No. 23-2969

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NETCHOICE, LLC, doing business as NetChoice,
Plaintiff-Appellee

v.

ROB BONTA, Attorney General Of The State Of California,
Defendant-Appellant

On Appeal from the United States District Court for the
Northern District of California, Case No. 5:22-cv-08861-BLF
The Honorable Beth Labson Freeman, Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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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 non-profit, tax-exempt corporation incorporated in the District of Columbia. It has no parent corporation, and no publicly held corporation has 10% or greater ownership in the Chamber.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

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 curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a substantial interest in the resolution of this case because it implicates the stability of the Internet economy and core constitutional rights of participants in that economy. Many of the Chamber's members use the Internet to interact with their customers and the public at large—groups that inherently include children. The Chamber's members are thus intimately familiar with and profoundly affected by regulatory regimes that would reshape rights and duties for online communications and activity. Because of these interests, the Chamber submitted an *amicus* brief in the court below.

[1] 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.

California's Age-Appropriate Design Code Act ("AB 2273" or "the Act"), if upheld, would wreak havoc on the Internet. Although nominally a children's privacy law, the Act would render the State a roving Internet censor. It would give the California Attorney General ("AG") unprecedented authority to regulate online speech that the government finds "potentially harmful." And it would let the AG prevent speakers from obtaining information to develop and disseminate any message that California determines to not be in the "best interests" of children. Such deliberate content-based regulation of speech violates the First Amendment and is part of a broader troubling trend in which States attempt to justify censoring speech that they dislike by invoking the laudable interest in protecting children. This Court and others rightly and routinely hold such laws unconstitutional. *See, e.g.*, *Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109 (9th Cir. 2023) (finding unconstitutional California law seeking to regulate advertisements where they "reasonably appear[] to be attractive to minors"); *Book People, Inc. v. Wong*, 91 F.4th 318 (5th Cir. 2024) (enjoining Texas law seeking "to keep material deemed inappropriate off Texas public-school bookshelves").

Besides violating the First Amendment, the Act also flatly conflicts with the federal Children's Online Privacy Protection Act ("COPPA"). *See* Pub. L. No. 105-277, §§ 1301–08, 112 Stat. 2681, 2681-728–35 (1998) (codified at 15 U.S.C. §§ 6501–06). Through COPPA, Congress enacted a nationwide scheme of children's

privacy regulation that expressly preempts all "inconsistent" state laws. 15 U.S.C. § 6502(d). The Act is fundamentally inconsistent with COPPA because it would impose liability for practices that Congress deliberately did not. In doing so, the Act upsets Congress's deliberate balance and stands as a substantial obstacle to Congress's carefully drawn scheme.

Because the bulk of the Act is unlawful and not severable from any remaining provisions, AB 2273 should be enjoined in its entirety.

ARGUMENT

I. AB 2273 VIOLATES THE FIRST AMENDMENT.

The District Court correctly held that the Act violates the First Amendment. But in conducting that analysis, the court incorrectly "assume[d] . . . that only the lesser standard of intermediate scrutiny for commercial speech applies." *NetChoice, LLC v. Bonta*, No. 22-CV-08861-BLF, 2023 WL 6135551, at *10 (N.D. Cal. Sept. 18, 2023). Although the outcome is still the same—the Act is unconstitutional—the lower court erred in applying intermediate scrutiny. It should have applied strict scrutiny for two reasons: (i) the Act is content-based, and (ii) it regulates both commercial and non-commercial speech. And, in all events, AB 2273 is unconstitutionally vague.

A. AB 2273 Triggers Strict Scrutiny.

1. AB 2273 Is Content-Based.

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The Supreme Court employs a "commonsense meaning of the phrase 'content based,'" assessing "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Ibid.*; *see also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (plurality).

Although some "facial distinctions based on a message are obvious," other distinctions "are more subtle" and may even appear "facially content neutral." *Reed*, 576 U.S. at 163–64. For example, a law is content-based where it appears "neutral" but "is justified only by reference to the content of speech." *Boos v. Barry*, 485 U.S. 312, 320–21 (1988) (emphasis omitted). A law is also content-based where the government "impose[s] a restriction on access to information" based on "the way in which the information might be used or disseminated." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (quotations omitted).

