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NCLA Brief Supports Walmart Effort to Prevent Independent FTC from Exercising Executive Power

Federal Trade Commission v. Walmart Inc.

Washington, DC (September 14, 2022) – The Federal Trade Commission (FTC) lacks constitutional authority to bring a lawsuit for monetary damages and injunctive relief against Walmart Inc., argues the New Civil Liberties Alliance in an [amicus curiae brief](#) submitted in the case *FTC v. Walmart*, before the U.S. District Court for the Northern District of Illinois. As the brief puts it, FTC is on the horns of a dilemma. First, *Humphrey’s Executor v. United States* was wrongly decided in the 1930s because, given the breadth of the “executive power” vested in the President, FTC Commissioners cannot constitutionally enjoy protection from his removal. But second, even under the holding of *Humphrey’s*, the Commissioners cannot exercise executive power, such as bringing a lawsuit in court. Remarkably then, the district court should simultaneously reject *Humphrey’s* and follow it.

After an investigation into third-party abuses of Walmart’s money order services, FTC supposed that Walmart had violated several statutes and that a lawsuit against the company was necessary to obtain monetary penalties and an injunction against future violations. But when the Department of Justice declined FTC’s recommendation to initiate suit, FTC decided to act on its own. This it cannot do. FTC Commissioners are not removable at-will by the President, so they may not exercise executive power. Initiating “litigation seeking monetary or injunctive relief” employs quintessential executive power. FTC initiated the lawsuit pursuant to powers purportedly granted by statutes enacted in the 1970s. NCLA argues that FTC’s structure precludes augmenting its authority. Therefore, its actions are unconstitutional, and the 1970s-era statutory additions to FTC’s capabilities must be set aside.

In *Humphrey’s Executor*, the Supreme Court upheld, against a constitutional challenge, the provisions of the Federal Trade Commission Act, which made Commissioners removable only “for cause.” When *Humphrey’s Executor* upheld the constitutionality of FTC’s independence, it reasoned the agency, as it existed in 1935, did not exercise any executive power. As a matter of constitutional history, practice, and understanding, *Humphrey’s* was mistaken. The Supreme Court in recent cases has acknowledged, though not yet corrected, its error.

The district court has no choice but to follow *Humphrey’s*, because it is bound by Supreme Court precedent. But faithfully following the *Humphrey’s* precedent, which only approved of the FTC after concluding that it has solely “quasi legislative” and “quasi judicial” powers, requires the court to conclude that FTC may not exercise “executive power,” which includes bringing suit in an Article III court.

These dual layers of analysis—under the Constitution and under a wayward precedent—clarify the district court’s path forward. FTC’s attempt to bring suit against Walmart is unlawful on two grounds: (1) it is unlawful when one focuses on the Constitution and recognizes that *Humphrey’s* was factually and legally mistaken about the power FTC may exercise; and (2) it is unlawful when one simply follows *Humphrey’s*, because that precedent bars the FTC from exercising executive power in suits brought in the courts. Either way, the district court really has no choice but to grant Walmart’s [Motion to Dismiss](#).

NCLA released the following statements:

“*Humphrey’s Executor* is a relic from a time when the Supreme Court was less focused on constitutional history or practice. It is not surprising that in recent years, with the Court consistently seeking to interpret Constitutional provisions by reference to those provisions’ original public meaning, the Court has come to conclude that *Humphrey’s* is an ‘exception’ to the traditional understanding of ‘executive powers’ and that that exception ‘has not withstood the test of time.’ NCLA’s *amicus* brief brings the errors of *Humphrey’s* into stark relief, while simultaneously pointing out that—even under *Humphrey’s*—the powers FTC claims cannot be sustained.”

— **Gregory Dolin, Senior Litigation Counsel, NCLA**

“This motion to dismiss will hopefully remove any lingering doubt regarding what ought to be clear constitutional law: only federal officials removable at will by the President may ‘take Care that the Laws be faithfully executed’—that is, initiate lawsuits.”

— **Brian Rosner, Senior Litigation Counsel, NCLA**

For more information visit the *amicus* page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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