Case No. 13-16918

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL FRALEY, et al., Plaintiffs and Appellees, C.M.D., et al. Intervenor-Plaintiffs-Apellees, **JOHN SCHACHTER, et. al,** Objector and Appellant, **v.** **FACEBOOK, INC.,** Defendant-Appellee.	Consolidated with Nos. 13-16819, 13-16919; 13-16929; 13-16936; 13-17028; and 13-17097

On Appeal from the United States District Court
for the Northern District of California
No. 3:11-cv-01726 TD
The Honorable Richard Seeborg, Judge

BRIEF FOR THE STATE OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS STATE OF CALIFORNIA

A class of users sued Facebook for allegedly using their images in an advertising program without their consent, and the parties settled. Appellants object to the settlement on various grounds, including that it does not ensure compliance with California Civil Code § 3344, which requires parental consent for the use of images of minors under age 18. The district court approved the settlement, reasoning in part that the Children's Online Privacy Protection Act of 1998 (COPPA), 15 U.S.C. §§ 6501 *et. seq*., might preempt § 3344 as applied to minors between the ages of 13 and 18.[1]

That statement regarding possible preemption of state law is of concern to the Attorney General of California, who is responsible for enforcing the laws of the State. *See* Cal. Const. art. V, § 13. The Attorney General has several ongoing actions that seek to protect Californians from the unauthorized disclosure and use of highly sensitive information. *See People v. Kaiser Foundation Health Plan*, No. RG14711370 (Cal. Super. Ct. Jan. 24, 2014) (untimely notification of data breach); *People v. Bollaert*, No.

[1] Because all Facebook users are assumed to be over the age of 13, this case presents no question concerning preemption of California privacy protections for children under that age. *See* 15 U.S.C. § 6502(d).

CD252338 (Cal. Super. Ct. Dec. 10, 2013) (vindictive posting of personal and private images); *People v. Citibank*, No. RG13693591 (Cal. Super. Ct. Aug. 29, 2013) (untimely notification of data breach); *People v. Delta Air Lines, Inc.*, No. CGC 12-526741 (Cal. Super. Ct. Dec. 6, 2012) (failure to conspicuously post privacy policy); *People v. Blue Cross of California*, No. BC492959 (Cal. Super. Ct. Oct. 1, 2012) (public disclosure of social security numbers).

Protecting children's information is of particular importance, because of their still-developing capacities and the potential for misuse of their information to affect their futures. The Attorney General has developed numerous consumer privacy protection guides, including instructions for parents on how to protect their children's privacy online. Office of the Attorney General, *Protecting Your Child's Privacy Online* (2012), *available at* http://tinyurl.com/kqo4rqt. Similarly, the California Office of Privacy Protection, whose role was effectively taken over by the Attorney General in 2012, cleared negative credit histories for over 100 foster children. *See* California Office of Privacy Protection, *A Better Start: Clearing Up Credit Records for California Foster Children* 12 (2011), *available at* https://tinyurl.com/ ompsgy8.

It may not be necessary or wise for this Court to address any preemption question in determining whether the district court properly approved the parties' settlement of this litigation. The Attorney General submits this brief on behalf of the State of California only to explain why, if the Court does address preemption, it should not hold or suggest that COPPA preempts § 3344. This brief takes no position on other issues before the Court.

STATEMENT OF THE CASE

A. California Civil Code § 3344

The California Legislature enacted Civil Code § 3344 in 1971, in response to the commercial misappropriation of individuals' names in a magazine advertising scheme. Cal. Assemb. Comm. on the Judiciary, Analysis of Assemb. B. No. 836 (1971 Reg. Sess.) as amended May 21, 1971, at 1. (Statement of Assemblymember Vasconcellos, Sponsor). The legislation followed similar enactments in several other States. *Id.* As amended, § 3344 provides in relevant part:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner ... for purposes of advertising or selling … , without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages … in addition to [at least $ 750 in damages] ….

The law "complement[ed] the common law cause of action" for commercial misappropriation. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001). As the Act's sponsor explained in a letter to then-Governor Reagan, the law "filled a gap" in the common law by ensuring that individuals could obtain relief for invasions of privacy caused by commercial misappropriation even if they could not prove actual damages. Letter from Assemblymember Vasconcellos to Governor Reagan, Nov. 10, 1971, at 1.

