Docket No. 25-5438

In the

United States Court of Appeals

For the

Ninth Circuit

JASMINE HERNANDEZ-SILVA and MICHAEL SILVA, on behalf of their minor children M.C. 1 and M.C. 2; HEIDI SAAS, on behalf of her minor child M.C. 3; JULIANNA LORENZEN, on behalf of her minor children M.C. 4 and M.C. 5; individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

INSTRUCTURE, INC.,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Central District of California, No. 2:25-cv-02711-SB-MAA · Honorable Stanley Blumenfeld, Jr.

APPELLANTS' OPENING BRIEF

JULIE U. LIDDELL
EDTECH LAW CENTER PLLC
904 Rio Grande Street, Suite 100
Austin, TX 78701
(737) 351-5855
julie.liddell@edtech.law

BRANDON M. WISE
PEIFFER WOLF CARR KANE
CONWAY & WISE LLP
One US Bank Plaza, Suite 1950
St. Louis, MO 63101
(314) 833-4827
bwise@peifferwolf.com

LORI G. FELDMAN
GEORGE FELDMAN MCDONALD, PLLC
102 Half Moon Bay Drive
Croton-on-Hudson, NY 10520
(917) 983-9321
LFeldman@4-Justice.com

KAREN DAHLBERG O'CONNELL
ALMEIDA LAW GROUP LLC
157 Columbus Ave, 4th Floor
New York, NY 10023
(347) 395-5666
karen@almeidalawgroup.com

Attorneys for Appellants Jasmine Hernandez-Silva, Michael Silva, M.C. 1, M.C. 2, Heidi Saas, M.C. 3, Julianna Lorenzen, M.C. 4 and M.C. 5

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INTRODUCTION

Under the guise of providing educational technology, Instructure, Inc. ("Instructure") collects and monetizes the personal information of schoolchildren across the country without effective consent. Plaintiffs are K–12 students required to use Instructure's Canvas Learning Management System ("Canvas") as part of their compulsory education. Plaintiffs allege that Instructure harvests vast troves of students' personal information and use that data for commercial purposes. Plaintiffs claim that, in so doing, Instructure violates numerous state and federal laws, particularly those that afford heightened protection to children.

Instructure moved to dismiss Plaintiffs' First Amended Complaint ("FAC"), and the district court dismissed all nine of Plaintiffs' claims for failure to satisfy Rule 8. Plaintiffs appeal, arguing that the court misapplied governing pleading standards, improperly dismissed their Section 1983 claims on grounds not raised by Instructure, and misapplied the law governing state action. Plaintiffs respectfully request that this Court reverse the district court's order, vacate its judgment, and remand for further proceedings.

JURISDICTION

Plaintiffs filed suit on March 27, 2025, in the Central District of California under the Class Action Fairness Act of 2005 and filed an amended complaint on May 8, 2025. 2-ER-167; 28 U.S.C. § 1332(d)(2), (6). On August 14, 2025, the district court entered a final judgment dismissing the FAC with prejudice. 1-ER-2. On August 25, 2025, Plaintiffs timely appealed from the district court's order. 2-ER-288; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

(1) Did the district court misapply Rule 8 in assessing the adequacy of Plaintiffs' allegations supporting their:

- (a) use of Instructure's products;
- (b) claim under California Invasion of Privacy Act ("CIPA"), Cal. Penal Code §§ 631, 632;
- (c) claim under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*;
- (d) claim under California's Comprehensive Computer Data Access and Fraud Act ("CDAFA"), Cal. Penal Code § 502, *et seq.*;
- (e) common-law privacy claims; and
- (f) claim for unjust enrichment?

(2) Did the district court misapply the analytical framework for determining whether Plaintiffs' alleged facts showing state action under Section 1983?

(3) Should this Court decide whether Plaintiffs' allegations support the alleged constitutional violations that underpin their Section 1983 claims, and do they?

STATEMENT OF THE CASE

I. Plaintiffs allege that Instructure is a data-mining company posing as a provider of K–12 education technology.

As alleged in the FAC, Instructure contracts with schools and school districts to provide a host of services ranging from course management; assignment delivery and grading; communication between teachers, students, and parents; student-content delivery and management; and student-data analytics. 2-ER-178 at ¶ 41. Its core business, however, is generating, collecting, storing, analyzing, and disseminating student data. 2-ER-170, 178 at ¶¶ 2, 43–47.

Plaintiffs are students whose schools use Instructure's flagship product Canvas, a cloud-based learning management system ("LMS") that serves as a central hub for classrooms by integrating course materials, assignments, and communication tools into a single platform. 2-ER-174, 178, 179 at ¶¶ 17, 18, 21, 23, 24, 41, 52. Canvas is one of the most commonly used LMS systems in the U.S. and is used by millions of K–12 students. 2-ER-179 at ¶ 52. Plaintiffs are required to use Canvas as part of their compulsory education. 2-ER-217 at ¶¶ 263–65.

Instructure provides the student data it collects to its customers, which includes schools and school districts, but also *hundreds* of private companies. 2-ER-170, 188 at ¶¶ 2, 86–92. Instructure and its customers convert students' information into detailed behavioral profiles of those students, which customers use to develop and market products, influence students' thought processes and behavior, and make significant decisions affecting students' lives. 2-ER-170, 177, 211 at ¶¶ 2, 34, 226–32.

Instructure admits that it expansively takes, uses, and shares student data, which it describes in its various terms and policies. 2-ER-180, 183 at ¶¶ 56, 73; 2-ER-109–64. However, Instructure fails to obtain effective consent before doing so. 2-ER-194–99 at ¶¶ 114–74. Instructure admits that it does not seek consent from the students whose information it extracts and collects or from their parents. 2-ER-199 at ¶ 141. Instead, for children 13 and older, Instructure purports to shift to schools the burden of obtaining parental consent. 2-ER-199 at ¶ 142. For children under 13, Instructure relies on the consent of schools *alone*, paradoxically leaving parents of young children with fewer rights than parents of teenaged students. *Id*. at ¶¶ 143–44. Contrary to Instructure's argument, 2-ER-84–85, schools are not authorized, as a matter of law, to consent to the sweeping collection, use, and disclosure of student data in lieu of students and their parents. 2-ER-199 at ¶¶ 145–48. Further, because student use of Instructure's products in K–12 schools is mandatory, students are unfairly coerced into submitting to Instructure's indiscriminate data practices. 2-ER-200, 213, 216, 231 at ¶¶ 159, 238, 261, 264, 378. Neither Plaintiffs nor their parents consented to Instructure taking, using, or sharing their personal information for any purpose. 2-ER-217–18 at ¶¶ 273–79.

II. Plaintiffs sued Instructure under state and federal laws.

On March 27, 2025, Plaintiffs filed a complaint against Instructure in the Central District of California (amended on May 8, 2025) alleging that Instructure had generated and collected vast troves of their personal information, which it used for wide-ranging commercial purposes without effective consent. 2-ER-167. They asserted that families may not be stripped of their basic rights in exchange for the education to which they are legally entitled. *Id*. As stated in the FAC, "[b]y sending their children to school as is their right and duty, [parents] do not forfeit their right to decide what personal information may be extracted from their children and how that information may be used." 2-ER-172 at ¶ 12. Instructure may provide student-information services to schools, but it may not violate the rights of students in doing so by surreptitiously exploiting their data for commercial gain.

Plaintiffs brought nine claims. Five were on behalf of all Plaintiffs and a putative nationwide class:

Count I: Violation of 42 U.S.C. § 1983 – Fourth Amendment;

Count II: Violation of 42 U.S.C. § 1983 – Fourteenth Amendment;

Count VII: Invasion of Privacy – Public Disclosure of Private Facts;

Count VIII: Invasion of Privacy – Intrusion Upon Seclusion; and

Count IX: Unjust Enrichment.

2-ER-225, 228, 239, 241, 244. The other four claims were brought by California Plaintiffs on behalf of themselves and a putative California subclass:

Count III: CIPA;

Count IV: CDAFA;

Count V: UCL; and

Count VI: Cal. Civ. Code § 52.1 – Tom Bane Civil Rights Act.

2-ER-231, 234, 235, 237.

On June 2, 2025, Instructure filed a motion to dismiss the FAC under Rule 12(b)(6). 2-ER-76. Instructure argued that laws that enhance student privacy actually undermine it—specifically, by letting a private company take and use all manner of personal information from students by any means, as long as the company has consent from someone at the students' schools. 2-ER-84–86. Plaintiffs responded that Instructure's radical position finds no support in any law, especially laws enacted to *protect* children's information and parents' rights over that information. 2-ER-45.

