No. 21-16281

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARA JONES, *ET AL.*,
Plaintiffs-Appellants,
v.
GOOGLE LLC, *ET AL.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of California, Case No. 5:19-cv-07016, Judge Beth Labson Freeman

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Chamber of Commerce of the United States of America hereby certifies that it is a not-for-profit corporation. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 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. An important 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* briefs in cases, like this one, that raise issues of concern to the nation's business community.[1]

The Chamber has a substantial interest in the resolution of this case because it implicates the stability of the Internet economy. Many of the Chamber's members participate in marketing and advertising products and services over the Internet to the public at large, a group that inherently includes children, and are intimately familiar with and profoundly affected by the regulatory regimes in this area. As such, the Chamber possesses unique insight into the problems that will result if the panel's decision is permitted to disturb the delicate, deliberate balance that Congress

[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief under Ninth Circuit Rule 29-2(a).

struck in regulating the collection of children's personal information on the Internet. Allowing the preempted claims urged by Appellants would upset this balance, thereby affecting countless Internet users and businesses in this country and, ultimately, around the world. The Chamber respectfully submits that its views on the implication of this case shed important light on the correct resolution of the statutory questions presented here.

INTRODUCTION

The panel's decision, if left intact, will upend the status quo that has stood in place since Congress enacted the Children's Online Privacy Protection Act ("COPPA") more than two decades ago. In COPPA, Congress chose not to include a private right of action, and instead placed primary enforcement authority over COPPA in the hands of the Federal Trade Commission ("FTC"). To ensure the exclusivity of this enforcement scheme, Congress enacted a broad preemption clause. By nullifying this careful enforcement scheme, the panel's decision will sow confusion and subject internet companies to an uncertain morass of disparate, and potentially conflicting, legal regimes.

COPPA's preemption clause precludes the imposition of liability for activities covered by COPPA whenever such imposition would be "inconsistent with the treatment of those activities . . . under this section." 15 U.S.C. § 6502(d). The "treatment" of activities under that section necessarily encompasses both substantive

requirements *and* a remedial scheme. Only by ignoring the word "*treatment*" did the panel construe the statute as preempting nothing beyond inconsistent *substantive* requirements. Critically, the panel has failed to give effect to the express words chosen by Congress.

The panel's interpretive error led it to overlook the preemptive import of Congress's statutory command. Congress's concern with preventing inconsistent "treatment" by states reflects a conscious legislative intent to create a nationwide, uniform standard overseen by the FTC. This uniformity, complete with centralized enforcement, is at the core of COPPA. By overturning the delicate balance Congress crafted, the panel's decision—the first of its kind—imperils companies that create content for children on the Internet.

The panel's decision also conflicts with this Court's authority recognizing that claims premised on mere violations of a federal standard cannot bypass the limitations imposed by that federal standard. And the panel's decision similarly conflicts with the only other appellate decision addressing preemption under COPPA. In *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016), the Third Circuit recognized that state-law claims were not preempted because they were directed to conduct that was not regulated by COPPA. Here, however, plaintiffs' claims are premised on the exact duties imposed by COPPA. Until now, no court has ever held that a private plaintiff may simply repackage a

COPPA claim as a state-law tort and thereby perform an end run around Congress's chosen remedial scheme.

COPPA has been key to fostering the growth of content and services for children on the Internet. Central to COPPA is its establishment of a uniform, nationwide standard upon which stakeholders can rely. The panel's 10-page opinion marks a potential sea change in jurisprudence and is exceptionally important. Accordingly, this Court should grant rehearing en banc.

ARGUMENT

I. THE PANEL DISREGARDED THE STATUTORY LANGUAGE AND ITS INTENT

A. The Panel Ignored The Plain Text Of The Preemption Clause

The panel's error stems from a fundamental misreading of COPPA's preemption provision. First, the panel ignored the plain text of the statute. Second, in doing so, the panel brushed aside the careful remedial scheme reflected therein. In these respects, the panel's decision involves "a question of exceptional importance" that warrants en banc consideration. Fed R. App. P. 35(a)(2).

