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* SUPPORTING APPELLEES

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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 Appellants upend the delicate, deliberate balance that Congress struck in regulating

[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). *Amicus curiae* has filed a motion for leave to file this brief under Fed. R. App. P. 29(a)(2).

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 statutory questions presented here.

INTRODUCTION

The Internet is a thriving ecosystem, but it is also a delicate one. Few aspects are more delicate than the provision of content to children. Everyone wants to see children enriched by innovative, educational, enriching content, and the Internet has become the principal medium through which such content is provided. At the same time, children need to be specially protected from inappropriate content and unscrupulous practices. It follows that sound regulation of content provided to children via the Internet involves a difficult balancing act—one that balances the desire to protect children against the desire to encourage and facilitate high-quality content for them. Reasonable people can always disagree about how exactly the balance should be struck, but all should agree that it needs to be struck, carefully and definitively, so that all concerned can ascertain the "rules of the road" around the country and can conduct business accordingly.

After extensive deliberation, Congress struck a statutory balance when it passed the Children's Online Privacy Protection Act ("COPPA") more than two

decades ago. Congress's statutory balance was informed by specific recommendations from the Federal Trade Commission ("FTC") and reflected important policy choices. First, Congress placed primary enforcement authority in the hands of the FTC and state attorneys general. Second, Congress explicitly declined to include a private right of action to enforce COPPA. Third, Congress made its remedial scheme exclusive by including an express preemption provision.

Congress had good reason to make the choices it did. It recognized that the FTC was the foremost authority on addressing children's privacy issues. It also foresaw that the FTC would be able to craft and revise rules in response to new technological and industry developments, especially because Congress simultaneously bestowed broad rulemaking authority on the FTC towards this every end. Most importantly, Congress appreciated that deploying a uniform, federal standard would enable companies around the country to supply the desired content to children, subject to appropriate, dependable parameters and safeguards.

History has vindicated Congress's choices. Since COPPA's enactment in 1998, the FTC has actively enforced COPPA and exercised its rulemaking authority, while quality content for children on the Internet has flourished.

Against this history, Appellants urge this Court effectively to cast aside Congress's considered choices and to graft a new private right of action onto

COPPA. Because any such change in law would upend a delicate balance and defy Congress's express intent, this Court should affirm the district court's judgment.

ARGUMENT

I. COPPA'S STATUTORY SCHEME PREEMPTS PLAINTIFFS' STATE-LAW CLAIMS

This case involves a straightforward application of the express preemption clause Congress included in COPPA. The statutory scheme adopted by Congress bestows primary enforcement authority on the FTC, with complementary enforcement by state attorneys general. Congress chose to preempt state laws inconsistent with this remedial scheme. Accordingly, Appellants' state-law claims for violations of COPPA were correctly dismissed as preempted.

COPPA's operative preemption clause is unequivocal: "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). This broad provision prohibits the imposition of *any* liability for activities described in COPPA if such imposition would be inconsistent with how those activities are treated in § 6502.

Core to COPPA is its remedial scheme. Congress conferred primary enforcement authority on the FTC, while granting certain other federal agencies enforcement authority over specific entities within their oversight. 15 U.S.C. §

6505. Congress also permitted state attorneys general to bring *parens patriae* actions. *Id.* Accordingly, in nearly every case, an actor who violates the statute must answer to the FTC (or to a state attorney general). *See* §§ 6502, 6505. As Appellees Google LLC and YouTube LLC well explain, imposing liability for activities regulated by COPPA in a manner inconsistent with Congress's remedial approach would violate COPPA's preemption clause. *See* Google Red Br. 24-31.