AB 2273 is content-based for three independent reasons. *First*, the Act on its face distinguishes based on content because it regulates covered businesses'

communications, including their dissemination of expressive content, that the State deems "potentially harmful" or a "material detriment" to children. Among other obligations, the Act requires businesses to create a Data Protection Impact Assessment ("DPIA") for "any online service, product, or feature likely to be accessed by children." Cal. Civ. Code § 1798.99.31(a)(1)(A). The DPIA must "address" purported "risks of material detriment" stemming from expressive activity, including risks from (i) what the State deems "harmful, or potentially harmful, content," (ii) communications from the business, such as "notifications," and (iii) "targeted advertising." *Id.* § 1798.99.31(a)(1)(B). Businesses must then create "a timed plan to mitigate or eliminate" these purported risks. *Id.* § 1798.99.31. "Risks," "harmful," and "material detriment" remain undefined, *see id.* § 1798.99.30, but the State suggests that they are not limited to constitutionally unprotected obscene or illegal content, but also merely "unwanted material," *see* Appellant's Br. 41. Thus, the DPIA provisions regulate content based on a free-floating analysis of whether the State considers protected expression to be "potentially harmful" or a "material detriment."[2] That is content-based speech regulation triggering strict scrutiny.

Just like the California statute struck down in *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), AB 2273 purports "to create a wholly

[2] *Amicus* refers to these collective requirements as "the DPIA provisions."

new category" of impermissible "speech directed at children" and thus "imposes a restriction on the content of protected speech." *Id.* at 794, 799. The statute at issue in *Brown* was designed to prevent minors from accessing constitutionally protected expressive content: "violent video games" with "morbid" and supposedly "patently offensive" content. *Id.* at 789. AB 2273 is similarly content-based because it seeks to categorically restrict content California deems "harmful" or "detrimental" to children. *See also Reno v. ACLU*, 521 U.S. 844, 871 (1997) (holding that restrictions on "patently offensive" and "indecent" content rendered law "a content-based regulation of speech").

AB 2273's reach is not limited to traditionally unprotected speech such as obscenity, incitement, or fighting words, even adjusted to the perspective of children. *Cf. Brown*, 564 U.S. at 793. "No doubt a State possesses legitimate power to protect children from harm," the Supreme Court explained in *Brown*, "but that does not include a free-floating power to restrict the ideas to which children may be exposed. 'Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'" *Id.* at 794–95 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975)).

Second, the Act is content-based because it can be justified only by reference to the content of the protected speech it regulates—specifically, its "likely

communicative impact" on readers, listeners, and viewers. *Texas v. Johnson*, 491 U.S. 397, 411 (1989). "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). The DPIA provisions are expressly designed to mitigate risks from what the State considers to be "harmful, or potentially harmful, content" and other expression that might, in the State's opinion, cause "harm" to the listener. Cal. Civ. Code § 1798.99.31(a)(1)(B), (a)(2). Because the DPIA provisions seek to justify speech regulation based on "the direct impact that speech has on its listeners," AB 2273 "must be considered content-based." *Boos*, 485 U.S. at 321; *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992).

Third, the Act is content-based because it restricts access to information based on the protected expression the information may facilitate. The Act prohibits collecting or retaining any child's "personal information" unless it is either "necessary to provide an online service, product, or feature," *or* there is a "compelling reason" that collecting or retaining the "information is in the best interests of" children likely to access the service. Cal. Civ. Code § 1798.99.31(b)(3); *see also id.* §§ 1798.99.31(b)(1), (4), (similar restrictions on using information); 1798.99.31(b)(2) (similar restrictions on automated processing of information). As with many of the Act's operative standards, "compelling reason" and "best interests" remain undefined. *See id.* § 1798.99.30. But the bottom line is not in dispute: these

vague standards govern whether businesses may obtain information. Thus, if a business seeks to collect information to help it craft a constitutionally protected message, the Act will allow that collection only if the message offers a "compelling reason" that collection is "in the best interests of children." That is content-based speech regulation.

The Supreme Court's decision in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), confirms that the information-collection provisions in AB 2273 are content-based. In *Sorrell*, Vermont enacted a law providing that certain "pharmacy records" could "not be sold" or "disclosed by pharmacies for marketing purposes." 564 U.S. at 557. The Court held that this scheme "enact[ed] content- and speaker-based restrictions" because it allowed purchase of pharmacy records for some speech (e.g., "educational communications"), but not other speech (i.e., "marketing"). *Id.* at 563–64. Just as Vermont engaged in content-based speech regulation when it restricted the collection of information to certain speakers in the name of "the best interests of patients," *id.* at 557, California here seeks to engage in content-based speech regulation by restricting the collection of information to speakers using a "best interests" standard, Cal. Civ. Code § 1798.99.31(b)(3).

For these three independent reasons, the Act is a "content-based regulation of speech" and therefore "is subject to strict scrutiny." *Santopietro v. Howell*, 73 F.4th 1016, 1024 (9th Cir. 2023).