Section 3344 was last amended in 1984. The amendments expanded the law's protections to provide for descendibility of the right of publicity (prohibited at common law) and to increase the minimum penalty for a violation to $750. 1984 Cal. Stat. Summary Digest 633 (Ch. 1704 (SB 613)). The provision's substantive protections are narrower than COPPA, protecting only against the unauthorized use of specifically listed information (name, voice, signature, photograph, or likeness) for specified commercial purposes. However, the protections are broader than COPPA's in the sense that they impose parental consent requirements for minors up to

the age of 18, and apply to the use of information in any media, not just online.[2]

B. Children's Online Privacy Protection Act of 1998

COPPA dates to the 1990s, when the growth of e-commerce spurred federal regulators to develop a limited set of Internet marketing standards addressing issues of special sensitivity. COPPA is designed to protect information collected online from children. As enacted, it provides that:

> It is 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 the regulations prescribed [by the Federal Trade Commission (FTC)].

15 U.S.C. § 6502(a). A "child" is defined as an individual under the age of 13. 15 U.S.C. § 6501(a). In relevant part, the FTC regulations require an operator to disclose information collection practices and "obtain verifiable parental consent for [any] collection, use, or disclosure of personal information from children." *Id.* § 6502(b)(1)(A); *see* 16 C.F.R. § 312.5(a).

[2] Although the statute does not define the term minor, an individual under the age of 18 is generally considered a minor in California. *See* Cal. Fam. Code § 6500.

C. Procedural History

The named plaintiffs brought this class action on behalf of all Facebook users who were featured in so-called "sponsored" advertisements, claiming that Facebook used their identity for advertising without their knowledge or consent. *See* Opening Br. for Appellants Schachter et al. 2-6 (Schachter Br.). Class members include teenagers and their parents, who claim that Facebook never obtained parental consent for use of their identity as required by Civil Code § 3344. *Id.* In the district court, Facebook responded in part by arguing that California's parental consent requirement is preempted by COPPA as applied to teenagers. *Id.* at 5, 38. The parties ultimately proposed a settlement agreement that provides for payments to named class members, cy pres payments to non-profit organizations working on Internet privacy issues, and requirements that Facebook take steps to give users greater information and control with respect to its sponsored advertising program and make certain alterations to its user agreements. *Id.* at 8-10.

Some teenagers and their representatives have objected to the proposed settlement on various grounds, including that its terms do not adequately ensure future compliance with § 3344. *Id.* at 11-12. The district court overruled these objections and approved the settlement. *Fraley v. Facebook*,

-- F. Supp. 2d --, No. CV 11-01726 RS, 2013 WL 4516819 (N.D. Cal. Aug. 26, 2013). In concluding that the settlement was "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e), the court reasoned in part that plaintiffs could face "substantial hurdle[s]" in prevailing on their claims. *Fraley*, 2013 WL 4516819, at *8. As relevant here, the court commented that the objectors' argument based on § 3344 was uncertain of success because COPPA might preempt § 3344 as applied to teenagers. *Id.* The district court noted that COPPA regulates the collection and use of the personal information of children under the age of 13, but does not extend its protections to teenagers, and "expressly preempts state requirements that are 'inconsistent with' [COPPA's] 'treatment.'" *Id.* The court remarked that, because of its silence as to teenagers, COPPA "could bar any efforts by plaintiffs to use state law to impose a parental consent requirement for minors over the age of 13." *Id.*

On appeal, the objectors continue to argue that the settlement should not be approved because it is unfair and does not bar conduct that they claim violates various laws, including § 3344. Schachter Br. at 19-21, 28-31. In the district court, Facebook argued that the court could properly approve the settlement without resolving whether conduct that the settlement would permit might otherwise violate the law. *See* Defendant Facebook, Inc.'s

Memorandum of Points & Authorities in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement (Memorandum), *Fraley*, No. CV 11-01726 RS (N.D. Cal. Jun. 28, 2013). It may well be that the Court can properly resolve this case without addressing any question of preemption. Indeed, it might be wiser not to address such a sensitive issue in the context of review of a settlement, which by definition does not involve judicial resolution of the underlying merits. The State files this brief only to explain why, if the Court does consider preemption, it should not hold or suggest that federal law preempts the protections that state law provides to teenagers through § 3344.

