IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SIRDONIA LASHAY MANIGAULT-JOHNSON, AND HER CHILD R.R., on behalf of themselves and others similarly situated, Plaintiffs, v. GOOGLE, LLC, a Delaware Limited Liability Company; ALPHABET, INC., a Delaware Corporation; YOUTUBE, LLC, a Limited Liability Company, Defendants.	Civil Action No. 2:18-cv-1032-BHH **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS:

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES:

REGULATIONS:

LEGISLATIVE MATERIALS:

TABLE OF AUTHORITIES—Continued

Page(s)

RULES:

OTHER AUTHORITIES:

INTRODUCTION

Plaintiffs allege that Defendants Google, LLC, Alphabet, Inc., and YouTube, LLC (collectively, "Defendants") collected and disclosed information related to their use of the YouTube service in violation of the federal Children's Online Privacy Protection Act of 1998 ("COPPA"). Yet Plaintiffs do not assert any claim under COPPA, and for good reason: There is no private right of action under that statute. In enacting COPPA, Congress chose to vest primary enforcement responsibility with the Federal Trade Commission ("FTC"), thus providing regulated entities with the certainty of a single federal enforcement scheme and giving the FTC flexibility to address evolving technology. In coordination with the FTC, states through their attorneys general also have an enforcement role and may seek compensation on behalf of their residents. Congress decided that the goals of the statute were best accomplished without giving individual litigants a private right of action.

In an attempted end run around this exclusive enforcement structure, the Class Action Complaint ("Complaint" or "CAC") asserts two purported state law causes of action, both of which rest entirely upon alleged COPPA violations: a privacy claim under the California Constitution and a common law intrusion upon seclusion claim. These claims are preempted by COPPA and should be dismissed for that reason alone. Congress has expressly entrusted COPPA enforcement to the FTC, while also allowing state attorneys general to play an important role. Even without express preemption, these private claims are preempted because allowing them to proceed would undermine Congress' remedial scheme. Moreover, giving force to these preemption principles does no disservice to any state law rights—for while COPPA established a regime to obtain parental consent for the collection of certain information, sensitive or not, from

minors under the age of 13, as explained below, California and South Carolina's privacy laws are aimed at preventing "egregious" intrusions into personal and intimate affairs.

Even in the absence of preemption, the law does not otherwise support the claims Plaintiffs attempt to bring here. As a threshold matter, South Carolina residents cannot assert a claim for violation of rights under the California Constitution. In addition, Plaintiffs' allegations fall short of satisfying the elements of a privacy claim under both the California Constitution and common law. Courts have repeatedly held that the conduct at issue—Defendants' alleged collection of user information, IP addresses, cookies, and device identifiers, in accordance with their Terms of Service and Privacy Policy—does not constitute a breach of social norms or an intrusion into intimate affairs sufficient to state a claim for violation of state privacy laws. Furthermore, the intrusion upon seclusion claim fails because no facts alleged in the Complaint show Plaintiffs were harmed by Defendants' purported conduct. Google is committed to user privacy, and as such, treats the data at issue in accordance with its Privacy Policy and Terms of Service. But the law does not support the claims Plaintiffs assert.

Defendants therefore respectfully request that the Complaint be dismissed in its entirety.[1]

BACKGROUND

I. Statutory Background

As access to the Internet expanded in the late 1990s, Congress enacted COPPA to enhance parental control over children's online activities and protect children's privacy. *See* 15 U.S.C. §§ 6501 *et seq*. At Congress's direction, the FTC adopted detailed implementing regulations governing the collection and use of personal information about minors under the age

[1] Defendant Alphabet, Inc. has also moved to dismiss the Complaint under Rule 12(b)(6) for the independent reason that Plaintiffs have not alleged that it engaged in any wrongdoing.

of 13, which the Commission amended in 2013 (the "COPPA Rule"). *See id.* §§ 6501-6502; 16 C.F.R. §§ 312.1 *et seq*.

COPPA has a carefully calibrated remedial scheme. Enforcement is primarily in the hands of the FTC and other specialized federal agencies. 15 U.S.C. § 6505. State attorneys general may also bring actions to "obtain damage, restitution, or other compensation on behalf of residents" of their state, provided notice is given to the FTC. *Id.* § 6504. In enacting COPPA, Congress also sought to encourage industry members and others to create their own oversight programs that meet the FTC's standards. *Id.* § 6503. Compliance with programs that have been approved by the FTC operates as a "safe harbor" from enforcement activity. *Id.*; 16 C.F.R. § 312.11.

Importantly, COPPA does not provide for a private right of action. It also includes an express preemption clause, stating:

> 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).