Instructure also argued that Plaintiffs' allegations rely "on generic statements about what Instructure's products can do and what personal information they may interact with, instead of allegations about how those products actually harmed them." 2-ER-83. It further argued that Plaintiffs failed to allege state action and that their allegations did not support their alleged constitutional violations. *Id*.

III. The district court dismissed the FAC in its entirety.

The district court heard the motion on August 1, 2025. 1-ER-249. On August 4, the court granted the motion and dismissed all nine of Plaintiffs' claims, including two—the Section 1983 claims—with prejudice. 1-ER-4. The court did not address the key issue of consent. Instead, its dismissal was based primarily on its determination that Plaintiffs' allegations did not meet Rule 8's pleading requirements as to any of their claims. *Id.*

At the district court's invitation, 2-ER-279–80, Plaintiffs requested dismissal of all their claims with prejudice to promptly seek appeal from the court's ruling, and, on August 14, the district court entered a final order accordingly, 1-ER-3. Plaintiffs appeal from the dismissal of each of their claims except for Count VI, their claim under California's Tom Bane Act.

SUMMARY OF THE ARGUMENT

I. The district court misapplied Rule 8 in assessing the adequacy of Plaintiffs' allegations to support each of their claims.

The district court erred in failing to read the FAC holistically in assessing the adequacy of the allegations; in disregarding key allegations supporting the claims; in deciding issues relevant only to class certification; and in refusing to consider Instructure's unlawful withholding of information it faulted Plaintiffs for not alleging. The court then proceeded to misapply Rule 8's pleading requirements, including those articulated by this Court, in evaluating each of Plaintiffs' claims;

ignored well-pleaded allegations set out in the FAC; and improperly resolved fact issues that may not be resolved at this stage.

II. The district court misapplied standards governing Section 1983 claims.

The district court misapplied the analytical framework for determining state action under 42 U.S.C. Section 1983; dismissed Plaintiffs' claims on a basis not raised by Instructure or briefed by the parties; misinterpreted case law explaining state-actor analysis; misconstrued Plaintiffs' claims; and again ignored well-pleaded allegations supporting those claims.

III. This Court should decide whether the FAC supports the alleged constitutional violations that underpin Plaintiffs' Section 1983 claims.

The district court dismissed Plaintiffs' claims based on its finding that Plaintiffs failed to show state policy and state action and so did not decide whether Plaintiffs stated constitutional violations. Because remand would not serve justice or judicial economy, Plaintiffs request that this Court decide those issues in the first instance and hold that the allegations are sufficient.

STANDARD OF REVIEW

An appellate court reviews de novo the district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Hunley v. Instagram, LLC*, 73 F.4th 1060, 1068 (9th Cir. 2023). It "accept[s] the well-pleaded factual allegations of a complaint as true and construe[s] all inferences in favor of the nonmoving party." *Mahoney v. Sessions*, 871 F.3d 873, 877 (9th Cir. 2017). The appellate court applies a two-step inquiry, first separating the conclusory allegations in the complaint from the well-pleaded factual allegations, and next determining whether those well-pleaded allegations, taken as true, state a plausible entitlement to relief. *Eclectic Props. E., LLC v. Marcus & Millichap Co*., 751 F.3d 990, 996 (9th Cir. 2014). It may affirm the district court's order of dismissal only if it appears "beyond doubt" that the plaintiffs can prove no set of facts that would entitle them to relief. *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998).

ARGUMENT

I. <u>ISSUE 1</u>: Did the district court misapply Rule 8 in assessing the adequacy of Plaintiffs' allegations supporting their:

(a) use of Instructure's products;

(b) CIPA claim;

(c) UCL claim;

(d) CDAFA claim;

(e) common-law privacy claims; and

(f) unjust-enrichment claim?

A. The district court erred in determining that Plaintiffs failed to allege sufficient facts showing how they used Instructure's products.

Before addressing Plaintiffs' specific claims, the district court made numerous preliminary findings as to the purported inadequacy of the allegations generally, which the court found were dispositive of Instructure's motion. 1-ER-5–6. The court concluded that "Plaintiffs' failure to allege specific facts about Defendant's taking of *their* data defeats all their claims." *Id*. at 7. Each of the court's determinations is erroneous.

This Court has observed that, to satisfy Federal Rules of Procedure Rule 8, allegations in a complaint (1) "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively[,]" and (2) "must plausibly assert an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011); *see also Whitaker v. Tesla Motors, Inc*., 985 F.3d 1173, 1176 (9th Cir. 2021) ("well-pleaded facts, not legal conclusions," are necessary to survive a Rule 12(b)(6) motion). The district court determined that Plaintiffs did not meet the requirements of Rule 8. 1-ER-6.

1. The district court erred in failing to review the FAC holistically.

The district court first stated that the FAC contains only "a few pages" setting out allegations specific to Plaintiffs that "contain[] mostly conclusory assertions." 1-ER-6. However, the section cited by the court contains 35 paragraphs describing Plaintiffs' use of Instructure's products; how Instructure collects, uses, and shares their data; that Plaintiffs did not consent to Instructure's data practices; how

Instructure denied them access to and control over their data; and how Plaintiffs were harmed by Instructure's conduct. 2-ER-217–20 at ¶¶ 263–298. Citing only that section, the court stated that Plaintiffs "offer[ed] scant detail" about their own experiences with Instructure's products. 1-ER-6. It stated that Plaintiffs "fail to identify what information—or even what categories of information—was collected from any plaintiff or to whom it was allegedly disclosed." *Id*. But the court erred in restricting its review to one section of the FAC in determining the adequacy of Plaintiffs' allegations. *Petrie v. Elec. Game Card, Inc*., 761 F.3d 959, 970 (9th Cir. 2014) (a court must review "all allegations holistically, rather than in isolation, to determine if a complaint is well-pleaded").

The FAC, read as a whole, is replete with allegations that apply to all students who use Instructure's products, which includes Plaintiffs as students who use Canvas. 2-ER-217 at ¶ 263. Those allegations detail what data Instructure takes from students (including Plaintiffs), 2-ER-180–81 at ¶¶ 56–57; how it uses that data, 2-ER-184–88 at ¶¶ 75–85; to whom it discloses that data and how, 2-ER-188–93 at ¶¶ 86–110; that it does so without obtaining effective consent, 2-ER-198–200 at ¶¶ 136–56; and how Instructure's conduct harmed Plaintiffs, 2-ER-207–16 at ¶¶ 197–259. Read in conjunction with the dozens of "Plaintiff-Specific" allegations that the court found insufficient, Plaintiffs' allegations satisfy Rule 8: they do not simply recite the elements of the claims; they contain sufficient allegations of underlying facts to give fair notice and to enable Instructure to defend itself effectively; and they state a plausible claim for relief, such that it is not unfair to require Instructure to be subjected to the expense of discovery and continued litigation. *See Starr*, 652 F.3d at 1216. Any potential dissimilarities between Plaintiffs and other class members "are relevant only to class certification, not standing." *Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015) (cleaned up).

Further, Plaintiffs' allegations were based largely on Instructure's own terms of service and privacy policies, which Instructure attached as exhibits to its motion and sought to incorporate by reference without opposition from Plaintiffs.[1] *See*, *e.g.*, 2-ER-86 (Instructure's reliance on its terms and request for incorporation of same), 2-ER-116–20 (product privacy notice identifying information collected from students through school accounts); 2-ER-142 (data processing addendum identifying student data collected through Canvas, including biographical, location, and other identifying student information; academic records; and student-generated content and communications); 2-ER-161 (privacy policy identifying student data collected

[1] As to Instructure's request, the court stated only that "even if [Instructure's documents] are properly incorporated by reference into the pleadings, the court does not consider them for the truth of the facts they assert and instead accepts as true the allegations in the FAC for purposes of Defendant's pleading challenge." 1-ER-5 n.1. While the court could not assume the truth of those documents for the purpose of disputing allegations in the FAC, it could consider them as true insofar as they *support* allegations in the FAC. *Id.* (citing *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1003 (9th Cir. 2018)).

automatically when students use its products, including interaction data, device information, and usage data). In other words, Instructure's own terms show that it is *impossible* for students to use Canvas without Instructure generating, extracting, and collecting troves of personal information from them.

The court then noted that Plaintiffs describe Instructure's full product line generally while identifying only one they used. 1-ER-5. But Plaintiffs did identify a product they used, namely, Canvas—the second-largest learning management system in the U.S.—which they were required to use at school. 2-ER-174, 179, 201, 217 at ¶¶ 17-24, 52, 161, 263. They describe Instructure's other products in support of their allegations that Instructure uses student data, including Plaintiffs' data, collected from each product to develop and support its entire suite of products. 2-ER-186–88, 217 at ¶¶ 80–85, 267. The court cited no authority suggesting that such allegations are deficient under Rule 8.

