Children's Digital Privacy and the Case Against Parental Consent

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Children's engagement with the internet has exploded. From education to social media, companies have offered products and services that—far from being mere distractions for children—have increasingly become necessities. These necessities are most keenly felt in the EdTech world. As companies in the United States rely on the verifiable parental consent required by the Children's Online Privacy Protection Act (COPPA) to collect and use minors' data, reviewing boilerplate waivers of liability and consent forms for children's online activities has thus become part of parenting. This piece argues that under the common law tradition of protecting the best interests of the child, when it comes to protecting children's digital privacy, relying solely on parental consent is insufficient and ill-suited.

This work compares parental consent forms for children's online activities to parental waivers for tort liability for physical injuries suffered by children. In the latter, courts have not reached a consensus on whether such contracts are enforceable or altogether void. However, most courts have struck down such waivers as against public policy in commercial settings. By relying on courts' decisions regarding the role of parents in protecting the best interests of the child when faced with a child's physical injury, this piece argues that public policy should have to force to override parental consent as it pertains to the protection of a minor's digital privacy and their use of EdTech tools. It thus encourages lawmakers at the federal and state levels to move away from a parental consent apparatus and instead put forward new measures for the protection of children's digital privacy.

It further illustrates that, despite COPPA, common law privacy torts are not fully preempted. Adopting the approach proposed in this work will also motivate companies to be more vigilant towards handling minors' data to avoid potential lawsuits. It will further encourage a market for competition between

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socially responsible companies that would prioritize children's privacy over an endless list of corporate interests.

Introduction

In February 2020, New Mexico's attorney general sued Google.[1] In *Balderas v. Google*,[2] New Mexico alleged that the company is illegally collecting children's data in violation of the Children's Online Privacy Protection Act (COPPA),[3] the New Mexico Unfair Practices Act (UPA),[4] and the common law privacy tort of intrusion upon seclusion, among others.[5] New Mexico's attorney general argued that Google had failed to obtain "verifiable parental consent," as required by COPPA, for the collection, use, or disclosure of personal information.[6]

1. Complaint, New Mexico *ex rel.* Balderas v. Google, LLC, 489 F. Supp. 3d 1254 (D.N.M. 2020) (No. 1:20-cv-00143-NF).

2. 489 F. Supp. 3d 1254 (D.N.M. 2020), *appeal dismissed*, No. 20-2172, 2021 WL 8650746 (10th Cir. Dec. 17, 2021).

3. 15 U.S.C. § 6502.

4. N.M. STAT. ANN. §§ 57-12-1 to 57-12-26 (West 2022).

5. For an analysis of this case, see Zahra Takhshid, New Mexico v. Google LLC*: Children's Privacy in the Age of e-Learning*, JOLT DIGEST (Mar. 16, 2020), https://jolt.law.harvard.edu/digest/new-mexico-v-google-llc-childrens-privacy-in-the-age-of-e-learning [https://perma.cc/3XTV-FJPM].

6. *Balderas*, 489 F. Supp. 3d at 1258–59; Brief for Appellant at 23, *Balderas*, No. 20-2172 (10th Cir. Dec. 17, 2021). COPPA defines "personal information" (commonly referred to as Personally Identifiable Information or PII) as individually identifiable information about an individual collected online, including:

(1) A first and last name;

(2) A home or other physical address including street name and name of a city or town;

(3) Online contact information as defined in this section;

The lawsuit was initiated based on a Google service called G Suite for Education (GSFE).[7] GSFE provides students with access to services such as Gmail, Google Calendar, Google Drive, and Google Docs, which collect various forms of the users' data—in this case, children's data.[8] In November 2020, the U.S. District Court for the District of New Mexico granted Google's motion to dismiss.[9] Google argued that to attain the verifiable parental consent that COPPA required, it had relied on the schools themselves as intermediaries. It reasoned that to comply with COPPA in "provid[ing] notice and obtain[ing] verifiable parental consent prior to collecting, using, or disclosing personal information from children," Google only needed to "mak[e] any reasonable effort."[10]

According to guidelines from the Federal Trade Commission (FTC), "schools may act as the parent's agent and can consent to the collection of kids' information on the parent's behalf."[11] However, in *Balderas*, this consent also meant consent to access to GSFE's "Additional Services," which included minors' access to services such as "Google Maps, Blogger and YouTube."[12]

Moreover, the services offered may also include Google Assistant Voice Match and Face Match, both of which require school administrators to

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> (4) A screen or user name where it functions in the same manner as online contact information, as defined in this section;
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> (5) A telephone number;
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> (6) A Social Security number;
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> (7) A persistent identifier that can be used to recognize a user over time and across different Web sites or online services. Such persistent identifier includes, but is not limited to, a customer number held in a cookie, an Internet Protocol (IP) address, a processor or device serial number, or unique device identifier;
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> (8) A photograph, video, or audio file where such file contains a child's image or voice;
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> (9) Geolocation information sufficient to identify street name and name of a city or town; or
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> (10) Information concerning the child or the parents of that child that the operator collects online from the child and combines with an identifier described in this definition.

16 C.F.R. § 312.2 (2022).

7. *Balderas*, 489 F. Supp. 3d at 1255.

8. *Id.* at 1255–56.

9. *Id.* at 1264.

10. *Id.* at 1258–59 (first quoting Complaint, *supra* note 1, at 18; and then quoting 16 C.F.R. § 312.2).

11. *Id.* at 1259 (quoting *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (Mar. 2015), https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions [https://perma.cc/BBL3-S5HH]; *see also* 16 C.F.R. § 312.5(b) (2022) ("Any method to obtain verifiable parental consent must be reasonably calculated, in light of available technology, to ensure that the person providing consent is the child's parent.").

12. *Balderas*, 489 F. Supp. 3d at 1260.

"get parental consent for users under the age of 18 to link their Google Workspace for Education accounts to a Google Assistant-enabled device" to be enabled.[13] New Mexico ultimately settled with Google and agreed to dismiss its appeal to the Tenth Circuit.[14]

While the *Balderas* suit was initiated before the COVID-19 pandemic, the pandemic made the underlying issue even more urgent as a shift to online education became inevitable.[15] With the COVID-19 pandemic, over 1.2 billion children around the world left the traditional classrooms,[16] many of which shifted to online learning in jurisdictions equipped with the necessary infrastructure. The online education market (EdTech) is predicted to reach $350 billion by 2025.[17]

This piece argues that there is a fundamental problem with relying on parental consent in protecting children's privacy. It is ill-suited as a matter of doctrine and policy and is traditionally disfavored under common law. COPPA was enacted in 1998, during a different era with simpler privacy concerns. In the era of EdTech and artificial-intelligence-enabled tools such as ChatGPT,[18] and voice-and facial-recognition tools, parental consent can no longer meaningfully serve its traditional purpose of protecting the best interests of the child, particularly given the complexity of innovation and potential for breaches of privacy associated with EdTech services. As such, new privacy initiatives at the federal level should also not rely primarily on parental consent but instead offer privacy protection laws that limit the overreach of EdTech companies.

While this piece primarily examines the issue of minors' use of EdTech tools, the problem of relying on parental consent for minors' online activities

13. *Google Workspace for Education Core and Additional Services*, GOOGLE, https://support.google.com/a/answer/6356441?hl=en [https://perma.cc/3G6N-955L].

14. New Mexico *ex rel.* Balderas v. Google, LLC, No. 20-2172, 2021 WL 8650746, at *1 (10th Cir. Dec. 17, 2021).

15. *See* Barbara B. Lockee, Comment, *Online Education in the Post-COVID Era*, 4 NATURE ELECS. 5, 5 (2021) (discussing how the pandemic forced a shift to virtual learning).

16. Cathy Li & Farah Lalani, *The COVID-19 Pandemic Has Changed Education Forever. This Is How*, WORLD ECON. F. (Apr. 29, 2020), https://www.weforum.org/agenda/2020/04/coronavirus-education-global-covid19-online-digital-learning/ [https://perma.cc/9GVA-NGQS].

17. *Id.*

18. Enkelejda Kasneci, Kathrin Sessler, Stefan Küchemann, Maria Bannert, Daryna Dementieva, Frank Fischer, Urs Gasser, Georg Groh, Stephan Günnemann, Eyke Hüllermeier, Stephan Krusche, Gitta Kutyniok, Tilman Michaeli, Claudia Nerdel, Jürgen Pfeffer, Oleksandra Poquet, Michael Sailer, Albrecht Schmidt, Tina Seidel, Matthias Stadler, Jochen Weller, Jochen Kuhn, Gjergji Kasneci, *ChatGPT for Good? On Opportunities and Challenges of Large Language Models for Education*, EDARXIV PREPRINTS (Feb. 1, 2023), https://edarxiv.org/5er8f/ [https://perma.cc/N7VE-4VSS] (presenting the potential benefits and challenges of educational applications of large language models like ChatGPT—an emerging AI powered chatbot that OpenAI introduced in 2022).

and the use of Internet of Things (IOT)[19] reaches far beyond the educational realm. Today, across the internet from online gaming to other entertainment apps, companies rely on parental consent to offer their products and services to minors. All the while, parents themselves are not sufficiently aware of the potential harms of online activities and their technological complexities to be able to meaningfully consent to them on behalf of their children.

Many scholars have written on the importance of protecting children's privacy and the inadequacy of boilerplate waivers;[20] however, this work is unique in its approach by comparing parental online waivers to the historical tradition of parental waivers of liability for physical injuries found in the common law of torts. The analysis offered in this piece illustrates that although the law has historically relied on parents to protect the best interests of the child, courts have not been shy in striking down parental consent and waivers of liability for physical injuries of children caused while participating in recreational activities.

When courts deal with parental waivers of liability associated with school activities, they tend to rule in favor of the school and uphold the waiver. This apparent deference to schools does not impact the position that this piece takes. The crucial difference between the traditional status of schools and today's presence of EdTech in schools is the transactional nature of EdTech-related contracts. If courts uphold certain waivers in schools and in the nonprofit context, it is to protect these nonprofit institutions and insulate them from the heavy burdens of liability. However, EdTech contracts today are commercial and like recreational-activities waivers, which are disfavored by courts. Moreover, parents and schools tend to have a closer relationship than consumers do with manufacturers—parents regularly talk to teachers and administrators, serve on school boards, and volunteer. Further, parents, school officials, and teachers tend to live in the

19. Shancang Li, Li Da Xu, Shanshan Zhao, *The Internet of Things: A Survey*, 17 INF SYST FRONT 243, 243 (2015), https://doi.org/10.1007/s10796-014-9492-7 [https://perma.cc/D9KW-9YPF] ("[T]he Internet of things (IoT) is a things-connected network, where things are wirelessly connected via smart sensors.").

20. *See, e.g.*, Anita L. Allen, *Minor Distractions: Children, Privacy and E-Commerce*, 38 HOUS. L. REV. 751, 752–53 (2001) (discussing COPPA and the implications for parental autonomy and privacy law); Amy Rhoades, *Big Tech Makes Big Data Out of Your Child: The FERPA Loophole EdTech Exploits to Monetize Student Data*, 9 AM. U. BUS. L. REV. 445, 447–48 (2020) (arguing that EdTech avoids COPPA liability and violates students' privacy by mining data online); Kate Hamming, *A Dangerous Inheritance: A Child's Digital Identity*, 43 SEATTLE U. L. REV. 1033, 1048 (2020) (considering COPPA and the lack of federal laws to protect children's personal information privacy or provide children with remedies against their parents); Lauren A. Matecki, *Update: COPPA Is Ineffective Legislation! Next Steps for Protecting Youth Privacy Rights in the Social Networking Era*, 5 NW. J. L. & SOC. POL'Y 369, 370 (2010) (highlighting the shortcomings of COPPA in protecting children thirteen and over and noting the challenges with the rise of social networking).

same communities. It is thus understandable why courts would treat recreational activities waivers differently in a school setting and protect the school from liability. How waivers work in this setting does not tells us much about how they should work for distant business transactions between EdTech corporations and schools.