2. AB 2273 Regulates Non-Commercial Protected Speech.

The District Court erred in applying intermediate scrutiny when it reasoned that the Act may regulate "only commercial speech," *NetChoice*, 2023 WL 6135551, at *10, because the Act also regulates non-commercial speech.

"Commercial speech does no more than propose a commercial transaction." *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1122 (9th Cir. 2020) (quotations omitted). And "the speaker's economic motivation is insufficient by itself to render speech commercial." *Ibid.* (quotations omitted). Thus, speech on a for-profit company's "website does not meet the standard for commercial speech" where it does more than "propose a commercial transaction." *Ibid.* (quotations omitted). And even where the regulated speech is commercial, strict scrutiny nevertheless applies where the commercial speech is "inextricably intertwined with" non-commercial speech. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988).

The Act regulates far more than commercial speech, properly defined. Under the Act, businesses are expected to mitigate risk from what the State considers "potentially harmful" "content," Cal. Civ. Code § 1798.99.31(a)(1)(B)(i), to prevent information collection unless it meets a "best interests" standard, *id.* § 1798.99.31(b)(3), and to refrain from "using" information in a way the State deems "materially detrimental" to a child's "well-being," *id.* § 1798.99.31(b)(1). These restrictions on "content," "collection," and "use" are not limited to the commercial

context but instead reach any business's "online service, product, or feature likely to be accessed by children." *Id.* § 1798.99.31(a). Thus, the Act permits state officials to assess for harm not only "content" in an advertisement but also "content" in a website banner summarizing the day's news or "content" in a user's post. The Act would prevent collecting information to curate expressive content to children—for example, recommending articles about a topic in which a child has expressed interest—unless California considers that reason "compelling" enough to be in the "best interests of children." And the Act would allow officials to restrain the "use" of information for what they consider to be a "materially detrimental" ad but also the "use" of information for targeted recommendations for purportedly "materially detrimental" expressive content.

Because the Act, by its own terms, regulates vast amounts of speech that "do[es] not propose a commercial transaction," the commercial-speech inquiry does "not present a close question." *IMDb*, 962 F.3d at 1122. The Act is not limited to "commercial speech," and this Court should "apply strict scrutiny." *Id.* at 1125.

B. AB 2273 Fails Strict Scrutiny.

Because the Act is a "content-based restriction," it must be "narrowly tailored to achieving a compelling governmental interest." *Project Veritas v. Schmidt*, 72 F.4th 1043, 1062 (9th Cir. 2023). This burden is a heavy one that renders "[c]ontent-based laws" "presumptively unconstitutional." *Reed*, 576 U.S. at 163. As both

Judge Freeman and Appellees persuasively explain, the Act cannot satisfy even the more forgiving intermediate-scrutiny standard. *See NetChoice*, 2023 WL 6135551, at *10–*18, Appellee's Br. 42–54. The Act is not "reasonably tailored" because its subjective content-based standards would "burden substantially more speech than is necessary to further the government's legitimate interests." *NetChoice*, 2023 WL 6135551, at *15 (quotations omitted). Thus, the Act must fail the more demanding requirements of narrow tailoring too.

C. AB 2273 Is Unconstitutionally Vague.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "Vague laws thus stand in basic opposition to the rule of law." *Butcher v. Knudsen*, 38 F.4th 1163, 1169 (9th Cir. 2022). And "vagueness concerns are more acute when a law implicates First Amendment rights, and, therefore, vagueness scrutiny is more stringent." *Ibid.* (quotations omitted). "Consistent with these principles, courts have not hesitated to reject on vagueness grounds laws regulating speech protected by the First Amendment." *Id.* at 1169–70 (collecting cases).

AB 2273 is unconstitutionally vague. The Act's key operative terms—including "harmful," "detriment," and "best interests"—are undefined and directly regulate speech. The result is to delegate their meaning "to the subjective judgment

of" state enforcers and "to inhibit the exercise of freedom of expression because individuals will not know whether the [law] allows their conduct." *Hunt v. City of Los Angeles*, 638 F.3d 703, 712–13 (9th Cir. 2011). Indeed, the compliance burden and chilling effects from AB 2273 will be enormous. Businesses must continuously predict whether their decisions will satisfy California's expectations of what content is "harmful" or in a child's "best interest." The Constitution will not bear such imprecision, particularly where it "touch[es] upon sensitive areas of basic First Amendment freedoms." *Fox*, 567 U.S. at 254 (quotations omitted).

Finally, and to be sure, the government may impose regulations on businesses' privacy practices to protect consumers. The government may also specifically protect children's privacy. But the government may not, consistent with the First Amendment, use its legitimate interest in protecting children's privacy as a talisman to justify broad and freewheeling restriction of online expression that state officials consider "potentially harmful" (whatever that means).

