Case No. 13-16918
(Consolidated with Nos. 13-16819, -16919, -16929, -16936, -17028 & -17097)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANGEL **FRALEY**, et al.,

Plaintiffs-Appellees,

C.M.D., et al.,

Intervenor-Plaintiffs-Appellees,

JOHN **SCHACHTER** (on behalf of himself and his minor son S.M.S.), KIM PARSONS (on behalf of herself and her minor daughter C.B.P.), ANN LEONARD (on behalf of herself and her minor daughter D.Z.), R.P. (through her mother Margaret Becker), and J.C. (through his father Michael Carome), Class Members,

Objectors-Appellants,

v.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal from the U.S. District Court for the Northern District of California
(Hon. Richard Seeborg, United States District Judge)

REPLY BRIEF FOR APPELLANTS SCHACHTER ET AL.

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July 11, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND LEGISLATIVE MATERIALS

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court approved a settlement that authorizes a party to violate the laws of seven states that expressly bar the use of a minor's likeness without parental consent. The smorgasbord of attempts to defend the settlement offered by appellees Facebook and counsel for the plaintiff class are unpersuasive.

The appellees acknowledge that class settlements may not authorize unlawful conduct, but contend that this basic principle cannot be invoked here because there is no *case law* (as opposed to statutory text) demonstrating that this settlement authorizes unlawful conduct. This argument misreads precedent and treats statutes as less authoritative sources of law than case decisions. The seven state statutes that the Schachter objectors have cited leave no room for doubt that the use of a minor's likeness without parental consent is unlawful in those states. Case law is not needed to confirm what statutory text makes plain.

Class counsel — but not Facebook — make a cursory effort to argue that the settlement is permissible because it does not "bless" or "authorize" any conduct and that minor class members retain their rights to sue for future violations of the seven state laws. This notion blinks at reality. Should an under-18 Facebook user (or her parent) raise a challenge to any future violation of the minor's privacy rights contemplated by this settlement, Facebook would surely defend by pointing to this settlement and arguing that its approval by a federal court precludes a claim

that Facebook's use of the minor's image in conformity with the settlement's terms gives rise to liability under state law.

Facebook's and class counsel's reliance on the settlement's safeguards is unavailing, as even they seem to recognize. Both sets of appellees tout the efficacy of the settlement's parental controls and safeguards, but neither disputes that the settlement will, at least sometimes, permit Facebook to use minors' likenesses without parental consent — precisely what California, Florida, New York, Oklahoma, Tennessee, Virginia, and Wisconsin forbid.

Facebook's attempt to seek refuge in the First Amendment because the "speech" at issue supposedly originated with its minor users is disingenuous. It is not the minor users' right to speak that is at issue, but their capacity to consent to *Facebook's* use of their names and images for its own commercial gain in violation of state law.

Appellees also argue that the settlement's legality is a "merits" question, that six of the seven minors' privacy state laws are irrelevant, and that the minors' privacy laws are preempted. These points are all rebutted in the Schachter objectors' opening brief. The briefs of the Federal Trade Commission and the State of California as amici curiae provide additional reasons that the preemption argument fails.

For these reasons and those stated in the opening brief, the district court's approval of the settlement should be vacated.

ARGUMENT

I. Appellees Fail To Rebut The Central Charge That The Settlement Authorizes Clearly Illegal Conduct.

Neither class counsel nor Facebook disputes that "a [class action] settlement that authorizes the continuation of clearly illegal conduct cannot be approved." *Robertson v. Nat'l Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977); *accord Isby v. Bayh*, 75 F.3d 1191, 1197 (7th Cir. 1996); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975); *see generally* Schachter Opening Br. 19-21.

Instead, Facebook and class counsel attempt to avoid the application of this principle on several grounds. They argue that only case law can establish that settlement terms authorize illegal conduct, that (according to class counsel but not Facebook) the settlement does not authorize the conduct the Schachter objectors have shown to be illegal, and that the settlement's parental safeguards make up for whatever illegal conduct is authorized. None of these arguments has merit.

A. Case law confirming that the settlement authorizes illegal conduct is unnecessary where statutory text makes the illegality clear.