The transactional nature of EdTech activities, this piece argues, undermines the agency of the traditional role of the school echoed in tort cases and the patriarchal role of parents. COPPA's reliance on parental consent is therefore ill-suited to protect children's privacy from corporations that are working for profit. The fact that EdTech tools are also becoming a necessity for learning points to another reason why waivers should be discouraged. More broadly, parental consent is no longer an adequate form of minor protection for online activities. As such, Congress and state legislatures should take a stance regarding the protection of children's digital privacy and incorporate additional measures.[21] Until such legislative change happens, courts should be willing to rely on their own traditions of protecting the best interests of the child and strike down parental waivers in online settings when dealing with children above the age of thirteen and below the age of eighteen—the gap created by COPPA's limited scope protecting only children under the age of thirteen.

This piece proceeds in the following way: Part I discusses the current landscape of protective measures for children's online activities, including COPPA. Part II illustrates the courts' approach towards parental waivers of liability for physical injuries and the relevance of the courts' treatment of the doctrine of assumption of risk to the consent forms mandated by COPPA. Part III argues that the EdTech industry is different from the traditional role of schools and elaborates on why parental consent is no longer a sufficient tool for the legislative goal of protecting the best interests of the child. By studying two recent cases, Part III also addresses the concern with COPPA's possible preemption of the common law of torts. It argues that where apps and EdTech do acquire parental consent as a way of insulating themselves from liability for their activities with respect to children between the age of thirteen to eighteen, who are not within the scope of COPPA, courts should strike down those consent forms as against public policy and allow for common law privacy lawsuits until a stronger legislative measure is in place to protect minors' privacy online.

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21. In May 2022, the FTC announced its plan "to crack down" on educational technology companies that "illegally surveil" children learning online. Press Release, Fed. Trade Comm'n, FTC to Crack Down on Companies that Illegally Surveil Children Learning Online (May 19, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-crack-down-companies-illegally-surveil-children-learning-online [https://perma.cc/5JFS-8J4J].

I. Minors and Privacy: An Overview

Children, as consumers, shape an important aspect of the technological market, and their presence continues to be an inevitable part of the economy.[22] The American legislatures and the common law have historically protected children against threats to their safety.[23] But protecting privacy with emerging forms of surveillance is a new phenomenon. Looking at the early initiatives can be helpful to understand the evolution of privacy protection measures. The Watergate scandal, involving "illegal surveillance on opposition political parties and individuals," inspired the passage of the Federal Privacy Act of 1974.[24] Congress had relied on a report by the Department of Health, Education, and Welfare (HEW) to draft the Privacy Act of 1974.[25] The report, which also inspired the Fair Information Practice Principles, was "the first comprehensive study of the risks to privacy presented by the increasingly widespread use of electronic information technologies by organizations, replacing traditional paper-based systems of creation, storage, and retrieval of information."[26] The Act was "later modified by the Computer Matching and Privacy Protection Act of 1988."[27]

This expansion in legal protection of privacy was accompanied by the passage of the Family Educational Rights and Privacy Act (FERPA)[28] in 1974. FERPA limited the disclosure of educational records for students under the age of eighteen.[29] It vested parents with certain rights for the protection of such records.[30] As governments became more invested in studying the

22. Allen, *supra* note 20, at 754.

23. *See id.* at 755 (discussing "the drive to protect children from threats to their safety and moral development").

24. *Overview of the Privacy Act: 2020 Edition*, U.S. DEP'T OF JUST., https://www.justice.gov/opcl/overview-privacy-act-1974-2020-edition/introduction [https://perma.cc/N7K7-DHXL] (Oct. 4, 2022).

25. *Id.*

26. *Id.*

27. *Id.*

28. Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, tit. V, § 513, 88 Stat. 571 (codified as amended at 20 U.S.C. § 1232g).

29. *See* 20 U.S.C. § 1232g(b), (d) (prohibiting the funding of any program or educational agency or institution that engages in the practice of releasing educational records of students without the consent of their parents, and listing exceptions, and transferring the power to consent to the student at age eighteen).

30. *Id.*; *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html [https://perma.cc/A33L-RL76] (Aug. 25, 2021). Given new technologies, parental permission for the release of children's records can also include the disclosure of "images of students' faces or live footage of them to a company deploying a facial recognition system for the school." Lindsey Barrett, *Ban Facial Recognition Technologies for Children—and for Everyone Else*, 26 B.U. J. SCI. & TECH. L. 223, 273 (2020) (first citing 20 U.S.C. § 1232(g); and then citing 34 C.F.R. § 99.3 (2019)). "*Biometric record*, as

collection and use of personal information, HEW proposed a set of principles that later became "Fair Information Practices."[31] The HEW report identified five core principles of privacy protection: "(1) Notice/Awareness; (2) Choice/Consent; (3) Access/Participation; (4) Integrity/Security; and (5) Enforcement/Redress."[32]

Building on the Fair Information Practices, many stakeholders from different sectors, such as policy makers, educators, and parents, showed their support for the passage of COPPA in 1998.[33] COPPA required the FTC to issue regulations regarding children's online privacy,[34] which went into effect in 2000[35] and were drafted and passed against the backdrop of the notice and consent principals of the codes.

COPPA, as Professor Anita Allen states, "is indeed both privacy law and family law. COPPA is Internet privacy law, governing the commercial sector and the market for information. COPPA is also family law, governing young families in the combined interests of child welfare and parental autonomy."[36] COPPA is "a governmental effort to compel parental child protection in the best interests of children."[37]

The law traditionally protects those with limited capacity. For example, "infants and persons suffering from mental infirmity" are two protected classes in contract law.[38] Contracts that minors enter into are voidable, with

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used in the definition of *personally identifiable information*, means a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting." 34 C.F.R. § 99.3 (2019).

31. Pam Dixon, *A Brief Introduction to Fair Information Practices*, WORLD PRIV. F. (June 5, 2006), https://www.worldprivacyforum.org/2008/01/report-a-brief-introduction-to-fair-information-practices/ [https://perma.cc/2V58-3A4T]. In 1980, the Organization for Economic Co-operation and Development (OECD) also issued its privacy guidelines that influenced many countries in adopting similar principles (later updated in 2013). *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, OECD, https://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm [https://perma.cc/VCG2-X2NK] (2013).

32. FED. TRADE COMM'N, PRIVACY ONLINE: A REPORT TO CONGRESS 7 (1998) [hereinafter PRIVACY ONLINE], https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf [https://perma.cc/9KFF-SF6F].

33. Allen, *supra* note 20, at 752.

34. 15 U.S.C. § 6502(b)(1).

35. Children's Online Privacy Protection Rule, 16 C.F.R. pt. 312 (2000). The uses of the term COPPA throughout the piece refer to both the statute and the regulation.

36. Allen, *supra* note 20, at 753 (footnote omitted).

37. *Id.* at 771.

38. JOSEPH M. PERILLO, CONTRACTS 259 (7th ed. 2014). Generally, minors are referred to as "infants" in the legal literature. IAN AYRES & GREGORY KLASS, STUDIES IN CONTRACT LAW 468 (9th ed. 2017); PERILLO, *supra*, at 259–60.

a few exceptions.[39] The age of majority in common law had been twenty-one, though since 1970 most jurisdictions have adopted eighteen as the age of majority and thus as the age at which individuals have the capacity to contract.[40] These same laws also apply to children contracting in cyberspace.[41] However, COPPA stops short of protecting minors beyond the age of thirteen. According to COPPA, "'child' means an individual under the age of [thirteen]."[42]

COPPA's use of the age of thirteen as its cutoff point appears to be at odds with both the old common law tradition of recognizing twenty-one as the age of capacity and the modern law of recognizing the age of eighteen as the age of capacity. The FTC's "Frequently Asked Questions" for complying with COPPA take note of the limit of the age protection to the age of thirteen, yet it does not offer any reason for this choice.[43] Instead, it further refers the reader to a different set of guidance documents educating families on protecting themselves and their children from online hackers, threats, and scams,[44] but this publication addresses the possible victims, not the predators. To protect children under the age of thirteen, COPPA asks an operator to:

> (a) Provide notice on the Web site or online service of what information it collects from children, how it uses such information, and its disclosure practices for such information (§ 312.4(b));
>
> (b) Obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children (§ 312.5);
>
> (c) Provide a reasonable means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance (§ 312.6);
>
> (d) Not condition a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity (§ 312.7); and

39. PERILLO, *supra* note 38, at 259–60; *see* Casey v. Kastel, 142 N.E. 671, 673 (N.Y. 1924) (finding contract with a minor voidable, not void). For example, a minor is liable in quasi-contracts for necessities like a basic public school education. *See* PERILLO, *supra* note 38, at 271–72.

40. PERILLO, *supra* note 38, at 260.

41. *Id.* (citing A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009)).

42. 15 U.S.C. § 6501(1); *see also* 16 C.F.R. § 312.2 (2022) (same).

43. *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (July 2020), https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions [https://perma.cc/M672-RY3K]).

44. *Online Privacy and Security*, FED. TRADE COMM'N, https://consumer.ftc.gov/identity-theft-and-online-security/online-privacy-and-security [https://perma.cc/4WAN-PE27].

> (e) Establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children (§ 312.8).[45]

A look into the history and context of COPPA can shed light on why its approach falls short when applied to our modern society. COPAA was enacted at a time when the major concern was protecting kids from revealing personal information rather than companies collecting kids' user data.[46] As such, asking for the permission of a parent to control what a child may say to a third party made sense at the time. The vision, which supported protecting children's online privacy through parental consent, can be better understood in light of the privacy protection climate in 1998. Back then, children's access to internet websites was seen as a threat to minors who may recklessly reveal personal information online.[47] The 1998 FTC report to Congress in support of privacy protection for children noted:

> Traditionally, parents have instructed children to avoid speaking with strangers. The collecting or posting of personal information in chat rooms and on bulletin boards online runs contrary to that traditional safety message. Children are told by parents not to talk to strangers whom they meet on the street, but they are given a contrary message by Web sites that encourage them to interact with strangers in their homes via the Web. The dangers in the Web environment are heightened by the fact that children cannot determine whether they are dealing with another child or an adult posing as a child.[48]

This report helps capture the sentiment of the time and how parental control of online activities was viewed. Indeed, Google itself was only launched in 1998.[49] The privacy threats and data collection methods used today by corporations were not as pervasive, and many did not even exist yet. Today, with the advent of artificial intelligence tools, for example, children

45. 16 C.F.R. § 312.3(a)–(e) (2022).

46. *See* Allen, *supra* note 20, at 758 ("COPPA was enacted to curb the informational privacy loss that threatens families with young children.").

47. *Id.* (noting that COPPA was passed in light of studies citing risks to children, like "informational privacy losses, . . . exploitation by advertisers, accessibility to child sexual predators, and exposure to adult content . . . . The [legislative intent] was to make it more difficult for Web sites to collect personal information . . . without a parent's knowledge and consent").

48. PRIVACY ONLINE, *supra* note 32, at 5.

49. *From the Garage to the Googleplex*, GOOGLE, https://about.google/our-story/ [https://perma.cc/938D-5NZ6].

are facing new risks such as becoming subjects of facial recognition apps,[50] a technology that was not widespread in 1998.[51]

Slowly, the practice of collecting information became so pervasive that the FTC initiated a review in 2010 that resulted in COPPA's 2013 revisions.[52] The revisions were aimed at widening "the definition of children's personal information to include persistent identifiers such as cookies that track a child's activity online, as well as geolocation information, photos, videos, and audio recordings."[53] COPPA also updated its guidelines for businesses' compliance in 2017 to address new technologies associated with the internet of things (IoT), such as toys and other connected devices.[54]

The U.S. Congress has also been trying to catch up with the inadequacy of the current protective measures. There are several proposed bills in Congress aimed at expanding children's privacy protection measures. For example, the Children and Teens' Online Privacy Protection Act was introduced in the Senate in May 2021.[55] The bill extends COPPA privacy protections to minors, defined as someone between twelve and sixteen years old.[56] This bill continues with the tradition of requiring parental consent and does not change that framework.[57]

Another bill was introduced in the Senate in April 2021 called the Clean Slate for Kids Online Act of 2021.[58] The bill would amend COPPA "to give Americans the option to delete personal information collected by internet

50. S*ee generally* Barrett, *supra* note 30 (discussing threats and harms to children from facial recognition technology).