ARGUMENT

I. COPPA DOES NOT PREEMPT STATE PROTECTIONS, SUCH AS § 3344, THAT DO NOT CONFLICT WITH FEDERAL LAW

"[P]reemption claims turn on Congress's intent," ascertained through "express preemption by statute, occupation of the field, or conflict between state and federal regulation." *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 397 F.3d 755, 758 (9th Cir. 2005). Where, as here "a federal law contains an express preemption clause, [the court] 'focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1977 (2011).

COPPA's preemption provision is limited in its reach:

> No State or local government may impose any liability … 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). An express preemption provision such as this, displacing only "'inconsistent'" state regulation, "supports an inference that Congress did not intend to preempt matters *beyond* the reach of that provision." *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) (citation omitted) (payphone

service provider's implied contract and *quantum meruit* suit against long distance provider not preempted by Federal Communications Act).

By preempting only state law provisions that are "inconsistent" with COPPA's provisions, Congress left intact state regulation that can coexist with COPPA. And Congress has been well aware, at least since the 1970s, of the many state laws that protect consumer privacy. Especially when regulating in a field that has already been pervasively occupied by state law, Congress would have spoken far more plainly if it intended any broad displacement of consistent or supplementary state regulation. *See Air Conditioning*, 397 F.3d at 758. Congress's decision in COPPA to bar only "inconsistent" state law establishes that the federal Act's provisions are intended to provide a floor, not a ceiling.

A. COPPA Does Not Preempt Consistent State Regulation

By its terms, COPPA leaves state regulation intact except to the extent a State's rules are affirmatively inconsistent with the Act's own provisions. By focusing on state regulation that is "inconsistent" with its terms, rather than foreclosing any additional regulation of the privacy interests of minors, COPPA plainly recognizes the possibility of complementary state regulation such as § 3344.

When a federal statute expressly preempts only "inconsistent" state regulation, this Court has applied the test for "conflict" preemption. Such a law forecloses only those "'state law[s that] stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Metrophones*, 423 F.3d at 1073. Notably, "Congressional 'silence'" with respect to areas that the statute does not address implies that state laws are *not* preempted, so long as complying with both federal and state law is not "'physically impossible'" and does not "'frustrate any purpose of the federal remedial scheme.'" *Ishikawa v. Delta Airlines, Inc.*, 343 F.3d 1129, 1134 (9th Cir. 2003) *amended in non-relevant part at* 350 F.3d 915 (9th Cir. 2003) (quoting *Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238, 251 (1984)). Preemption is reserved for those "state laws that establish different … requirements … or otherwise directly conflict with" the federal statute. *Beffa v. Bank of the West*, 152 F.3d 1174, 1177 (9th Cir. 1998) (state law negligence claims that did not actively conflict with Expedited Funds Availability Act not preempted). The language of such a federal law "expresse[s] no desire to preempt state laws or causes of action that supplement, rather than contradict" the federal Act. *Id.*

Section 3344 does not conflict with COPPA by extending parental consent protections to teenagers, because teenagers' interests simply are not

addressed by the federal Act. COPPA does not, in the terms of the federal preemption provision, "describe[]" "activit[ies]" involving teenagers at all, nor prescribe any federal "treatment of th[eir] activities or actions." 15 U.S.C. § 6502(d). Complying with § 3344 as to teenagers in no way hinders an entity's ability to also faithfully abide by COPPA's text as to children 12 and under. Thus, § 3344 merely supplements COPPA's protections. Because there is no direct conflict between the laws, COPPA no more preempts state law protecting teenage privacy rights than it preempts state privacy regulation pertaining to adults. *See also* 144 Cong. Rec. S12789 (statement of Senator Bryan, COPPA co-sponsor) ("[S]tate and local governments may not ... impose liability for activities or actions *covered by* [COPPA] ...") (emphasis added). Section 3344 presents no obstacle to the accomplishment of the congressional purposes served by COPPA, and therefore remains intact. *See Metrophones*, 423 F.3d at 1073. Indeed, that point is strongly confirmed by the brief filed in this case by the FTC, the federal agency charged with implementing and enforcing COPPA. *See* Brief for Amicus Curiae Federal Trade Commission in Support of Neither Party; *see, e.g.*, 15 U.S.C. § 6502(b).

The silence of COPPA's preemption provision as to supplementary state regulation stands in stark contrast to the terms of, for example, the

Federal Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681 *et seq.*, which "regulates the issuance and use of 'consumer reports' by 'consumer reporting agencies'" to protect consumers' financial information. *See Am. Bankers Ass'n v. Gould*, 412 F.3d 1081, 1083 (9th Cir. 2005). As originally enacted, the FCRA, like COPPA, did not preempt state law unless it was "inconsistent with" the FCRA. Pub L. 91-508, § 601, 84 Stat. 1136 (1970). Congress recognized that this language permitted "a variety of different state requirements." 141 Cong. Rec. S5449 (1995) (statement of Senator Bond).