II. THE FEDERAL CHILDREN'S ONLINE PRIVACY PROTECTION ACT EXPRESSLY PREEMPTS AB 2273.

Besides the First Amendment, COPPA also federally preempts AB 2273. Although Judge Freeman declined to reach that question after finding the law unconstitutional, *NetChoice*, 2023 WL 6135551, at *21, this Court may affirm the District Court's injunction on alternative federal-preemption grounds. *See Enyart v. Nat'l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011) (explaining

court of appeals "may affirm the district court on any ground supported by the record").

A. COPPA Expressly Preempts State Laws That Regulate Children's Online Privacy Differently.

The Constitution's Supremacy Clause provides that federal law "shall be the supreme Law of the Land," the "Laws of Any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, "Congress may displace state law through express preemption provisions." *Aylward v. SelectHealth, Inc.*, 35 F.4th 673, 680 (9th Cir. 2022) (citations and quotations omitted). Where "a federal statute includes an express preemption provision, the task of statutory construction must in the first instance focus on the plain wording of the clause." *Nat'l R.R. Passenger Corp. v. Su*, 41 F.4th 1147, 1152 (9th Cir. 2022) (citations and quotations omitted). "[T]he surrounding statutory framework" and "Congress's stated purposes in enacting the statute" may also inform "whether the state law at issue falls within the scope of the preemption clause." *Id.* at 1152–53 (citations and quotations omitted). No presumption against preemption applies "where, as here, 'the statute contains an express pre-emption clause.'" *Hollins v. Walmart Inc.*, 67 F.4th 1011, 1016 (9th Cir. 2023) (quoting *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016)); *accord California Restaurant Assn. v. City of Berkeley*, 89 F.4th 1094, 1101 (9th Cir. 2023).

1. COPPA's Text And Structure.

COPPA's express-preemption clause directly addresses California's attempt to regulate children's online privacy. It 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).

The plain language of the clause establishes an expansive preemptive effect. States are prohibited from "impos[ing] *any* liability" on "activities or actions" if (i) those activities or actions are "in connection with an activity or action described" by COPPA, and (ii) the imposition of liability is "inconsistent with the treatment of those activities or actions under" COPPA. *See id.* (emphasis added); *accord Atay v. Cnty. of Maui*, 842 F.3d 688, 701 (9th Cir. 2016) (distilling text of preemption provision into constituent elements). The sweeping nature of this "plain wording" "contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

The statutory structure further reinforces the breadth of the express-preemption clause. Consider first COPPA's treatment of the FTC, as compared to the States. Congress vested the FTC with both rulemaking authority to define privacy rules, 15 U.S.C. § 6502(b), and enforcement authority, *id.* § 6502(c).

Congress also expressly provided that "[n]othing . . . in [COPPA] shall be construed to limit the authority of the Commission under any other provisions of law." *Id.* § 6505(e).

By contrast, Congress sharply limited the States' role to enforcement. States may bring civil actions only to enforce "regulation[s] *of the Commission*." *Id* § 6504(a)(1) (emphasis added). The FTC may intervene in any state enforcement suit, *id.* § 6504(b), thus ensuring federal supervision even for States' limited enforcement role. Congress also preserved only a defined set of state enforcement powers: "conduct[ing] investigations," "administer[ing] oaths or affirmations," and "compel[ling] the attendance of witnesses or the production of documentary and other evidence," *id.* § 6504(c). These sharp limits on state authority confirm that Congress intended to preclude States from promulgating their own children's online-privacy rules.

Indeed, Congress spoke clearly when it wanted to allow other entities to shape children's privacy rules. Under COPPA's safe-harbor provision, "representatives of the marketing or online industries" or "other persons" may promulgate "self-regulatory guidelines," compliance with which "satisf[ies] the requirements of regulations issued under" COPPA. 15 U.S.C. § 6503(a), (b)(2). The FTC may "approve[]" these guidelines though "notice and comment," and the FTC's approval or disapproval is subject to judicial review. *Id.* § 6503(b), (c). This scheme confirms

Congress's intent to carefully define the entities responsible for crafting children's privacy rules and to subject those entities' rules to FTC oversight.

If States were instead allowed to impose their own children's online-privacy rules, it would render ineffective COPPA's safe-harbor framework. Congress requires the FTC to "provide incentives for" complying with approved guidelines, and those "incentives shall include provisions for ensuring that a person will be deemed to be in compliance with the requirements of the regulations under" COPPA "if that person complies with [approved] guidelines." *Id.* § 6503(b)(1), (2). But if States could layer on new and different children's online-privacy requirements, there would be little incentive for businesses to voluntarily comply with an FTC-approved safe harbor because being "deemed to be in compliance" with COPPA would mean little in a world with 50 different children's online-privacy laws.

