

No. 14-8091

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IN THE  
**United States Court of Appeals**  
**for the Third Circuit**

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FEDERAL TRADE COMMISSION,  
Plaintiff-Respondent,  
v.

WYNDHAM HOTELS & RESORTS, LLC,  
Defendant-Petitioner.

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On Appeal from the United States District Court  
for the District of New Jersey  
No. 2:13-cv-01887-ES-SCM (Salas, J.)

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**BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA, AMERICAN HOTEL & LODGING  
ASSOCIATION, AND NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS IN SUPPORT OF PETITIONER**

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## **RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

The Chamber of Commerce of the United States of America (the Chamber) is a non-profit, tax-exempt organization incorporated in the District of Columbia.

The Chamber has no parent company and no publicly held company has ten percent or greater ownership in the Chamber.

The American Hotel & Lodging Association (AH&LA) has no parent company and no publicly held company holds more than a ten percent interest in the AH&LA.

The National Federation of Independent Business (NFIB) has no parent company and no publicly held company holds more than a ten percent interest in the NFIB.

## TABLE OF CONTENTS

	<u>Page</u>
RULE 26.1 CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF AUTHORITIES .....	iii
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i> .....	1
ARGUMENT .....	3
I. THERE ARE SUBSTANTIAL GROUNDS FOR GENUINE DIFFERENCES OF OPINION .....	3
II. EARLY RESOLUTION OF THESE ISSUES IS CRITICAL.....	5
CONCLUSION .....	9
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF BAR MEMBERSHIP	
CERTIFICATE OF VIRUS DETECTION	
CERTIFICATE OF SERVICE	

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>CASES:</b>	
<i>FTC v. Wyndham Worldwide Corp.</i> , No. 13-1887 (ES), 2014 WL 1349019 (D.N.J. Apr. 7, 2014) .....	4
<i>FTC v. Wyndham Worldwide Corp.</i> , No. 13-1887 (ES), 2014 WL 2815356 (D.N.J. June 23, 2014) .....	4
<i>LabMD v. FTC</i> , No. 14-cv-00810-WSD (N.D. Ga. filed Mar. 20, 2014) .....	7
<b>STATUTES:</b>	
15 U.S.C. § 45 .....	5
28 U.S.C. § 1292(b) .....	3
<b>OTHER AUTHORITIES:</b>	
Christopher Cole, et al., <i>FTC Data Security Authority Remains Murky Despite Wyndham</i> , <a href="http://www.law360.com/articles/525058/ftc-data-security-authority-remains-murky-despite-wyndham">http://www.law360.com/articles/525058/ftc-data-security-authority-remains-murky-despite-wyndham</a> (Apr. 8, 2014) .....	4
Federal Trade Commission, Bureau of Consumer Protection Business Center, Legal Resources, <a href="http://www.business.ftc.gov/legal-resources/29/35">http://www.business.ftc.gov/legal-resources/29/35</a> (last visited July 7, 2014) .....	6
Mandiant, <i>M-Trends: Beyond the Breach</i> (2014) .....	6
Thomas O’Toole & Katie Johnson, <i>FTC’s Unfairness Authority Upheld in Wyndham Data Security Litigation</i> , <a href="http://www.bna.com/ftcs-unfairness-authority-n17179889558">http://www.bna.com/ftcs-unfairness-authority-n17179889558</a> (Apr. 14, 2014) .....	4
Gerard Stegmaier & Wendell Bartnick, <i>Another Round In the Chamber: FTC Data Security Requirements and the Fair Notice Doctrine</i> , 17 J. Internet L. 1 (2013) .....	5
Verizon, <i>2014 Data Breach Investigations Report</i> (2014) .....	6

**TABLE OF AUTHORITIES—Continued**

	<u>Page</u>
David Zetoony, <i>The 10 Year Anniversary of the FTC’s Data Security Program: Has the Commission Finally Gotten Too Big for Its Breaches?</i> , 2011 Stan. Tech. L. Rev. 12 (2011).....	5

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**STATEMENT OF INTEREST OF *AMICI CURIAE***

The Chamber of Commerce of the United States of America (the Chamber), the American Hotel & Lodging Association (AH&LA), and the National Federation of Independent Business (NFIB) respectfully submit this brief as *amici curiae* in support of petitioner Wyndham Hotels & Resorts, LLC (Wyndham)'s petition for leave to appeal from the District Court's certified order.<sup>1</sup>

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29, the Chamber, AH&LA, and NFIB certify that all parties have consented to the filing of this brief. The Chamber, AH&LA, and NFIB likewise certify that no party's counsel authored this

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. A principal function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community.