When Congress decided to impose a uniform standard under the FCRA, it did not rely on statutory *silence* to preclude other state law protections. Rather, in 1996 and 2003, Congress expressly limited state regulation extending beyond the FCRA. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009; Fair and Accurate Credit Transaction Act of 2003, Pub. L. No. 108–159, 117 Stat. 1952, *codified as amended*, 15 U.S.C. § 1681t(a). The FCRA's ceilings on state regulation were carefully designed, comprising two subsections, five clauses, and twenty-eight subclauses, laying out a detailed scheme for preempting supplementary state regulation, and grandfathering numerous existing state law requirements. 15 U.S.C. § 1681t(b)-(c). These ceilings were established after six years of pitched legislative battle and included

numerous compromises. *See* Joseph L. Seidel, *The Consumer Credit Reporting Reform Act: Information Sharing and Preemption*, 2 N.C. Banking Inst. 79 (1998). Tellingly, even in the FCRA context, this Court has been careful to limit the preemptive reach of these federal ceilings. *Gould*, 412 F.3d at 1087 (rejecting argument for broad preemptive interpretation of the term "information" in the FCRA).

Congress enacted COPPA to protect online information a mere two years after enacting FCRA's detailed preemptive provisions with respect to financial information. Its decision to preempt only "inconsistent" state laws is thus especially notable. In this context, there can be no question that Congress understood it was leaving room for consistent but supplementary state regulation such as § 3344.

B. Any Question Concerning The Scope Of COPPA's Preemption Must Be Resolved In Favor Of The Continued Enforcement Of State Law

If there were any doubt concerning the limited scope of COPPA's preemption, the Court would be required to resolve it based on "the starting presumption that Congress did not intend to supplant state law." *Air Conditioning*, 397 F.3d at 759. Under that strong presumption against preemption, "the 'historic police powers of the States [are] not to be

superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* (citations omitted).

Here, California law operates in an area of historic state regulation, where the presumption against preemption is at its strongest. Protection from commercial misappropriation, especially for children, has traditionally been, and remains, an area of special state concern, robustly addressed by state common and statutory law. *See Downing*, 265 F.3d at 1001. Section 3344 itself was enacted in 1971. 1971 Cal. Stat. 3426. Analogous provisions were enacted in 1909 in New York, 1909 N.Y. Laws ch. 14, *codified*, N.Y. Civ. Rights Law § 50; 1965 in Oklahoma, 1965 Okla. Sess. Laws ch. 431, § 1, *codified as amended*, Okla. Stat. Ann. tit. 21, § 839.1; 1967 in Florida, Fla. Stat. ch. 67-57, § 1 (1967), *codified as amended*, Fla. Stat. Ann. § 540.08; 1977 in Virginia, 1977 Va. Acts ch. 617, *codified*, Va. Code Ann. § 8.01-40; 1977 in Wisconsin, 1977 Wis. Sess. Laws ch. 176, *codified as amended*, Wis. Stat. § 995.50; and 1984 in Tennessee, 1984 Tenn. Pub. Acts, ch. 945, § 5, *codified as amended*, Tenn. Code Ann. § 47-25-1105.

These state statutes protect one facet of a broader right of privacy that has also traditionally fallen within state control. "The roots of modern information privacy law are found in state common law." Paul M. Schwartz,

Feature, *Preemption and Privacy*, 118 Yale L.J. 902, 907 (2009). Information privacy throughout the late nineteenth and early twentieth centuries was addressed by state common law torts that protected individuals' personal information. As privacy law was codified, States remained in the forefront: "[T]he states in the United States have been especially important laboratories for innovations in information privacy law." *Id.* at 916. The Privacy Protection Study Commission that Congress created in the Privacy Act of 1974 pointed in its final report to "the significant increase in State regulatory efforts to protect the interests of the individual in records kept about him ... [which had] already led a number of States to try out innovative protections, particularly in their regulation of private-sector organizations." Privacy Protection Study Comm'n, *Personal Privacy in an Information Society* 491 (1977). In many important areas, such as preventing financial identity theft, state information privacy laws have preceded federal regulation.