Indeed, as discussed below, Congress added the express-preemption clause in response to concerns that the "safe harbors could prove ineffective if companies find themselves subject to a myriad of inconsistent State laws relating to children's privacy online." *S. 2326, Children's Online Privacy Protection Act of 1998: Hearing Before the Subcomm. on Commerce, Sci., and Transp.*, 105th Cong. 21–22 (1998) ("Senate Hearing") (statement of Jill Lesser, Director, Law and Public Policy, Assistant General Counsel, America Online, Inc.). Because different state children's online-privacy requirements would "thwart enforcement of [COPPA] and

undermine its purpose," *Arellano v. Clark Cnty. Collection Serv., LLC*, 875 F.3d 1213, 1218 (9th Cir. 2017), such differing laws are expressly preempted.

2. COPPA's Legislative Context.

The legislative context confirms the unambiguous meaning of COPPA's text and structure. COPPA's comprehensive scheme and implementing rules "reflect the culmination of a years-long process" involving both Congress and the FTC. FTC Commissioner Bedoya Am. Br. 9 ("Commissioner Bedoya Br."). Although COPPA's initial draft did not include an express-preemption clause, *see* S. 2326, 105th Cong. (1998), it was added after regulated parties argued that it was "crucial that the legislation include language to ensure that the Federal standard created [by COPPA] will provide uniform treatment and will prohibit States from imposing liability under an inconsistent standard." Senate Hearing, 105th Cong. 22 (statement of Jill Lesser). Congress thus instructed the FTC, at the agency's own urging, to create regulations that set forth "*uniform* privacy protections." *Id.* at 12 (prepared statement of FTC Chairman Robert Pitofsky) (emphasis added); *accord* 15 U.S.C. § 6502(b), (d).

Congress's approach to children's online-privacy regulation reflects its overarching policy of uniform federal rules of the road for the Internet. When Congress enacted COPPA in 1998, it was well aware that "[t]he Internet" "requires a cohesive national scheme of regulation so that users are reasonably able to

determine their obligations." *Am. Librs. Ass'n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997). Because the Internet "requir[es] national regulation," *ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999), Congress preempted *all* children's privacy regulations that are inconsistent with COPPA.

3. Caselaw Interpreting COPPA.

Caselaw interpreting COPPA's preemption provision accords with the statutory text, structure, and context. In *New Mexico ex rel. Balderas v. Tiny Lab Productions*, 457 F. Supp. 3d 1103 (D.N.M. 2020), the District of New Mexico found that a plaintiff's "state law claims [we]re preempted . . . by the plain language of COPPA" where the state law would have allowed the plaintiff to state a claim for collecting children's information without "actual knowledge" of collection. *Id.* at 1120–21. Noting that COPPA requires "an actual knowledge standard," the court held that the state-law claims were preempted because "COPPA preempts state law that treats like conduct differently." *Ibid.* Similarly, in *H.K. through Farwell v. Google LLC*, 595 F. Supp. 3d 702 (C.D. Ill. 2022), a court found that an Illinois law was "preempted by COPPA" where the Illinois law "and COPPA ha[d], at minimum, different notice and data retention requirements." *Id.* at 709–11.

This Court, in *Jones v. Google LLC*, 73 F.4th 636 (9th Cir. 2023), recently reaffirmed that "contradictory state law requirements, or" "requirements that stand as obstacles to federal objectives" are "inconsistent" with, and thus preempted by,

COPPA. *Id.* at 642. Although *Jones* did not find preempted "state-law causes of action that are *parallel to*, or proscribe the *same conduct* forbidden by, COPPA," *id.* at 644 (emphasis added), it left no doubt that COPPA preempts laws with "requirements" or "duties" that "differ" from the federal standard, *see id.* at 643 (citations and quotations omitted). Such differing requirements "stand as obstacles to federal objectives," *id.* at 642, by undermining Congress's safe-harbor regime, *see supra* section II.A.1, and other deliberate legislative choices, *see infra* Section II.B.