2. The district court erred in considering matters relevant only to class certification.

The district court then noted that, "[a]lthough Plaintiffs seek to certify nationwide and statewide classes, they do not allege that all school districts contract with Defendant in the same ways or for the same products." 1-ER-6. But Instructure did not raise that argument, and the court cited no authority holding that such allegations are necessary for a class-action complaint to survive a motion to dismiss. Rather, those matters are relevant only to class certification, which may not be considered at this stage. *Gillibeau v. City of Richmond*, 417 F.2d 426, 432 (9th Cir. 1969) ("compliance with Rule 23 is not to be tested by a motion to dismiss for failure to state a claim").

The court then stated that Plaintiffs "do not even identify what schools or districts their children attend or what products those schools use." 1-ER-6. But Plaintiffs do allege that they use Canvas "at their schools." 2-ER-217 at ¶ 263. They did not identify their schools for privacy reasons, and the court cited no authority suggesting that such information is essential to state a claim at this stage.[2]

3. The district court erred in failing to consider that Instructure alone possesses the information it faulted Plaintiffs for not alleging.

The court then observed that Plaintiffs argued that the court should consider the fact that Instructure "wrongfully withheld information about what data it took from their children and how it shared the data[.]" 1-ER-7. In rejecting that argument, the court noted that "at least some of the information about the products Plaintiffs' children used and the type of information they submitted is within their knowledge." *Id*. But a court may not "assume that [a claimant] can prove facts that it has not alleged[,]" *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983)—especially where Plaintiffs are

[2] Again, Instructure did not raise that argument, and, as Plaintiffs informed the district court at the hearing on Instructure's motion, they did provide that information to Instructure confidentially. 2-ER-266 at 4–10.

children using products at school, and their parents received little or no information about those products or their children's use of them. 2-ER-217–18 at ¶¶ 263, 274–75.

Further, the court erred in ignoring allegations that Instructure alone possessed the information it faulted Plaintiffs for not pleading, and that Instructure refused to provide Plaintiffs that information in violation of federal law. 1-ER-7. "Pleading upon information and belief is appropriate where, as here, 'the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible.'" *R.C. v. Walgreen Co*., 733 F. Supp. 3d 876, 891 n.3 (C.D. Cal. 2024) (quoting *Soo Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017) (citing *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995) ("[W]e relax pleading requirements where the relevant facts are known only to the defendant."))).

Accordingly, Plaintiffs' allegations are "based upon knowledge as to themselves and the acts of themselves and their minor children, and upon information and belief as to all other matters[.]" 2-ER-173 at ¶ 13. Plaintiffs allege that, because Instructure has a policy of denying parents access to their children's information in violation of federal law, "[s]tudents and parents do not and cannot know the full extent of the data Instructure obtains about them, whether that data is accurate, how that data is stored, how long that data is retained, who has access to that data, or how that data or data-derivative information or products are used." 2-ER-197–98 at ¶¶ 127–33. Such allegations are highly relevant in assessing the adequacy of allegations under Rule 8. *See*, *e.g.*, *Biggs v. Bank of Am. Corp.*, EDCV 15-00267-VAP (KKx), 2017 WL 11648863, at *7 (C.D. Cal. July 28, 2017) (pleading standards are relaxed where facts are within defendant's knowledge); *Doe v. GoodRx Holdings, Inc.*, No. 23-CV-00501-AMO, 2025 WL 2052302, at *7 (N.D. Cal. July 22, 2025) (allegations sufficient where "only Defendants would possess" the details they faulted plaintiffs for not providing). But for Instructure's wrongdoing, Plaintiffs could have alleged even more detail about what specific data Instructure took from them and how it and third parties used such data.

The district court then stated that Plaintiffs may not "use litigation as a fishing expedition to seek discovery and find out whether Defendant misused the data." 2-ER-7. But, as previously explained, Plaintiffs did allege that they use Canvas at school, and they alleged what information Instructure took and how it was used based on Instructure's own disclosures, which Instructure attached to its motion to dismiss. To the extent that the court implicitly determined that Plaintiffs could not rely on Instructure's own public statements describing how it collects, uses, and shares data in alleging that Instructure collects, uses, and shares data as it describes, the court cites no authority for that proposition. Rather, companies routinely and successfully cite their own terms and policies in defense against claims regarding their data practices—as Instructure itself did in this case. 2-ER-86 (citing its own terms and policies to refute Plaintiffs' claims and allegations), 107–64 (seeking incorporation of certain terms and policies); *see also*, *e.g.*, *Rodriguez v. Google LLC*, 772 F. Supp. 3d 1093, 1100-03 (N.D. Cal. 2025) (Google argued that plaintiffs consented to its data practices because the practices were disclosed in its terms). Instructure may not alternately invoke or eschew its own terms as is convenient for avoiding liability. By allowing Instructure to do so, the district court both misconstrued the law and incentivized corporate misconduct.

In sum, Plaintiffs' allegations, taken as true, set out well-pleaded facts—not legal conclusions—that plausibly allege an entitlement to relief such that it is not unfair to require Instructure to be subjected to the expense of discovery and continued litigation. *See Starr*, 652 F.3d at 1216. The district court's order fails to show "beyond doubt" that Plaintiffs can prove no set of facts that would entitle them to relief and should thus be reversed. *Delew*, 143 F.3d at 1222.

B. The district court erred in dismissing Plaintiffs' CIPA claim.

The district court erred in dismissing Plaintiffs' CIPA claim. 1-ER-11. It stated that "[t]he FAC only vaguely references Defendant's use of APIs without explaining how the technology allows real-time interception in general or how it was used to intercept Plaintiffs' data in particular." 1-ER-10–11. The court further stated that the FAC contains only "[a] single vague and conclusory allegation that 'Instructure shares student data in real time and/or near-real time," which "is not sufficient to demonstrate any eavesdropping by third parties, let alone to plausibly allege that confidential communications by Plaintiffs' children were intercepted or subject to eavesdropping by a third party." 1-ER-11 (citing ¶ 94). But the court's findings are wholly refuted by the FAC.

The FAC contains extensive allegations explaining how Instructure's application programming interface ("API") technology facilitates real-time interception of student data. It describes Instructure's sprawling data-sharing partner network and how Instructure's "primary value to third-party partners depends on maximizing access to student data." 2-ER-188–89 at ¶¶ 86–92. It alleges that Instructure "designs its products to 'deliver an open, extensible learning ecosystem,' with an '[e]mphasis on OPEN.'" 2-ER-189 at ¶ 93. It then alleges extensive detail—spanning 15 paragraphs—explaining how such data sharing works, including screenshots. 1-ER-189–93 at ¶¶ 95–109. A brief summation of those allegations is as follows:

- Instructure's Representational State Transfer API is how third parties interact programmatically with Instructure products. 2-ER-190 at ¶ 98.

- Its API allows third-party developers to build integrations and provides access to vast troves of students' personal information through Instructure's suite of products. *Id*.

- Instructure does not limit the amount of student data partners can access beyond technologically necessary "throttling." 2-ER-189 at ¶ 95.

- Instructure's API provides Instructure's partners access to Canvas user data for a host of commercial purposes, including data harvesting, analysis, disclosure, and training AI systems. 2-ER-190 at ¶ 99.

- Partners can "easily integrate" with Instructure products "through a library of open APIs" that transmit data upon the occurrence of "events," which "refer[] to a specific action or occurrence within the Canvas platform that triggers a data notification or update." *Id*. at ¶ 100.

- The Canvas API provides partners "the most up-to-date information possible." 2-ER-191 at ¶ 102. It transmits student data to partners "upon essentially any activity within Canvas products." *Id*. The FAC identifies some of the "triggering events" that relay detailed student data in real time, such as account creation and use, login activity, addition or creation of content, user communications and group discussions, and assignment submissions. *Id*.

- The FAC identifies numerous "Payload Examples" of student data that is transmitted on triggering events. 2-ER-191–93 at ¶¶ 103–07. One example is data shared when a student is added to a Canvas account, which includes data such as the student's name, Canvas ID, "Unique user id," when the account was created, and "State of the user." 2-ER-192 at ¶ 104. Another is when a student submits an assignment, third parties receive extensive information, including "[t]he content of the submission." 2-ER-193 at ¶ 106.

