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,
No. 5:19-cv-07016 (Hon. Beth Labson Freeman)

BRIEF FOR AMICUS CURIAE FEDERAL TRADE COMMISSION IN SUPPORT OF NEITHER PARTY

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INTRODUCTION AND INTEREST OF THE FEDERAL TRADE COMMISSION

The Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. § 6501, et seq., regulates the collection of information from children over the internet. COPPA's preemption clause restricts states from imposing liability for regulated activities – for example, online data collection from children – that is inconsistent with COPPA's treatment of those activities. This case involves alleged state-law liability for collecting data from children and tracking their online behavior. The Court has invited the Federal Trade Commission to address "whether the [COPPA] preemption clause preempts fully stand-alone state-law causes of action by private citizens that concern data-collection activities that also violate COPPA but are not predicated on a claim under COPPA." DE 71.

The Federal Trade Commission ("FTC" or "Commission") is an independent agency of the United States Government that protects consumer interests by, among other things, enforcing consumer protection laws and conducting studies of industry-wide consumer protection issues. The FTC was a driving force behind the enactment of COPPA and serves as the principal enforcer of COPPA and its implementing rule, which was promulgated by the Commission. The FTC

[1] "DE" refers to appellate docket entries; "Dkt.," to district court docket numbers; "Google," to all defendants collectively; and "children," to those under 13.

BACKGROUND

I. The Children's Online Privacy Protection Act (COPPA)

As the internet became more central to the lives of children and their families, corresponding privacy concerns arose. Congress enacted COPPA in 1998 to better protect children's online privacy. An FTC study provided the basis for the legislative efforts that culminated in COPPA's enactment. See Federal Trade Commission, Privacy Online: A Report to Congress (June 1998); 144 Cong. Rec.

collection of personal information from children without parental consent." 144 Cong. Rec. S11657 (Oct. 7, 1998) (Statement of Sen. Bryan).

To meet those objectives, Congress directed the Commission to promulgate implementing regulations, including detailed regulations governing the collection and use of personal information from children online. 15 U.S.C. § 6502(b)(1), 6502(c). Pursuant to Congress's instructions, the Commission promulgated the Children's Online Privacy Protection Rule ("the COPPA Rule"), 16 C.F.R. Part 312. See 64 Fed. Reg. 22750 (Apr. 27, 1999) (notice of proposed rulemaking); 64 Fed. Reg. 59888 (Nov. 3, 1999) (final rule). COPPA declares it "unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates [those FTC] regulations." 15 U.S.C. § 6502(a)(1).

Congress assigned principal responsibility for COPPA's enforcement to the Commission, authorizing the agency to bring enforcement actions for violations of the COPPA Rule in the same manner as for other Commission rules defining unfair or deceptive acts or practices under the FTC Act. 15 U.S.C. § 6502(c). Several other federal agencies help enforce the statute in specified areas. 15 U.S.C. § 6505(b). In addition, COPPA authorizes state attorneys general to enforce compliance with the COPPA Rule by filing actions in federal district courts after serving prior written

notice upon the Commission when feasible. Id. § 6504(a). The statute does not include a private right of action.

Congress included an express preemption clause in COPPA. That clause, entitled "Inconsistent State Law," provides:

> No State or local government may impose any liability for commercial activities or actions by operators in interstate or foreign commerce 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). By singling out "inconsistent" state law, Congress expressed its desire to leave undisturbed state law that is consistent with COPPA.

II. The FTC's Enforcement Of COPPA

Since the COPPA Rule took effect in April 2000, the FTC has brought numerous enforcement actions for violations of the rule. Of particular relevance here, in 2019, the FTC and the New York Attorney General charged Google and YouTube with violating the COPPA Rule by collecting personal information from children without first notifying parents and getting their consent. The suit alleged that Google and YouTube earned millions of dollars by using the collected information to deliver targeted ads to viewers of YouTube channels directed at children. The case resulted in a record-setting $170 million settlement and an order requiring the companies to implement various compliance measures. See FTC, F5

Google and YouTube Will Pay Record $170 Million for Alleged Violations of Children's Privacy Law (Sept. 4, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations-childrens-privacy-law.