51. *See* Thorin Klosowski, *Facial Recognition Is Everywhere. Here's What We Can Do About It.*, N.Y. TIMES: WIRECUTTER (July 15, 2020), https://www.nytimes.com/wirecutter/blog/how-facial-recognition-works/ [https://perma.cc/FF77-T4NX] (stating facial recognition's first dramatic shift to the public stage came in 2001, when law enforcement used facial recognition technology on crowds at Super Bowl XXXV).

52. Press Release, Fed. Trade Comm'n, FTC Strengthens Kids' Privacy, Gives Parents Greater Control Over Their Information By Amending Children's Online Privacy Protection Rule (Dec. 19, 2012), https://www.ftc.gov/news-events/press-releases/2012/12/ftc-strengthens-kids-privacy-gives-parents-greater-control-over [https://perma.cc/9KHY-AKG6].

53. Press Release, Fed. Trade Comm'n, Revised Children's Online Privacy Protection Rule Goes Into Effect Today (July 1, 2013), https://www.ftc.gov/news-events/press-releases/2013/07/revised-childrens-online-privacy-protection-rule-goes-effect [https://perma.cc/Q63A-XURT].

54. Kristin Cohen & Peder Magee, *FTC Updates COPPA Compliance Plan for Business*, FED. TRADE COMM'N (June 21, 2017), https://www.ftc.gov/news-events/blogs/business-blog/2017/06/ftc-updates-coppa-compliance-plan-business [https://perma.cc/KU2C-ZFHQ].

55. S. 1628, 117th Cong. § 1 (2021).

56. *Id.* § 3(a)(19); *see, e.g.*, *id.* § 3(b)(1) (amending a heading to include minors in addition to children).

57. *Id.* § 3(a)(4), (b)(3).

58. The bill was also once introduced in 2018. Hamming, *supra* note 20, at 1048.

operators as a result of the person's internet activity prior to age [thirteen]."[59] This too does not change the parental consent approach.

A more ambitious bill presently under consideration in the U.S. Senate is called Kids Internet Design and Safety Act, or the KIDS Act.[60] The KIDS Act cites to advancements of technologies such as "[a]rtificial intelligence, machine learning, and other complex systems [that] are used to make continuous decisions about how online content for children can be personalized to increase engagement."[61] It features proposals to address damaging design features, amplification of harmful content, and manipulative marketing.[62]

At the state level, some lawmakers have also taken action. For example, in 2013, California enacted the Online Eraser Law that came into effect in January 2015.[63] The law extends certain cyber protection, most notably the right to erase one's content from a website,[64] to minors whom the law defines as persons "under the age of [eighteen]."[65] California also has also enacted "The California Age-Appropriate Design Code Act," which aims to further protect children's privacy by defining children as consumers "under the 18 years of age."[66]

However, COPPA contains an express preemption stating that: "No State or local government may impose any liability for commercial activities

59. S. 1423, 117th Cong. (2021).

60. S. 3411, 116th Cong. (2020).

61. *Id.* § 2.

62. Press Release, Ed Markey, U.S. Senator, Senators Markey and Blumenthal, Rep. Castor Reintroduce Legislation to Protect Children and Teens from Online Manipulation and Harm (Sept. 30, 2021), https://www.markey.senate.gov/news/press-releases/senators-markey-and-blumenthal-rep-castor-reintroduce-legislation-to-protect-children-and-teens-from-online-manipulation-and-harm [https://perma.cc/Z8JC-DBA3].

63. CAL. BUS. & PROF. CODE §§ 22580–22582 (West 2022); Thomas R. Burke, Deborah A. Adler, Ambika K. Doran & Tom Wyrwich, *California's "Online Eraser" Law for Minors to Take Effect Jan. 1, 2015*, DAVIS WRIGHT TREMAINE LLP (Nov. 17, 2014), https://www.dwt.com/insights/2014/11/californias-online-eraser-law-for-minors-to-take-e [https://perma.cc/J2RL-FV5S].

64. *Teens' Online Privacy*, CONSUMER FED'N OF CALIF., https://consumercal.org/about-cfc/cfc-education-foundation/what-should-i-know-about-privacy-policies-2/teen-online-privacy/ [https://perma.cc/3NQV-PCYT]. In October 2021, Google announced that it is possible for children below the age of eighteen or their parents to ask Google to remove their images, with exceptions for newsworthiness and public interest. *See Remove Images of Minors from Google Search Results*, GOOGLE, https://support.google.com/websearch/answer/10949130?hl=en [https://perma.cc/GJT9-TU4V]; s*ee also* James Vincent, *You Can Now Ask Google to Remove Images of Under-18s from Its Search Results*, THE VERGE (Oct. 27, 2021, 3:56 AM), https://www.theverge.com/2021/10/27/22748240/remove-images-google-search-results-under-18-request-how-to [https://perma.cc/A5EV-893Y].

65. CAL. BUS. & PROF. CODE § 22580(d) (West 2022).

66. CAL. CIV. CODE § 1798.99.30(b)(1) (West 2023). The law takes effect July 1, 2024. 2022 Cal. Legis. Serv. Ch. 320 (A.B. 2273) (West).

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."[67]

Several companies have also signed a 2020 pledge called the K-12 School Service Provider Pledge to Safeguard Student Privacy.[68] The Pledge states that "[s]chool service providers take responsibility to both support the effective use of student information and safeguard student privacy and information security."[69] As it spells out its commitment, it states that the signatories pledge "not [to] collect, maintain, use or share student personal information beyond that needed for authorized educational/school purposes, or as authorized by the parent/student."[70] However, by carving out an exception for collection when authorized by a parent, the Pledge creates the same boilerplate loophole that plagues COPPA.[71]

As this piece illustrates, minors are granted limited digital privacy protection in the United States, the core of which relies on the notice-and-parental-consent method. Today, however, protecting children's digital privacy *from* parents has become a burning issue. The phenomenon of "sharenting" has increasingly become a danger to children's privacy, personas, and digital identities.[72]

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67. 15 U.S.C. § 6502(d).

68. *K-12 School Service Provider Pledge to Safeguard Student Privacy*, STUDENT PRIV. PLEDGE, https://studentprivacypledge.org/wp-content/uploads/2020/04/Student-Privacy-Pledge-2-Pager.pdf [https://perma.cc/A5ZV-CK2X] [hereinafter *The Pledge*]; *see also* STUDENT PRIV. PLEDGE, https://studentprivacypledge.org [https://perma.cc/8DHF-Y37G] (counting 258 total 2020 Pledge signatories as of February 2023).

69. *The Pledge*, *supra* note 68.

70. *Id.*

71. The Pledge has other shortcomings too. For example, it carves out an exception for nonidentifiable student information without explaining the procedure of identification. *See id.* (defining "student personal information" as "personally *identifiable* information as well as other information when it is both collected and maintained on an individual level and is linked to personally identifiable information" (emphasis added)). The Electronic Frontier Foundation reports on this issue that "[w]hile the U.S. Department of Education has drafted guidance on data de-identification, the 2020 Pledge fails to define that term and thus fails to provide a standard for de-identification that provides some baseline privacy protection and that can be used to determine signatories' compliance with the Pledge." Sophia Cope, Jason Kelley & Bill Budington, *FPF's 2020 Student Privacy Pledge: New Pledge, Similar Problems*, ELEC. FRONTIER FOUND. (Sept. 28, 2021), https://www.eff.org/deeplinks/2021/09/fpfs-2020-student-privacy-pledge-new-pledge-similar-problems [https://perma.cc/ZR3F-45VF]. This is important as "[n]ot all de-identification processes provide adequate protection. For example, an edtech provider might build a student profile that contains sensitive student data and then simply replace that student's name with an ID number." *Id.*

72. *See, e.g.*, Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 843–44 (2017) (arguing that by sharing information about their child, parents create an "indelible digital footprint," which the child has no control over); Hamming, *supra* note 20, at 1048 (discussing how COPPA gives parents "the ultimate authority to make choices about their children's data privacy").

Companies, too, are ill-suited to be trusted with self-regulation for ensuring the safety of minors.[73] For example, in September 2021, a series of files reviewed by the *Wall Street Journal* revealed that Meta knew how harmful its Instagram platform was for teenage girls yet it failed to act.[74] In a Senate Committee on Commerce, Science, and Transportation hearing, the "Facebook Whistleblower" Frances Haugen elaborated in detail how "Facebook's products harm children" and Facebook "has repeatedly misled us about what its own research reveals about the safety of children."[75]

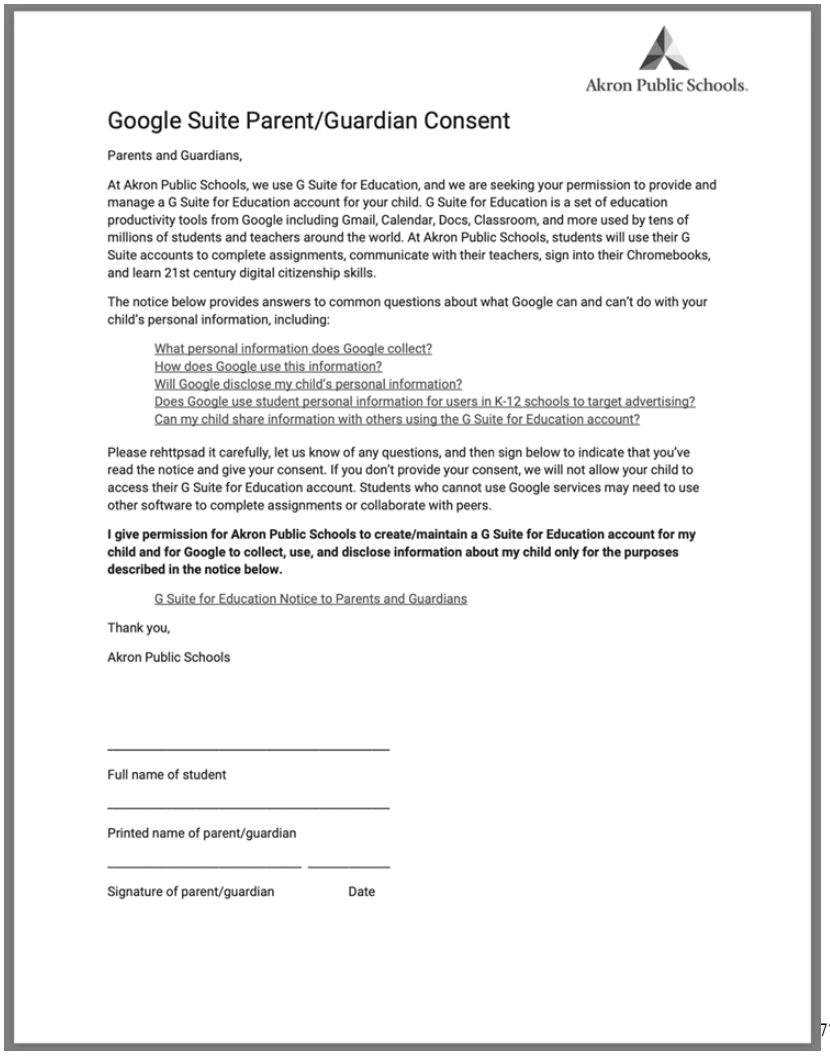
This underwhelming privacy protection for minors became a greater risk during the COVID-19 pandemic. The pandemic boosted the EdTech industry as over 1.2 billion children left the classroom for remote learning.[76] Consequently, parents who may not normally interact with their child's online activities, nor have children at schools which typically rely on EdTech tools, were given consent forms to sign. One example of the consent form that all EdTech services following COPPA rely on can be found here:

73. *See, e.g.*, Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021, 7:59 AM), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739 [https://perma.cc/7GL6-74Q2] (illustrating that despite having knowledge of the harmful effects Instagram has on teenage girls, Facebook has made little effort to remedy these effects and frequently downplays the issue in public).