II. Factual Background

YouTube offers free services that allow users around the world to upload, share, and view video content on a nearly limitless range of topics. *See* CAC ¶¶ 4, 24. YouTube is directed to a general audience, not to children, and the Complaint asserts that YouTube operates the world's "largest and most popular internet video viewer site." *Id.* ¶ 4. Users may access and use YouTube's services and products provided that they agree to YouTube's Terms of Service

("Terms"). *See* Terms of Service (Ex. A) § 1(A).[2] According to the Terms, users "affirm that [they] are either more than 18 years of age, or an emancipated minor, or possess legal parental or guardian consent, and are fully able and competent to enter into the [Terms]." CAC ¶ 31 (quoting Ex. A § 12). Users must further "affirm that [they] are over the age of 13, as the Service is not intended for children under 13." *Id.* (quoting Ex. A § 12). The Terms caution users: "If you are under 13 years of age, then please do not use the Service. There are lots of other great web sites for you. Talk to your parents about what sites are appropriate for you." *Id.* (quoting Ex. A § 12).

As the Complaint recognizes, Google's Privacy Policy expressly informs all users that Google collects certain information from them—including users who do not create accounts—"about the services that [they] use and how [the individual] use[s] them." *Id.* ¶ 53; *see* Google Privacy Policy (Ex. B) (providing that the Privacy Policy "applies to all of the services offered by Google LLC and its affiliates, including YouTube"). The information that is routinely collected from Google users—as the Privacy Policy discloses—includes "unique device identifiers, and mobile network information including phone number," CAC ¶ 53, "cookies that may uniquely identify your browser" and "Internet protocol address," Ex. B, and at times, "location information," *id.* Google employs that information to "provide, maintain, protect and improve" its services, as well as "to offer [the user] tailored content." *Id.* If users "creat[e] a

[2] This brief cites the Complaint, as well as YouTube's Terms of Use and Google's Privacy Policy. As these documents are cited in the Complaint, they are appropriate for consideration on a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (a court may consider "the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference"); *see also Bailey v. Virginia High Sch. League, Inc.*, 488 F. App'x 714, 715–716 (4th Cir. 2012) (per curiam). Although Google updated its Privacy Policy on May 25, 2018, the citations here are to the version that was in effect as of the date this lawsuit was filed, as that is the version referenced in the Complaint.

Google Account," the Privacy Policy explains that it uses additional information shared to "show [the account-holder] more relevant search results and ads." *Id.*; *see also* CAC ¶ 55.

Plaintiff Sirdonia Lashay Manigault-Johnson is a South Carolina resident and parent of Plaintiff R.R., a child under age 13 who allegedly used YouTube's online video services via the website and downloadable application. CAC ¶ 2. Plaintiffs allege that in violation of YouTube's Terms, R.R. "created an account on Defendants' website to view content on R.R.'s mobile device on an ongoing and continuous basis" and "downloaded Defendants' app to view the same." *Id.* ¶ 62. Plaintiffs do not allege how R.R. obtained access to a mobile device or that Defendants have knowledge of R.R.'s age.

The remainder of Plaintiffs' Complaint is devoted to allegations that Defendants' conduct violated COPPA. Plaintiffs assert that "during the time R.R. viewed videos on Defendants' websites or through their apps, one or more of the Defendants collected, disclosed, or used personal information and persistent identifiers of R.R." for "commercial gain." *Id.* ¶ 63. Plaintiffs allege that Defendants collected information from R.R. consisting of "persistent identifiers that can be used to recognize a user over time and across different Web sites," as well as geolocation information, an Internet Protocol ("IP") address, a customer-held cookie, and a unique device identifier. *Id.* ¶¶ 52, 63. Plaintiffs also allege that Defendants never asked Manigault-Johnson "for her verifiable parental consent . . . to collect, disclose, or use her child's personal information" or "provided direct notice" about such practices. *Id.* ¶¶ 64-65. Plaintiffs contend that this collection and use of R.R.'s personal information without parental consent violates COPPA. *Id.*

Other than the alleged violation of COPPA, the Complaint does not identify any economic or non-economic injury that Plaintiffs purportedly suffered as a result of Defendants'

alleged conduct. Rather, the Complaint asserts only that Defendants' actions were "highly offensive" to Manigault-Johnson and invaded R.R.'s privacy. *Id.* ¶ 66; *see id.* ¶¶ 84–86, 93–95.

Because COPPA has no private right of action, Plaintiffs instead purport to assert two state law claims, both premised entirely on alleged COPPA violations: (1) common law invasion of privacy; and (2) violation of the right to privacy under the California Constitution. With respect to the first claim, Plaintiffs seek to represent a putative nationwide class of United States residents "who are younger than the age of 13, or were younger than the age of 13 when they viewed content on or through Defendants' websites or apps, and their parents and/or legal guardians, from whom Defendants collected, used, or disclosed personal information without verifiable parental consent." *Id.* ¶ 68. As to the second claim, Plaintiffs seek to represent a putative subclass of the "Multi-state Class" limited to California residents. *Id.* ¶ 69.

