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Statement of the American Antitrust Institute on President Trump's Removal of Democratic FTC Commissioners Without Cause

To break the law or to change the law? For some litigants, that is the question. President Trump has removed two Democratic Commissioners from the Federal Trade Commission without cause, and there is one thing the President knows for sure: His actions break existing law. They violate Section 1 of the Federal Trade Commission Act (FTC Act) and the Supreme Court's holding in *Humphrey's Executor v. United States*.[1]

The President knows this because Section 1 of the FTC Act expressly states that FTC Commissioners may be removed "for inefficiency, neglect of duty, or malfeasance in office,"[2] and *Humphrey's Executor* holds that "the provisions of section 1 of the Federal Trade Commission Act … restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named," and "such a restriction or limitation" is "valid under the Constitution of the United States."[3]

The President has effectively conceded that he broke the law because the removal of the Commissioners came after his Attorney General's Office had already filed a § 530D report with Congress.[4] Under 28 U.S.C. § 530D, a report must be written by the Attorney General and sent to Congress whenever any member of the Department of Justice adopts a policy to refrain from defending the constitutionality of an existing law.[5] The President's § 530D report states that the Department of Justice "will no longer defend" the "recognized" constitutionality of for-cause removal provisions that apply to multi-member regulatory commissions, including the FTC, the NLRB, and the CPSC.[6] The President knows his actions broke the law because his § 530D report recognizes that he seeks to affirmatively change the law.

Private litigants sometimes do this—they break the law as a means of trying to change it. The app developer Epic Games, for example, sought justice by breaching a contract. It knowingly violated the terms of Apple's and Google's exclusivity provisions in app distribution contracts. By doing so, it purposely triggered its own exclusion from their app stores and thereby created a viable claim to challenge the exclusivity provisions as Sherman Act violations. A jury vindicated Epic's maneuver, holding that Google's

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[1] 295 U.S. 602 (1935).
[2] 15 U.S.C. § 41
[3] 295 U.S. at 619, 632 (certifying two questions and answering "yes" as to both).
[4] *See* Letter from Sarah M. Harris, Acting Solicitor General, to the Honorable Jamie Raskin, Ranking Member, House Committee on the Judiciary, re Restrictions on the Removal of Certain Principal Officers of the United States (Feb. 12, 2025).
[5] *See* 28 U.S.C. § 530D(a)(1)(A)-(B).
[6] *See* Letter from Sarah M. Harris, *supra* note 4, at 1, 2.

exclusivity provisions were in fact unlawful restraints of trade. The jury's verdict, if upheld on appeal, does not change the fact that Epic breached the original contract, but as a practical matter it cures the breach retrospectively.

This is a very different scenario. The President wants to give the current Supreme Court a chance to overturn *Humphrey's Executor*, so he purposely violated binding Supreme Court precedent interpreting the constitutionality of Section 1 of the FTC Act. In other words, the person entrusted by the Constitution to take care that the laws be faithfully executed has knowingly broken constitutional law in the service of a litigation strategy.

And to what end? A challenge to *Humphrey's Executor* has already been teed up in several other cases, at least one of which—*Wilcox v. Trump*—is on an expedited schedule and is likely to come before the Supreme Court in a matter of weeks or months. Against the marginal utility of adding a distant back-up plan if the other challenges fail, the Trump Administration risks imperiling the aggressive enforcement agenda that the President and FTC Chairman Andrew Ferguson promised voters in technology, labor, healthcare, and other markets. In circular-firing-squad fashion, the administration has now hamstrung itself, casting a pall of uncertainty and possible invalidity over every forthcoming FTC vote in which two members of the current four-person Commission are denied their right to participate.

In a short statement issued yesterday, Chairman Ferguson pointedly did not condone these firings. But in a show of solidarity with the President, he stated that he has "no doubts" about the President's constitutional authority to remove Commissioners without cause.[7] The Chairman does not mean to say the President can currently do so *lawfully*. Everyone, including the President and the Acting Solicitor General who filed a § 530D report, knows that isn't true.

His confidence stems from a conviction—a hope, really—that the President will successfully persuade the Supreme Court, in *Wilcox* or another case, to change current law in the future. Given the current Court, his optimism may be justified. But on the day the President chose to fire two Democratic FTC Commissioners without cause, *Humphrey's Executor* remains on the books. Therefore, there can be no doubt that the President knowingly broke existing law. He also tied one hand behind the back of his FTC Chairman, who has made an admirable commitment to aggressive antitrust enforcement—a policy that enjoys widespread bipartisan support across an otherwise polarized electorate.[8] Retrospectively or otherwise, some breaches are incurable.

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[7] Statement of Chairman Andrew N. Ferguson, Fed. Trade Comm'n (Mar. 18, 2025).
[8] Am. Antitrust Inst., Empirical Data Show Voters in Battleground States Overwhelmingly Support Aggressive Antitrust Enforcement (Oct. 21, 2024).