Appellees are incorrect in suggesting that only case law can demonstrate the illegality of the conduct that this settlement authorizes. *See* Answering Br. of Pls.-Appellees Susan Mainzer, et al. 29-30 (hereinafter "Class Counsel Br.");

Answering Br. of Def.-Appellee Facebook, Inc. 55 (hereinafter "Facebook Br."). They cite no precedent that remotely suggests that unambiguous statutory commands are insufficient to demonstrate the illegality of a settlement; indeed, none of their authorities even addresses that issue. Rather, appellees derive their case-law-only principle mainly by overreading dicta. Of the cases the appellees cite for their view, *see* Class Counsel Br. 29; Facebook Br. 55, one merely pointed out that the absence of case law establishing clear illegality contributed to the court's conclusion that the settlement at issue authorized conduct whose "alleged illegality . . . is not a legal certainty." *Robertson*, 556 F.2d at 686; *accord Grunin*, 513 F.2d at 124 (illegality not established where one set of cases suggested illegality but another set of cases suggested a basis to distinguish the first). Another case appellees cite suggested in dicta that prior case law is required to establish that conduct is clearly illegal, *see Isby*, 75 F.3d at 1197, but the court then went on to analyze state *statutory* authority to determine whether the settlement at issue authorized clearly illegal conduct. *Id.* at 1198.

The other two cases on which the appellees rely addressed assertions that settlement terms violated the Constitution: both concerned school desegregation under the Equal Protection Clause of the Fourteenth Amendment. Without statutory text to analyze, the courts in these cases had no choice but to rely on case law alone to show clear illegality. *See Little Rock Sch. Dist. v. Pulaski Cnty.*

Special Sch. Dist. No. 1, 921 F.2d 1371, 1385 (8th Cir. 1990); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 321 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). As the Eighth Circuit explained, because the Constitution provides only "rather general standards," *Little Rock Sch. Dist.*, 921 F.2d at 1384, it is almost always difficult to say, based on the constitutional text alone, that a particular practice is categorically forbidden. *See id.* at 1384 (giving examples from the Eighth Amendment and Equal Protection contexts). But no decision has held that case law is required where statutory text makes plan the illegality of the conduct that a settlement authorizes.

Indeed, the appellees' insistence on case law *to the exclusion* of plain statutory language makes little sense. Such a rule would denigrate the authority of legislatures by suggesting that they are incapable of drafting clear and specific laws that could render conduct "clearly illegal" without the help of interpreting courts. Appellees' rule would arbitrarily divide "clearly illegal" conduct between those acts that had previously been tested in court and those that had not, with courts free to approve settlements authorizing the latter but not the former. Happenstance rather than principle would dictate which laws federal courts would be bound to respect in approving settlements. Additionally, a rule relying on courts alone as the arbiters of what conduct is "clearly illegal" would perversely result in providing *less* respect to statutes the *clearer* they are, because ambiguous statutes

are more likely to be the subject of litigation and therefore to be interpreted by the courts.

The seven statutes that the Schachter objectors invoke define with precision what is prohibited (the use of a name or likeness of a living person for advertising without consent) and the only circumstance under which that prohibition may be overcome with respect to minors (parental consent). For instance, California law provides: "*Any person who knowingly uses another's name*, voice, signature, photograph, or *likeness*, in any manner, on or in products, merchandise, or goods, or *for purposes of advertising* or selling, or soliciting purchases of, products, merchandise, goods or services, *without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable* . . . ." Cal. Civ. Code § 3344(a) (emphasis added). There is no way to read that statute to permit, as the parties' settlement here does, the use of a minor's likeness for advertising without parental consent. Tellingly, neither class counsel nor Facebook suggests such an alternative reading of this or any of the other statutes on which the Schachter objectors rely.

Given the plain text of these statutes, no case law is necessary to show that the use of a minor's likeness for advertising without parental consent is clearly unlawful in California, Florida, New York, Oklahoma, Tennessee, Virginia, and Wisconsin.

B. The settlement authorizes what state law forbids.

In conclusory fashion, class counsel assert that the settlement does not authorize any unlawful conduct because "[t]he Settlement does not 'bless' or immunize or authorize the actions of Facebook, it only releases claims for past behavior." Class Counsel Br. 29. Moreover, class counsel claim, "[i]f any Class members have a future claim he [sic] or they wish to bring, this Settlement does not prevent them from filing it." *Id.*