ARGUMENT

I. Plaintiffs' Claims Are Preempted by COPPA.

"The Supremacy Clause of the Constitution renders federal law 'the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191 (4th Cir. 2007) (quoting U.S. Const. art. VI, cl. 2). "Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (internal quotation marks omitted). Under both frameworks, preemption will be found where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

"'[T]he ultimate touchstone' in every pre-emption case" is congressional intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)). "Congress' intent, of course, primarily is discerned from the language of the . . . statute and the statutory framework surrounding it." *Id.* at 486 (internal quotation marks omitted). "Also relevant, however, is the structure and purpose of the statute as a whole . . . as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.* (internal quotation marks and citation omitted). As shown below, Plaintiffs' purported state law claims are expressly and impliedly preempted by COPPA.

A. COPPA Expressly Preempts Plaintiffs' State Law Claims.

COPPA explicitly provides that "[n]o 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). By its plain terms, COPPA's preemption clause bars Plaintiffs' assertions of state law. COPPA provides for a specific enforcement and remedial scheme—involving federal agency as well as state enforcement—but omits a private right of action. Plaintiffs' attempts to rely on state law to enforce COPPA through private actions would "impose . . . liability" that is flatly "inconsistent with the treatment of [the regulated] activities" under the Act. *Id.*

Plaintiffs' two claims, while formally styled as arising under state law, in fact are founded entirely on "activit[ies] or action[s] described in" COPPA. *Id.* Tellingly, in the very first paragraph of the Complaint, Plaintiffs allege that Defendants collect information from children under 13 "for future commercial exploitation, in direct violation of the federal

Children's Online Privacy Protection Act," before asserting that they bring claims under federal and state laws. CAC ¶ 1. The rest of Plaintiffs' allegations are consistent with what they telegraph in that initial paragraph—that their entire Complaint is predicated on a claimed violation of COPPA, rather than on activity that violates state law.

The core allegations of the Complaint are a detailed recitation of the provisions and requirements of COPPA and the FTC's COPPA Rule, *id.* ¶¶ 13-20, and the charge that Defendants "collected, disclosed, or used personal information . . . of R.R. . . . for commercial gain" without obtaining verifiable parental consent "as required by COPPA." *Id.* ¶¶ 62-65. Plaintiffs then rely solely on COPPA in an effort to establish their purported state law claims. *See id.* ¶¶ 84, 93. Plaintiffs' requested relief is an order enjoining "tracking practices in violation of COPPA, and destruction of all personal data obtained in violation of COPPA." *Id.* ¶¶ 87, 96. Nowhere in the Complaint do Plaintiffs refer to any conduct outside COPPA's reach.

Plaintiffs, in other words, seek to do precisely what Congress expressly proscribed when it enacted COPPA; they purport to use the vehicle of state law to privately enforce the Act. But COPPA embodies a careful congressional choice about how to enforce the protections afforded by the statute—one that expressly forecloses Plaintiffs' state law claims. 15 U.S.C. § 6502(d). Congress specified that the FTC would have primary enforcement authority over the Act, *id.* §§ 6502(c), 6505(d), with certain other federal agencies retaining authority over entities they oversee. *Id.* § 6505(a), (b). Congress also gave states a role in enforcement, through *parens patriae* actions brought by their attorneys general. *Id.* § 6504(a)(1). Before proceeding with any such lawsuits, a state attorney general must give the FTC notice of the impending action, *id.* § 6504(a)(2), and the FTC has a statutory right to intervene. *See id.* § 6504(b). The statute also

ensures the lead role of the FTC by preventing states from "institut[ing]" duplicative actions during the "pendency" of a parallel FTC proceeding. *Id.* § 6504(d).

COPPA was also designed to encourage the development of "safe harbor" programs that meet the requirements of the FTC's COPPA Rule and are approved by the FTC following a public comment process. *Id.* § 6503(a), (b).

Crucially, this scheme does not include any federal private right of action for individuals. *See generally id.* §§ 6504-6505. That was very much by design. Congress was presented with proposals to include a private cause of action, but declined to do so. *See, e.g., Privacy in Cyberspace: Hearing Before the Subcomm. on Telecomm., Trade and Consumer Prot. of the H. Comm. on Commerce*, 105th Cong. (1998), 1998 WL 634723 (statement of Kathryn Montgomery, President, Center for Media Education) (stating that the "bill should be altered to provide consumers with a private right of action"). Congress instead gave exclusive enforcement authority to the FTC, other federal agencies, and state attorneys general. It also included an express preemption clause foreclosing state law claims that would subject website operators to "liability . . . that is inconsistent with [COPPA's] treatment of those activities." 15 U.S.C. § 6502(d).

Allowing private parties—like Plaintiffs here—to use state law to circumvent the careful balance Congress struck when it enacted COPPA would create the exact type of "inconsistent . . . treatment" that the Act's preemption clause forecloses. "It is . . . an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." *Karahalios v. National Federation of Fed. Employees, Local 1263*, 489 U.S. 527, 533 (1989) (quoting *Transam. Mortg. Advisors, Inc. v. Lewis*, 444

U.S. 11, 19 (1979)). That is especially true, as here, where the statute preempts "inconsistent" state law treatment.