"[T]he plain wording of an 'express pre-emption clause . . . necessarily contains the best evidence of Congress' pre-emptive intent.'" *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1071 (9th Cir. 2005) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). COPPA's preemption provision reads: "No State or local government may impose any liability for commercial activities or actions . . . in connection with an activity

or action described in this chapter that is *inconsistent with the treatment of those activities or actions under this section*." 15 U.S.C. § 6502(d) (emphasis added). Thus, no liability may be imposed for activities covered by COPPA if such imposition would be inconsistent with how those activities are *treated* in *this section*.

In considering the section's *treatment* of the activities regulated by COPPA, it is important to consider the entirety of § 6502. Subsection (c), entitled "Enforcement," treats violations of COPPA as "violations of a rule defining an unfair or deceptive act or practice" under the FTC Act, "[s]ubject to section[] . . . 6505 of this title." *See* § 6502(c). The incorporated section makes plain that Congress conferred primary enforcement authority over COPPA on the FTC, with supplemental authority extended to specialized federal regulators within their areas of expertise, and to state attorneys general. 15 U.S.C. § 6505. COPPA omits any private right of action. As such, violations of COPPA are generally treated as violations to be addressed by the FTC. This enforcement scheme, which is explicitly mandated in § 6502, is an integral part of the section's *treatment* of COPPA-regulated activities.

The panel acknowledged that "the word 'treatment' appears unique to COPPA's preemption clause," but then ascribed no import whatsoever to that "unique" statutory language. Panel Op. 11. Rather than grappling with the language Congress actually enacted, the panel instead remarked that COPPA's preemption

provision bore a superficial "similarity" to other preemption clauses that deviate from COPPA's distinctive language and bar only "inconsistent" substantive requirements under state law. *Id.* The panel thus analyzed a preemption clause different from the one Congress actually enacted en route to reading the statute as though it prohibited only "contradictory state law requirements." *Id.* This denies due credit to an express statutory term and reflects error.

Under ordinary principles of statutory construction, the court must "give effect, if possible, to every word Congress used" in a statute. *Connell v. Lima Corp.*, 988 F.3d 1089, 1097 (9th Cir. 2021) (citation omitted). Despite this clear directive, the panel effectively flipped the presumption, writing that it "was not persuaded that" the inclusion of this language served any purpose and reading the word "treatment" out of the statute without providing any reasoned justification. Panel Op. 12. In sweeping this language aside, the panel failed to appreciate the profound, express difference between this preemption clause and those previously addressed by this Court. *See* Appellees' Pet. at 12-15. Such discounting of Congress's considered choice, specifying the proper treatment for COPPA violations, poses a question of exceptional importance warranting en banc review.

B. The Panel Overlooked The Preemptive Import Of The Language It Ignored

In glossing over the language in the statute, the panel failed to appreciate the deliberate Congressional choice that it reflects. In enacting COPPA, Congress chose

to place enforcement authority *exclusively* in the hands of the federal agencies and state attorneys general, with the FTC designated as the primary enforcement authority. Congress's treatment of COPPA-regulated activities reflects calculated choices aimed at striking a delicate balance in the complex ecosystem of the Internet.

In analyzing preemption, courts must consider "the structure and purpose of the statute as a whole . . . as revealed not only in the text, but through . . . the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Here, it is apparent that allowing a plaintiff to circumvent Congress's careful enforcement scheme by asserting state-law claims based solely on COPPA would stand as an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress." *Metrophones*, 423 F.3d at 1072-73.

Notably, Congress enacted COPPA in response to the FTC's comprehensive report on the collection of personal information on the Internet. *See* Fed. Trade Comm'n, *Privacy Online: A Report to Congress* (1998) ("Privacy Report");[2] *S. 2326, Children's Online Privacy Protection Act of 1998: Hearing Before the Subcomm. on Commerce, Sci., and Transp.*, 105th Cong. 3 (1998) ("Senate Hearing") (Statement of Sen. Burns) ("[T]he bill drew heavily from the

[2] https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf.

recommendations and findings of the FTC's . . . report on Internet privacy."). In its Privacy Report, the FTC recommended federal legislation to protect children's privacy online, which legislation would establish the appropriate "standards of practice governing the online collection and use of information from children." Privacy Report at 41-42. The FTC identified three alternative approaches to enforcement—(i) self-regulation, (ii) private remedies, and (iii) government enforcement—but ultimately left Congress to choose whichever option it deemed best. *Id.* at 10-11.