74. *Id.*

75. *Protecting Kids Online: Testimony from a Facebook Whistleblower: Hearing Before the Subcomm. on Consumer Prot., Product Safety, and Data Sec.*, 117th Cong. 1–2 (2021) (statement of Frances Haugen), https://www.commerce.senate.gov/2021/10/protecting%20kids%20online:%20testimony%20from%20a%20facebook%20whistleblower [https://perma.cc/L8V4-Y5N3].

76. Li & Lalani, *supra* note 16.



Akron Public Schools.

Google Suite Parent/Guardian Consent

Parents and Guardians,

At Akron Public Schools, we use G Suite for Education, and we are seeking your permission to provide and manage a G Suite for Education account for your child. G Suite for Education is a set of education productivity tools from Google including Gmail, Calendar, Docs, Classroom, and more used by tens of millions of students and teachers around the world. At Akron Public Schools, students will use their G Suite accounts to complete assignments, communicate with their teachers, sign into their Chromebooks, and learn 21st century digital citizenship skills.

The notice below provides answers to common questions about what Google can and can't do with your child's personal information, including:

What personal information does Google collect?
How does Google use this information?
Will Google disclose my child's personal information?
Does Google use student personal information for users in K-12 schools to target advertising?
Can my child share information with others using the G Suite for Education account?

Please rehttpsad it carefully, let us know of any questions, and then sign below to indicate that you've read the notice and give your consent. If you don't provide your consent, we will not allow your child to access their G Suite for Education account. Students who cannot use Google services may need to use other software to complete assignments or collaborate with peers.

I give permission for Akron Public Schools to create/maintain a G Suite for Education account for my child and for Google to collect, use, and disclose information about my child only for the purposes described in the notice below.

G Suite for Education Notice to Parents and Guardians

Thank you,

Akron Public Schools

_____

Full name of student

_____

Printed name of parent/guardian

_____ _____

Signature of parent/guardian Date

[77]

Generally, the complexities of understanding waivers and consent forms have made standardized contracts a disfavored method of contracting among

77. *Google Suite Parent/Guardian Consent*, AKRON PUB. SCHS., https://cdn5-ss14.sharpschool.com/UserFiles/Servers/Server_409079/File/Google%20Suite%20Parent%20Guardian%20Consent%20rev1.pdf [https://perma.cc/DC9P-WUUC]. *See, e.g.*, *G Suite for Education Notice to Parents and Guardians*, SUSQUEHANNA VALLEY CENT. SCH. DIST., https://www.svsabers.org/GSuiteforEducationNoticeforParentsandGuardians.aspx [https://perma.cc/DZ9Q-NPDJ] (providing notice to parents of what student information is shared with Google); *Google Workspace for Education Terms of Service*, GOOGLE, https://workspace.google.com/intl/en/terms/education_terms.html [https://perma.cc/RZH9-SLK6] (Sept. 20, 2021) (describing the services G Suite supplies).

many legal scholars.[78] As it pertains to the online world, the new privacy harms waived in such forms or given consent to are far more complex. Many of the possible harms are difficult to predict and may not be obvious at the time of the activity. Privacy scholars Daniel Solove and Danielle Citron note:

> Privacy harms often not only involve a future risk of injury but also are compounded by an additional dimension of complexity: the range of possible future injuries is much more varied. To fully understand the implications of the collection, use, or disclosure of personal data, one must know about the future uses to which the data will be put.[79]

Moreover, privacy harms associated with data collection "are highly contextual, with the harm depending upon how the data is used, what data is involved, and how the data might be combined with other data. Sharing an innocuous piece of data with another company might provide a key link to other data or [enable] certain inferences."[80]

Relying on parental consent under COPPA could allow minors to access additional services such as "YouTube, Google Maps, and Blogger"[81] offered by EdTech companies and within the scope of signed consent forms. This further exasperates the potential for future harms. Today, the consent apparatus is no longer asking a parent whether to allow their children to talk to strangers;[82] it is asking parents to think of the best interests of the child and consent to activities for which it is nearly impossible to grasp what the potential harmful consequences may be. How can a parent use their judgment in deciding what is in the best interests of their child and make an informed choice when it may not even be clear what consequences the use of an application might have for their beloved child?

To provide the right framework of privacy protection for minors, it is illuminating to investigate the common law of torts and the doctrine of assumption of risk. As Part II illustrates, even for physical injuries that are

78. *See, e.g.*, MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 12 (2013) (arguing that even if people read standardized contracts, they would not understand them).

79. Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 817 (2022).

80. *Id.* at 818.

81. *See Google Workspace for Education Core and Additional Services*, GOOGLE, https://support.google.com/a/answer/6356441?hl=en [https://perma.cc/BU6S-MSVR] (allowing additional services such as "YouTube, Google Maps, and Blogger" to be added to Google Workspace for Education accounts).

82. *See* FUTURE OF PRIV. F., THE STATE OF PLAY: VERIFIABLE PARENTAL CONSENT AND COPPA 29 (2021), https://fpf.org/wp-content/uploads/2021/11/FPF-The-State-of-Play-Verifiable-Parental-Consent-and-COPPA.pdf [https://perma.cc/3ABF-VY86] (discussing that one of the original purposes of COPPA was to guard children from the risks of internet such as "contact with strangers").

much clearer in nature, courts have been reluctant to allow parents to waive their child's right to sue because many courts view such waivers to be at odds with what is in the best interests of the child.

II. Parental Waivers of Liability for Physical Injuries

A. To a Willing Person It Is Not a Wrong

The Latin maxim *volenti non fit injuria* (*volenti*) means "to a willing person it is not a wrong."[83] *Black's Law Dictionary* translates the phrase as "a person is not wronged by that to which he or she consents."[84] And it defines it as "[t]he principle that a person who knowingly and voluntarily risks danger cannot recover for any resulting injury."[85] The idea of *volenti* has been traced as far back as the times of Aristotle.[86] *Volenti* originated in the civil law tradition and was later incorporated into common law.[87] The maxim paved the way for our modern-day defense of assumption of risk.[88]

The Restatement (Third) of Torts has adopted the terms *contractual releases* and *contractual waivers of liability* to emphasize the contractual nature of such documents.[89] The "individualistic tendency of common law" was quick in picking up the defense.[90] Professor Francis Bohlen wrote on the popularity of the defense:

> Each individual is left free to work out his own destinies; he must not be interfered with from without, but in the absence of such interference he is held competent to protect himself. While therefore protecting him from external violence, from imposition and from coercion, the common law does not assume to protect him from the effects of his own personality and from the consequences of his voluntary actions or of his careless misconduct.[91]

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83. *Volenti non fit injuria*, BLACK'S LAW DICTIONARY (4th pocket ed. 2011).

84. *Id.*

85. *Id.*

86. *Volenti non fit injuria*, BLACK'S LAW DICTIONARY (10th ed. 2014) (quoting P.H. WINFIELD, A TEXT-BOOK OF THE LAW OF TORT § 13 (5th ed. 1950)).

87. *See* Charles Warren, Volenti Non Fit Injuria*, in Actions of Negligence*, 8 HARV. L. REV. 457, 461 (1895) (describing *volenti* as "borrowed from the old civil law").

88. *Id.* at 462 & nn.4–5 (citing as early uses of the maxim: Skipp v. Eastern Counties Ry. Co., (1853) 9 Exch. 223; then Assop v. Yates, (1858) 2 H. & N. 768; then Dynen v. Leach, (1857) 26 L. J. Exch. 221; and then Senior v. Ward, (1859) 1 E. & E. 385). An 1820 decision has been said to be the first major appearance of the defense. *Id.* at 462 (quoting Ilott v. Wilkes, (1820) 3 B. & Ald. 304, 311).

89. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. a (AM. L. INST. 2000) (explaining the decision to change the nomenclature from *express assumption of risk* to *contractual limitations on liability*).

90. Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 14 (1906).

91. *Id.*

The Industrial Revolution also welcomed contractual limitations on liability. Companies began using contracts to restrict their liability for physical injuries.[92] These contracts were beginning to raise concerns. For some, it would have been impossible to "contract upon anything approaching a fair footing of equality."[93] These concerns were first raised in services that were considered public goods, such as carriage of goods or carriage of passengers.[94] However, industrialization "required the recognition of affirmative duties of care, which constrained voluntary assumption of risk contracts."[95]

In the second half of the twentieth century, as modern notions of consumer protection emerged, courts began to entertain public policy objections to certain exculpatory contracts. One of the most prominent cases that dealt with the role of public policy in judging an exculpatory clause is *Tunkl v. Regents of the University of California*.[96] *Tunkl* involved a patient, who later passed away due to injuries incurred, signing the hospital's waiver form and later suing the hospital for negligence.[97] The court laid out a six-factor test in determining when public policy can overrule a contractual

92. *See* Zahra Takhshid, *Assumption of Risk in Consumer Contracts and the Distraction of Unconscionability*, 42 CARDOZO L. REV. 2183, 2197–2202 (2021) (collecting cases where companies disclaimed liability through exculpatory contracts).

93. Bohlen, *supra* note 90, at 22–23.

94. Emlin McClain, *Contractual Limitation of Liability for Negligence*, 28 HARV. L. REV. 550, 551–52 (1915).

95. Takhshid, *supra* note 92, at 2189.

96. 383 P.2d 441 (Cal. 1963).

97. *Id.* at 442.

release of liability.[98] This public policy test has now been widely adopted by many other states.[99]

Nevertheless, the scope of enforceability of waivers of liability continues to cause controversy.[100] The general attitude of U.S. courts is that waivers that tend to remove liability for physical injuries caused by gross negligence may be struck down.[101] However, while disfavored, waivers of liability concerning ordinary negligence are typically upheld, with some exceptions such as appearing to be against public policy or at times unconscionable to the court.[102] Nevertheless, courts have treated parental waivers of liability for children's injuries differently, and that is where this piece's analysis turns.[103] The contrast with parental authority in signing consent forms for children's digital privacy protections is illuminating.

B. Parental Waiver of Liability

Courts have not been consistent in their analysis of parental waivers concerning ordinary negligence and physical injuries for children versus those of adults. By contrast, most courts have held that waivers of potential

98. *Id.* at 444–46. Justice Tobriner spelled out six characteristics for transactions which courts have believed to involve public interest:

> It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Id. (footnotes omitted).

99. Takhshid, *supra* note 92, at 2192 & n.50 (first citing Morgan v. S. Cent. Bell Tel. Co., 466 So. 2d 107, 117 (Ala. 1985); then citing Banfield v. Louis, 589 So. 2d 441, 446 (Fla. Dist. Ct. App. 1991); then citing Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 758 P.2d 968, 971–72 (Wash. 1988) (en banc); and then citing Kyriazis v. Univ. of W. Va., 450 S.E.2d 649, 654–55 (W. Va. 1994)).

100. *See, e.g.*, Hila Keren, *Contract Law v. Tort Law*, CONTS. JOTWELL (May 19, 2021), https://contracts.jotwell.com/contract-law-v-tort-law/ [https://perma.cc/WQ6Y-XK3V] (explaining the "Hamlet-style dilemma" courts face in deciding whether to enforce exculpatory clauses).

101. *Cf.* Jones v. Dressel, 623 P.2d 370, 372 (Colo. 1981) (en banc) (upholding a waiver of liability where the plaintiff's injuries were due to the defendants' "simple negligence").

