

# Press Release



Washington Legal Foundation  
Advocate for Freedom and Justice®  
2009 Massachusetts Avenue, NW  
Washington, DC 20036  
202.588.0302 wlf.org

FOR IMMEDIATE RELEASE

October 15, 2014

Media Contact: Cory Andrews | 202-588-0302

## WLF Asks Third Circuit to Rein In FTC's Data-Security Crusade

(*FTC v. Wyndham Hotels & Resorts, LLC*)

**"The FTC's 'catch-as-catch-can' approach to regulatory enforcement under § 5 is not only deeply unfair to the business community, it also falls far short of satisfying the legal standard for fair notice."—Cory Andrews, WLF Senior Litigation Counsel**

WASHINGTON, DC—The Washington Legal Foundation (WLF) has asked the U.S. Court of Appeals for the Third Circuit to reverse a district court order refusing to dismiss an FTC lawsuit against Wyndham Hotels & Resorts, LLC ("Wyndham"). The lawsuit claims that Wyndham—which fell victim to criminal hacking—engaged in "unfair trade practices" by allegedly failing to prevent unauthorized hackers from breaching its data defenses.

In a brief filed in *FTC v. Wyndham Hotels & Resorts, LLC*, WLF argued that because the FTC has never promulgated data-security standards, neither Wyndham nor any other member of the business community has any way to know beforehand what the FTC considers to be an "unreasonable" data-security measure. Instead, the FTC has preferred to proceed by filing suit against a business under the FTC Act, then using the threat of fines and litigation costs to coerce that business into accepting a consent decree that gives the FTC roving, unchecked authority to conduct audits and impose penalties on the business in the future. In its brief, WLF argued that the FTC's "enforcement by consent decree" approach fails to satisfy the constitutional requirement that defendants be given fair notice of conduct that can subject them to punishment before they are found liable.

WLF also demonstrated in its brief that the FTC's prior consent decrees and online data-security advice for businesses are not entitled to *Chevron* deference. The Supreme Court has clarified that the only guidance documents eligible for *Chevron* deference are those relatively formal agency documents promulgated via notice-and-comment rulemaking, such as regulations. Because FTC's prior consent decrees and online guidance brochure did not contain a reasoned analysis of the FTC's interpretation of the law, they do not deserve deference.

WLF filed its brief on behalf of itself and its client, the Allied Educational Foundation.

Upon filing its brief, WLF issued the following statement by Senior Litigation Counsel Cory Andrews: "The FTC's 'catch-as-catch-can' approach to regulatory enforcement under § 5 is not only deeply unfair to the business community, it also falls far short of satisfying the legal standard for fair notice. As the administrative state continues to metastasize, it is more important than ever for agencies to play by the rules—especially the rule of fair notice—and for stakeholders to have reasonable certainty regarding what is expected of them in order to avoid running afoul of the law."

*WLF is a national public interest law firm and policy center that regularly litigates to oppose overreaching regulation by federal agencies.*

###