Upon reviewing these remedial options, Congress decided that government enforcement (principally by the FTC) should serve as the exclusive remedial mechanism. Congress implemented this decision by specifically identifying the manner in which violations of COPPA should be treated and by expressly preempting state and local laws "inconsistent with [that] treatment." *See* 15 U.S.C. § 6502. Despite this clear choice, the panel ignored the language enacted by Congress. The upshot threatens to undermine a critical feature of COPPA—its enforcement by the FTC.

Congress's choice was unsurprising. As the then-Chairman of the FTC explained during his congressional testimony regarding COPPA, "[t]he protection of children has long been an important part of the Commission's consumer protection mission," and the FTC had "paid especially close attention to the growing

area of marketing to children on the Internet." *Id.* at 8-9; *see also id.* at 12 (remarking that the FTC had "developed significant expertise regarding children's privacy" in the preceding years, and thus fully supported the bill, which would "enable the Commission . . . to develop flexible, practical, and effective approaches to protect children's privacy on commercial Web sites").

Of course, Congress could have decided otherwise. During congressional debate over COPPA, several organizations expressly advocated for a private right of action. *See, e.g.*, *Privacy in Cyberspace: Hearing Before the Subcomm. on Telecomms., Trade and Consumer Prot.*, 105th Cong. 358 (1998) (statement of Kathryn Montgomery, Center for Media Education) (arguing that the "bill should be altered to provide consumers with a private right of action"). Having considered a private right of action for potential inclusion in COPPA's remedial scheme, Congress deliberately opted against supplying one.

Congress understood the difficulty involved with policing activities on the Internet, a landscape that transcends boundaries and never ceases evolving. Placing enforcement authority in the hands of the FTC, and bestowing upon it rulemaking authority in this specific subject matter area, would "enable the Commission to work cooperatively with industry and consumer organizations to develop flexible, practical, and effective approaches to protect children's privacy on commercial Web

sites."[3] Senate Hearing at 12 (Statement of FTC Chairman Pitofsky); *see also id.* at 26 (Statement of Deirdre Mulligan, Center for Democracy and Technology) (opining that "that the bill correctly places the crafting, implementation, and enforcement of the bill's provisions at the Federal Trade Commission"). And of course, by enacting federal rules, the FTC could administer a single, controlling standard applicable nationwide. As the then-Chairman of the FTC explained during hearings on COPPA, its aim was to "provide *uniform* privacy protections" for children online. Senate Hearing at 12 (emphasis added).

This uniformity is especially important on the Internet, which transcends traditional jurisdictional boundaries. "[T]he internet, like . . . real and highway traffic . . ., requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations." *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999) (omissions in original) (quoting *Am. Libraries Ass'n. v. Pataki*, 969 F. Supp. 160, 164–67 (S.D.N.Y. 1997)). "Regulation on a local level, by contrast, will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities." *Pataki*, 969 F. Supp. at 183.

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3 In COPPA, Congress mandated that the FTC issue regulations. 15 U.S.C. § 6502(b) ("[T]he Commission *shall* promulgate . . . regulations . . . ." (emphasis added)).

These problems abound regardless of whether divergent state regulation arises from formal legislation or judicial interpretation of state laws.

Indeed, COPPA's uniform standard could be rendered meaningless in the absence of a strong preemption provision. Absent preemption, an otherwise controlling federal standard might be undercut by countless state and local laws imposing distinct, and potentially inconsistent, obligations within their respective jurisdictions. Only through preemption can Congress "creat[e] a national standard and eliminat[e] the chance of fifty different state laws enacted to solve the same problem." Corey Ciocchetti, *The Privacy Matrix*, 12 J. Tech. L. & Pol'y 245, 280 (2007). Furthermore, a singular standard secured by federal preemption "helps e-commerce companies comply" by providing clear guidance. *Id.* at 301.