Indeed, as explained below, one of Congress's main objectives in enacting COPPA was to assign specifically to the FTC primary responsibility for implementing and enforcing the rules of the road in this sensitive area. In doing so, Congress quite consciously decided to exclude the possibility of private enforcement through a private right of action. That is, COPPA reflects Congress's judgment that the appropriate way to treat any perceived violations was through government regulators following the lead of the FTC, *rather than* through private lawsuits. Allowing a plaintiff to circumvent this carefully crafted scheme by asserting state-law claims premised on COPPA would stand as an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress." *Metrophones Telecomm. Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056, 1072-73 (9th Cir. 2005); *see also* Google Red Br. 33-36. Because Appellants' claims are clearly premised on violations of COPPA, the district court properly dismissed those claims as preempted.

II. THE DISTRICT COURT'S CONCLUSION IS CONSISTENT WITH CONGRESS'S OBJECTIVES IN ENACTING COPPA

A. Congress Deliberately Delegated Enforcement Of COPPA To The FTC And Preempted State Laws Inconsistent With This Scheme

Congress enacted COPPA in 1998 in response to growing concerns about the collection of children's personal information on the Internet. Pub. L. No. 105-277, 112 Stat. 2681 (1998). In regulating the complex, dynamic, flourishing ecosystem of the Internet, Congress had to make a series of difficult, calculated choices en route to striking a delicate, intricate balance. After considering proposals and input from numerous stakeholders, Congress ultimately chose to place enforcement authority *exclusively* in the hands of the federal agencies and state attorneys general, with the FTC as the primary enforcement authority. The legislative history demonstrates that Congress thus made a well-considered choice, founded on a robust record.

Prior to the passage of COPPA, the FTC drew on "its extensive experience in addressing business practices affecting children, as well as its three-year study of online privacy issues" to develop a comprehensive report concerning the collection of personal information on the Internet. Fed. Trade Comm'n, *Privacy Online: A Report to Congress* 42 (1998) ("Privacy Report").[2] In its Privacy

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

Report, the FTC advocated federal legislation as necessary to protect children's privacy online, maintaining that such federal legislation should establish the "standards of practice governing the online collection and use of information from children." *Id.* at 41-42. These standards would extend across "[a]ll commercial Web sites directed to children." *Id.* at 42.

Recognizing that the practical effect of any data-privacy regulations depends upon the means by which they are enforced, the FTC set forth several alternative approaches to enforcement: (i) self-regulation, (ii) private remedies, and (iii) government enforcement. *Id.* at 10-11. After enumerating and comparing these alternative approaches, the FTC did not provide a specific recommendation for one versus another, leaving Congress to choose for itself among these options. *Id.*

The Privacy Report spurred Congress to act by enacting COPPA. In doing so, Congress made many choices that designedly combine into an integrated federal framework. Among those is the decision for specified government enforcement to serve as the exclusive enforcement mechanism, a legislative decision that no court should override.

Congress relied heavily on the FTC's expertise and recommendations when drafting COPPA. *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 recommendations and findings of the FTC's . . . report on Internet privacy."). In light of this history, it is hardly surprising that Congress selected the FTC as the primary enforcement authority for its new legislation. The FTC was, and remains, the entity with the greatest expertise in enforcing issues relating to the protection of children's privacy. 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").

Notably, COPPA was designed to afford the FTC greater authority over the issues already within the scope of its expertise. As the FTC Chairman explained during congressional hearings on COPPA, it was not then clear that Section 5 of the FTC Act, 15 U.S.C. § 45(a), "authorize[d] the Commission to take action in *all* circumstances necessary to protect children's online privacy," and this uncertainty was "the primary reason why [the FTC] continue[d] to recommend a legislative response to these issues." Senate Hearing at 12. COPPA reflects Congress's

election to imbue the FTC with broader enforcement and rulemaking authority in a specific subject matter area. *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 248 (3d Cir. 2015) (noting that Congress's passage of the COPPA was consistent with FTC already possessing at least some regulatory authority over cybersecurity issues); *see also* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 603-06 (2014) ("The New Common Law of Privacy") (explaining how the FTC became the "the go-to agency for privacy" issues in the late 1990s, and how its role has only grown subsequently).