The suggestion that a binding settlement agreement formally endorsed by a federal court does not "bless" or "authorize" the conduct permitted by the agreement and has no effect on future claims for legal violations is thoroughly unconvincing. Facebook (which, notably, does *not* join in class counsel's assertion that future lawsuits based on conduct expressly contemplated by the settlement may proceed unimpeded) would surely defend any future suit for a violation of the state laws that the Schachter objectors cite by relying on this very settlement and its approval by a federal district court to argue that Facebook's conduct is lawful and that class members bound by the settlement are precluded from contending otherwise to the extent that Facebook's challenged conduct conforms with the settlement agreement. In such a future case, judges called upon to apply the otherwise-straightforward minors' privacy statutes to Facebook's conduct would be put in the difficult position of either disagreeing with the district court's

judgment in this case that the settlement was lawful — thereby permitting what would effectively be a collateral attack on this settlement and the district court's judgment — or contorting the interpretation of state statutes to avoid such a result. The specter that this settlement could lead to a conflict between a federal court's judgment and a state law's clear command is one of the many reasons that a federal court should not approve a settlement that endorses a party's violation of a state law.

Class counsel also argue that the settlement does not violate state law because if children are trusted to represent their own age on Facebook, then a child's representation of parental consent is tantamount to actual parental consent. *See* Class Counsel Br. 31. This is a non sequitur. That Facebook takes children at their word regarding their own age has no bearing on whether a child should be able to represent the views of a third party (her parent). The purpose of parental consent is to interpose the judgment of a parent between a child and a corporation that seeks to exploit the child for monetary gain. That purpose is thwarted if only the parent's name (invoked by the child, who herself cannot consent), rather than the parent's actual judgment, is interposed. Accepting a child's representation of parental consent in place of parental consent is like letting a child sign his own permission slip to get out of school. If an advertiser may rely on a child's

representation of parental consent, the advertiser is effectively relying on the child's own consent, which the statutes expressly forbid.

C. The settlement's parental safeguards do not prevent the settlement from authorizing illegal conduct.

Both class counsel and Facebook seek refuge in the settlement's safeguard provisions. *See* Class Counsel Br. 30; Facebook Br. 60-61. But those provisions, even assuming they would work as well as the settling parties hope, do not prevent Facebook from using minors' likenesses for advertising without parental consent. In fact, given that all of the safeguards depend on some affirmative act by either the minor Facebook user, the minor user's parent, or both, *see* Schachter Opening Br. 24-25, the safeguards may not prevent *any* unlawful uses of minors' images, much less all such uses. Facebook's contention that some parents consent to the use of their children in advertising, Facebook Br. 59-60, is irrelevant. The fact that *some* parents consent to use of their children's images in advertising does not vitiate state laws requiring that *all* parents be given the choice in the first place. No party disputes that, under the settlement, Facebook need not obtain parental consent for every child it uses in its ads.

Most damning to the appellees' reliance on the safeguards is the fact that the appellees themselves, even as they strain to tout the parental safeguards as "a reasonable solution to the issue of whether parents have given their consent implicitly," Class Counsel Br. 30, or "meaningful new controls," Facebook Br. 60,

cannot represent to the Court that these safeguards will prevent Facebook from using minors' images for advertising without parental consent. On this point, the Schachter objectors and the appellees agree.

Facebook's only response to the problem of ongoing unlawful uses of minors' images is to repeat the district court's characterization that "Objectors [are] simply advocating for a 'better' deal." *Id.* at 61. Facebook attacks a straw man: the Schachter objectors are not quarreling over whether the deal is "good enough" but instead contend that the settlement authorizes clearly unlawful conduct. Whereas the former inquiry is a question of degree (regarding which the district court may be afforded deference), the latter inquiry — the basis for the Schachter objectors' objection — is a binary one. Either a settlement authorizes the violation of unlawful conduct, or it does not. Whether it is a "good deal" is irrelevant. Because the settlement here does authorize unlawful conduct, it should be vacated, regardless of whether the district court thought it was a good deal.

II. The First Amendment Does Not Protect Facebook's Unlawful Appropriation Of Minors' Names And Images For Commercial Purposes.

Facebook advances the novel contention that the First Amendment protects Facebook's appropriation ("republication" is Facebook's euphemism) of its users' names and images because in doing so it is merely repeating their "speech." *See* Facebook Br. 43-45, 57-58. This argument is based on a sleight of hand. The rights

of minor users to speak online, whether in written form or in the form of a "like" that expresses an affinity, are irrelevant, because Facebook is claiming protection for something different: its own "republication" of that speech, plus the name and image of the speaker, in paid advertisements serving Facebook's own commercial purposes. That the right to speak does not include the untrammeled right to appropriate the speech and identities of others is not a novel concept. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) ("The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."). Facebook is incorrect that in the guise of "republication" it can avail itself of a *user's* free speech rights to defend the appropriation of the user's name and image for *Facebook's* own commercial purposes.