The AH&LA is the only national association representing all sectors and stakeholders in the lodging industry, including individual hotel property members, hotel companies, student and faculty members, and industry suppliers. It has played this role for over a century providing members with national advocacy on Capitol Hill, public relations services and education, research, and information.

The NFIB is the nation's leading small business association, representing approximately 350,000 members across the country. To fulfill its role as the voice for small business, the NFIB frequently files *amicus curiae* briefs in cases that will impact small businesses, such as this case.

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brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than the Chamber, AH&LA, and NFIB, and their members and counsel, contributed money intended to fund the brief's preparation or submission.

The businesses represented by the Chamber, AH&LA, and NFIB use electronic data, including personal data, to enhance business efficiency and to benefit consumers. For the modern company, personal and other types of digitized data are essential for a multitude of reasons, including administering employee benefits programs, processing payment and shipping information, and enabling customer loyalty programs, among many other uses. *Amici* all have a significant interest in further explaining the legal and policy implications of permitting appeal of the District Court's order denying Wyndham's motion to dismiss.

## **ARGUMENT**

Petitioner Wyndham's motion explains why the District Court's order denying its motion to dismiss involves controlling questions of law as to which there are substantial grounds for differences of opinion and where an immediate appeal will materially advance the ultimate termination of the litigation, demonstrating that the Court should grant the petition. *See* 28 U.S.C. § 1292(b). We will not repeat those arguments at length here, but will instead supplement them with amici's own perspective.

### **I. THERE ARE SUBSTANTIAL GROUNDS FOR GENUINE DIFFERENCES OF OPINION.**

This case presents issues of first impression that have produced extensive discussion and debate. The briefing on the motion to dismiss, the District Court's opinion, and the District Court's order certifying the interlocutory appeal

demonstrate that the question whether the Federal Trade Commission (FTC) has general authority to regulate data security and the related question whether it has provided adequate notice to regulated entities are complex, difficult issues that have not previously been resolved. *See, e.g., FTC v. Wyndham Worldwide Corp.*, No. 13-1887 (ES), 2014 WL 1349019, at \*4 (D.N.J. Apr. 7, 2014) (stating that the Court “wrestled” with the parties’ arguments in deciding the motion to dismiss); *FTC v. Wyndham Worldwide Corp.*, No. 13-1887 (ES), 2014 WL 2815356, at \*3 (D.N.J. June 23, 2014) (finding that “reasonable jurists may differ over the Court’s resolution of the two legal issues in question”).

The District Court’s opinion on the motion to dismiss also generated substantial media coverage, as members of the legal community discussed the implications of the decision for the FTC’s authority. *See, e.g.,* Thomas O’Toole & Katie Johnson, *FTC’s Unfairness Authority Upheld in Wyndham Data Security Litigation*, <http://www.bna.com/ftcs-unfairness-authority-n17179889558> (Apr. 14, 2014) (analyzing the FTC’s enforcement approach in light of the decision); Christopher Cole, et al., *FTC Data Security Authority Remains Murky Despite Wyndham*, <http://www.law360.com/articles/525058/ftc-data-security-authority-remains-murky-despite-wyndham> (Apr. 8, 2014) (noting that the FTC’s role in regulating data security continues to evolve in the courts, before Congress, and through the recently-published cyber security framework).

It is not just Wyndham and *amici* that have identified questions about the limits of the FTC's authority and enforcement practices. See Wyndham Pet. for Leave to Appeal 7-15. Legal commentators, among others, have voiced similar concerns. See, e.g., Gerard Stegmaier & Wendell Bartnick, *Another Round In the Chamber: FTC Data Security Requirements and the Fair Notice Doctrine*, 17 J. Internet L. 1 (2013) (finding problems with the FTC Section 5 enforcement actions under fair notice doctrine); David Zetoon, *The 10 Year Anniversary of the FTC's Data Security Program: Has the Commission Finally Gotten Too Big for Its Breaches?*, 2011 Stan. Tech. L. Rev. 12 (2011), at ¶ 23 (finding it "highly doubtful" that FTC could bring an unfairness action based on failure to monitor data security practices).<sup>2</sup> At a minimum, there are grounds for genuine disagreement about the issues addressed in the Court's decision denying Wyndham's motion to dismiss.