102. For a detailed analysis, see Takhshid, *supra* note 92, at 2185–86, 2197–2203.

103. *See infra* subpart II(B).

liability for gross negligence or recklessness are unenforceable.[104] Jurisdictions such as Colorado and Alaska have addressed the issue through legislation and allow for the enforceability of parental waivers.[105] In Colorado's case, the legislature took the initiative after the Supreme Court of Colorado invalidated a parental waiver in a case involving a minor becoming blind as a result of a ski accident.[106]

In jurisdictions where the legislature has not expressly affirmed or disaffirmed parental waivers of liability, courts' primary reasons for upholding parental waivers can be divided into three main categories: (1) parents are acting in the best interests of their children and courts will generally defer to the authority of parents to make such decisions; (2) cities benefit from children participating in recreational activities, and as a matter of public policy, states encourage such businesses, and they should be protected from the economic burden of potential liability lawsuits; and (3) when nonprofits and schools are involved, the reasonable approach is protecting such entities that benefit the community and children; otherwise, the financial toll on them would make it impossible for nonprofits and schools to offer their services.

For example, in *Sharon v. City of Newton*[107] in Massachusetts, which upholds parental waivers of their children's claims, a student whose parent had signed a waiver form was injured on the school's premises while practicing cheerleading.[108] In upholding the parental waiver, the court discussed parental authority and cited the Supreme Court case *Parham v. J.R.*,[109] which involved the question of the authority of a parent to admit their minor child into a mental health facility.[110] *Sharon* quoted *Parham*, stating "[t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."[111]

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104. Takhshid, *supra* note 92, at 2193.

105. COLO. REV. STAT. ANN. § 13-22-107(1)(a)(VI) (West 2022); ALASKA STAT. ANN. § 09.65.292(a) (West 2022).

106. *See* Cooper v. Aspen Skiing Co., 48 P.3d 1229, 1231–32 (Colo. 2002) (en banc) (holding that "the public policy of Colorado affords minors significant protections that preclude a parent or guardian from releasing a minor's own prospective claim for negligence"), *superseded by statute*, COLO. REV. STAT. ANN. § 13-22-107(1)(b) (West 2022) ("The general assembly . . . declares that the Colorado supreme court's holding in [Cooper v. Aspen Skiing Co.] has not been adopted by the general assembly and does not reflect the intent of the general assembly or the public policy of this state.").

107. 769 N.E.2d 738 (Mass. 2002).

108. *Id.* at 741.

109. 442 U.S. 584 (1979). *Sharon*, 769 N.E.2d at 746–47 (citing *Parham*, 442 U.S. at 602).

110. *Parham*, 442 U.S. at 587.

111. *Sharon*, 769 N.E.2d at 746 (quoting *Parham*, 442 U.S. at 602).

The court noted that "[t]o hold that releases of the type in question here are unenforceable would expose public schools, who offer many of the extracurricular sports opportunities available to children, to financial costs and risks that will inevitably lead to the reduction of those programs."[112]

Courts in other jurisdictions such as California,[113] Maryland,[114] and New Jersey,[115] have similar approaches in upholding parental waivers.[116] But it appears that these jurisdictions are in the minority and that most do not uphold parental waivers of children's claims for negligence.[117] This is particularly important when seen in contrast to waivers signed by adults. As previously discussed, most states *uphold* adult waivers for physical injuries

112. *Id.* at 747.

113. *See, e.g.*, Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647, 648–49 (Cal. Ct. App. 1990) (rejecting the plaintiff's arguments that a release signed by her and her parent was unenforceable as a matter of public policy, citing benefits to the public and parental authority to contract on behalf of children). *Cf.* City of Santa Barbara v. Superior Ct., 161 P.3d 1095, 1110, 1114 (Cal. 2007) (rejecting the defendants' argument that "failing to enforce agreements releasing liability for future *gross* negligence would imperil the very existence of sports and recreational industries" based on empirical data from other states where courts hold "unenforceable any release of liability for ordinary negligence").

114. *See, e.g.*, BJ's Wholesale Club, Inc. v. Rosen, 80 A.3d 345, 353, 359 (Md. 2013) (concluding that parental authority to sign an exculpatory clause on behalf of a minor child "was not a transaction affecting the public interest" that would invalidate the contract because of "clear societal expectations set forth in the law that parents should make decisions pertaining to their children's welfare").

115. *See, e.g.*, Hojnowski v. Vans Skate Park, 901 A.2d 381, 397 (N.J. 2006) (holding that "pre-tort waiver[s] entered into by a minor, or ratified by a parent on behalf of a minor, should be enforceable when a reviewing court or arbitrator determines that the waiver was reasonable").

116. For a full discussion, see Elisa Lintemuth, *Parental Rights v. Parens Patriae: Determining the Correct Limitations on the Validity of Pre-Injury Waivers Effectuated by Parents on Behalf of Minor Children*, 2010 MICH. ST. L. REV. 169.

117. One study conducted in 2014 showed that only eight states decisively enforced youth sport related releases. Alfred C. Yen & Matthew Gregas, *Liability Waivers and Participation Rates in Youth Sports: An Empirical Investigation*, 10 ARIZ. ST. SPORTS & ENT. L.J.1, 6 (2020). For an extensive list of authorities showing a majority of state courts invalidate parental waivers, see cases cited in Hawkins v. Peart, 37 P.3d 1062, 1065 (Utah 2001), *superseded by* UTAH CODE ANN. § 78B–4–203(2)(b) (West 2022), such as Fedor v. Mauwehu Council, Boy Scouts of Am., Inc., 143 A.2d 466, 467–68 (Conn. Super. Ct. 1958); Meyer v. Naperville Manner, Inc., 634 N.E.2d 411, 414–15 (Ill. App. Ct. 1994); Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 n.3 (Me. 1979); Childress v. Madison Cnty., 777 S.W.2d 1, 6–7 (Tenn. Ct. App. 1989); Munoz v. II Jaz Inc., 863 S.W.2d 207, 209–10 (Tex. App.—Houston [14th Dist.] 1993, no writ); and Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 10–12 (Wash. 1992); *see also* Galloway v. Iowa, 790 N.W.2d 252, 256 (Iowa 2010) (citing jurisdictions that have ruled parental waivers for minors are against public policy, including Apicella v. Valley Forge Mil. Acad. & Junior Coll., 630 F. Supp. 20, 24 (E.D. Pa. 1985); Kirton v. Fields, 997 So. 2d 349, 358 (Fla. 2008); *Hojnowski*, 901 A.2d at 386; and Rogers v. Donelson–Hermitage Chamber of Com., 807 S.W.2d 242, 245–46 (Tenn. Ct. App. 1990)); Johnson v. New River Scenic Whitewater Tours, Inc., 313 F. Supp. 2d 621, 632–33 (S.D. W. Va. 2004) (citing West Virginia's strong public policy of preserving familial peace and parental immunity as a reason for striking down parental waivers); Woodman v. Kera LLC, 785 N.W.2d 1, 2, 16 (Mich. 2010) (holding parental waivers unenforceable at common law and against public policy).

resulting from ordinary negligence, with exceptions for successful public policy or unconscionability defenses.[118]

In striking down parental waivers, courts consistently mention the importance of protecting the welfare of the child and "guard[ing] minors against improvident parents."[119] One court added maintaining the peace of family unions because otherwise "[i]f a parent could enter into a binding contract of indemnification regarding tort injuries to her minor child, the result would be that the child, for full vindication of his legal rights, would need to seek a recovery from his parent."[120] Courts have also cited to the *parens patriae* doctrine, by which a state may restrict parental control for a child's wellbeing.[121]

A closer look at parental waivers illustrates that courts also differentiate between recreational activities conducted in association with schools and those not connected to schools that are for commercial purposes only.[122] For example, the state of New Jersey, which typically upholds waivers of potential claims for negligence,[123] acknowledges that "different public policies apply for non-profit waivers."[124] One court, in striking down a parent's waiver, noted: "Although a minority of states have upheld a parent's pre-injury exculpatory agreement on behalf of a minor child, they have done so primarily on the basis that the defendant is a government or non-profit sponsor of the activity."[125] This view is also supported by statutes enacted to protect nonprofit organizations and public schools.[126]

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118. The author has extensively studied the issue and argued that this is the wrong approach; courts should instead strike down waivers for physical injuries, even for adults. *See generally* Takhshid, *supra* note 92 (discussing the issue of when courts should enforce liability waivers).

119. Brendan Sullivan, *Kentucky's Stance on Non-Profit, Parental Liability Waivers: How Everyone Can Profit from Their Enforceability*, 47 N. KY. L. REV. 75, 78 (2020).

120. *Johnson*, 313 F. Supp. 2d at 632.

121. Woodman v. Kera, LLC, 760 N.W.2d 641, 647 (Mich. Ct. App. 2008) (invalidating a parental waiver and noting that "the issue juxtaposes the inherent rights and fundamental authority of a parent to make determinations for his or her minor child pursuant to the Fourteenth Amendment against public-policy concerns and the state's authority in accordance with the doctrine of *parens patriae*").

122. Sullivan, *supra* note 119, at 78, 85 (noting that "[m]ost jurisdictions find for-profit, parental liability waivers unenforceable").

123. *See, e.g.*, Stelluti v. Casapenn Enters., 1 A.3d 678, 695 (N.J. 2010) (upholding a gym's waiver of liability for negligence).

124. Sullivan, *supra* note 119, at 76–82 (surveying all fifty U.S. states and citing Hojnowski v. Vans Skate Park, 901 A.2d 381, 388 (N.J. 2006)).

125. Harrigan v. New England Dragway, Inc., No. 13-10132, 2014 WL 12589625, at *7 (D. Mass. Jan. 2, 2014).

126. *See, e.g.*, MASS. GEN. LAWS. ANN. ch. 231, § 85V (West 2022) (shielding nonprofit volunteers in recreational sports from tort liability for ordinary negligence in the course of their duties).

It is important to take note of the underlying reasoning offered by courts in educational settings. Generally, such waivers, unlike those in commercial settings, are considered permissible because of the benefits that participation in school-related activities and sports provide for children.[127] One may argue that the same reasoning applies to student use of EdTech and the experiences they offer students. However, this analogy is flawed. These technologies are all on a spectrum with a mix of good and bad elements, like access to chatrooms, an additional service offered to students—and so they may not necessarily fall along the same lines and may be less positive.[128]

Moreover, the concern that schools may suffer undue financial burdens from potential lawsuits by minors does not exist in the EdTech setting. In the context of EdTech, the potential lawsuit would involve suing a commercial entity, a company that works for profit, puts its interest above all others, and competes to win access to schools in the first place. In many cases, companies like Google are also creating their EdTech products only as part of a much larger enterprise.[129] As such, it is important to distinguish EdTech from the

127. Yen & Gregas, *supra* note 117, at 3–4. A division of the California Court of Appeals also noted:

> The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of recreational and sports activities. Those options are steadily decreasing—victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. In this instance [the student] agreed to shoulder the risk. No public policy forbids the shifting of that burden.

Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647, 649 (Cal. Ct. App. 1990).

128. This excludes extreme sports and American football that studies have shown are greatly followed by physical damage and concussions. *See* Kimberly Hornbeck, Kevin Walter & Matthew Myrvik, *Should Potential Risk of Chronic Traumatic Encephalopathy Be Discussed with Young Athletes?*, AMA J. OF ETHICS (July 2017), https://journalofethics.ama-assn.org/article/should-potential-risk-chronic-traumatic-encephalopathy-be-discussed-young-athletes/2017-07 [https://perma.cc/ECZ9-WU8A] (discussing how healthcare professionals can help parents and children make informed decisions about participation in contact sports).

129. *E.g.*, *Google Cloud for Education Technology*, GOOGLE CLOUD, https://cloud.google.com/solutions/edtech [https://perma.cc/96JU-VVWG]; Daniel Mollenkamp, *Facebook Seems to Be Adding Video-Course Features. For Edtech, That Raises Old Fears*, EDSURGE (June 14, 2022), https://www.edsurge.com/news/2022-06-14-facebook-seems-to-be-adding-video-course-features-for-edtech-that-raises-old-fears [https://perma.cc/3FPX-GDKB]; Haje Jan Kamps, *Disney Accelerator Alum Miko Celebrates 140-Country Launch*, TECHCRUNCH (Aug. 22, 2022, 12:30 PM), https://techcrunch.com/2022/08/22/miko-disney-accelerator/ [https://perma.cc/QB5V-A259]

typical school setting by understanding the transactional and commercial nature of contracts between an EdTech company and the school.[130]

Indeed, companies compete to gain access to schools for both the short-term and, more importantly, long-term benefits that such participation offers them. Even when it appears to be a philanthropic action, technology companies at schools are "influencing the subjects that schools teach, the classroom tools that teachers choose and fundamental approaches to learning."[131] That is why the same line of public policy reasoning in protecting the school as an entity necessary for the best interests of the child no longer exists in connection with EdTech. There is no public policy that necessitates the promotion of commercial activity at the expense of children's privacy.