4. The Federal Government Can Amend Children's Online Privacy Regulations If Necessary.

COPPA does not prevent the development of new children's online-privacy regulations that are consistent with the First Amendment. Rather, Congress merely requires their promulgation at the federal level. Indeed, the FTC has previously amended its COPPA regulations, *see* Children's Online Privacy Protection Rule, Final Rule Amendments, 78 Fed. Reg. 3,971 (Jan. 17, 2013), and is considering further changes right now, *see* Children's Online Privacy Protection Rule, Notice of Proposed Rulemaking, 89 Fed. Reg. 2,034 (Jan. 11, 2024). The FTC has also approved six COPPA safe-harbor programs, *see COPPA Safe Harbor Program*, FTC, https://www.ftc.gov/enforcement/coppa-safe-harbor-program (last visited Feb. 14, 2024), and is considering adopting a new federal standard for website operators to obtain verifiable parental consent, *see* Children's Online Privacy Protection Rule Proposed Parental Consent Method, Request for Public Comment,

88 Fed. Reg. 46,705 (July 20, 2023). The agency vigorously enforces these rules. *See* Commissioner Bedoya Br. 12–14, 22–24 (detailing enforcement efforts).

Congress may also change children's online-privacy protections. Indeed, bills pending in the current Congress would significantly overhaul COPPA. *See* S. 1418, 118th Cong. (2023); H.R. 2801, 118th Cong. (2023). Congress considers significant substantive amendments to COPPA every session. *See, e.g.*, S. 3663, 117th Cong. (2022); S. 1628, 117th Cong. (2021).

Ultimately, even if the adoption of new children's online-privacy standards is warranted and constitutional, the State may not ignore the appropriate federal forums for these issues and strike out on its own path.

B. COPPA Expressly Preempts AB 2273 Because California's Law Is Inconsistent.

1. AB 2273's "Likely-To-Be-Accessed" Standard Is Inconsistent With COPPA's "Directed-To-Children" Standard.

In COPPA, Congress chose to regulate "website[s] or online service[s] directed to children," 15 U.S.C. § 6501(10)(A), and operators with "actual knowledge that [they are] collecting personal information from a child," *id.* § 6502(a)(1); *see also* 16 C.F.R. § 312.2. Congress exempted websites and services that "solely" "refer[] or link[] to a commercial website or online service directed to children by using information location tools, including a directory, index, reference, pointer, or hypertext link." 15 U.S.C. § 6501(10)(B).

Congress's enactment of the "directed to children" standard was deliberate. COPPA, as initially drafted, would have defined its scope with a multifactor test, comprised of vague indicators, such as a website's "tone," "message," or other undefined "characteristic." *See* S. 2326, 105th Cong. § 2(11). Through careful legislative compromise, Congress replaced this approach with COPPA's more administrable directed-to-children standard.

AB 2273, by contrast, adopts a "likely to be accessed by children" standard, Cal. Civ. Code § 1798.99.30(b)(4), that uses a vague, multifactor test like the one Congress considered and rejected. To determine whether content is "likely to be accessed by children"—and thus subject to AB 2273—California uses a confusing set of six indicators, including that "[t]he online service, product, or feature is directed to children as defined by [COPPA]." *Id.* § 1798.99.30(b)(4)(A). But because there are five additional and alternative indicators, *see id.* § 1798.99.30(b)(4)(B)–(F), AB 2273 deliberately regulates activity that would not trigger COPPA's standard. *See id.* § 1798.99.29 (explaining that Act is designed to regulate more broadly than COPPA). For example, if "evidence" indicates that an online service, product, or feature is "accessed by a significant"—but undefined—"number of children," *id.* § 1798.99.30(b)(4)(B), it may fall within AB 2273's scope, even if that access is incidental, rather than as a result of being "directed" or "targeted" to children, 15 U.S.C. § 6501(10)(A).

AB 2273's likely-to-be-accessed standard falls squarely within the scope of COPPA's express-preemption provision. Practices related to children's online privacy that are permissible under COPPA's statutory standard may trigger liability under AB 2273's standard. As a result, AB 2273 is designed to "impose" "liability" for activities and actions "in connection with" children's online privacy in a way "that is inconsistent with the treatment of those activities or actions under" COPPA. 15 U.S.C. § 6502(d). The law's threshold standard is thus expressly preempted.

2. AB 2273's Age Trigger Is Inconsistent With COPPA.

COPPA regulates the online privacy of "individual[s] under the age of 13." 15 U.S.C. § 6501(1). The "age of 13" cutoff was no idle choice. *Accord* Commissioner Bedoya Br. 9 ("COPPA's implementing rules were not written at random."). Congress initially proposed regulating the privacy of "individual[s] under the age of *16*." S. 2326, 105th Cong. § 2(1) (emphasis added). But legislators questioned whether "the legislation should cover kids over 13," noting that perhaps "a 16-year-old should be able to inquire about religion, politics, or products without being constrained by a notification requirement." Senate Hearing, 105th Cong. 13 (statement of Sen. Burns); *see id.* at 16 (statement of Sen. Bryan) (same). Stakeholders likewise advocated that "any legislation in this area should be limited to children under 13," flagging issues with "restricting the ability of teens to access important information." *Id.* at 21 (statement of Jill Lesser); *see also* Commissioner

Bedoya Br. 26 (noting focus on "children under 12" in "congressional record" and distinguishing between teens and pre-teens).