These allegations, which explain how numerous third parties collect confidential student communications—including education records protected by the Family Education Rights and Privacy Act ("FERPA")—in real time through the Canvas API (upon the occurrence of "triggering events"), amply support Plaintiffs' CIPA claim. *See Cherkin v. PowerSchool Holdings, Inc*., No. 24-cv-02706-JD, 2025 WL 844378, at *5 (N.D. Cal. Mar. 17, 2025) (upholding CIPA claim based on similar allegations regarding real-time transmission "through automatic-syncing and data-transmission technologies" such as APIs); *Frasco v. Flo Health, Inc.*, No. 21-cv-

00757-JD, 2025 WL 2680068, at *16 (N.D. Cal. Sept. 17, 2025) (finding that CIPA violation was supported by evidence that "when a user clicked 'Next' during the onboarding survey, the Flo App would 'invoke[ ] the Facebook SDK,' and the SDK would begin to record the information as it was being logged and processed by the app"); *D'Angelo v. FCA US, LLC*, 726 F. Supp. 3d 1179, 1198 (S.D. Cal. 2024) (finding allegations that the defendant allowed a third party "to secretly intercept in real time" chat communications on defendant's platform by "embedd[ing]" code that "directs [chat] communications to be routed directly to [the third party]" sufficient to support in-transit element of CIPA) (collecting cases).

The district court further determined that Plaintiffs failed to allege how Instructure's API technology "was used to intercept Plaintiffs' data in particular." 1-ER-10. But Rule 12(b)(6) requires only that a plaintiff "plead factual content that 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Greenley v. Kochava, Inc.*, 684 F. Supp. 3d 1024, 1049 (S.D. Cal. 2023) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Therefore, pleading a CIPA violation does not require identifying a specific communication that was intercepted." *Id*. at 1050. Rather, that may be inferred from detailed allegations of a defendant's practices and a plaintiff's alleged use of the defendant's product, *id*., as Plaintiffs adequately allege in this case.

In sum, the district court erred in concluding the Plaintiffs' CIPA claim was unsupported by well-pleaded facts. *See Starr*, 652 F.3d at 1216.

C. The district court erred in dismissing Plaintiffs' UCL claim.

The district court determined that Plaintiffs failed to allege facts supporting standing under the UCL. 1-ER-12. The court concluded that allegations of loss of personal information and diminution of its value—absent allegations that Plaintiffs could have sold the data the defendant took from them, that they attempted to or intended to sell their data, or that the defendant's collection of such data impeded their ability to sell their data—are insufficient to confer standing, citing its order in *Griffith v. TikTok, Inc.*, 697 F. Supp. 3d 963, 976–77 (C.D. Cal. 2023).

1. Courts are split as to whether allegations of data loss confer UCL standing.

In *Griffith*, the district court observed that courts are split on that issue, and there is no binding precedent from this Court. 697 F. Supp. 3d at 977; *see also A.B. by & through Turner v. Google LLC*, 737 F. Supp. 3d 869, 881 (N.D. Cal. 2024) ("There is a split of authority in this District on this issue and no binding Ninth Circuit precedent.").

Although some courts have determined that allegations of data misappropriation fall short of showing economic injury, there is a "'growing trend across courts'" to recognize the lost value of misappropriated personal information. *Calhoun v. Google LLC*, 526 F. Supp. 3d 605, 635 (N.D. Cal. 2021) (quoting *In re*

Marriott Int'l, Inc., Customer Data Sec. Breach Litig., 440 F. Supp. 3d 447, 461 (D. Md. 2020)); *see also In re Tiktok, Inc., Minor Priv. Litig.*, No. MDL 3144-GW-RAOx, 2025 WL 3628598, at *20 (C.D. Cal. Nov. 5, 2025) (agreeing "with the *Calhoun*/*Brown* reasoning for the principle that personal information has an economic value, as evinced by an asserted market for it, such that '[p]rivacy harms involving personal data can constitute an injury to money or property sufficient to provide standing under the UCL.'") (quoting *In re Meta Pixel Tax Filing Cases*, 724 F. Supp. 3d 987, 1024 (N.D. Cal 2024); *GoodRx Holdings*, 2025 WL 2052302, at *12 ("Plaintiffs meet the UCL's statutory standing requirement because they allege that the Moving Defendants took their data without compensating them for it and that the data has value to both companies and consumers"); *In re Meta Pixel Tax Filing Cases*, 724 F. Supp. 3d at 1025 (defendant's "sale of this confidential and valuable information has now diminished the value of such information to Plaintiffs"); *Turner*, 737 F. Supp. 3d at 881 ("the Court agrees with the rationale of *Calhoun* and *Brown* and concludes that plaintiffs have adequately pleaded the economic injury needed to establish UCL standing"); *Kis v. Cognism Inc*., No. 22-cv-05322-AMO, 2024 WL 3924553, at *7 (N.D. Cal. Aug. 23, 2024) (loss of personal information without compensation confers standing); *Klein v. Facebook, Inc*., 580 F. Supp. 3d 743, 803 (N.D. Cal. 2022) ("Consumers have adequately alleged that, by providing Facebook with their information and attention, they 'lost money or property.'") (quoting *Brown v. Google LLC*, No. 20-CV-03664-LHK, 2021 WL 6064009, at *15 (N.D. Cal. Dec. 22, 2021) (finding loss of personal information through Google's data collection sufficient to constitute a diminution of a future property interest)). That trend is consistent with "the increasing recognition of the value of" personal information in today's data economy. *Doe v. Microsoft Corp*., No. C23-0718-JCC, 2023 WL 8780879, at *13 (W.D. Wash. Dec. 19, 2023).

2. The *Kwikset* framework does not support the district court's narrow interpretation of UCL standing.

The courts that have concluded that UCL standing requires a plaintiff to allege an intent to sell their data, including the district court in this case, have construed that standard too narrowly. In *Kwikset Corporation v. Superior Court*, the California Supreme Court stated that "[t]here are innumerable ways in which economic injury from unfair competition may be shown." 51 Cal. 4th 310, 323 (2011). It described just a few:

> A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary.

Id. Nothing in *Kwikset* supports the constricted view that, in data-misappropriation cases, standing is limited to those who allege that they intended to sell their data. On the contrary, *Kwikset* observed that nothing in the text or legislative history of the

UCL "purport to define or limit the concept of 'lost money or property,' nor can or need [the court] supply an exhaustive list of the ways in which unfair competition may cause economic harm." *Id*. The courts that have concluded otherwise have unduly limited their analysis to the question of whether a plaintiff has alleged diminishment of a present or future property interest, including the district court in this case. *See*, *e.g*., 1-ER-12; *Griffith*, 697 F. Supp. 3d at 976–78; *In re Facebook, Inc., Consumer Priv. User Profile Litig*, 402 F. Supp. 3d 767, 804 (N.D. Cal. 2019). However, that is but one of the "innumerable ways in which economic injury from unfair competition may be shown" identified by the California Supreme Court. *Kwikset*, 51 Cal. 4th at 323.

Accordingly, in the *In re Meta Pixel Tax Filing Cases*, the court observed that, in addition to the "diminished value" theory, the UCL contemplates a "benefit-of-the-bargain" theory and a "right to exclude" theory. 724 F.Supp.3d at 1024. Under the former, a plaintiff can show standing by alleging that company used their data in a manner plaintiff had not expected, causing them to "surrender more or acquire less" than they otherwise would have. *Id*. (cleaned up). As to the latter, the court observed that the right to exclude others from property is "one of the main rights attaching to property," thus a violation of a plaintiffs' right to exclude would "constitute the diminishment of a present or future property interest." *Id*. at 1024–25 (cleaned up); *see also Moore v. Centrelake Med. Grp., Inc.*, 83 Cal. App. 5th 515, 527 (2022) (allegations that defendant denied plaintiffs the benefit of the bargain by making false representations as to its data security practices); *In re Tiktok*, 2025 WL 3628598, at *20 (finding allegations that plaintiffs' "personal information has passed beyond their control through its nonconsensual collection, disclosure to third parties, and a procedurally difficult and practically ignored data deletion process" sufficient to confer standing).

Similarly, the *Brown* court observed that allegations that the plaintiffs' data was valuable and they received no compensation for it sufficed:

> Under this standard, a party who has provided goods or services in a transaction and has not been paid the fair value of those goods or services has suffered an economic injury even though the party has *received* money instead of paying money. The same logic would apply to parties like Plaintiffs, who have provided valuable data to Google and have received *no* money in return.

Brown, 2021 WL 6064009, at *17 (cleaned up, emphasis in original); *see also GoodRx Holdings*, 2025 WL 2052302, at *12; *Kis*, 2024 WL 3924553, at *7. These courts have properly construed the UCL standing requirement in accordance with *Kwikset*.