California, in particular, has been at the forefront in protecting privacy rights. Along with nine other States, California enshrines privacy rights in its constitution. Nat'l Conf. of State Legislatures, *Privacy Protections in State Constitutions*, Dec. 11, 2013, available at http://tinyurl.com/ppc3uhc. Section 1 of Article I of the California Constitution includes "pursuing and

obtaining ... privacy" as an "inalienable right." Similarly, in 2002, California became the first State to require companies to notify customers of data breaches. *See* Cal. Civ. Code § 1798.29. Forty-five States followed suit. Nat'l Conf. of State Legislatures, *State Security Breach Notification Laws*, Jan. 21, 2014, available at https://tinyurl.com/nrb9bs7. Congress is only now considering similar bills. *See, e.g.*, Data Security and Breach Notification Act of 2013, S. 1193, 113th Cong. (2013). California continues to enforce its privacy laws vigorously, *see*, *e.g.*, *Kaiser Foundation*, No. RG14711370; *Citibank*, No. RG13693591; *Delta Air Lines*, No. CGC 12-526741; *Blue Cross*, No. BC492959, and makes special efforts to protect children's privacy, *see* Protecting Your Child's Privacy Online, *supra*.

Thus, federal privacy law often provides only a uniform national floor; States remain free to engage in their historic function of providing additional protections for their citizens' privacy rights. This is, for example, the approach adopted by the Cable Communications Policy Act of 1984, *see* 47 U.S.C. § 551(g); the Employee Polygraph Protection Act of 1988, *see* 29 U.S.C. § 2009; the Video Protection Privacy Act, *see* 18 U.S.C. § 2710(f); the Health Insurance Portability and Accountability Act of 1996, *see* Pub. L. No. 104-191, § 264(c)(2) (1996); 45 C.F.R. § 160. 203(b); the Telephone Consumer Protection Act, *see* 47 U.S.C. § 227(f)(1); the Gramm Leach

Bliley Act, *see* 15 U.S.C. § 6807 (b); and the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, *see* 120 Cong. Rec. 39862, 39863 (1974) (Joint Statement in Explanation of Buckley-Pell Amendment); *see* also *Gould*, 412 F.3d at 1087; *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1050 (7th Cir. 2013) (applying presumption against preemption with respect to "privacy" statute).

Against the longstanding history of state protection of information privacy in general, and against commercial misappropriation in advertising in particular, COPPA operates in a narrow sphere. It seeks to protect online collection or distribution of personal information concerning children under 13. COPPA does not address the privacy rights of those over 12, whether minors or adults; or information collection that does not occur online; or many other circumstances in which States remain free to enact additional protections.

It is inconceivable that Congress would have, through *silence* in COPPA's statutory text, intended to preempt either existing and longstanding state protections or States' ability to legislate further in the area in a manner not inconsistent with federal law. The extra protection that Congress provides for young children in COPPA should not be read to bar States from providing any protection to teenagers, thus leaving them

vulnerable to invasions of privacy that may harm them well beyond their teenage years.

II. COPPA'S LEGISLATIVE HISTORY PROVIDES NO BASIS FOR PREEMPTION

Facebook has previously cited the legislative history of COPPA to support an argument that Congress intended the Act to create a uniform federal standard preempting any additional state regulation of the online privacy rights of children. Memorandum, *supra*, at 23. Specifically, it has pointed to an unexplained change in the age before at which COPPA requires for parental consent, from age 16 in the bill's original draft to age 13 in the enacted text, to argue that Congress intended the final version of the Act to preempt any state requirement of parental consent for the collection of online information from teenagers over the age of 12.

That argument is unpersuasive. As the Supreme Court recently observed, "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Whiting*, 131 S. Ct. at 1980 (citation omitted). To be sure, "relying on legislative history materials in general" may be "useful[]" in some circumstances. *Id.* However, *Whiting* found "compelling" reasons to avoid relying on legislative history because only one of five legislative reports issued by Congress even "touche[d] on" the scope of the preemption

in question. *Id.* In this case, *no* statement by a member of Congress, in a report or otherwise, touches upon the reason for the change in the age at which Congress chose to provide federal protection.