Moreover, no expressive right of a minor user is jeopardized by restrictions on Facebook's ability to repackage and disseminate her name and image in commercial advertising without lawful consent. With or without "Sponsored Stories," a minor may speak on Facebook all she likes. Facebook relies on *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), which struck down a law restricting the sale of violent video games to minors, but unlike the law in that case, none of the seven state statutes the Schachter objectors cite restricts what a minor may say or what information she may receive.

Facebook's argument ultimately boils down to the notion that the settlement may authorize Facebook to violate the seven state privacy statutes because Facebook's minor users have a First Amendment right to consent to the use of their names and images in commercial advertising without regard to the wishes of their parents. Facebook cites no authority for this dramatic proposition, which runs entirely counter to more than a century of law recognizing that minors generally lack capacity to enter into significant commercial relationships without parental consent. *See* Br. of Amici Curiae Ctr. for Digital Democracy et al. 8-12; Br. of Amicus Curiae Elec. Privacy Info. Ctr. 3-5. That principle, of course, is most clearly embodied in the seven state statutes on which the Schachter appellants rely. *See* Br. for the State of Cal. as Amicus Curiae 15 (tracing the history of these laws, including California's, enacted 1971, and three that are even older — those of Florida (1967), Oklahoma (1965), and New York (1909)).

III. Appellees' Remaining Arguments Lack Merit.

The rest of appellees' arguments against the Schachter objectors' position repeat the reasons given in the decision below and are addressed in Part II of the Schachter objectors' opening brief. Only a few additional responses are warranted.

First, the Schachter objectors are not asking the court to resolve the merits of the underlying lawsuit. The question whether the settlement authorizes future violations of law is distinct from the question whether Facebook violated the law in

the past. To the extent the merits question and the authorizing-unlawful-conduct question overlap, a court cannot avoid looking into the merits to the extent necessary to discharge its responsibilities under Rule 23. *See* Schachter Opening Br. 30 (citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

Second, the appellees make the same mistake as the district court in asserting that only California law is relevant to what conduct is illegal for Facebook in Florida, New York, Oklahoma, Tennessee, Virginia, and Wisconsin. *See* Class Counsel Br. 27-28; Facebook Br. 56-57. Regardless of what law applies to the interpretation of the settlement agreement or to Facebook's terms of service, Facebook is not at liberty to ignore the laws — particularly the criminal laws — of other states where it operates. *See* Schachter Opening Br. 31-33.

Consider a minor user whose parent is not on Facebook and never agreed to its terms of service choosing California law. Facebook's choice of law provision would not protect it against a suit by that minor's parent in her home state for the unlawful use of the minor's likeness without the parent's consent. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty."). And Facebook could not use a choice-of-law clause to ignore the *criminal* laws of the states in which it operates: notwithstanding Facebook's terms of service, officials of the sovereign States of

New York, Oklahoma, and Tennessee could clearly prosecute Facebook for violating those states' criminal statutes by using a minor's likeness for advertising without parental consent. *See* N.Y. Civ. Rights Law §§ 50, 51; Okla. Stat. Ann. tit. 21, §§ 839.1, 839.2; Tenn. Code Ann. § 47-25-1105(a)-(b).

Ultimately, because the minors'-privacy protections of the seven state laws invoked are materially the same, *see* Schachter Opening Br. 21-24, 31-32, the Schachter objectors' reliance on all of these laws will stand or fall as one. But the existence of not just one but seven state laws that expressly prohibit what the district court has authorized Facebook to do underscores the broad reach of the decision below and the gravity of the court's error in approving the settlement.

Third, Facebook persists in its assertion that the Child Online Protection and Privacy Act (COPPA) preempts the state laws on which the Schachter objectors rely. Facebook does not add anything new to the district court's express-preemption rationale, which the Schachter objectors have already refuted. *See* Schachter Opening Br. 34-36.