3. Plaintiffs' allegations confer UCL standing.

Given that personal data is "the 'oil' of the digital economy," 2-ER-175–76, 213 at ¶¶ 28–32, 240, allegations of data misappropriation should suffice to demonstrate economic injury under the *Kwikset* framework. However, even if more is required, Plaintiffs' allegations are far more extensive and detailed than the vague or generalized allegations of data misappropriation found insufficient in other cases.

The FAC describes a robust market for student data and how Instructure has profited significantly from such data. 2-ER-176–79, 213 at ¶¶ 33–47, 239. It alleges that "[d]ata generation, extraction, collection, analysis, and sharing form the foundation of Instructure's business model." 2-ER-179 at ¶ 46. Instructure itself has touted that it "has obtained more student data than nearly any other EdTech company." *Id*. at ¶ 47. By contrast, students receive no compensation in exchange for their valuable data, instead receiving only education services to which they are already legally entitled. 2-ER-172, 201–02, 207, 212–14, 216, 218, 220 at ¶¶ 12, 170–71, 201, 231–50, 260–62, 277, 297.

Further, Plaintiffs allege that, by selling Canvas into the compulsory environment of K–12 education where students are required to use it, Instructure denies students the choice of whether to participate in the data market at all. 2-ER-177, 182, 214, 216-18 at ¶¶ 34, 61, 242, 249, 261, 264, 276. Those allegations show that Plaintiffs were required to enter into a transaction (a data-extraction arrangement with Instructure) costing them property (troves of their valuable personal information) "that would otherwise have been unnecessary" to participate in their own education. *Kwikset*, 51 Cal. 4th at 323.

Simply by attending school as their right and duty, students are subjected to Instructure's sweeping data practices, forever losing control over their personal, private, valuable information. 2-ER-206, 208, 210, 219 at ¶¶ 195, 206, 217, 294. In fact, Instructure grants innumerable companies access to student data while *denying* students and their parents access to their own data in violation of federal law. 2-ER-188–94, 217–19 at ¶¶ 86–113, 271, 280–85, 293. Instructure then uses that data, in part, to build valuable predictive behavioral profiles on students that are "the equivalent of credit reports on children in every domain over which Instructure claims algorithmic expertise," which neither students nor their parents can access, review, or correct. 2-ER-170, 177, 179, 184–86, 211–13, 219 at ¶¶ 2, 34, 47, 75–79, 226–38, 288, 295.

The FAC thus contains ample allegations showing economic injury sufficient to confer UCL standing, and the district court erred in concluding otherwise.

D. The district court erred in dismissing Plaintiffs' CDAFA claim.

The district court then determined that Plaintiffs did "not plausibly plead standing under CDAFA," though commenting that it was "a closer question." 1-ER-12. It noted that courts in this Circuit "are divided as to whether the diminution in value of plaintiffs' data constitutes 'damage or loss' under CDAFA." *Id*. It then concluded that, even if diminution of value can confer standing, Plaintiffs "have not alleged that theory in a nonconclusory fashion," alleging only "general facts regarding the market for user data and conclud[ing] that by profiting from students' data generally, Defendant '[has] thus caused students economic injury.'" *Id*. at 13 (citing ¶ 247).

First, as discussed in section I.C.3., *supra*, Plaintiffs allege considerably more detail regarding the loss Instructure caused them to suffer than the district court acknowledged. *See Brown v. Google LLC*, 685 F. Supp. 3d 909, 940 (N.D. Cal. 2023) (evidence of market for plaintiff's data precludes ruling as a matter of law that plaintiffs suffered no damages under CDAFA); *Biden v. Ziegler*, 737 F. Supp. 3d 958, 976 (C.D. Cal. 2024) (upholding CDAFA claim where "Plaintiff asserts, as the owner of the data, he has suffered damages caused by the Defendant in an amount to be proven in trial").

Second, "the plain language of CDAFA's 'damage or loss' requirement contains no such limitation," as the purpose of the statute is to protect the privacy of individuals. *Cherkin*, 2025 WL 844378, at *6 (retaining similar CDAFA claim on basis of statutory language and purpose) (citing *Frasco v. Flo Health, Inc*., 2024 WL 4280933, at *2-3 (N.D. Cal. Sept. 23, 2024)).

Third, this Court has noted that allegations showing that a defendant has been unjustly enriched through its use of misappropriated data are sufficient to confer standing under CDAFA. *In re Facebook*, 956 F.3d at 600 ("Under California law, this stake in unjustly earned profits exists regardless of whether an individual planned to sell his or her data or whether the individual's data is made less valuable."). As discussed in section I.F., *infra*, Plaintiffs alleged that Instructure has been unjustly enriched through its nonconsensual collection, use, and disclosure of student data to the tune of billions of dollars. *See id.*; *see also Rodriguez v. Google LLC*, 772 F. Supp. 3d 1093, 1110 (N.D. Cal. 2025) (finding standing under CDAFA where plaintiffs "present[ed] evidence that their data has economic value" and "Plaintiffs have a stake in the value of their data."). The district court thus erred in dismissing Plaintiffs' CDAFA claim.

E. The district court erred in dismissing Plaintiffs' common-law privacy claims.

The district court concluded that Plaintiffs failed to state a common-law privacy claim under either a public-disclosure theory or an intrusion-upon-seclusion theory. 1-ER-15. Its conclusion is unsupported by the FAC.

1. Plaintiffs alleged extensive detail regarding Instructure's data practices.

The court stated that "[t]he FAC does not identify which products Plaintiffs use (other than one—Canvas LMS), what type of data was collected from them, or to whom Defendant provided the data." *Id.* First, as discussed in section I.A.1., *supra*, the district court cites no authority suggesting that Plaintiffs were required to allege use of more than one product to support a claim. Also as previously explained, Plaintiffs extensively described the types of data taken from them, 2-ER-180 at ¶¶ 56–57; to whom Instructure provided it and how, 2-ER-188–94 at ¶¶ 86–87, 93–113; and for what purposes, including for marketing, sales, and "maximiz[ing] profits in education," 2-ER-189 at ¶¶ 88–92.

The district court then stated that Plaintiffs did not allege "who these partners are—e.g., schools, companies that facilitate the use of Canvas at schools, or other third parties who do not require the students' data for any legitimate educational purposes." 1-ER-15. Not so: the FAC alleged that Instructure's partners—numbering over 1,000—"including integration partners, service partners, and sales and marketing partners." 2-ER-188 at ¶ 87. It then identified specific examples, such as TurboVote, a voter registration company; Panopto, an AI video company; and Mercer Mettle, a talent-assessment platform. *Id*. Whether these companies collect student data for "legitimate educational purposes"—and whether any such purposes justify or excuse Instructure's invasion of students' privacy—are fact questions that may not be resolved at the pleading stage. *See Cottle v. Plaid Inc*., 536 F. Supp. 3d 461, 491 (N.D. Cal. 2021).

Courts have also found extensive collection of user data for the creation of user "insights" or "comprehensive behavioral profiles"—as opposed to "routine commercial behavior of collecting contact information for sending advertisements"—sufficient to support privacy claims. *Riganian v. LiveRamp*

Holdings, Inc., 791 F. Supp. 3d 1075, 1087–88 (N.D. Cal. 2025) (citing *Katz-Lacabe v. Oracle Am., Inc.*, 668 F. Supp. 3d 928, 935 (N.D. Cal. 2023), and *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589 (9th Cir. 2020)); *see also Cherkin*, 2025 WL 844378, at *4 (collecting cases). Plaintiffs alleged that Instructure uses student data to create "intimately detailed profiles on children" that "purport to analyze and predict student performance and behavior" and that are "used by the collecting company, schools, and a host of other third parties to identify, target, manipulate, and influence decision-making about them." 2-ER-170, 177, 211 at ¶¶ 2, 34, 226. These allegations sufficiently describe Instructure's data practices to support Plaintiffs' privacy claims.

2. Plaintiffs' allegations that Instructure violated federal law support their claims.

The FAC also contains detailed allegations describing how Instructure has knowingly violated the Children's Online Privacy Protection Act ("COPPA"), a federal statute enacted to provide children under 13 greater rights over their personal information. 2-ER-181, 197, 199, 204 at ¶¶ 60, 126–32, 141, 189. These allegations further support Plaintiffs' privacy claims. *See Turner*, 737 F. Supp. 3d at 884 ("A violation of federal law is generally considered egregious, and because COPPA prohibits such data collection from minors to protect their privacy, plaintiffs have adequately pleaded an egregious intrusion into the minors' expectation of privacy."); *In re Tiktok*, 2025 WL 3628598, at *16 ("Consistent with *Turner*, *McDonald*, and

Hubbard, the Court finds that Plaintiffs' allegations that Defendants targeted children and knowingly violated COPPA sufficient to plead the requisite offensiveness at this stage.").