To the extent this Court considers COPPA's legislative history, there are strong indications that the Act's supporters recognized the argument for, and would not have intended to preclude, privacy protections for teenagers. Initial efforts to protecting children's privacy rights in Congress set the cut-off age for parental consent at 16. *See* Children's Privacy Protection and Parental Empowerment Act (CPPPEA), H.R. 3508, 104th Cong. (1996); H.R. 1972, 105th Cong. (1997). Some commentators argued that 16 was an "arbitrary" line that would interfere with college marketing practices. Hearing before the Subcomm. on Crime of the Comm. on the Judiciary: H.R. 3508 Children's Privacy Protection and Parental Empowerment Act of 1996, 104th Cong. 66-67 (1997) (statement of Martin Lerner, President, American Student List Co., Inc.). Others defended both the proposed cut-off age and the bill as a whole. *See id*. at 36 (statement of Rep. Bob Franks).

Even more significantly, the FTC's Report that recommended the enactment of COPPA suggested age 12 as an appropriate age through which to require parental consent. Federal Trade Commission, *Online Privacy: A Report To Congress* 41-42 (1998). Yet, in introducing COPPA the next

month, the Act's sponsors set age 16 as the proposed limit for the consent requirement. S. 2326, 105th Cong. § 3(a)(a)(A)(iii) (1998). Moreover, at the same time that it enacted COPPA, Congress also passed the Child Online Protection Act, which prohibited knowingly posting "material that is harmful to minors" on the Internet "for commercial purposes." 47 U.S.C. § 231(a)(1) (held unconstitutional by *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2008)). COPA defined a minor as an individual aged 16 or under. *Id.* at 231(e)(7); *see also* Children's Internet Protection Act of 2000, 47 U.S.C. § 254(1)(B)) (requiring K-12 schools and libraries receiving federal funding to put in place filtering policies). It is implausible to contend that the Congress that sought to shield teenagers up to age 16 from harmful Internet content in COPA would, at the same time, through its *silence* in COPPA, have intended to affirmatively preempt any state legislation protecting the online privacy interests of any child over the age of 12.

In this legislative context, Congress's decision to select age 12, rather than a somewhat higher age, as the oldest age at which to provide federal protection under COPPA cannot be construed as setting a preemptive nationwide limit on the permissible extent of any related privacy regulation. At the time, some commentators advocated limited federal protections for

teenagers. *See* Memorandum, *supra*, at 23 n.22. Others, however, including the Chairman of the FTC, indicated uncertainty on the subject; and yet others supported additional federal protections. *See* Hearing before the Senate Subcomm. on Communications of the Comm. on Commerce, Sci., and Transp.: S. 2326, Children's Online Privacy Protection Act of 1998, 105th Cong. 13 (1998) (Hearing) (statement of Robert Pitofsky, Chairman, Federal Trade Commission) (expressing uncertainty as to whether teenagers should be protected); *id.* at 36 (statement of Kathryn Montgomery, President, Ctr. for Media Educ.) (supporting "age appropriate" protections for teenagers). Nothing in the history of COPPA indicates that Congress intended to resolve that debate by affirmatively preempting States from reaching their own conclusions and providing additional protection for teenagers.

There is, accordingly, no basis from departing from COPPA's text, which preempts only state regulation that is "inconsistent" with federal law. That provision does not bar state enforcement of complementary or supplemental protections such as those provided by § 3344.

CONCLUSION

To the extent this Court reaches the issue, it should conclude that COPPA does not preempt California's § 3344 as applied to children aged 13 to 18.

Dated: March 21, 2014

Respectfully Submitted,

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13-16918

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANGEL FRALEY, et al., Plaintiffs and Appellees, C.M.D., et al. Intervenor-Plaintiffs-Apellees, **JOHN SCHACHTER, et. al,** Objector and Appellant, **v.** **FACEBOOK, INC.,** Defendant-Appellee.	Consolidated with Nos. 13-16819, 13-16919; 13-16929; 13-16936; 13-17028; and 13-17097

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: March 21, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 13-16918

I certify that:

[x] 4. **Amicus Briefs**.

[x] Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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March 21, 2014
Dated

s/ Craig J. Konnoth
Craig J. Konnoth
Deputy Solicitor General

CERTIFICATE OF SERVICE

Case Name: ***Farley, et al.; C.M.D., et al.; Schacter, et al.; v. Facebook, Inc.*** No. **13-16918**

I hereby certify that on March 21, 2014, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

BRIEF FOR THE STATE OF CALIFORNIAS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 21, 2014, at San Francisco, California.

J. Espinosa
Declarant

s/ ***J. Espinosa***
Signature

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