Congress was told that placing enforcement authority in the hands of the FTC 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." Senate Hearing at 12 (Statement of FTC Chairman Pitofsky); *see also id.* at 41 (Statement of Kathryn Montgomery, Center for Media Education) (noting that the legislation "would give the Federal Trade Commission authority to develop flexible and effective privacy safeguards through public rulemaking proceedings and to enforce those rules swiftly and comprehensively"); *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"). Of course, by enacting federal rules, the FTC could impose a single, controlling standard across the industry.

Recognizing as much, Congress in COPPA mandated that the FTC issue regulations. 15 U.S.C. § 6502(b) ("[T]he Commission *shall* promulgate . . . regulations . . . ." (emphasis added)). Further, it empowered the FTC to do so under the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553, in lieu of "the more burdensome Magnuson-Moss procedures under which the FTC must usually issue regulations, 15 U.S.C. § 57a." *Wyndham*, 799 F.3d at 248; *see also* Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 Geo. Wash. L. Rev. 1979, 1982-85 (2015) (describing onerous procedures under Magnuson-Moss Act). The upshot imbues the FTC with greater flexibility and agility in exercising its rulemaking authority. Ariel Fox Johnson, *13 Going On 30: An Exploration of Expanding COPPA's Privacy Protections To Everyone*, 44 Seton Hall Legis. J. 419, 428 (2020) ("13 Going On 30") ("One of COPPA's biggest benefits is the Commission's rulemaking authority, which allows COPPA to stay up to date via APA-style rulemaking (a power the FTC lacks in many other arenas)."). This flexible rulemaking authority enables the FTC to keep pace with frequent technological developments and evolving industry practices by revising its rules, which it can do far more nimbly than legislatures or courts can.

To be sure, Congress considered and could have chosen a different remedial scheme. During congressional debate over COPPA, several organizations specifically advocated for a private right of action that would allow parents to sue for violations. For example, one advocacy group urged that the proposed "bill should be altered to provide consumers with a private right of action." *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). Similarly, during a House hearing, U.S. Representative Tauzin asked the FTC's commissioners whether a private right of action for parents would be appropriate. *Id.* at 315. FTC Commissioners Thompson and Anthony responded that they did not believe a private right of action was necessary at that time. *Id.* at 315-16. Having thus considered supplying a private right of action, Congress deliberately opted against doing so.

The legislative history reveals that a central feature of COPPA was providing the FTC with remedial authority over the statute. Congress granted the FTC broad rulemaking authority and primary enforcement authority in order to ensure that the FTC could develop and evolve a consistent, optimal standard covering the United States and all services operating within COPPA's scope.

B. Preemption Is Central To Congress's Statutory Scheme

Against this backdrop, Congress had every reason to provide for preemption, lest its legislative scheme and balance otherwise be frustrated. Congress knew COPPA would operate in the uniquely complex, dynamic, sensitive environment of the Internet, populated by myriad participants and stakeholders. Once the appropriate legislative balance was struck between potentially competing interests, including those of parents, minors, adult users, and industry, it was only appropriate that the statutory balance be clearly delineated and uniformly maintained. And it was the FTC that was tasked, by Congress, with working cooperatively with industry to strike the right balance in arriving at a singular federal standard governing the online collection of children's information throughout the United States. Absent a preemption provision, this federal standard might be undercut and swamped by untold numbers of state and local laws—all distinct and potentially divergent—that might claim say over the Internet within their respective jurisdictions. Nor is it satisfying to say, as Appellants would, that state laws could be substantively contoured and enforced in line with COPPA: Rubber meets road when laws are concretely applied and enforced in specific cases—and a penumbra of state laws that radiate around COPPA and are enforceable by private plaintiffs would be a recipe for state courts potentially to arrive at a cacophony of incoherent and divergent decisions.

Looming large before Congress, therefore, was the imperative to establish one uniform federal standard that one federal regulator, the FTC, would then interpret and enforce. In urging the passage of COPPA, the then-Chairman of the FTC explained that the proposed legislation sought to "provide *uniform* privacy protections" for children online. Senate Hearing at 12 (emphasis added). "[P]reemption is particularly helpful in creating a national standard and eliminating 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). Senator Bryan, when introducing the bill in the U.S. Senate, explained that he and Senator McCain were "introducing legislation that would require the FTC to come up with rules to govern these kind of activities." 144 Cong. Rec. S8483 (daily ed. July 17, 1998).