First and foremost, such suits would subvert the authority that Congress entrusted in the FTC to police COPPA violations. In designating the FTC as the primary implementer and overseer of the protections afforded by COPPA, Congress selected a highly experienced agency that could respond to industry developments and adapt its rules to evolving technology.[3] *See* 144 Cong. Rec. S11657 (daily ed. Oct. 7, 1998) (statement of bill sponsor Sen. Bryan) (emphasizing the need for the FTC to regulate "flexibly" and adjust its standards "in light of available technology"). Private COPPA lawsuits would also interfere with the *parens patriae* role of the states and state attorneys general.[4]

Finally, private claims of the type at issue here would also undermine the incentives Congress sought to provide for industry self-regulation through the use of "safe harbor" programs. This safe harbor scheme is designed to encourage the "ongoing . . . development of new more effective industry efforts," while avoiding the "need [for] constant Government supervision and lawsuits." *Children's Online Privacy Protection Act of 1998: Hearing on S. 2326 Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci. & Transp.*, 105th Cong. 12, 14 (1998) (statement of Robert Pitofsky, Chairman, Fed. Trade Comm'n); *see also*

[3] The FTC has brought numerous enforcement actions related to COPPA since the statute was enacted. *See Legal Resources*, Fed. Trade Comm'n, *available at* https://www.ftc.gov/tips-advice/business-center/legal-resources (filter by type "case" and topic "Children's Privacy") (last visited June 1, 2018). The Court may take judicial notice of these public records. *Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

[4] COPPA is no outlier in this regard; Congress regularly limits the enforcement of statutes to the agency charged with implementing them and to the states. *See, e.g.*, 42 U.S.C. § 1320d (Department of Health and Human Services and state enforcement of HIPPA's data breach rules); 15 U.S.C. § 7706 (FTC and state enforcement as to e-mail solicitation statute). *See generally Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) ("[S]ome remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights").

Fed. Trade Comm'n, *Protecting Children's Privacy in an Electronic World: Prepared Statement Before the House Comm. on Energy & Commerce, Subcomm. on Commerce, Mfg. & Trade* 20 (Oct. 5, 2011), *available at* goo.gl/wVafnK ("The safe harbor provision was designed to encourage industry members and other groups to develop their own COPPA oversight programs, thereby promoting efficiency and flexibility, and rewarding operators' good faith efforts to comply."). Permitting private plaintiffs to sue for COPPA breaches under the cover of state law would frustrate the Act's objective because a court applying state law would not necessarily be bound by COPPA's safe harbor. *Accord Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005) (holding that "rules adopted by . . . self-regulatory organizations ('SROs') within the securities industry" under the Securities Exchange Act "preempt[ed] conflicting state laws"). Congress chose to avoid this confusion; the Plaintiffs should not be allowed to introduce it here.

Notably, the only published opinion addressing COPPA's preemption provision supports the conclusion that Plaintiffs' purported state law claims are barred. In *Nickelodeon*, the Third Circuit permitted the state law claims in that case to proceed because they alleged something *beyond* the conduct regulated by COPPA. Plaintiffs there alleged that certain defendants had collected children's information "using deceitful tactics." *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 292 (3d Cir. 2016). Only because "the wrong at the heart of the plaintiffs' intrusion claim" against those defendants was not that they "*collected* children's personal information, or even that they *disclosed* it," but rather that they did so "under false pretenses," the Third Circuit held that the action was not inconsistent with COPPA. *Id.* Here, by contrast, Plaintiffs' supposed state law claims are entirely predicated on alleged violations of COPPA, pure and simple.

B. COPPA Impliedly Preempts Plaintiffs' State Law Claims.

The Supreme Court has made it clear that even when a statute contains an express preemption clause, the "ordinary working of conflict pre-emption principles" may serve to preempt state laws beyond the scope of that clause. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000). Conflict preemption applies "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Columbia Venture, LLC v. Dewberry & Davis, LLC*, 604 F.3d 824, 829-830 (4th Cir. 2010) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)). Among other circumstances, "[t]his occurs where state law 'interferes with the *methods* by which the federal statute was designed to reach [its] goal.'" *Id.* at 830 (quoting *Gade*, 505 U.S. at 103).

It does not matter that the federal and state laws may share the same underlying objective (and here, as explained below, the objectives are *not* the same, as the state law objectives are narrower for the type of information at issue). The point is that where a federal statute provides for a specific "method" of enforcement and a state law interferes with it, preemption is the inevitable conclusion. *See Gade*, 505 U.S. at 102-104 (state laws concerning occupational safety were preempted by OSHA's enforcement scheme); *Michigan Canners & Freezers Assn. v. Agric. Mktg. and Bargaining Bd.*, 467 U.S. 461, 477 (1984) (state statute preempted even though it "share[d] the goal of augmenting the producer's bargaining power" with the federal Agricultural Fair Practices Act); *Wisconsin Dept. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286-287 (1986) (state statute preempted even though it was designed to reinforce requirements of federal Act).