The foregoing analysis has shown that allowing EdTech companies to access and profit from children's data by a simple consent form signed by a parent is at odds with the common law tradition which invalidates parental waivers signed on behalf of minors. Part III provides an analysis of how these findings can play a role in protecting minors' privacy and deciding how to treat parental consent forms.

III. EdTech and Minor's Privacy Protection: A Way Forward

A. The Problem with Verifiable Parental Consent

COPPA lays out detailed instructions for mandatory notices and acquiring a verifiable parental consent. It mandates companies seek the required verifiable consent before "collection, use, and/or disclosure of personal information from and about children on the internet,"[132] and do so by, among other things, "provid[ing] notice on the Web site or online service of what information it collects from children, how it uses such information,

130. For example, section 2.5 of article 16 of Google Workspace for Education Terms of Service, which is available online and applicable to public education institutions in North America (except Brazil), states:

> 2.5 Delinquent Payments; Suspension. Late payments may bear interest at the rate of 1.5% per month (or the highest rate permitted by law, if less) from the payment due date until paid in full. Customer will be responsible for all reasonable expenses (including attorneys' fees) incurred by Google in collecting such delinquent amounts. Further, if Customer's payment for the Services is overdue, Google may Suspend the Services.

Google Workspace for Education Terms of Service, GOOGLE, https://workspace.google.com/intl/en/terms/education_terms.html [https://perma.cc/HK64-YLWT] (Nov. 7, 2022).

131. Natasha Singer, *The Silicon Valley Billionaires Remaking America's Schools*, N.Y. TIMES (June 6, 2017), https://www.nytimes.com/2017/06/06/technology/tech-billionaires-education-zuckerberg-facebook-hastings.html [https://perma.cc/TPN5-RLY8].

132. 16 C.F.R. §§ 312.1, 312.3 (2022).

and its disclosure practices for such information."[133] It further states that this notice of information practices "must be clearly and understandably written, complete, and must contain no unrelated, confusing, or contradictory materials."[134]

While COPPA might thus seem to be protective of privacy, scholars have questioned whether privacy notices of the sort on which it relies are actually protective. As the American Law Institute's Data Privacy project observes, "[t]he overwhelming majority of commentary, scholarship, and empirical evidence suggests that traditional notice does not work."[135] They are often "written with an eye to avoiding legal liability."[136] As such, COPPA's effort in using mandatory notice as a tool for children's privacy protection is not convincing. The ALI notes:

> As privacy notices are made easier to understand, they are often made less informative. An organization's various policies and practices regarding the protection of personal data can only be expressed in simple language to a certain point. Beyond that, a short and simplistic privacy notice will fail to convey meaningful information.[137]

Moreover, these guidelines on procedural aspects of consent forms typically show up in courts' decisions when dealing with the validity of an adult waiver of liability. However, as this work's previous discussion illustrated,[138] when a parental consent form is involved, courts are not so interested in how conspicuous or clear the waiver was—rather, the principal question is whether a parent waiving such a right is acting in the best interests of the child. COPPA's framework fails to capture that main problem with such consent and instead relies on the company to "[e]stablish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children."[139] Companies have repeatedly failed to prioritize confidentiality and security over their own interests.[140]

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133. *Id.* § 312.3(a).

134. *Id.* § 312.4(a).

135. PRINCIPLES OF THE L., DATA PRIVACY § 3 cmt. a (AM. L. INST. 2020).

136. *Id.*

137. *Id.* That is why the ALI suggests distinguishing between transparency statements that would serve as an oversight checklist for regulators, and individual notice that serves to provide information to the users.

138. *See supra* subpart II(B) and accompanying text.

139. 16 C.F.R. § 312.3(e) (2022).

140. *See, e.g.*, Wells et al., *supra* note 73 (discussing that Facebook is aware of significant mental health repercussions their apps can cause but has "made minimal efforts to address these issues and plays them down in public"); *see also* Lois Beckett, *Under Digital Surveillance: How American Schools Spy on Millions of Kids*, THE GUARDIAN (Oct. 22, 2019, 1:00 AM), https://www.theguardian.com/world/2019/oct/22/school-student-surveillance-bark-gaggle [https://perma.cc/

An example based on Google's forms will help illustrate these points. Google has drafted a question-and-answer document that is meant to address the concerns of parents signing their consent forms. It poses the question: Will Google disclose my child's personal information? The document then answers that:

> Google will not share personal information with companies, organizations and individuals outside of Google unless one of the following circumstances applies: **With parental or guardian consent.** Google will share personal information with companies, organizations or individuals outside of Google when it has parents' consent (for users below the age of consent), which may be obtained through G Suite for Education schools.[141]

It does not say how that consent is obtained neither defines the scope of the consent. The fact that Google can share a minor's personal information with companies outside of Google with parents' consent is a clear indication why it does not matter how simplified the consent form may be. Under this policy, Google will be allowed to share minors' personal information beyond what is necessary for the operation of the core of its educational services offered at schools. In other words, once Google, or any other EdTech company, has the precious "verifiable parental consent," it has a wide range of ways in which it can use and benefit from the data.

The heightened concern here is that the use of the application for a minor is not a matter of recreational activity such as with online games. EdTech is all about a minor's education. As discussed in the Introduction, using technology for learning purposes and remote education is no longer a luxury. After the pandemic, "at least several hundred of the nation's 13,000 school districts have established virtual schools this academic year, with an

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2FHE-T9GE] (noting how Gaggle, an AI-based privacy company that works with schools, has caused many privacy concerns); Mark Keierleber, *Exclusive Data: An Inside Look at the Spy Tech That Followed Kids Home for Remote Learning—and Now Won't Leave*, THE 74 (Sept. 14, 2021), https://www.the74million.org/article/gaggle-spy-tech-minneapolis-students-remote-learning/ [https://perma.cc/CP3H-BQWW] (elaborating on Gaggle's privacy concerns); Caroline Haskins, *Gaggle Knows Everything About Teens And Kids In School*, BUZZFEED NEWS (Nov. 1, 2019, 2:48 PM), https://www.buzzfeednews.com/article/carolinehaskins1/gaggle-school-surveillance-technology-education [https://perma.cc/6YPJ-9P83] (discussing Gaggle as one player in the "new economy of student surveillance").

141. *G Suite for Education Notice to Parents and Guardians*, GOOGLE, https://drive.google.com/file/d/1IqCTJxIJdAdyRWOCbwAwQHovAI519Czy/view [https://perma.cc/Q65D-PCSD]. *See, e.g.*, *G Suite for Education Parent/Guardian Consent Form 2021–2022*, OXFORD PUB. SCHS., https://content.myconnectsuite.com/api/documents/5226920cfa2b422aa59943e91db0a220.pdf [https://perma.cc/M532-N5M8] (illustrating an example of what a consent/release form for the use of G Suite at a school may look like).

eye to operating them for years to come."[142] With the rise of EdTech, schools have become consumers.[143] As one scholar notes: "[e]ducation technology not only can shift power, it can reframe education policy debates in subtle ways."[144] Hence, children's use of EdTech is a matter of necessity. And for issues of necessity, there is a consensus amongst various courts that even adult waivers of liability are invalid as violating public policy, let alone parental waivers.[145]

In addition, it is a heavy burden, even for those working in civic organization and nonprofits who study and monitor privacy compliance by EdTech, to access and understand school contracts and EdTech practices that may be undermining students' privacy. For example, in 2015 the American Civil Liberties Union (ACLU) conducted a study in Massachusetts in which they accessed schools' records through public record laws and compared their findings with the information that would be available to a parent online regarding children's privacy.[146] They observed the financial cost associated with accessing such records and noted:

> Newton [Public School District] demanded $5,834 to produce all but a few records; Lexington asked for approximately $2,200; and Waltham estimated the cost would be between $1,020 and $1,360, plus the cost of making copies. While we were interested to learn how these districts handle student privacy, we did not have the resources to meet these demands.[147]

142. Natasha Singer, *Online Schools Are Here to Stay, Even After the Pandemic*, N.Y. TIMES, https://www.nytimes.com/2021/04/11/technology/remote-learning-online-school.html [https://perma.cc/6WMA-6VUZ] (Apr. 14, 2021); *see also* Heather L. Schwartz, David Grant, Melissa Diliberti, Gerald P. Hunter & Claude Messan Setodji, *Remote Learning Is Here to Stay: Results from the First American School District Panel Survey*, RAND CORP. (2020), https://doi.org/10.7249/RRA956-1 [https://perma.cc/Y3SJ-WWTD] (observing that some districts anticipated that remote learning would be a permanent feature of students' education in the future).

143. *See* Chris Jay Hoofnagle, Adjunct Professor, UC Berkeley Sch. of Info. & Sch. of L., EdTech: Promise and Peril, Keynote Address at the Technology, Law and Privacy Conference: Privacy and Education in a Social Environment 4, 11 (June 10, 2016) (transcript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359205 [https://perma.cc/KAC5-ZTMH]) (noting that "[c]onsumers and school districts" spend billions of dollars when it comes to education technology in the hopes that teaching will be "more productive and efficient").

144. *Id.* at 15.

145. *See, e.g.*, Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 444–47 (Cal. 1963) (setting out the widely adopted six-factor public policy test). *See supra* note 99 and accompanying text.

146. KADE CROCKFORD & JESSIE J. ROSSMAN, ACLU FOUND. OF MASS., BACK TO THE DRAWING BOARD: STUDENT PRIVACY IN MASSACHUSETTS K-12 SCHOOLS 9 (2015), https://www.aclum.org/sites/default/files/wp-content/uploads/2015/10/back_to_the_drawing_board_report_large_file_size.pdf [https://perma.cc/76LJ-DXLV].

147. *Id.*

This example in Massachusetts illustrates how difficult it is in practice to learn and access the content of EdTech contracts and their practices.[148]

COPPA's emphasis on obtaining *verifiable* parental consent appears to only resolve the ongoing debate about data breach and data use by tech companies where an adult user can hardly be deemed to have consented to such use of their personal data. This is in part due to a lack of general data privacy protection in the United States. Today, U.S. law is also not "clear on when a consumer has effectively consented to an otherwise impermissible use of her information."[149] Therefore, COPPA's protection of relying on the ill-suited mechanism of parental consent does not effectively resolve the issue of the risks and potential harms associated with the collection of data from minors.

An additional important note here is the issue of public policy. As Part II's discussion of parental waivers of liability for physical injuries illustrated, in such cases, courts are not as much concerned with the procedure of how the consent form was signed,[150] as they are with whether signing such waivers is in the best interests of the child, whether striking down such waivers discourages recreational activities, and how and when to protect involved nonprofit organizations.

This piece addressed these concerns in Part II by emphasizing that most jurisdictions do not uphold parental waivers for children's personal injury. It noted that when courts uphold such waivers dealing with nonprofits and schools, they have a different set of concerns in mind (such as protecting these nonprofit institutions in the community). But those concerns do not apply in the present context, as the nature of the transaction between EdTech companies and the school is a commercial one and any liability should be placed on the company, not the school.[151]

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148. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 66, § 10 (West 2022) (establishing procedures for permitting inspection of public records, including associated fees). For more on how and if FERPA and the Freedom of Information Act (FOIA) can help in studying students' privacy, see Mark J. Sommaruga, *Student E-Mails, FERPA and FOIA: What School Districts Must Disclose (and When)?*, PULLMAN & COMLEY (Dec. 24, 2019), https://www.pullcom.com/education-law-notes/student-e-mails-ferpa-and-foia-what-school-districts-must-disclose-and-when [https://perma.cc/L8HG-DDDF].

149. Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REG. 45, 48 (2019).

150. *See supra* subpart II(B). This is distinct from cases analyzing adult waivers of liability where courts heavily consider the procedural aspects of a waiver such as size of font, visibility, etc. This is not to say that for parental waivers, courts do not consider conspicuousness of waivers at all. Rather, the main concern of most courts is the question of what is in the best interests of the child.

151. Companies may try to shift their COPPA compliance liability to the schools. Benjamin Herold, *COPPA and Schools: The (Other) Federal Student Privacy Law, Explained*,

Another point to highlight is the issue of necessary services and the role of the public policy defense.[152] Historically, courts have been reluctant to uphold waivers for services that share a public calling, such as communication tools (telegraph transmission companies), carriage of passengers and goods, innkeeping, and hospital care.[153] The Restatement (Second) of Torts notes:

> Where the defendant is a common carrier, an innkeeper, a public warehouseman, a public utility, or is otherwise charged with a duty of public service, and the agreement to assume the risk relates to the defendant's performance of any part of that duty, it is well settled that it will not be given effect. Having undertaken the duty to the public, which includes the obligation of reasonable care, such defendants are not free to rid themselves of their public obligation by contract, or by any other agreement.[154]

This is an important point as it relates to this piece's positions on EdTech. Education, too, is a public calling. While waivers of liability for physical injury are upheld in courts to protect schools as crucial community institutions, EdTech companies do not need the same protection. Since the COVID-19 pandemic necessitated the presence of EdTech providers, they have become more like hospitals—while communities need their services and thus need the private sector to invest, they cannot be allowed to insulate themselves by waivers of liability that take away parents' right to sue.[155]

In response, the EdTech industry may argue that parents do in fact have the option of not signing the consent form or of enforcing their rights in the future to review the data collected and refuse future use of such data.[156] However, given the reality of the education space, singling out their child as the only one not having their parents' permission to use the new EdTech tools

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EDUCATIONWEEK (July 28, 2017), https://www.edweek.org/technology/coppa-and-schools-the-other-federal-student-privacy-law-explained/2017/07 [https://perma.cc/9A7U-76CP]. Such action should be a red flag for any school when signing a contract.

152. *See* RESTATEMENT (SECOND) OF TORTS § 496B (AM. L. INST. 1965) ("A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.").

153. *See* McClain, *supra* note 94, at 551–52 (discussing the absolute liability rule for public carriers).

154. RESTATEMENT (SECOND) OF TORTS § 496B cmt. g (AM. L. INST. 1965).

155. Some scholars believe that hospitals should be able to use liability waivers to reduce the costs associated with healthcare. *See, e.g.*, RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 209 (2008).

156. 16 C.F.R. § 312.6(a)(1)–(2) (2022) (stating that online service providers must include a description of the types of personal information collected from the child and discontinue further use of or delete the personal information of the child at any time upon parental request).

in the classroom is not what any parent would want.[157] There is a "network effects" problem—parents have no meaningful option to withhold consent if access to the tech is for all practical purposes necessary for the child to participate in ordinary school activities. In such a situation, there is no meaningful choice.

Since the pandemic, it has also become functionally impossible not to sign such forms, since not consenting could at times mean no access to education. Therefore, instead of regulating the procedural aspect of the consent form, the legislature must address the substantive aspects of how to contain the reach of EdTech companies and limit their use of minors' data.

Those who favor the current consent-form approach of COPPA, and who may view the Act as paternalistic even in its current format,[158] may also argue that the Supreme Court's understanding of the Fourteenth Amendment's Due Process Clause has been to afford parents the "fundamental right . . . to make decisions concerning the care, custody, and control of their children."[159] This right extends to education, as the U.S. Supreme Court has held "it is the natural duty of the parent to give his children education."[160] Therefore, parents should have the right to allow their minors to use EdTech tools that may even undermine their privacy and potentially cause future dignitary harms.

But this reasoning is not warranted here. The consent form at issue here and the concern of breach of privacy this piece is advocating against do not bring in the question of a parent's right to shape their child's education. Rather, this piece voices the concern that the child's use of technology in school under the parental-consent apparatus puts the child's privacy rights at the mercy of a tech company. In the same way that parental waivers for physical injury have been barred by courts without violating a parent's right, here too Congress or state legislatures are in positions to intervene.

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157. Therefore, consenting does not mean understanding or making an informed choice. The Future of Privacy Forum conducted a study in 2015 "to gain a better understanding of what public school parents actually know and want concerning the use of technology and collection of data in their child's school, as well as their perspectives on the benefits and risks of student data use within the educational system." FUTURE OF PRIV. F., BEYOND THE FEAR FACTOR: PARENTAL SUPPORT FOR TECHNOLOGY AND DATA USE IN SCHOOLS 12 (2015), https://fpf.org/wp-content/uploads/2015/11/Beyond-the-Fear-Factor_Sept2015.pdf [https://perma.cc/L6YU-5Z62]. The study found that 87% of parents worry that "[t]heir child's electronic education record could be hacked or stolen." *Id.*

158. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 893–94 (6th ed. 2018).

159. Troxel v. Granville, 530 U.S. 57, 66 (2000) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

160. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

Moreover, the constitutional rights in question are rights designed to ensure that the government does not interfere unduly with parental choices about how to raise one's children. It is not concerned with the rights that parents or children have in relation to those whose services they purchase. A court's denial to a parent of the effective ability to sign a waiver on behalf of the child does not meaningfully interfere with any parental right to shape the child's education. It is just that the parent cannot decide to waive the child's right to sue.

Indeed, one may argue that COPPA has already taken steps to regulate the content of the contract a parent may sign in reliance on the *parens patriae* doctrine. The protection offered is not enough and Congress should go one step further by, for example, regulating EdTech companies directly rather than exonerating itself from its duty to protect minors by requiring a consent form.

Moreover, as previously explained,[161] with the ambiguity of the risks and harms associated with EdTech companies' collection of minors' data, the parent is also not in reality able to make an informed choice. Common Sense Media, a U.S.-based nonprofit organization that has been studying children's privacy for several years,[162] issued its latest report for 2021. One of its key findings was that despite the progress made in the past years for more transparency in privacy policies, making an informed choice continues to be a major concern for consumers and parents.[163]

Additionally, choosing the EdTech company involved with the school is typically not a choice that the parent makes. Rather, the parent is given the consent form based on the school's selection and choice of the EdTech company. Even though we can imagine scenarios in which a parent chooses a school specifically for the technology services it offers students, that is not the case for most people who must enroll their children in public schools and are given such forms on a take-it-or-leave-it basis.

It is important to also note that parents might be more likely to sign any EdTech school waiver since they are already trusting the school with their child's physical presence every day. If they are trusting an institution with their child, why would they hesitate to trust them with their child's data? This

161. *See supra* subpart II(A).

162. *State of Kids' Privacy Report 2021*, COMMON SENSE MEDIA (Nov. 16, 2021), https://www.commonsensemedia.org/research/state-of-kids-privacy-2021 [https://perma.cc/SCC8-NS5A].

163. COMMON SENSE MEDIA, STATE OF KIDS' PRIVACY: KEY FINDINGS 5 (2021), https://www.commonsensemedia.org/sites/default/files/research/report/common-sense-2021-state-of-kids-privacy-key-findings.pdf [https://perma.cc/ZGC9-AZ4Z]. For the full report, see GIRARD KELLY, JEFF GRAHAM, JILL BRONFMAN & STEVE GARTON, COMMON SENSE, STATE OF KIDS' PRIVACY (2021), https://www.commonsensemedia.org/sites/default/files/research/report/common-sense-2021-state-of-kids-privacy.pdf [https://perma.cc/JR95-KVU9].

is another reason why intervention and oversight rather than relying on parental consent is necessary.

Similar concerns have been raised in a dissenting opinion in a dispute about the validity of a parental waiver for a public school's YMCA summer program that resulted in a near-drowning accident. In *Hillerson v. Bismarck Public Schools*[164] the trial court issued summary judgment upholding the waiver, but the Supreme Court of North Dakota reversed based on ambiguity concerning the waiver that raised an issue concerning the intent of the signing party.[165] The dissent wrote in favor of invalidating the waiver based on public policy even though it concerned a public school's summer program.[166]

The dissent argued that the summer program was an essential service subject to public regulation, and presenting a waiver of a child's rights to their parents under the circumstances of this case was against public policy and "contrary to good morals."[167] There was disparate bargaining power between the parents and the organizations running the summer program; there was no negotiation, the children were admitted to the program on full scholarship, and the family had no choice but to sign the waiver or go without summer childcare due to their income.[168]

Moreover, COPPA currently does not even give the parents a private right of action. The FTC's implementing regulations state: "the FTC has authority to enforce violations of such rules by seeking penalties or equitable relief. COPPA also authorizes state attorneys general to enforce violations affecting residents of their states."[169] Therefore, by neither expressly granting parents a private right of action nor conveying any criminal liability, COPPA seems to be carving out apparent control for parents over their child's data without actually offering the protection a minor deserves in using essential EdTech services.

New legislative initiatives should consider regulation that would move away from the centrality of ineffective parental consent. There may be concerns that with such protective regulations EdTech companies will lose incentive to provide such services just as they are becoming necessary for children's education. This objection is without merit. EdTech companies are motivated by profit from their sales to schools and, more importantly, incentivized by building a generation accustomed to specific products that are likely to be used by students even beyond their school years. With tough

164. 840 N.W.2d 65 (N.D. 2013).

165. *Id.* at 72.

166. *Id.* at 72–73 (Maring, J., dissenting).

167. *Id.* at 77.

168. *Id.* (citing N.D. CENT. CODE ANN. § 9-08-01(3)).

169. STEPHEN P. MULLIGAN, WILSON C. FREEMAN & CHRIS D. LINEBAUGH, CONG. RSCH. SERV., R45631, DATA PROTECTION LAW: AN OVERVIEW 25 (2019) (footnote omitted).

regulation, companies will be competing for a spot at schools by promoting their top-notch privacy-protection tools rather than distracting apps and colorful games.

B. Preemption and Privacy Torts

Until new legislative initiatives take place, parents may wonder how to react to alleged violations of minors' privacy. While COPPA has not created a private right of action, common law privacy torts appear to continue to remain an option outside of COPPA. In recent years, lawsuits relying on common law privacy torts have been filed against companies for their data collection practices and breaches of privacy.[170] While scholars have proposed new torts for digital privacy harms,[171] the four traditional common law privacy torts relied on today were first categorized by Dean Prosser as:

> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[172]

Understanding and using common law privacy torts are even more important after the U.S. Supreme Court decision in *TransUnion LLC v. Ramirez*.[173] In *TransUnion*, the Court concluded that, to have Article III standing (concrete injury-in-fact) for data privacy claims, plaintiffs must show a common law analogous harm.[174] The case created a new challenge to showing injury-in-fact to sue for data and privacy rights violation.[175] Despite the unpopularity of the decision amongst some privacy scholars,[176] the

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170. For example, the New Mexico attorney general is also inserting the claim of intrusion upon seclusion. For an overview of the four privacy torts, see generally Zahra Takhshid, *Retrievable Images on Social Media Platforms: A Call for a New Privacy Tort*, 68 BUFF. L. REV. 139 (2020).

171. *See, e.g.*, *id.* at 144, 146–48 (arguing for the creation of a new tort to "further promote privacy in public spaces, foster responsible behavior among social media users, and compensate the injured"); *see also* Sarah Ludington, *Reining in the Data Traders: A Tort for the Misuse of Personal Information*, 66 MD. L. REV. 140, 146 (2006) (arguing for a new common law tort that will remedy injury by data misuse). For a look into the shortcomings of privacy torts, see Neil M. Richards, *The Limits of Tort Privacy*, 9 J. ON TELECOMM. & HIGH TECH. L. 357, 361 (2011) and Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1889 (2010).

172. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

173. 141 S. Ct. 2190 (2021).

174. *Id.* at 2204.

175. *See* Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62, 64 (2021) ("The Court sums up current standing doctrine with a slogan: 'No concrete harm, no standing.'").