A uniform federal standard is especially paramount in the context of the Internet, which transcends jurisdictional boundaries. As courts have recognized, "[a]ttempting to localize internet regulation is extremely problematic because the Internet 'by its nature has no local areas.'" *PSINet, Inc. v. Chapman*, 362 F.3d 227, 234 (4th Cir. 2004) (quoting Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 Harv. J.L. & Tech. 113, 131 (1996)). "[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. The same basic problem obtains regardless whether local regulation occurs through the passage of formal state legislation that departs from a uniform federal standard, or through state judicial interpretations of kindred laws that private plaintiffs may invoke in ways that diverge from the interpretation of federal agencies and courts.

Sharing this recognition, many commentators have concluded that "the characteristics of the Internet favor federal preemption as the most appropriate default regime." 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, 1376 (2005) ("*The Case for Federal Preemption*"). Just as it makes obvious sense to vest a single entity with primary responsibility for interpreting and enforcing the statute, it is equally imperative to preempt state and local legislation and enforcement; the former simply cannot happen effectively without the latter. Consistency and predictability cannot be achieved absent "a needed national standard that eliminates state-by-state

variations." Ciocchetti, *The Privacy Matrix*, *supra*, at 301. By the same token, a singular standard "helps e-commerce companies comply" by providing clear guidance, and simultaneously "increases the chances that the American public can better understand the law and its privacy implications." *Id.*

Had Congress not included an express preemption provision in COPPA and thus obviated inconsistent treatment under state law, industry players would likely be caught in a dizzying and prohibitively-expensive patchwork of state and local laws that clash with one another and federal law, too. *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"). Assuming a company could even sort through the various legal regimes to determine its obligations, a conflicting hodgepodge of different laws (even if theoretically aligned on basic substance) could still render it altogether impossible to operate in this space. 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 would threaten to discourage responsible providers from offering useful services to children on the Internet.

And even if, by some chance, the various states did not impose conflicting regimes so as to render compliance altogether impossible, no state should be allowed to establish a *de facto* nationwide legal regime. By Appellants' conception, Congress's express preemption provision should be cast aside in favor of enabling states to act in the mold of Justice Brandeis's "local laboratories, where varying regulatory approaches can be tried on a limited, experimental scale." Blue Br. 45-46. But that suggestion is out of place in this specific context: It ignores how state and local regulation of Internet activity necessarily ripples beyond the borders of any given jurisdiction. State-by-state regulation often "creates an environment in which prudent Internet-related businesses must conform to every state . . . law, producing in effect a national policy based on the standards of the most restrictive state," "thereby nullif[ying] the ["laboratories"-type] experimentation that Brandeis praised." Menell, *The Case for Federal Preemption*, *supra*, at 1372. Far from allowing fifty laboratories to tinker within safe, designated spaces, Appellants' proposal would invite any one state laboratory to constrain and contaminate all others. In such circumstances, the wisdom of federal preemption is unassailable. Otherwise, the courts of whatever state arrives at the most stringent requirements would wind up setting "a de-facto national standard without any of its members being elected nationally." Ciocchetti, *The Privacy Matrix*, *supra*, at 280.

Moreover, leaving regulation in this area to the vicissitudes of state-by-state common law would be antithetical to the Congressional intent behind COPPA. If courts throughout the country were empowered to offer their own interpretations, unencumbered by the preemptive effect of COPPA's remedial scheme, there would be no reliable, workable, singular standard. "[T]he lack of harmonization among state common law precedents" would likely produce confusing and conflicting interpretations, such that the "distillation of the applicable law" might give rise to "an area 'where angels fear to tread.'" *See* Menell, *The Case for Federal Preemption*, *supra*, at 1390-91 (quoting *Am. Safety Table Co. v. Schreiber*, 269 F.2d 255, 271 (2d Cir. 1959)) (discussing state common law governing unfair competition). The resulting legal morass would inevitably "discourage innovation in Internet business models by creating a gauntlet of legal costs and exposure—both in business planning and implementation." *Id.* at 1379.

