

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

December 19, 2023

Lyle W. Cayce
Clerk

No. 23-60255

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA;
LONGVIEW CHAMBER OF COMMERCE;
TEXAS ASSOCIATION OF BUSINESS,

Petitioners,

versus

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for Review of an Order of
the Securities and Exchange Commission
Agency No. 34-97424
Agency No. IC-34906
Agency No. 88 Fed. Reg. 36002

Before SMITH and SOUTHWICK, *Circuit Judges*.*

JERRY E. SMITH, *Circuit Judge*:

The petitioners move this court to vacate the final rule. The time to respond or oppose has expired. We grant the motion and vacate the rule.

* Judge Higginson, who was a member of the panel, now stands recused. This opinion is issued by a quorum. *See* 28 U.S.C. § 46(d).

No. 23-60255

On October 31, 2023, we issued an opinion on petitioners’ challenge to the rule of the Securities and Exchange Commission (“SEC”) requiring issuers to report day-to-day share repurchase data once a quarter and to disclose the reason why an issuer repurchased shares of its own stock. *Chamber of Com. of the U.S. v. SEC*, 85 F.4th 760 (5th Cir. 2023). We held that the SEC had acted arbitrarily and capriciously, in violation of the Administrative Procedure Act (“APA”), when it failed to respond to petitioners’ comments and failed to conduct a proper cost-benefit analysis. We therefore granted the petition for review, issued a “limited remand” directing the SEC “to correct the defects in the rule within 30 days,” and “retain[ed] jurisdiction to consider the decision . . . made on remand.” *Id.*

On November 22, 2023—twenty-two days after the initial opinion issued—the SEC filed an opposed motion seeking to extend the thirty-day remand period for an indefinite time. In that motion, the agency explained it “ha[d] worked diligently to ascertain the steps necessary to comply with the Court’s remand order and ha[d] determined that doing so w[ould] require additional time.” We denied that motion on November 26, 2023.

The thirty-day remand period expired on November 30, 2023. One day later, at the request of the Clerk of this court, the SEC filed a letter stating that “the Commission was not able to ‘correct the defects in the rule’ within 30 days of the [c]ourt’s opinion.”

I.

Under the APA, this court must “set aside agency action[] found to be arbitrary [or] capricious, contrary to constitutional right, or without observance of procedure as required by law.” *Id.* at 767–68 (citations omitted) (cleaned up). Accordingly, “[t]he default rule is that vacatur is the appropriate remedy.” *Data Mktg. P’ship v. Dep’t of Lab.*, 45 F.4th 846, 859 (5th Cir. 2022).

No. 23-60255

Departing from that default rule is justifiable only in “rare cases”¹ satisfying two conditions: *First*, there must be a “serious possibility” that the agency will be able to correct the rule’s defects on remand. *Texas v. United States*, 50 F.4th 498, 529 (5th Cir. 2022) (citation omitted). Remand without vacatur is therefore inappropriate for agency action suffering from one or more serious procedural or substantive deficiencies.² *Second*, vacating the challenged action would produce “disruptive consequences.” *Id.* (citation omitted).

In this panel’s earlier opinion, we “recognized that there was at least a serious probability that the SEC would be able to substantiate its decision if given an opportunity to do so.” 85 F.4th at 780 (citations omitted) (cleaned up). We therefore “afford[ed] the agency limited time to remedy the deficiencies in the rule” by remanding “with direction . . . to correct the defects in the rule.” *Id.*

That thirty-day period has come and gone. The SEC claims to have “worked diligently to ascertain the steps necessary to comply with the Court’s remand order.” Yet the agency has nothing to show for its efforts. It returns to this court empty-handed, admitting that it “was not able to

¹ *United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (citations omitted).

² For example, remand without vacatur would not be appropriate for agency action (1) plagued with “fundamental substantive defects,” *id.*; (2) promulgated in violation of notice-and-comment requirements, *see Nat. Resources Def. Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020); or (3) for which “there is serious doubt over the substantive correctness of the agency action at issue,” 33 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. 3D § 8382, 2023 Supp. at 39 (Thomson Reuters); *see also All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 255 (5th Cir. 2023), *cert. granted*, 2023 U.S. LEXIS 4917 (U.S. Dec. 13, 2023) (No. 23-235), *and cert. granted*, 2023 U.S. LEXIS 4916 (U.S. Dec. 13, 2023) (No. 23-236), *and cert. denied*, 2023 U.S. LEXIS 4914 (U.S. Dec. 13, 2023) (No. 23-395).

No. 23-60255

‘correct the defects in the rule’ within 30 days.” The rule remains no less flawed—and no less unlawful—than it was on October 31, 2023.

II.

The SEC acted arbitrarily and capriciously, in violation of the APA, when it failed to respond to petitioners’ comments and failed to conduct a proper cost-benefit analysis. The challenged rule is VACATED. The mandate shall issue forthwith.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

December 19, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 23-60255 Chamber of Com of the USA v. SEC
Agency No. 34-97424
Agency No. IC-34906
Agency No. 88 Fed. Reg. 36002

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that

this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that Respondent pay to Petitioners the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

 *Shea E. Pertuit*

By: _____
Shea E. Pertuit, Deputy Clerk

Enclosure(s)

Mr. Tyler Stephen Badgley
Mr. Christopher Bates
Mrs. Angela Laughlin Brown
Mrs. Megan Leef Brown
Mr. Noel John Francisco
Mr. Dominick V. Freda
Mr. Ezekiel Levenson Hill
Mr. Thomas M. Johnson Jr.
Mr. Jeffrey Liu
Mr. Brinton Lucas
Mr. Kevin Ryan Palmer
Mr. Brian Charles Rabbitt
Ms. Julie Goldsmith Reiser
Mr. Charles E.T. Roberts
Mr. John Paul Schnapper-Casteras
Mr. Theodore Joseph Weiman