The Fourth Circuit's decision in *Columbia Venture* is instructive. There, the court found an inconsistency between the National Flood Insurance Program, which created a "limited

[administrative] appeals process," and state tort law, which provided a "cause[] of action against . . . independent contractors" that "circumvent[ed] the limits imposed" by the federal process. 604 F.3d at 831-832. That conflict undermined Congress' efforts "to strike a balance between protecting property owners' right to appeal . . . and the government's interest in minimizing the costs inherent in . . . provid[ing] flood insurance." *Id.* at 831. Accordingly, the Fourth Circuit held the state law claim to be preempted under conflict principles.

There are numerous cases to the same effect. *See, e.g., Perez v. Nidek Co.*, 711 F.3d 1109, 1119 (9th Cir. 2013) (the plaintiff's "fraud by omission claim" was preempted by the federal Food, Drug, and Cosmetic Act because, under the statute, "[t]he FDA is responsible for investigating potential violations of the FDCA" and "private enforcement of the statute is barred"); *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004) (state agency's order interfered with method provided by federal statute for service providers to apply for entry into the market); *Umland v. PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 65 (3d Cir. 2008) (state law claims preempted where they would "interfere with the IRS's administrative scheme"); *Anderson*, 508 F.3d at 191-194 (the "enforcement scheme" of the Fair Labor Standards Act precluded state tort actions to enforce federal wage laws); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) ("[P]laintiffs' state-law claims are indirect attempts at privately enforcing" the federal statute and "would interfere with the implementation of that scheme." (internal quotation marks omitted)).

These decisions all support preemption here. Congress entrusted COPPA's enforcement primarily to the FTC, while also allowing state attorneys general to play an important complementary role. Congress' remedial scheme would be undermined if private parties like Plaintiffs here were allowed to proceed with state law claims. Plaintiffs should not be permitted

to do an end run around Congress' chosen enforcement methods. *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 602 (4th Cir. 2010) (preempting a state law claim where "it [was] clear" that "the regulatory purposes of the [federal statute] would be undermined by allowing" it)). That conclusion draws further support from Congress' inclusion of a preemption clause, foreclosing state law "liability" that is "inconsistent" with the statute's method of regulation. *See Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072-1073 (9th Cir. 2005) (finding state law claims preempted under both conflict and express preemption doctrines, where statute preempted "inconsistent" "[S]tate requirements").

Meanwhile, state attorneys general are well armed to bring enforcement claims in response to local grievances and to request compensatory relief on behalf of their residents. 15 U.S.C. § 6504(a)(1). And the states have done so.[5] Given these means for private recourse and remediation, this Court should have no "reluctan[ce]" to give COPPA's preemption clause its full effect. *Contra Abbot ex rel. Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1112-1114 (4th Cir. 1988) (holding that the presumption against preemption is stronger when there is no federal remedy at all).

In sum, Congress struck a careful balance in enacting COPPA, safeguarding the important privacy interests of children while assigning the principal role of implementer and

[5] *See, e.g.*, Press Release, New York State Attorney General, A.G. Schneiderman Announces Results of "Operation Child Tracker," Ending Illegal Online Tracking of Children at Some of Nation's Most Popular Kids' Websites (Sept. 13, 2016), https://ag.ny.gov/press-release/ag-schneiderman-announces-results-operation-child-tracker-ending-illegal-online (announcing settlements with Viacom, Mattel and other companies, resolving investigations into their violations of COPPA); Press Release, Office of the Attorney General, State of New Jersey, Acting Attorney General Announces Settlement Resolving Allegations that Maker of "Dokobots" App Violated Children's Online Privacy Rules (Nov. 22, 2013), http://nj.gov/oag/newsreleases13/pr20131122a.html; Plaintiff's Original Complaint, *Texas v. Future US, Inc.*, No. A07CA-987LY (W.D. Tex. Dec. 5, 2007), 2007 WL 4817945 (Texas State Attorney General enforcement action filed against "Gamesradar.com").

overseer to the FTC. Application of state tort law standards to the conduct alleged would interfere with and undercut Congress' careful work.

II. Plaintiffs Have Failed to Plead Sufficient Facts to Support Any Claim Upon Which Relief Can Be Granted.

In addition to being preempted, Plaintiffs' state law privacy claims fail as a matter of law because courts have not found the activity alleged in the Complaint to violate state law. "Dismissal under Rule 12(b)(6) is appropriate" because the Complaint "lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Bostic v. Bostic*, No. 6:14-2130-BHH, 2015 WL 5178163, at *1 (D.S.C. Sept. 3, 2015) (quoting *Hartmann v. California Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013)). This does not mean that Google treats the data at issue in this case as subject to no limitations or respect; Google is committed to user privacy, and it adheres to its Privacy Policy and Terms. State privacy law, however, does not speak to the conduct described and does not impose sanctions for it.

A. Plaintiffs Have Not Pled Facts to Support a California Constitutional Privacy Claim.

Plaintiffs' claim for violation of the right to privacy under the California Constitution should be dismissed for two independent reasons. As a threshold matter, as South Carolina residents, Plaintiffs cannot assert a privacy claim under the California Constitution. In addition, Plaintiffs have failed to allege facts sufficient to support several of the elements of a California constitutional privacy claim.