Congress ultimately agreed and—through careful legislative compromise—declined to regulate the online activities of individuals age 13 and older. Although some have since proposed regulating individuals over the age of 13, *see, e.g.*, S. 1628, 117th Cong. § 3(a)(5) (2022), those efforts have not carried the day.

AB 2273 is inconsistent with Congress's deliberate choice to limit children-specific online-privacy regulations to individuals under age 13. AB 2273 regulates online activities related to individuals "who are under 18 years of age," Cal. Civ. Code § 1798.99.30(b)(1), thereby "impos[ing]" "liability" for online activities related to the privacy of minors ages 13 through 17, which "is inconsistent with the treatment of those activities or actions under" COPPA, 15 U.S.C. § 6502(d). COPPA thus expressly preempts AB 2273's imposition of liability for online activities related to individuals age 13 and older. *See Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 948 (N.D. Cal. 2013) (Seeborg, J.) (explaining that COPPA "could bar any efforts by plaintiffs to use state law to impose a parental consent requirement for minors over the age of 13." (cleaned up)), *aff'd sub nom. Fraley v. Batman*, 638 F. App'x 594 (9th Cir. 2016).

It is no answer to claim that COPPA's preemptive reach does not extend to state regulation of teenagers' use of the Internet because COPPA did not apply its

restrictions to teenagers. This argument asks the court to pretend that regulation of teenagers' online activities is wholly irrelevant to COPPA and the balance that was struck by Congress. To the contrary, COPPA preempts regulating not only "an activity or action described" in COPPA but all matters "*in connection with*" those activities or actions. 15 U.S.C. § 6502(d) (emphasis added). As the Supreme Court has "often recognized," the phrase "'in connection with'" typically "bear[s] a 'broad interpretation.'" *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019) (collecting cases). Online practices related to teenagers' privacy were deliberately excluded from children-specific regulation, and those practices are plainly "connected with" COPPA's regulation of minors' privacy.

3. AB 2273's Compliance Obligations Are Inconsistent With COPPA.

COPPA's regulatory centerpiece is "parental consent." 144 Cong. Rec. S11657 (Oct. 7, 1998) (statement of Sen. Bryan). COPPA's drafters recognized that legislation was "not" "the total end of what [Congress was] trying to do," Senate Hearing, 105th Cong. 13 (statement of Sen. Burns), but rather a means to "empower the parents," who would "exercise some judgment and some discretion about" their kids' online activities, *id.* at 13–14 (statement of FTC Chairman Pitofsky). As a result, COPPA is light on prescriptive requirements and instead relies on parental consent as its touchstone. *See* 15 U.S.C. § 6502(b); 16 C.F.R. §§ 312.4–312.6.

In stark contrast to this approach, AB 2273 imposes a litany of rigid compliance obligations that require different conduct than COPPA's parental-consent-based regime. These include requirements to complete and maintain a DPIA for any online service, product, or feature likely to be accessed by children, Cal. Civ. Code § 1798.99.31(a)(1), (3), (4); to mitigate any risk to children arising from data-management practices, *id.* § 1798.99.31(a)(2); to estimate the age of child users "with a reasonable level of certainty" and employ appropriate corresponding data-management practices, *id.* § 1798.99.31(a)(5); to offer a "high level of privacy" by default, absent a "compelling reason," *id.* § 1798.99.31(a)(6); to publish and enforce "privacy information, terms of service, policies, and community standards," *id.* § 1798.99.31(a)(7), (9); to provide an "obvious signal" when a child is being monitored or tracked, *id.* § 1798.99.31(a)(8); and to provide "tools" to exercise privacy rights, *id.* § 1798.99.31(a)(10).

In addition to these affirmative requirements, AB 2273 imposes prohibitions that outlaw conduct that is legal under COPPA. Under these prohibitions, among others, regulated entities may not "[p]rofile a child by default" absent certain exceptions, *id.* § 1798.99.31(b)(2); use a child's personal information for certain purposes, absent a "compelling reason," *id.* § 1798.99.31(b)(3), (4), (8); and collect precise geolocation information, unless it is "strictly necessary" or without providing an "obvious sign" while collecting, *id.* § 1798.99.31(b)(5), (6).