Further, Instructure's practice of denying students and their parents access to their own data—and contractually prohibiting its partners from doing so—while stating in its privacy policy that it *does* provide parents such access suggests that Instructure itself recognizes the impropriety of its data practices, especially in light of its public statements that "data privacy is a fundamental right." 2-ER-172, 194, 204, 205, 218 at ¶¶ 12, 111, 189, 190, 282; *see In re Facebook*, 956 F.3d at 606 (finding that highly offensive element was sufficiently pled where Facebook collected full-string detailed URLs and where "Plaintiffs have alleged that internal Facebook communications reveal that the company's own officials recognized these practices as a problematic privacy issue").

3. Analysis of Plaintiffs' privacy claims is fact intensive.

Finally, "[u]nder California law, courts must be reluctant to reach a conclusion at the pleading stage about how offensive or serious the privacy intrusion is." *Riganian*, 791 F. Supp. 3d at 1088 (cleaned up). Only if the allegations "show no reasonable expectation of privacy or an insubstantial impact on privacy interests" can the "question of a serious or highly offensive invasion be adjudicated as a matter of law." *Id*. (cleaned up); *see also Cottle*, 536 F. Supp. 3d at 491. And at least one court has concluded that allegations that a company "collects, for its own commercial benefit, data about public-school kids from information that the students share as part of their legally required education . . . without parental notice or consent, as is alleged, plausibly describes conduct that is highly offensive to a reasonable person and constitutes an egregious breach of the social norms." *Cherkin*, 2025 WL 844378, at *3 (cleaned up); *see also Turner*, 737 F. Supp. 3d at 884 (minors adequately alleged reasonable expectation of privacy in their personal information disclosed on apps).

Because the FAC contains far more than "scant pleadings" in support of Plaintiffs' privacy claims, the district court erred in dismissing them. 1-ER-15.

F. The district court erred in dismissing Plaintiffs' unjust-enrichment claim.

The district court determined that Plaintiffs failed to state a claim for unjust enrichment. 1-ER-15. The court cited *Astiana v. Hain Celestial Group, Inc*. for the proposition that, "in California, there is not a standalone cause of action for 'unjust enrichment.'" *Id*. (quoting 783 F.3d 753, 762 (9th Cir. 2015)). It concluded that Plaintiffs "make no suggestion that their unjust enrichment claim presents a viable quasi-contract theory of recovery," and "decline[d] to read *EGL* [*sic*] as displacing *Astiana*'s general rule that there is no independent cause of action for unjust enrichment under California law." *Id*. (quoting *Griffith v. TikTok, Inc*., No. 5:23-CV-00964-SB-E, 2023 WL 9019035, *6 (C.D. Cal. Dec. 13, 2023), citing *ESG Cap.*

Partners, LP v. Stratos, 828 F.3d 1023, 1039 (9th Cir. 2016)). But in *ESG*, this Court explained that "[t]o allege unjust enrichment as an independent cause of action, a plaintiff must show that the defendant received and unjustly retained a benefit at the plaintiff's expense." 828 F.3d at 1038. And that is precisely what Plaintiffs alleged: that, but for its nonconsensual data practices, misappropriation of Plaintiffs' personal information, and invasion of their privacy, "Instructure could not have grown its business, acquired numerous other tangible and intangible assets, developed other apps, gone public in 2021 at a $2.9 billion valuation, and been acquired by Kohlberg Kravis Roberts in November 2024 in an all-cash deal valuing the company at $4.8 billion." 2-ER-244 at ¶ 454, *see also* 2-ER-216 at ¶¶ 260-62. In other words, "plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on defendant which defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value." *Shin v. ICON Found.*, 2024 WL 2883659, at *9 (N.D. Cal. June 6, 2024).

Furthermore, unjust enrichment "is broader than mere 'restoration' of what the plaintiff lost." *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 542 (2007). "[T]he public policy of this state does not permit one to take advantage of his own wrong regardless of whether the other party suffers actual damage." *Id.* (cleaned up). "The emphasis is on the wrongdoer's enrichment, not the victim's loss. In particular, a person acting in conscious disregard of the rights of another should be required to disgorge all profit because disgorgement both benefits the injured parties and deters the perpetrator from committing the same unlawful actions again." *Id.*; *see also In re Facebook*, 956 F.3d at 599 ("California law recognizes a right to disgorgement of profits resulting from unjust enrichment, even where an individual has not suffered a corresponding loss."). The FAC is replete with allegations that Instructure acted in conscious disregard of the rights of students and their parents, including Plaintiffs, in taking, using, and sharing their data without their consent in service of its bottom line. *See Cherkin*, 2025 WL 844378, at *7 (permitting unjust enrichment claim where "plaintiffs have plausibly alleged severe intrusions on public-school students' privacy").

II. <u>ISSUE 2</u>: Did the district court misapply the analytical framework for determining whether Plaintiffs adequately alleged state action under Section 1983?

The district court misapplied the analytical framework for determining state action under 42 U.S.C. section 1983; improperly dismissed Plaintiffs' claims on a basis not raised by Instructure or briefed by the parties; misinterpreted case law governing state-actor analysis; misconstrued Plaintiffs' claims; and again ignored well-pleaded allegations in assessing the adequacy of the FAC to support Plaintiffs' Section 1983 claims.

A. The district court erred in finding that Plaintiffs' allegations did not meet the state-policy requirement, if applicable.

The district court determined that "[t]he allegations in the FAC do not show that the government is responsible for Defendant's collection and use of student data." 1-ER-8.

1. The adequacy of the allegations to support state policy was not at issue.

First, the district court improperly conflated Rule 8 and Rule 23. The court stated that "it appears that the relevant government actor is different for each group of plaintiffs, and the FAC does not even identify which school district's actions or policies are behind each of the alleged violations, let alone show how each relevant district directed Defendant's actions." 1-ER-8. But Instructure did not make that argument, and the district court cites no authority requiring that Plaintiffs identify individual school districts' policies supporting a defendant's actions. Rather, those matters, if relevant, should be considered under Rule 23 at class certification, not on a motion to dismiss. *See Melendres*, 784 F.3d at 1262; *Gillibeau*, 417 F.2d at 432. The FAC met Rule 8 by defining the putative classes using objective criteria, namely persons "who attend or attended a K–12 school who used Instructure K-12 school-marketed products." 2-ER-220 at ¶¶ 300-01. The districts can be identified later through discovery. *See Griffin v. Cedar Fair, L.P.*, 817 F. Supp. 2d 1152, 1158 (N.D.

Cal. 2011) (specifics are for discovery; Rule 8 "is only a 'minimal hurdle' that does not require specific details").

Second, the district court impermissibly concluded that Plaintiffs failed to meet the "state policy" requirement of section 1983 because Instructure did not raise that argument and the parties did not brief it. *See Wong v. Bell*, 642 F.2d 359, 362 (9th Cir. 1981) (courts may not dismiss claims *sua sponte* unless the plaintiff was given an opportunity to respond or it is clear that relief is not possible). And this Court has observed that "our cases 'have not been entirely consistent on'" whether failure to meet the "state policy" requirement "is fatal to [a] state action claim." *Children's Health Def. v. Meta Platforms, Inc.*, 112 F.4th 742, 755 (9th Cir. 2024) (quoting *O'Handley v. Weber*, 62 F.4th 1145, 1157 (9th Cir. 2023)); *see also Kennedy v. Google LLC*, 688 F. Supp. 3d 951, 957 n.1 (N.D. Cal. 2023) (noting that "the Ninth Circuit does not apply the *Lugar* framework rigidly") (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). Because the court raised this issue *sua sponte*, Plaintiffs were denied an opportunity to argue either that it should not apply or that the FAC satisfied that requirement. Further, it is not clear that Plaintiffs are not possibly entitled to relief; the court thus erred in dismissing their claim on that ground. *See Wong*, 642 F.2d at 362.

2. The FAC supported a state-policy finding.

Even assuming that the court could raise the state-policy issue *sua sponte* and dismiss Plaintiffs' claims on that basis, and assuming that this Court would require a state-policy showing on these allegations, the FAC supported a finding of state policy. "To satisfy the state policy requirement, the alleged constitutional deprivation must result from 'the exercise of some right or privilege created by the State' or 'a rule of conduct imposed by the State or by a person for whom the State is responsible.'" *Children's Health*, 112 F.4th at 754 (quoting *Lugar*, 457 U.S. at 937).