1. Plaintiffs Cannot Assert a California Constitutional Privacy Claim.

The California Constitution was created by and for the "People of the State of California." Cal. Const. pmbl. It only "creates a legal and enforceable right of privacy for *every Californian*." *Williams v. Winco Holdings, Inc.*, No. 1:16-cv-00508-DAD-SAB, 2016 WL

3648967, at *4 (E.D. Cal. July 7, 2016) (emphasis added) (quoting *White v. Davis*, 13 Cal. 3d 757, 775 (1975)); *see also Buzayan v. City of Davis*, 927 F. Supp. 2d 893, 902–903 (E.D. Cal. 2013) ("The California Constitution, at Article I, section 1, includes privacy as among the inalienable rights guaranteed *to its residents*." (emphasis added)); *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 16 (1994). Article I, section 1 "has been repeatedly construed to provide *California citizens* with privacy protections." *Jeffrey H. v. Imai, Tadlock & Keeney*, 85 Cal. App. 4th 345, 353 (2000) (emphasis added), *as modified* (Jan. 3, 2001). As the Supreme Court of California has clarified, "the ballot argument accompanying the measure that added the privacy clause to article I, section 1, expressly confirm[ed] that the constitutional right of privacy afforded by this provision was intended to apply to '*every Californian*.'" *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 334 (1997) (emphasis added). That limitation makes sense: There is absolutely no indication in the California Constitution that the people of California sought to extend its protections to persons wholly outside their state. And courts have recognized that protections afforded by California law that are similarly limited to "a resident of California" cannot be claimed by non-Californians. *See, e.g., In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-MD-02752-LHK, 2017 WL 3727318, at *35–36 (N.D. Cal. Aug. 30, 2017) (citing Cal. Civ. Code § 1798.82(a)); *In re Sony gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 973 (S.D. Cal. 2012) (citing Cal. Civ. Code § 1798.81.5(a)).

Plaintiffs "reside in Dorchester County, South Carolina," and do not claim to have resided in California at any relevant time. CAC ¶ 3. As residents of South Carolina, Plaintiffs cannot maintain a privacy claim under the California Constitution. *See Lungren*, 16 Cal. 4th at 334. What is more, Plaintiffs appear to recognize as much. They only pleaded the constitutional claim "on behalf of the California Subclass." CAC at 17 & ¶ 69. But the named Plaintiffs are

inadequate to represent that subclass, given their South Carolina residency. *See* Fed. R. Civ. P. 23(a)(4). And there cannot be a putative class claim without a named plaintiff who can pursue that claim. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (explaining that Rule 23 "effectively limit[s] the class claims to those fairly encompassed by the named plaintiff's claims" (internal quotation marks omitted)). The California constitutional privacy claim should be dismissed on the grounds of Plaintiffs' residency alone.

2. Plaintiffs Do Not Adequately Allege a Constitutional Privacy Claim.

Even if these South Carolina Plaintiffs could claim the protection of the California Constitution, which they cannot, they have not pled facts supporting a privacy claim under the California Constitution. The courts have made clear that to support such a claim, Plaintiffs must plead conduct by Defendants constituting a "serious invasion" of privacy, where Plaintiffs had a legally protected privacy interest and reasonable expectation of privacy in the information at issue. *Hill*, 7 Cal. 4th at 39–40. The Complaint fails this test.

California law sets a "high bar" for a "serious" invasion of privacy. *See Belluomini v. Citigroup, Inc.*, No. CV 13–01743 CRB, 2013 WL 3855589, at *6 (N.D. Cal. July 24, 2013). "Actionable invasions of privacy" under the California Constitution "must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an *egregious breach* of the social norms underlying the privacy right." *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012) (emphasis in original) (quoting *Hill*, 7 Cal. 4th at 26, 37). Examples include stalking and filming of neighbors in their home, *see Egan v. Schmock*, 93 F. Supp. 2d 1090 (N.D. Cal. 2000), and a law firm's disclosure of the HIV status of a litigant. *See Jeffrey H.*, 85 Cal. App. 4th at 355.

The Complaint falls short of this "high bar." The conduct described in the Complaint relates to Defendants' purported collection, use, or disclosure of information connected to R.R.'s use of YouTube. *See* CAC ¶¶ 48-61, 63-66. Far from being an "egregious breach of the social norms," California courts have consistently held that collecting and disclosing information related to an individual's digital or Internet footprint is "common" among website operators and therefore does *not* violate the California Constitution. *See In re iPhone Application*, 844 F. Supp. 2d at 1063 (holding that the disclosure to third parties of information such as a unique device identifier number did not constitute an egregious breach of privacy); *In re Google, Inc. Privacy Policy Litig.*, 58 F. Supp. 3d 968, 985 (N.D. Cal. 2014) ("Courts in this district have consistently refused to characterize the disclosure of common, basic digital information to third parties as serious or egregious violations of social norms."); *Yunker v. Pandora Media, Inc.*, No. 11-CV-03113 JSW, 2013 WL 1282980, at *15 (N.D. Cal. Mar. 26, 2013) (finding allegations that the defendant provided information related to the plaintiff's downloading of digital music files to advertising libraries insufficient to show egregious breach of social norms); *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1025 (N.D. Cal. 2012) (finding that LinkedIn did not commit a "serious invasion" of users' privacy by disclosing URLs visited). These practices "are part of routine Internet functionality," *In re Facebook Internet Tracking Litig.*, 263 F. Supp. 3d 836, 846 (N.D. Cal. 2017), not an offensive invasion of a private zone.