The panel's decision enfeebles Congress's preemption provision, exposing industry participants now to a potential wave of litigation from any private plaintiff who invokes a state-law cause of action but purportedly stops short of directly contradicting COPPA. This one case may breed vast consequences, because the panel's decision portends the elimination of a national standard and opens the door to a dizzying patchwork of varying laws as spun by private plaintiffs. *See* Tony Glosson, Note, *Data Privacy in Our Federalist System*, 67 Fed. Comm. L.J. 409, 432 (2015) (noting that, "[i]n the data privacy sphere," conflicting laws are a "very real concern").

As jurisdictions develop their own kindred laws, untethered from the FTC's guidance and authority, companies will need to sort through an array of different, and perhaps divergent, laws—so long as those laws do not facially "contradict" COPPA. "[T]he lack of harmonization among state common law precedents" will likely produce confusing and conflicting interpretations. *See* Peter S. Menell, *Regulating "Spyware": The Limitations of State "Laboratories" and the Case for Federal Preemption of State Unfair Competition Laws*, 20 Berkeley Tech. L.J. 1363, 1390-91 (2005) (citation omitted). This tangled web of disparate regulation will "discourage innovation in Internet business models by creating a gauntlet of legal costs and exposure—both in business planning and implementation." *Id.* at 1379.

It is not difficult to imagine how state-law claims that do not directly contradict COPPA might nevertheless impose conflicting and unworkable obligations on internet companies. For example, one state could mandate that a website delete all personal information collected from children, while another state might mandate that all such data be preserved for auditing and law-enforcement purposes. Or, one state court could interpret COPPA's consent provisions in a manner that conflicts with another state's interpretation, and with that of the FTC. The resulting uncertainty and confusion from situations like these will discourage responsible providers from offering useful services to children on the Internet.

And companies may ultimately find it altogether impossible to operate in this space.

II. THE PANEL'S DECISION CONFLICTS WITH NINTH CIRCUIT AUTHORITY AND WITH OTHER CIRCUITS

The panel's decision departs from established authority both within and outside the Ninth Circuit. First, the panel did not account for precedent recognizing that state-law claims based on federal standards are inconsistent with those federal standards when they avoid their limitations. Second, the panel did not engage the contrary reasoning of the Third Circuit in the only other federal appellate decision to address preemption under COPPA.

This Court has previously acknowledged that state-law claims premised on a federal statute or regulation may be found inconsistent, and therefore preempted, where the claim seeks to alter the limitations of that federal statute or regulation. In *Metrophones*, although the state-law claims for quantum meruit and breach of implied contract were not preempted, the negligence claim altered the statutory scheme by making the defendant "liable for calls other than those for which the regulations make it responsible," and was thus preempted. 423 F.3d at 1078. By contrast, this Circuit has recognized that, where claims address a separate wrong outside the scope of a federal statute, they are not inconsistent. *See Beffa v. Bank of the West*, 152 F.3d 1174, 1177-78 (9th Cir. 1998) (concluding that negligence claims were not preempted because they were not based on federal statute, but "addresse[d]

a separate wrong . . . beyond the scope of [the] EFAA"). Here, Appellants seek to leverage the duties imposed by COPPA while avoiding the enforcement scheme that is part and parcel of the statutory regime. This is inconsistent with COPPA's enforcement scheme and with its purpose and it should therefore be preempted, as cases like *Metrophones* recognize.

For similar reasons, the panel's decision also conflicts with the Third Circuit's reasoning in *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016). There, private plaintiffs pursued state-law claims for intrusion upon seclusion against Viacom and Google. *Id.* at 267. In addressing preemption under COPPA, the Third Circuit concluded that the plaintiffs' claim were not preempted because COPPA "says nothing about whether [personal] information can be collected using deceitful tactics." *Id.* at 292. Accordingly, the plaintiffs avoided preemption because the duties implicated by their claims were altogether outside the scope of COPPA.

Here, by contrast, Appellants' claims concededly restate the very same duties imposed by COPPA. There is no doubt, in other words, that Appellants are treading on COPPA's turf. The preemption problem arises because Appellants are treading that statutory turf while systematically diverging from the prescribed "treatment" so carefully specified by Congress. Given the broad, express terms in which Congress chose to preempt under COPPA, Appellants should not be

permitted here to employ the vehicle of state law to circumvent Congress's considered decision to exclude a private right of action.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing en banc.

February 2, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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