The FAC contained extensive allegations that Instructure's conduct resulted from the exercise of some right or privilege created by the state. It alleged that "Instructure contracts with schools and school districts to provide a host of core educational services deeply intwined with student information." 2-ER-178 at ¶ 41. It further alleged that, "[b]y persuading those customers to implement its products in schools, Instructure gains virtually unfettered access to the data of the children who attend those schools, including their personal and private information." 2-ER-179 at ¶ 51. Using the student data it obtains pursuant to that authority, Instructure then creates "highly detailed and intimately personal dossiers of" students, which schools use to "automat[e] learning evaluation methods (such as aptitude), comprehension testing, development of "personalized" curricula or "learning journeys," student management and oversight, and other aspects of school administration and education, all under the guise of improving education." 2-ER-184–85 at ¶¶ 75–77. Instructure relies on schools to obtain parental consent—or relies on the consent of schools alone—to extract, use, and share student information. 2-ER-199 at ¶¶ 142–44.

In fact, Instructure itself has repeatedly insisted that "*schools*—not Instructure—decide what data to collect and how to use it," citing their own privacy policies. 2-ER-24 (emphasis in original); *see also* 2-ER-87 (arguing that schools "control the students' data in the first place" and that Instructure only "shares student data at the schools' request."). Instructure further contends that "State legislatures also recognize schools' legitimate need to use software vendors," citing, as an example, California's statute that "permits school districts to release student records to contractors providing 'outsourced institutional services or functions' to the districts 'without written parental consent.'" 2-ER-85 (quoting Cal. Educ. Code § 49076(a)(2)(G)(i)).

This case thus stands in stark contrast to those cited by the district court. 1-ER-7. In *Children's Health*, the defendant's only alleged connection to the state was "the CDC's identification of 'vaccine misinformation' and 'vaccine hesitancy' as top priorities in 2019," which this Court held "fall far short of suggesting any actionable federal 'rule' that Meta was required to follow." 112 F.4th at 755. Similarly, in *O'Handley*, this Court rejected a claim by a Twitter user who objected to Twitter's decision to suppress his tweets and suspend his account. 62 F.4th at 1156. The Court held that allegations that Twitter's decision was prompted by a message from the California Secretary of State identifying one of the user's tweets as spreading election-related 'disinformation' did not show that that Twitter had 'ceded control over [its] content-moderation decisions to the State[.]'" *Id.* at 1154–56. Those tenuous alleged ties to the government are wholly unlike the close ties between Instructure and schools alleged here.

The district court then noted that Plaintiffs allege that Instructure's data practices exceed the scope of their authorization provided by schools, "allegations inconsistent with the schools being responsible for the challenged actions." 1-ER-8. But the court cites no authority for the proposition that allegations that a private actor exceeded the scope of its state-granted authority precludes a state-policy finding. Rather, the key inquiry is whether a private actor's conduct resulted from its exercising a state-created right or privilege or from a state-imposed rule of conduct. *O'Handley*, 62 F.4th at 1156 (finding no state policy where defendant's action "was derived from its user agreement with [plaintiff], not from any right conferred by the State").

Finally, to the extent that fact questions exist that are relevant to the state-policy analysis—such as the precise division of control over student data as between schools and Instructure, or the details of Instructure's exceeding the scope of its state-granted authority—those questions may not be resolved at the pleading stage.

B. The district court erred in finding that Plaintiffs did not plead facts meeting the state-actor requirement.

The district court then stated that Plaintiffs raised state-actor arguments "in opposition" to its state-policy analysis. 1-ER-8. However, the state-policy and state-actor requirements together constitute "the two-step framework" for determining state action. *O'Handley*, 62 F.4th at 1156. Again, because Instructure did not challenge the adequacy of the allegations to show state policy, Plaintiffs did not address the first step. Instead, Instructure challenged Plaintiffs' allegations as inadequate under the second step, namely, to show that Instructure was a state actor, which Plaintiffs addressed. 2-ER-89–90.

This Court has "recognized at least four general tests" for identifying state action: public function, joint action, governmental compulsion or coercion, and governmental nexus or "entwinement." *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020); *see also Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–96 (2001) (equating "entwinement" and "governmental nexus"). "Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists." *Rawson*, 975 F.3d at 747 (cleaned up). "At bottom, the inquiry is always whether the defendant has exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 748 (cleaned up); *see also West v. Atkins*, 487 U.S. 42, 57 n.15 ("If an individual is possessed of state authority and purports to act under that authority, his action is state action.") (cleaned up). In support of their claims, Plaintiffs cited the public-function, joint-action, and entwinement tests. 2-ER-47.

1. The FAC supported a state-actor finding under the public-function test.

The district court correctly noted that, to qualify as a traditional, exclusive public function within the meaning of state-action precedents, the government must have traditionally and exclusively performed the function. 1-ER-8. To that end, Plaintiffs allege that Instructure performs a public function in providing state-required education services to public schools, including course management, assignment delivery, and grading; communication between teachers, students, and parents; student-content delivery and management; and student-data analytics. 2-ER-172, 178, 201 at ¶¶ 10, 41–42, 166. Instructure admits as much. 2-ER-84, 92, 101; *see Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988) (courts may consider statements in a brief as admissions). Absent those functions, school ceases to be recognizable as school: little remains without "course management[,] assignment delivery and submission, grading, communication between teachers, students, and parents, and student-data analytics." 2-ER-84. Accordingly, students' use of Instructure's products, including Canvas, is mandatory.

2-ER-200, 213, 216, 217, 231 at ¶¶ 159, 238, 261, 264, 378. By performing those functions, Instructure is a state actor as to those functions.

Finding these allegations inadequate, the district court relied on *Caviness v. Horizon Community Learning Center, Inc*., but that case supports Plaintiffs' position. 1-ER-8–9 (citing 590 F.3d 806 (9th Cir. 2010)). There, a fired teacher brought Section 1983 claims against his employer, a private charter school, alleging it defamed him and violated his constitutional rights. *Caviness*, 590 F.3d at 813. The teacher argued that because charter schools were statutorily designated as "public schools," they were state actors for all purposes, including matters involving internal employment disputes. *Id*. The court disagreed, noting that the public-school designation alone did not "resolve the question whether the state was sufficiently involved in causing the harm to plaintiff such that we should treat [defendant] as acting under color of state law." *Id*. at 814 (cleaned up); *see also Rendell–Baker v. Kohn*, 457 U.S. 830, 838–41 (1982) (defendant was not a state actor as to internal employment dispute). The district court here suggested that, under *Caviness*, a private provider of education services can never be a state actor. 1-ER-8–9. But *Caviness* rejected any such bright-line rule, observing that "[i]t is important to identify the function at issue because an entity may be a State actor for some purposes but not for others." *Caviness*, 590 F.3d at 812–13. And the "inquiry begins by identifying the specific conduct of which the plaintiff complains." *Id*. at 813 (cleaned up). Under *Caviness*, therefore, Plaintiffs have alleged facts showing that Instructure is a state actor for the purpose of collecting and managing student information for public schools, which is the focus of the FAC, as opposed to purposes relating to Instructure's internal employment functions.

This case is more like *Peltier v. Charter Day School, Inc.*, in which the Fourth Circuit held that a charter school performed a public function in setting a student dress code. 37 F.4th 104 (4th Cir. 2022). There, a state statute expressly permitted the state to delegate its constitutional duty to operate schools to charter schools. *Id.* at 116. The court observed that "[t]he Supreme Court has held that such a delegation of a state's responsibility renders a private entity a state actor." *Id.* at 118 (citing *West*, 487 U.S. at 56). It explained that "a state cannot delegate duties that 'it is constitutionally obligated to provide and leave its citizens with no means for vindication of those [constitutional] rights.'" *Id*. (quoting *West*, 487 U.S. at 56-57 & n.14). "Were we to adopt [defendant]'s position, North Carolina could outsource its educational obligation to charter school operators, and later ignore blatant, unconstitutional discrimination committed by those schools." *Id.*

Similarly, Plaintiffs here allege that "[s]chools have always collected certain personal information belonging to students and their parents in order to provide educational services," but "[s]chools no longer do the collecting; corporate third parties do. The information taken is not only traditional education records, but thousands of data points that span a child's life." 2-ER-172 at ¶¶ 10–11. The district court's position would strip students of significant constitutional protections simply because schools decided to delegate their duty to collect, manage, and use student information to a private entity. *See Peltier*, 37 F.4th at 118. Such deprivation finds no support in our nation's jurisprudence. *See*, *e.g*., *New Jersey v. T.L.O.*, 469 U.S. 325, 337–42 (1985) (explaining that children do not forgo their right to privacy simply by attending school and that invasions of that right must be carefully balanced against the state's interest in doing so). The allegations thus support a finding that Instructure is a state actor in providing core educational services to K–12 public schools that are inextricably related to Plaintiffs' allegations and claims.