These compliance obligations are inconsistent with COPPA. For example, if a business, in California's opinion, does not estimate the age of its users with sufficient "certainty," *id.* § 1798.99.31(a)(5), or fails to employ adequate "community standards," *id.* § 1798.99.31(a)(9), it may be held liable under AB 2273. But these obligations do not appear in COPPA. Thus, if businesses engage in COPPA-compliant online practices that run afoul of AB 2273, the Act will "impose" "liability" for those activities, which is—by definition—"inconsistent with the treatment of those activities or actions under" COPPA. 15 U.S.C. § 6502(d). COPPA thus expressly preempts these requirements.

Such differing requirements also stand as a significant obstacle to COPPA. Consider, for example, AB 2273's requirement for businesses to "[e]stimate the age of child users with a reasonable level of certainty appropriate to the risks" of the online service, product or feature. Cal. Civ. Code § 1798.99.31(a)(5). As the District Court found, age estimation "would almost certainly cause news organizations and others to take steps to prevent those under the age of 18 from accessing online news content, features, or services." *NetChoice*, 2023 WL 6135551, at *8 (cleaned up) (quoting *amicus* brief of New York Times). That result is exactly what Congress sought to avoid when it designed COPPA "in a manner that preserves the interactivity of children's experience on the Internet and preserves children's access to information in this rich and valuable medium." 144 Cong. Rec.

S11657 (Oct. 7, 1998) (statement of Sen. Bryan). Because the "Internet can be a lifeline to young people," Commissioner Bedoya Br. 26, COPPA did not adopt rigid prohibitions and instead incorporated parental notice and consent as its touchstone. AB 2273's contrary approach thus confirms that it is expressly preempted.

III. AB 2273 Is Entirely Invalid and Unenforceable Because The Unlawful Provisions Are Not Severable.

Severability is a question of state law. *Qwest Commc'ns Inc. v. City of Berkeley*, 433 F.3d 1253, 1259 (9th Cir. 2006), *overruled on other grounds by Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571 (9th Cir. 2008). Under California law, an "invalid part" of a statute "can be severed if, and only if, it is grammatically, functionally, and volitionally separable." *Jevne v. Superior Ct.*, 35 Cal. 4th 935, 960 (2005) (citations and quotations omitted); *see Garcia v. City of Los Angeles*, 11 F.4th 1113, 1120 (9th Cir. 2021). A provision "is grammatically separable if it is distinct and separate and, hence, can be removed as a whole without affecting the wording of any of the measure's other provisions." *Jevne*, 35 Cal. 4th at 960–61 (citations and quotations omitted). "It is functionally separable if it is not necessary to the measure's operation and purpose." *Id.* at 961 (citations and quotations omitted). Finally, "it is volitionally separable if it was not of critical importance to the measure's enactment." *Id.* (citations and quotations omitted).

The preempted provisions of AB 2273 are not severable because they are not grammatically, functionally, or volitionally separable. Here, AB 2273's threshold

scoping terms—"child" and "likely to be accessed by children"—are preempted. *See supra* section II.B.1, 2. These terms appear in—and are cross-referenced by—virtually every provision of the Act and thus cannot be excised "without affecting the wording" of the rest of the statute. *Jevne*, 35 Cal. 4th at 961. These foundational terms are also plainly "necessary to the [law]'s operation and purpose." *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 21 Cal.4th 585, 613 (1999) (citations omitted). And it would strain credulity to suggest that the California legislature "would have separately considered and adopted [the rest of the statute] in the absence" of these key scoping terms that go to the statute's very purpose. *See Acosta v. City of Costa Mesa*, 718 F.3d 800, 818 (9th Cir. 2013) (cleaned up).

The analysis is the same for the remaining provisions. Virtually every substantive obligation imposed by AB 2273 violates the First Amendment or is at least preempted by COPPA. *See supra* section I, II.B.3. Absent those obligations, all that would remain of AB 2273 is a declaration of purpose, a handful of definitions, and a working group. That is not a statute but a legislative carcass.

Finally, to the extent this Court finds the Act unlawful only as to children under age 13—though it should not—the preempted provisions would still not be grammatically, functionally, or volitionally separable. The statute would not be grammatically separable because the age threshold—"under 18 years of age," Cal. Civ. Code § 1798.99.30(b)(1)—is written such that it "cannot be cured by excising

any word or group of words." *Santa Barbara Sch. Dist. v. Superior Ct.*, 13 Cal. 3d 315, 330–31 (1975). And if AB 2273 applied only to individuals age 13 and older, it would create an irrational outcome where data practices for older children were subject to more state scrutiny than data practices for younger children.

In sum, because any remaining provisions are not severable, AB 2273 "as a whole [is] preempted." *Jevne*, 35 Cal. 4th at 962.

CONCLUSION

In light of the foregoing, this Court should affirm.

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Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 23-2969

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