Furthermore, although Defendants protect the type of data at issue according to the Terms and Privacy Policy, California courts have not found that this information is protected under the state's constitutional privacy clause when collected by a website operator. California law recognizes a privacy interest in "precluding the dissemination or misuse of sensitive and confidential information." *Hill*, 7 Cal. 4th at 35. A confidential medical profile, private financial

records, sexual orientation, and sexual activity have been found to warrant such constitutional protection. *See, e.g., Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 712 (9th Cir. 2005) (medical profile); *Charles O. Bradley Tr. v. Zenith Capital LLC*, No. C–04–2239 JSW(EMC), 2006 WL 798991, at *2 (N.D. Cal. Mar. 24, 2006) (private financial records); *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1196 (C.D. Cal. 2007) (sexual orientation); *Pearce v. Club Med Sales, Inc.*, 172 F.R.D. 407, 410 (N.D. Cal. 1997) (sexual activity). By contrast, the data that Defendants allegedly collected with respect to R.R.—cookies and basic user information, *see* CAC ¶¶ 37, 52-53, 63; Ex. B—is of a different nature, and courts have not found it protected from collection by a website operator under the California Constitution. *See In re Facebook*, 263 F. Supp. 3d at 846 (URLs); *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016, 1041 (N.D. Cal. 2014) (e-mail); *cf. Nickelodeon*, 827 F.3d at 294-295 (tracking cookies).[6]

Putting aside that the Complaint acknowledges that YouTube's Terms prohibit users under 13 and does not allege that Defendants had any knowledge of Plaintiff R.R.'s age, the analysis does not change just because R.R. is alleged to be a minor. Indeed, the Third Circuit rejected the argument that Google's routine collection of information like IP addresses was "particularly odious" with respect to children. *Nickelodeon*, 827 F.3d at 294–295.[7] The court recognized that "courts have long understood that tracking cookies can serve legitimate commercial purposes." *Id.* And it held that the pervasiveness of that practice across the Internet

[6] To be clear, these arguments are limited to the context of tort litigation against a website operator. In particular, Defendants' arguments do not relate to the entirely separate issue of a user's privacy expectations vis-à-vis the government under the Fourth Amendment to the U.S. Constitution.

[7] The information at issue in *Nickelodeon* included "username/alias"; "gender"; "birthdate"; "IP address"; "browser settings"; "unique device identifier"; "web communications, including but not limited to detailed URL requests and video materials requested and obtained from . . . websites"; and "persistent . . . identifiers." 827 F.3d at 269.

meant that Google's alleged conduct was not "sufficiently offensive, standing alone, to survive a motion to dismiss"—including in the case of minors under the age of 13. *Id.*[8] The sponsor of COPPA noted that "[m]uch of this information" being collected by websites "appears to be harmless"—but the goal was to establish a new regulatory regime to obtain parental consent, while encouraging internet operators to pursue "self-regulatory efforts." *See* 144 Cong. Rec. S8483 (daily ed. July 17, 1998) (statement of Sen. Bryan). California's privacy laws are aimed at preventing "egregious" intrusions into personal and intimate affairs, while here Plaintiffs simply point to purported violations of COPPA to plead a constitutional privacy claim.

For all these reasons, the Complaint does not make out a claim for violation of the California Constitution, and that claim should be dismissed.

B. Plaintiffs Fail to State a Claim for Intrusion Upon Seclusion.

Plaintiffs also fail adequately to plead a common law claim for intrusion upon seclusion. In California, a plaintiff must allege facts to show that the defendant "intentionally intrude[d] into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy"; that the intrusion "occur[red] in a manner highly offensive to a reasonable person"; and that the intrusion harmed the plaintiff. *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286 (2009).[9] The Complaint does not satisfy any of these elements.

---

[8] The Third Circuit recognized that its conclusion might be different if there were allegations that a website "encouraged parents to permit their children to browse . . . under false pretenses." *Nickelodeon*, 827 F.3d at 295. There are no such allegations here, nor could there be: Plaintiffs' own theory is that Defendants' conduct was wholly consistent with the Terms and Privacy Policy. *See supra* Factual Background at 4-6; CAC ¶¶ 51-53, 55-56.