In short, preemption of state and local laws—whether inconsistent with COPPA in substance or with its remedial scheme—is not ancillary to COPPA. It was at the core of Congress's purposes in enacting COPPA and it remains indispensable to the efficacy of the federal scheme.

C. History Has Shown That COPPA's Remedial Scheme Has Been Successful

During the nearly 25 years that COPPA has been in effect, the FTC has actively exercised its rulemaking and enforcement authority. Until quite recently,

however, no case has been found (despite extensive searching by counsel) where a plaintiff has seriously bid to circumvent the enforcement scheme Congress devised. The implication of this conspicuous silence is clear—Congress's choice of remedial scheme was a prudent and satisfying one.

In 1999, the FTC complied with its congressional mandate by issuing the first COPPA Rule. *See* 16 C.F.R. § 312.1 (1999). Since then, the FTC has continued to update the COPPA Rule in response to technological developments, soliciting public comments for an updated COPPA Rule as recently as 2019. *See, e.g.*, The Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule, 84 Fed. Reg. 56,391 (Oct. 22, 2019). Even apart from formal rules, "there are numerous informal ways the Commission has acted to ensure COPPA addresses new technology (ex ante), including via its online FAQs, more formal policy statements, blog posts, workshops, parental consent mechanism approval, and advice and guidance to businesses." Johnson, *13 Going On 30*, *supra*, at 428. The FTC has also actively pursued cases under COPPA, obtaining numerous settlements since its enactment. 3 Ian C. Ballon, *E-Commerce and Internet Law* § 26.13[2][F] (2020) (describing numerous FTC enforcement actions under COPPA).

At the same time, the Internet has flourished and high-quality content for children has boomed. Congress's statutory scheme has thus operated precisely as

desired—striking a calculated balance by protecting privacy while still enabling diverse and innovative children's programming (including a wide variety of educational material) on the Internet. Given this demonstrated success, state claims should not now be permitted to "upset[] the careful balance that has been struck over years" of rule-making and enforcement actions. *Comments of the Association of National Advertisers on the COPPA Rule Review*, at 3 (2019).[3]

COPPA has enabled the FTC to "provide[] clear direction to industry in many areas, including the safeguards businesses must provide to children and flexible guidance on ways to provide those safeguards." *Id.* Precisely because the COPPA statutory scheme positions the FTC to supply the "clear rules of the road," nationwide traffic has been able to steer safely and smoothly while traversing the Internet. *See id.* (quotation marks omitted).

For decades, no plaintiff attempted to challenge COPPA's preemption of alternative remedial schemes. As best we can ascertain, the first attempt at a direct challenge to Congress's scheme came in *Manigault-Johnson v. Google LLC*, 2019 WL 3006646 (D.S.C. Mar. 31, 2019), where the plaintiffs sought to raise a state-law claim for intrusion upon seclusion based on violations of COPPA. There, as an alternative basis for dismissal, the court concluded that Congress clearly

[3] https://downloads.regulations.gov/FTC-2019-0054-116130/attachment_1.pdf.

intended to preclude the use of state law to enforce COPPA by assigning primary enforcement authority to the FTC and including an express preemption clause. *Id.* at *6. Before this case, *Manigault-Johnson* marked the only attempt to circumvent Congress's remedial scheme.

Appellants, like the plaintiffs in *Manigault-Johnson*, nonetheless seek to undermine the FTC's clear direction and call for drastic change. They urge this Court to open the floodgates to private rights of action under state law, reasoning that "[t]he common law is more flexible and better able to adapt to constantly shifting scams that confront all internet users, including children." Blue Br. 45. But their view reflects multiple misconceptions, and this Court should decline to open the floodgates that have thus far remained closed.