In support of its distinct theory of implied obstacle-preemption, Facebook relies on a one-page, unpublished California trial court order, Facebook Br. 59 (citing *Cohen v. Facebook, Inc.*, No. BC 444482 (L.A. Super. Ct. Sept. 22, 2011), *available at* ER 167), and a dictum from *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). Specifically, Facebook quotes *Sprietsma*'s observation that "a federal

decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated." *Id.* at 66, *cited at* Facebook Br. 59. But whether the federal decision implies such intent in any particular instance turns on the facts; as *Sprietsma* cautioned, "[i]t is quite wrong to view that decision [not to regulate] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Id.* at 65; *accord Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1139-40 (2011). Based on the facts, the Court held in *Sprietsma* that a federal agency's decision not to issue a regulation concerning propeller guards on motor boats did not signal its intention that propeller guards go unregulated by the states, but instead left the law "exactly the same as it had been" before the agency's decision. 537 U.S. at 65.

Facebook's attempt to show that, in enacting COPPA, Congress manifested an intent to *preclude* state regulation in the field of online privacy grasps at straws. Facebook cherry-picks passages from the testimony of two witnesses at a congressional hearing opposing overly broad regulation of teens' online speech. *See* Facebook Br. 36-37 (referring to a "barrage" of criticism and citing the testimony of just two witnesses, at SER 219-20 (Deirdre Mulligan, Staff Counsel, Center for Democracy and Technology), and SER 229 (Kathryn Montgomery, President, Center for Media Education)). Those same two witnesses, however, also spoke *in favor of* some regulation to protect teens on the internet. *See* SER 220 &

n.8 (Mulligan of Center for Democracy and Technology) (recommending that COPPA's definition of "child" be "under 13" but noting that "[w]e are working with the Subcommittee to craft privacy protections for older minors"); SER 225 (Montgomery of Center for Media Education) ("We do believe that the bill must provide adequate and age-appropriate privacy protections for teenagers, 13 to 16. . . . [W]e do not believe that the current draft of the bill is the appropriate way to do it. . . . However, we do believe that it is going to be very important that there be fair information practices for teens; that they should not just go from 12 to 13 into this huge abyss of unfair marketing practices."). Thus, even if snippets of statements made by witnesses at a congressional hearing could be imputed to Congress itself, these witness statements would not help Facebook here.

Facebook's attempts to read a preemptive purpose into the floor statements of one of COPPA's legislative sponsors are even less persuasive. That aspects of COPPA were "worked out carefully" with "First Amendment organizations," Facebook Br. 37 (quoting Sen. Bryan), is a far cry from showing that Congress intended to displace state regulation protecting the privacy of minors not covered by COPPA. The same is true of Senator Bryan's statement that Congress wished to preserve "access to information in this rich and valuable medium." Facebook Br. 38. In context, Senator Bryan's statement reveals that, in his view, the legislation was intended to protect children's privacy by enhancing parental consent:

> The goals of this legislation are: (1) to enhance parental involvement in a child's online activities in order to protect the privacy of children in the online environment; (2) to enhance parental involvement to help protect the safety of children in online fora such as chatrooms, home pages, and pen-pal services in which children may make public postings of identifying information; (3) to maintain the security of personally identifiable information of children collected online; and (4) to protect children's privacy by limiting the collection of personal information from children without parental consent. The legislation accomplishes these goals 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. S12787 (daily ed. Oct. 21, 1998) (Sen. Bryan).

Senator Bryan's goal of "enhanc[ing] parental involvement" in children's online safety is wholly consistent with state laws requiring parental consent before minors' names and images can be used in advertising. Senator Bryan's observation that COPPA accomplishes Congress's privacy-related objectives while "preserv[ing] children's access to information" does not in the least suggest that Congress had any interest in preempting state law, much less a specific intent to do so. The longstanding state involvement in the protection of privacy, *see* Br. for the State of Cal. as Amicus Curiae 14-18, should not be cast aside based on Facebook's speculative inferences that divine specific preemptive intent from quotations taken out of context.

That the FTC has submitted an amicus brief arguing that COPPA does not preempt state privacy protections for minors further counsels against finding preemption here. *See Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (noting that

agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (citations and internal quotation marks omitted)). And California's participation in this case underscores the implications for federalism of an analysis, like Facebook's, that substitutes out-of-context snippets of legislative history for clear evidence of congressional interest to preempt state law. The FTC and California briefs are, in addition, persuasive in their own right, and strongly support the conclusion that COPPA does not preempt state laws barring the use of a minor's name or likeness for advertising without parental consent.

CONCLUSION

The district court's approval of the settlement should be vacated.

July 11, 2014

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 32(a)(7)(B) because this brief contains 4,272 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type.

/s/ Scott Michelman

CERTIFICATE OF SERVICE

I certify that on July 11, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Scott Michelman