More recently, the FTC charged Epic Games, the maker of the video game Fortnite, with violating the COPPA Rule by collecting personal information from children without parental notice or consent and failing to comply with parental review and deletion requirements. Following a settlement with the FTC, Epic was ordered to pay $275 million for these violations, a new record for COPPA monetary penalties. See United States v. Epic Games, Inc., No. 5:22-cv-00518 (E.D.N.C. 2023). The FTC also has recently brought COPPA enforcement actions against, among others, a weight loss company that marketed an app for use by children and collected children's personal information without parental permission (among other violations); an online advertising platform, for collecting children's personal information without parental consent; and online app developers, for similar violations.[2]

[2] See, e.g., United States v. Kurbo, Inc. and WW International, Inc., No. 3:22-cv-00946 (N.D. Cal. 2022); United States v. OpenX Technologies, Inc., No. 2:21-cv-09693 (C.D. Cal. 2021); United States v. Kuuhuub Inc., et al., No. 1:21-cv-01758 (D.D.C. 2021); United States v. HyperBeard, Inc., et al., No. 3:20-cv-03683 (N.D. Cal. 2020) (all consent decrees).

In addition to its enforcement work, in the last five years alone, the FTC has undertaken numerous other initiatives involving COPPA, including launching a regulatory review of the COPPA Rule, releasing a policy statement, conducting studies and workshops, and issuing a report relating to COPPA.[3]

III. This Case

In the proceedings below, plaintiffs – a group of children – alleged that Google collected data about them and tracked their online activity surreptitiously and without their consent, and that its conduct violates the constitutional,

Op. 9-14. Relying on federal preemption precedent from the Supreme Court and this Court, the panel reasoned that state laws that "supplement" or "require the same thing" as a federal statute, such as state law damages remedies for conduct proscribed by federal law, generally do not "stand as an obstacle" to Congress' objectives and thus are not "inconsistent with" the relevant federal law. Op. 12 (cleaned up).

Google sought rehearing en banc, DE 63, and the Court asked the Commission to provide its views, DE 71. In response to that request, the FTC submits this brief addressing the specific question framed by the Court: "whether

Google conceded at argument, Google's proposed reasoning would mean that COPPA preempts all state laws protecting children's online privacy. But that interpretation nullifies the "inconsistent" limitation that Congress included in COPPA's preemption clause. And it is a "cardinal principle" of statutory interpretation that courts "must give effect, if possible, to every clause and word of a statute." Loughrin v. United States, 573 U.S. 351, 358 (2014), citing Williams v. Taylor, 529 U.S. 362, 404 (2000).

The panel properly rejected Google's interpretation, which would have the extreme effect of providing immunity from a wide swath of traditional state law claims that were never discussed in COPPA's legislative history, much less swept aside altogether. As the FTC explained in a 2014 amicus brief filed in this Court:

> COPPA was enacted in the shadow of state privacy laws—including state protections that are particular to minors—that had existed for nearly a century. . . . Having thus decided to "legislate[] . . . in a field which the States have traditionally occupied," Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), Congress can hardly have intended to displace this vast body of i

Indeed, the "significant role" COPPA gives to states – authorizing state attorneys general to bring civil actions for violations of the COPPA Rule – shows that Congress viewed "the States as partners in its endeavor 'to protect the privacy of children in the online environment,' 144 Cong. Rec. S11657 (Oct. 7, 1998)

above contains no indication that Congress was concerned about allowing consistent state laws to coexist with COPPA's federal standards.

Moreover, there is nothing "logically incongruous," Google Br. at 30-31, in Congress's enacting a uniform federal standard while leaving states some room to regulate similar conduct, provided that state regulation is consistent with the federal law. Time and again, this Court has interpreted express preemption clauses barring "inconsistent" state law claims to allow precisely such parallel regulation. See, e.g., Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc., 423 F.3d 1056, 1072 (9th Cir. 2005); Ishikawa v. Delta Airlines, Inc., 343 F.3d 1129, 1132 (9th Cir. 2003), amended on denial of reh'g, 350 F.3d 915 (9th Cir. 2003); Geffa v. Bank of the West, 152 F.3d 1174, 1177 (9th Cir. 1998); see also Bates v. Dow, 544 U.S. 431, 447-54 (2005) (state damages remedies not preempted by clause prohibiting state labeling requirements "in addition to or different from" federal ones); Medtronic, 518 U.S. at 495 (common law tort claims not preempted by clause barring state law requirements "different from, or in addition to," federal requirements). The panel's analysis adhered to these precedents.

3. Google is misguided in claiming that the use of the word "treatment" in COPPA's preemption clause categorically bar[illegible] 350 F.3d 1129, 1132 ct 185 EM Cogniz 26 Tw 17

law claims could not be squared with the preemption clause barring only claims "inconsistent" with the relevant federal law.

CONCLUSION

The panel's preemption holding was incorrect in these circumstances.

Respectfully submitted,

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May 20, 2023

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