176. *See, e.g.*, *id.* at 62 (contending that "*TransUnion* is wrong and troubling on many levels").

approach in this piece is well in line with the Supreme Court's decision noting that plaintiffs must identify a close historical or common law analogue for their asserted privacy injury.[177] A set of common law analogues for privacy harms is found in privacy torts.

The most common tort that is used in digital-privacy-related lawsuits appears to be the tort of intrusion upon seclusion.[178] Regarding this tort, the Restatement (Second) of Torts states, "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[179] Under this tort, a showing of reasonable expectation of privacy and highly offensive behavior, albeit a data practice, may be sufficient to argue that data collection and their procedures involving surveillance satisfy the requirements for this civil wrong.[180]

A challenge with using this tort is the defense of consent.[181] If a user is deemed to have consented to surveillance and the use of their data, the user can no longer move forward with this tort. That is where the question of effective consent comes into play for both adults and minors. If a parent's consent form is ruled as against public policy in an EdTech-related case, as this piece argues it should be, then a minor's action for damages, whether

177. *See supra* note 174 and accompanying text.

178. For examples of data- and privacy-related lawsuits asserting, among others, the tort of intrusion upon seclusion, see *In re* Google Inc. Cookie Placement Consumer Priv. Litig., 806 F.3d 125, 133 (3d Cir. 2015); *In re* Facebook, Inc. Internet Tracking Litig., 956 F.3d 589, 597 (9th Cir. 2020); Balderas v. Google, LLC, 489 F. Supp. 3d 1254, 1256 (D.N.M. 2020); *In re* Nickelodeon Consumer Priv. Litig., 827 F.3d 262, 267 (3d Cir. 2016); and Hubbard v. Google LLC, 546 F. Supp. 3d 986 (N.D. Cal. 2021), *appeal docketed sub. nom*. Jones v. Google LLC, No. 21-16281 (9th Cir. Aug. 5, 2021). In a forthcoming Article, I argue that the best tort for lawsuits associated with the unauthorized collection and distribution of personally identifiable information is the tort of appropriation of likeness. I argue that our personal data is the modern version of our identity and persona. The tort which has historically evolved to include personal attributes, such as voice, should now recognize digital persona and count PII as a protected category. Zahra Takhshid, *Data as Likeness*, 8–9 (Sept. 5, 2022) forthcoming the Georgetown Law Journal, (unpublished manuscript), https://ssrn.com/abstract=4210660 [https://perma.cc/7YY4-UR52].

179. RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

180. An additional requirement for this tort is a reasonable expectation of privacy. Given the default online data practices requiring only minimum privacy, whether users have a reasonable expectation of privacy when using online services remains an open question. Contrarily, one might argue that regardless of a privacy policy's provisions, the existence of the privacy policy itself can support a user's reasonable expectation of privacy, even if the user has not read the policy.

181. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 331 (Dennis Patterson ed., 2010) (noting that the affirmative defense of consent applies to all privacy torts).

brought by a guardian or by the minor after reaching the age of competency, may move forward.[182]

But has COPPA ruled out lawsuits for state common law privacy? The law states: "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."[183] However, courts have not been consistent in barring privacy claims.

In *In re Nickelodeon Consumer Privacy Litigation*,[184] minors under the age of thirteen brought a class action against Viacom, the company that owns the children's television station Nickelodeon and operates Nick.com,[185] and Google, alleging that they had "unlawfully used cookies to track children's web browsing and video-watching habits on Viacom's websites."[186] They brought their action based on several legal grounds, including the common law privacy tort of intrusion upon seclusion.[187] Plaintiffs alleged that Google and Viacom had collected various minors' personally identifiable information in order to sell targeted advertisements.[188] The Third Circuit affirmed the district court's dismissal of all claims except the plaintiffs' claim against Viacom for intrusion upon seclusion and remanded the intrusion claim for further proceedings.[189]

In reaching this decision, the Third Circuit first stated that the general presumption is against preemption.[190] It noted that "when federal laws have preemptive effect in some contexts, states generally retain their right 'to

182. There should be no limitation for such suit for children between the ages of thirteen and eighteen who have not been a protected category by COPPA. The ambiguity here applies to children under the age of thirteen whose parents have allegedly authorized the use of their PII.

183. 15 U.S.C. § 6502(d).

184. 827 F.3d 262 (3d Cir. 2016).

185. *Id.* at 268.

186. *Id.* at 269.

187. The claims included violations of the Video Privacy Protection Act, the Wiretap Act, the Stored Communications Act, and the California Invasion of Privacy Act, among others. *Id.* at 272, 278.

188. The alleged information included:

> (1) the child's username/alias; (2) the child's gender; (3) the child's birthdate; (4) the child's IP address; (5) the child's browser settings; (6) the child's unique device identifier; (7) the child's operating system; (8) the child's screen resolution; (9) the child's browser version; (10) the child's web communications, including but not limited to detailed URL requests and video materials requested and obtained from Viacom's children's websites; and (11) the DoubleClick persistent cookie identifiers.

Id. at 269.

189. *Id.* at 295.

190. *Id.* at 291.

provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements.'"[191] Since COPPA was silent on this issue, despite authorizing the FTC and attorneys general on matters of enforcement, the presumption should be against preemption.

The court further reasoned that the intrusion upon seclusion claim in this case was not inconsistent with COPPA. It stated:

> In our view, the wrong at the heart of the plaintiffs' intrusion claim is not that Viacom and Google *collected* children's personal information, or even that they *disclosed* it. Rather, it is that Viacom created an expectation of privacy on its websites and then obtained the plaintiffs' personal information under false pretenses. Understood this way, there is no conflict between the plaintiffs' intrusion claim and COPPA. While COPPA certainly regulates whether personal information can be collected from children in the first instance, it says nothing about whether such information can be collected using deceitful tactics. Applying the presumption against preemption, we conclude that COPPA leaves the states free to police this kind of deceptive conduct.[192]

Although the parties reached a $1.1 million settlement,[193] this important 2016 decision shows a way forward for common law privacy tort claims despite COPPA.

The scope and reach of *In re Nickelodeon* are, however, open to interpretation. In a different case, a federal district court in California ruled in 2021 that COPPA preempts common law causes of action. In *Hubbard v. Google LLC*,[194] minor plaintiffs brought a class action by and through their guardian *ad litem* against Google and YouTube (collectively, Google) alleging that Google had "unlawfully violated the right to privacy and reasonable expectation of privacy of their children, who are all under thirteen years of age."[195] Plaintiffs alleged that Google "did its tracking, profiling, and targeting of children while feigning compliance with applicable federal and state laws."[196] They further alleged that Google "tracked and collected the personal information of children under the allegedly false pretense that Google would be 'transparent' with parents about what information was

191. *Id.* at 291–92 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 495 (1996)).

192. *Id.* at 292.

193. Jesse M. Brody, *Parents Sue TikTok for COPPA Violations, Settle for $1.1M*, MANATT (Dec. 17, 2019), https://www.manatt.com/insights/newsletters/advertising-law/parents-sue-tiktok-for-coppa-violations-settle [https://perma.cc/L4WE-6VRU].

194. Hubbard v. Google LLC, 546 F. Supp. 3d 986 (N.D. Cal. 2021), *appeal docketed sub. nom*. Jones v. Google LLC, No. 21-16281 (9th Cir. Aug. 5, 2021).

195. *Id.* at 987–88.

196. *Id.* at 990.

being collected from child viewers and compliant with applicable legal requirements and prohibitions, including COPPA."[197]

The allegations included a wide range of causes of actions, including state privacy laws, consumer protections laws, unjust enrichment, and the tort of intrusion upon seclusion.[198] Defendant, on the other hand, brought a motion to dismiss "on several grounds, with preemption as a threshold issue."[199] The court sided with Google. The court noted that, based on a prior decision, since Congress did not expressly create a private right of action in COPPA, "the plain text of the statute clearly indicates Congress's desire to expressly preempt Plaintiffs' state law claims."[200] Because all the plaintiffs were under the age of thirteen, the alleged conduct is covered and preempted by COPPA.[201]

But plaintiffs argued that the court should follow *In re Nickelodeon Consumer Privacy Litigation* and rule that plaintiffs had sufficiently alleged deceptive conduct that goes beyond what is covered by COPPA.[202] The court disagreed, ruling that "Plaintiffs have not adequately alleged deceptive conduct that places Defendants' behavior outside of what is regulated by COPPA."[203] Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit.[204] In December 28, 2022, the Ninth Circuit panel issued its opinion reversing the district court's dismissal on preemption grounds.[205] The court held that "it would be nonsensical to assume Congress intended to simultaneously preclude all state remedies for violations of those laws. If exercising state-law remedies does not stand as an obstacle to COPPA in purpose or effect, then those remedies are treatments consistent with COPPA."[206] This holding opens the possibility of lawsuit by minors based on state-law remedies, including common law of torts, despite the COPPA regime.

Moreover, a group of minors continues to remain unprotected as COPPA only applies to minors below the age of thirteen. As previously noted, the age limit is inconsistent with the common law protection that declares contracts of minors below the age of eighteen voidable, and in

197. *Id.* Other allegations included deception on the part of Google through the creation of YouTube Kids. *Id.*

198. *Id.* at 990–91.

199. *Id.* at 991.

200. *Id.*

201. *See supra* note 45 and accompanying text.

202. *Hubbard*, 546 F. Supp. 3d at 991.

203. *Id.* at 994.

204. Jones v. Google LLC, No. 21-16281 (9th Cir. appeal docketed Aug. 5, 2021).

205. Jones v. Google LLC, 56 F.4th 735 (9th Cir. 2022).

206. *Id.* at 741.

certain circumstances, void.[207] Nevertheless, although not required by COPPA, companies may ask for parental waivers to insulate themselves from potential liability for kids between the ages of thirteen to eighteen.[208] In such cases, given this piece's analysis of waivers of liability, courts should view EdTech as a commercial player engaged in a commercial activity and invalidate the consent and waiver forms.[209] Therefore, where common law privacy harms such as intrusion upon seclusion or appropriation of likeness can be associated with certain activities of an EdTech company or, more broadly, a company that is active in the children's digital-economy landscape, parental waivers of liability for privacy harms should be invalidated as working against the best interests of the child.

Conclusion

Interaction with the EdTech industry has increasingly become part of parents' and students' lives. However, the current legal protections fall short in protecting minors' digital privacy. COPPA relies on parental consent for the protection of minors' digital privacy. This piece argued that relying on parental consent forms to protect children's digital privacy is inadequate and ill-suited. By comparing the privacy-protection apparatus to parental waivers for minors' physical injuries in torts, this work illustrated that waivers are disliked by courts—and in physical settings, most jurisdictions do not uphold parental waivers. In most cases when courts do uphold waivers, such waivers are associated with schools and nonprofit activities that are understood as noncommercial activities. Nevertheless, the EdTech industry is a for-profit industry, albeit one operating at schools, and the contracts between the school and the EdTech companies are of a commercial nature. With the emergence of the COVID-19 pandemic, the EdTech industry has further become a necessary medium for acquiring education for many children, which underscores the public policy defense that necessitates stepping away from insufficient parental consent forms.

207. RESTATEMENT (SECOND) OF CONTRACTS § 12 cmts.(a)–(b) (AM. L. INST. 1981).

208. California has also enacted "the California Age-Appropriate Design Code Act," which defines children as consumers "under the 18 years of age." *See supra* note 66 and accompanying text.

209. "[I]n 2014, the FTC filed an amicus brief with the Ninth Circuit disagreeing with a district court's ruling that COPPA displaces state laws that regulate the privacy of children over 13 years of age, a position that was later adopted by the appellate court." Brody, *supra* note 193.

This important and one-of-a-kind common law analysis reinforced the need to move away from frameworks that seek to protect children's digital privacy by relying on notice and parental consent forms and instead advocated for the adoption of positive law to protect children's digital privacy. Finally, this piece also illuminated a narrow way to bring lawsuits for digital privacy harms based on common law privacy torts.