[9] Plaintiffs assert that California law applies. CAC ¶ 12. The Court need not resolve any choice-of-law questions between California and South Carolina law because Plaintiffs' common law privacy claim fails under either state's law. *Cf. Snakenberg v. Hartford Cas. Ins. Co.*, 299 S.C. 164, 171-172 (Ct. App. 1989). South Carolina, for example, also requires an intentional intrusion into private affairs, which Plaintiffs have not shown. *Id.*

1. The Complaint Fails to Allege an Intentional Intrusion Into a Private Place.

Plaintiffs have not alleged facts that show Defendants "penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, [Plaintiffs]," and that they "had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source." *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 232 (1998); *see also Snakenberg*, 299 S.C. at 171 ("The intrusion on the plaintiff must concern those aspects of himself, his home, his family, his personal relationships, and his communications which one normally expects will be free from exposure to the defendant."). To the contrary, as noted above, this case involves Defendants' alleged collection of data routinely obtained by website operators. *See supra* Part II.A.2; *see also People v. Stipo*, 195 Cal. App. 4th 664, 669 (2011) ("Internet users have no expectation of privacy in . . . the IP addresses of the websites they visit because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information."); Ex. A § 1(A); Ex. B. Courts understand that when a person visits a website, the user's interactions with that website are not a secret to the website operators, and nothing in the Complaint shows that Defendants "penetrated" a "zone" of "physical or sensory privacy."

2. Plaintiffs Have Not Met The High Legal Bar For Offensiveness.

Plaintiffs' claim also fails because as the one court to have examined the issue found, the facts alleged do *not* describe conduct by Defendants that is "sufficiently offensive" to meet the high common law standard—with respect to minors or adults. *Nickelodeon*, 827 F.3d at 294. Just as with a California constitutional privacy claim, "the common law set a high bar for an invasion of privacy claim." *Low*, 900 F. Supp. 2d at 1025. An intrusion on seclusion is actionable only if it is "sufficiently serious and unwarranted as to constitute an egregious breach

of the social norms." *Hernandez*, 47 Cal. 4th at 295 (internal quotation marks omitted); *see also Nelson v. Sci. Applications Int'l Corp.*, No. 2:11-2928-PMD, 2013 WL 764664, at *9 (D.S.C. Feb. 7, 2013) ("This evidence does not show an unreasonable and 'substantial' intrusion into Plaintiff's private affairs, or a 'blatant and shocking disregard of Plaintiff's rights.'" (citation omitted)), *report and recommendation adopted*, No. 2:11-2928-PMD, 2013 WL 754834 (D.S.C. Feb. 27, 2013).

Again, Plaintiffs offer no facts to show that Defendants' conduct meets that high bar. While they continue to rely on the alleged violation of COPPA, they fail to demonstrate what about Defendants' actions (the collection of data from websites run by Defendants, in accordance with policy terms) made that conduct substantially "egregious" or "offensive" such that it amounted to an intrusion upon seclusion under tort law principles. *See Nickelodeon*, 827 F.3d at 294-295. Plaintiffs' recitation of the common law standard, *see* CAC ¶¶ 84, 93 (stating the alleged "intrusions are highly offensive to a reasonable person" and "constitut[ed] an egregious breach of social norms"), is just a legal conclusion that does not support a plausible claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

3. The Complaint Does Not Allege Facts Showing Resulting Injury.

Finally, another essential element of an intrusion upon seclusion claim in California is that "[t]he intrusion caused plaintiff to sustain injury, damage, loss or harm." *Rowland v. JPMorgan Chase Bank, N.A.*, No. C 14-00036 LB, 2014 WL 992005, at *11 (N.D. Cal. Mar. 12, 2014) (internal quotation marks omitted). Here, Plaintiffs allege no harm that they suffered from Google's "tracking and collection" of R.R.'s "personal information" or "persistent identifiers." *See* CAC ¶¶ 63, 66. Moreover, the allegations in the Complaint are consistent with Defendants

adhering to the express terms of the Privacy Policy. *See, e.g., id.* ¶¶ 55-56. Having failed to plead any particular injury at all, Plaintiffs clearly do not do so with the requisite specificity. *See Bostic*, 2015 WL 5178163, at *1. Aside from conclusory statements that they "were harmed by the intrusion into their private affairs," CAC ¶¶ 85-86, 94, Plaintiffs allege no facts showing that they suffered a cognizable injury stemming from Defendants' purported conduct, and the claim should be dismissed on that basis too.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion and dismiss the Complaint in its entirety.

Dated: June 4, 2018

Respectfully submitted,

By: */s/Lucile H. Cohen*

Bart Daniel
Federal Bar No. 403
Lucile H. Cohen
Federal Bar No. 10195
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
Tel: (803) 255-9332
Fax: (803) 255-5922
Bart.Daniel@nelsonmullins.com
Lucie.Cohen@nelsonmulllins.com

Edith Ramirez (*pro hac vice* motion pending)
Michelle A. Kisloff (*pro hac vice* motion pending)
Adam A. Cooke (*pro hac vice* motion pending)
Sara A. Solow (*pro hac vice* motion pending)
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Tel: (202) 637-5600

Fax: (202) 637-5910
Edith.Ramirez@hoganlovells.com
Michelle.Kisloff@hoganlovells.com
Adam.A.Cooke@hoganlovells.com
Sara.Solow@hoganlovells.com