First, Appellants misapprehend the role of the FTC as an enforcement authority. The FTC's actions under COPPA have resulted in voluntary settlements and a corresponding dearth of formal case law. Nevertheless, when the FTC brings enforcement actions that result in voluntary settlements, those settlements more broadly inform private conduct. Solove & Hartzog, *The New Common Law of Privacy*, *supra*, at 600. "[M]any privacy lawyers and companies view the FTC as a formidable enforcement power, and they closely scrutinize FTC actions in order to guide their decisions." *Id.* Indeed, the FTC's settlements flowing from

enforcement actions "have developed into a rich jurisprudence that is effectively the law of the land for businesses that deal in personal information." *Id.* at 588.

Second, Appellants give short shrift to the FTC's demonstrated expertise in protecting children and regulating privacy on the Internet. In actuality, the FTC has been the principal privacy enforcer in the United States for over 50 years. Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Business and Policymakers* A-3 (2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacyera-rapid-change-recommendations/120326privacyreport.pdf. And as the Internet has emerged as a lightning rod for privacy issues over the past 30 years, the FTC has exercised its enforcement authority over software and Internet companies. Alexander E. Reicher & Yan Fang, *FTC Privacy and Data Security Enforcement and Guidance Under Section 5*, 25 No. 2 Competition: J. Anti., UCL & Privacy Sec. St. B. Cal. 89, 93 (2016) (describing the FTC's early privacy enforcement and guidance with respect to activities on the internet, particularly with respect to data security).

Third, recognizing that one state may reasonably disagree with another, and even with Congress, about how exactly to regulate children's privacy at any given moment, companies trying to operate on the Internet must be able to ascertain the operative standard. Whatever the competing policy views may be, therefore, there

should be no questioning that a nationwide balance must ultimately be struck and a decision made, with precision and clarity. Here, the decision has been made by Congress, codified in COPPA, and left for the FTC to administer. It should not be disturbed by private plaintiffs. *See, e.g.*, *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 611-612 (1972) ("To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such [economic policy] decisions, . . . the judgment of the elected representatives of the people is required."); *West Winds, Inc. v. M.V. Resolute*, 720 F.2d 1097, 1102 (9th Cir. 1983) ("the judiciary is not the proper branch of government to update complex statutes when legislative decisionmaking is necessary").

To the extent various constituents might advocate for different policies or different outcomes, Congress is the right forum for them and is well equipped to take account as and if it sees fit. Towards that end, Congress may convene committees, take testimony, and study evidence, just as Congress did when first enacting COPPA. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 389 (1983) (noting that Congress "may inform itself through fact-finding procedures such as hearings that are not available to the courts").

Nor has Congress forgotten about COPPA. Within the last few years, members of Congress have proposed various amendments. For example, one proposal from Senators Markey and Hawley would—among other changes—raise

the applicable age of COPPA from 13 to 15, and provide for the deletion of certain personal information.[4] A proposal from Representative Castor would supply a private right of action to parents of children and teenagers.[5] Congress may one day see fit to amend COPPA to include a private right of action, or to limit its preemption provision. Until and unless Congress may do so, however, this private suit is on the wrong side of COPPA and the operative preemption provision, just as the district court ruled.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

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[4] *Senators Markey and Hawley Introduce Bipartisan Legislation to Update Children's Online Privacy Rules*, Senator Ed Markey (March 12, 2019), https://www.markey.senate.gov/news/press-releases/senators-markey-and-hawley-introduce-bipartisan-legislation-to-update-childrens-online-privacy-rules.

[5] Hunton Andrews Kurth LLP, *U.S. Rep. Castor Reintroduces Kids PRIVCY Act with Updated Provisions*, Nat'l L. Rev. (Aug. 2, 2021) https://www.natlawreview.com/article/us-rep-castor-reintroduces-kids-privcy-act-updated-provisions.

March 4, 2022

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
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- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Derek Shaffer **Date** 03/04/2022

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