## **II. EARLY RESOLUTION OF THESE ISSUES IS CRITICAL.**

Whether the FTC's enforcement authority under Section 5 of the FTC Act, 15 U.S.C. § 45, extends to regulation of data security is an issue of central importance to businesses that face the prospect of being investigated by the Commission. That prospect becomes likelier every day given the increase in cyber-based attacks against businesses many of which, experts agree, are likely to

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<sup>2</sup> <http://journals.law.stanford.edu/stanford-technology-law-review/online/10-year-anniversary-ftcs-data-security-program>.

succeed notwithstanding significant efforts on the part of those businesses. *See, e.g.,* Mandiant, M-Trends: Beyond the Breach (2014);<sup>3</sup> Verizon, 2014 Data Breach Investigations Report (2014).<sup>4</sup> Indeed, around a dozen settlements under Section 5 have been finalized just since this suit was filed in 2012. *See* Federal Trade Commission, Bureau of Consumer Protection Business Center, Legal Resources, <http://www.business.ftc.gov/legal-resources/29/35> (last visited July 7, 2014).

Given these trends, an appellate decision resolving Wyndham's questions about the FTC's general authority to regulate data security—and the related question of the sufficiency of the Commission's guidance about what constitutes commercially reasonable security measures—would provide much needed clarity. An FTC investigation imposes substantial costs, including costs related to the production of documents and information responsive to the Commission's requests. Moreover, companies currently struggle to decipher coherent standards from the FTC's dozens of consent orders and previous pronouncements on data security, and to accommodate those dictates with other security regulations and risk management protocols. With the greater certainty that an appellate decision would provide, businesses would be able to better allocate their scarce resources toward compliance with the complex regulatory regime governing data security.

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<sup>3</sup> <https://www.mandiant.com/blog/mtrends-2014-threat-report-revealed>.

<sup>4</sup> <http://www.verizonenterprise.com/DBIR/2014>.

Without interlocutory review, in contrast, businesses will have to wait months, if not years, for resolution of these fundamental legal issues. In this case, discovery is not set to close until September, with dispositive motions not due until November. *See* Pretrial Scheduling Order, *FTC v. Wyndham Worldwide Corp.*, No. 13-cv-01887-ES-JAD, D.E. 148 (D.N.J. filed Jan. 7, 2014). Even if the Court were to decide the core legal issues on summary judgment, any appeal would follow much later. The likelihood of significant delay, and the potential for scattered courts to reach conflicting results in the meantime, all put businesses in an untenable position. *See, e.g., LabMD v. FTC*, No. 14-cv-00810-WSD (N.D. Ga. filed Mar. 20, 2014) (challenge to FTC authority to regulate data security under Section 5 dismissed for lack of jurisdiction and on appeal to Eleventh Circuit). A ruling that the FTC lacks authority under Section 5 would effectively terminate the litigation, which makes it all the more important to avoid unnecessarily burdening the judicial system and parties.

In sum, continued uncertainty about whether the FTC has the authority to bring Section 5 data security enforcement actions imposes significant costs on businesses that are subject to an FTC investigation or that expend resources trying to divine what practices the Commission considers to be “reasonable” and “appropriate.” Those costs can be mitigated or avoided entirely by an appellate decision with broader applicability. Clarity on this important legal issue from an

appellate court would also expedite the termination of the litigation and save the courts from dedicating resources to a case that the FTC may not have had the authority to bring in the first place. These questions should be resolved now.

## CONCLUSION

For the foregoing reasons, and for those stated in Wyndham's petition, the petition should be granted.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,454 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

3. This brief complies with 3d Cir. Local App. R. 31.1(c) because the text of the electronic brief is identical to the text in the paper copies.

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**CERTIFICATE OF BAR MEMBERSHIP**

Pursuant to 3d Cir. Local App. R. 28.3(d) and 46.1(e), I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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## CERTIFICATE OF VIRUS DETECTION

Pursuant to 3d Cir. Local App. R. 31.1(c), I hereby certify that I have run Symantec Endpoint Protection Version 12.1.4013.4013 on this file. No virus was detected.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on July 10, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

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