2. The FAC supported a state-actor finding under the joint-action and entwinement tests.

The joint-action test asks whether the state is "so far insinuated into a position of interdependence with the [private party] that it was a joint participant in the enterprise." *Rawson*, 975 F.3d at 748. The entwinement test is met when "a sufficiently close nexus between the state and private actor [exists] so that the action of the latter may be fairly treated as that of the State itself[.]" *Id*. (cleaned up).[3]

The district court first observed that Plaintiffs point to the fact Instructure states that it is a "school official" under FERPA for the purpose of collecting student

[3] The state-action allegations under these tests are similar and are thus presented together for brevity.

data without parental consent. 1-ER-9. In determining that that fact alone was insufficient, the court noted that "*Caviness* was clear that statutory labels are 'not necessarily dispositive with respect to all of [a private] entity's conduct.'" 1-ER-9 (quoting 590 F.3d at 814). True, which is why Plaintiffs did not baldly cite that fact and instead directly linked it to their claims and Instructure's conduct as alleged in the FAC. 2-ER-178, 226, 228 at ¶¶ 41, 44, 333–34, 356–57. For example, Plaintiffs allege that, in deeming itself a "school official" under FERPA, Instructure admits that it acts as a school employee and is subject to the school's control, specifically for the purposes of collecting and managing student data. 2-ER-226 at ¶ 333; 34 C.F.R. § 99.31(a)(1)(A). Instructure further claims that FERPA lets it stand in the shoes of schools for purposes of redisclosing student information to third parties, which includes hundreds of "partners." 2-ER-200 at ¶ 153. Instructure similarly cites analogous California law governing school conduct in its own defense, as discussed in section II.A.2., *supra*. 1-ER-84–85 (citing Cal. Educ. Code § 49076). And it likewise contends that it may wholly shift its legal obligations under COPPA to schools, including obtaining parental consent and responding to parental inquiries regarding student information.[4] 2-ER-199, 218 at ¶¶ 142–44, 283–85. The link

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[4] The district court incorrectly stated that Plaintiffs allege that Instructure complies with COPPA. 1-ER-9. Rather, Plaintiffs allege that Instructure violates numerous provisions of COPPA and impermissibly attempts to shift its statutory obligations to schools—allegations that further support a finding of state action. 2-ER-85, 181, 194, 197–99, 204–05 at ¶¶ 60, 111–12, 126–32, 140–44, 185, 188–90.

between Instructure's self-conferred "school official" status and Plaintiffs' allegations are clear.

By contrast, neither Instructure nor the district court explained how Instructure's purported status as a school official for purposes of collecting and managing student information is irrelevant to its relationship with the state in providing public education services, including collecting and managing student information as described in the FAC. Put simply, Instructure claims to be a "school official" under state and federal law to acquire the student data central to its business without parental involvement, but denies acting "under color of law" to avoid liability. Instructure cannot reap the commercial benefits of being a "school official" for certain purposes while shirking the legal burdens of being a "state actor" for those same purposes.

The district court then stated that Plaintiffs' allegations that Instructure fails to provide schools information necessary to support informed consent "are in tension with" a joint-action theory. 1-ER-9. But the court cited no authority for the proposition that allegations that Instructure exceeded the scope of its school-granted authority negate allegations that Instructure and schools acted jointly (or were closely entwined) in collecting and managing student information. And the FAC contains numerous allegations establishing that Instructure works closely with public schools in deciding what information is collected about students and how it is used: Instructure contracts with schools to provide educational services, which schools procure using public funds. 2-ER-178–79, 184–85, 201 at ¶¶ 41–42, 53, 75–77, 160. Instructure obtains access to student data through those contracts. 2-ER-179, 198 at ¶¶ 51, 137. Students interact with Instructure only because they are legally required to attend school, and schools mandate the use of Instructure's products. 2-ER-182, 200–02, 217 at ¶¶ 62, 159–61, 169–71, 263–65. Instructure claims that its data practices are controlled by schools, as defined by its contracts with schools, its policies, and the schools' policies. 2-ER-195–96 at ¶¶ 122–23. In fact, "schools do not have access to or control over all the data that Instructure collects from and about students and their families." 2-ER-218 at ¶ 284. And when parents request their children's data, Instructure and schools point to each other. 2-ER-197, 200, 218 at ¶¶ 131, 153, 280-85. Their control of student data is effectively inseparable.

The district court then erroneously assessed Plaintiffs' allegations under the standard described in *Pasadena Republican Club v. Western Justice Center*, which focuses on the financial relationship between state and private actors. 1-ER-9 (citing 985 F.3d 1161, 1169–71 (9th Cir. 2021), looking at whether Plaintiffs alleged financial integration, resulting state profit, and coordination). However, those considerations are relevant to the "symbiotic relationship" test, on which the plaintiffs in *Pasadena* exclusively relied. *Id*. at 1167–71 (citing *Burton v. Wilmington*

Parking Auth., 365 U.S. 715, 723–25 (1961); *Brunette v. Humane Soc'y of Ventura Cnty*., 294 F.3d 1205, 1213 (9th Cir. 2002)) ("*Burton* teaches us that 'substantial coordination' and 'significant financial integration' between the private party and the government are hallmarks of a symbiotic relationship.").[5] By contrast, Plaintiffs here do not allege or argue state action under *Burton*'s symbiotic-relationship test.

The district court then determined that *Brannum v. Overton County School Board* did not support Plaintiffs' position. 1-ER-10 (citing No. 2:03-CV-0065, 2006 WL 8445313, at *3 (M.D. Tenn. June 20, 2006), *aff'd in part, rev'd in part and remanded*, 516 F.3d 489 (6th Cir. 2008)). In that case, the plaintiffs' school district approved the installation of security surveillance cameras throughout plaintiffs' school, contracting with a private company, Edutech. 2006 WL 8445313 at *3. School personnel "met with Edutech representatives at least five times on the design, installation, and maintenance process." *Id*. Edutech and school personnel "jointly decided" where to install the cameras, a fact relevant to the challenged conduct. *Id*. The images captured were accessible by remote internet connection. *Id*. at *4. The court found that, because Edutech and school personnel worked closely in deciding the placement and accessibility of the cameras, "Edutech's conduct bears a 'close

[5] In *Pasadena*, this Court described that test as "the 'joint action' or 'symbiotic relationship' test," but its analysis and authority clearly distinguish it from the "joint action" or "entwinement" (or "close nexus") tests on which Plaintiffs rely here. 985 F.3d at 1167–71; *cf. Rawson*, 975 F.3d at 753–56 & n.14 (distinguishing joint-action and close-nexus tests from symbiotic-relationship test under *Burton*).

nexus' to the [school]'s challenged action on the installation and monitoring of the surveillance system." *Id.* at *10. "Given the complex nature of this product and service, there is sufficient evidence to support a jury finding that Edutech acted under color of state law[.]" *Id.* On appeal, the Sixth Circuit also characterized the installation of the cameras as "state action." *Brannum*, 516 F.3d at 495.

The district court here determined that *Brannum* was inapposite because "Plaintiffs do not allege similar joint action with respect to the purported misconduct." 1-ER-10. The court found that Plaintiffs' allegations "do not demonstrate a joint decision between schools (let alone the particular schools Plaintiffs' children attend) and Defendant to collect students' data for the purpose of disclosing it to third parties." *Id.* First, Plaintiffs were not required to tailor their allegations to any individual school district, which is a matter for class certification. *See Melendres*, 784 F.3d at 1262; *Gillibeau*, 417 F.2d at 432. Second, Plaintiffs' allegations regarding the role Instructure plays as to student information—as previously detailed—is at least as active as the role Edutech played as to camera installation, and the services it provides are at least as complex.

The district court appears to have again reviewed each allegation in isolation rather than holistically, and this Court has repeatedly held that state-action analysis is fact intensive and the circumstances must be viewed "'in their totality.'" *Collins v. Womancare*, 878 F.2d 1145, 1150 (9th Cir. 1989) (quoting *Howerton v. Gabica*, 708 F.2d 380, 384 (9th Cir. 1983); *Thai v. Cnty. of Los Angeles*, 127 F.4th 1254, 1259 (9th Cir.) ("All of the circumstances must be examined to consider whether the actions complained of were sufficiently linked to the state.") (cleaned up). Here, all the circumstances taken together—that Instructure invokes laws that govern only schools in its defense, that it deems itself a "school official" under federal law for matters related directly to Plaintiffs' claims, that it purports to shift its obligations under COPPA to schools, that it obtains student data only by virtue of its school-granted authority, that it works closely with schools in deciding how to take and use student data—amply support a finding of state action at the pleading stage. *See Collins*, 878 F.2d at 1150. The district court erred in concluding otherwise.

III. <u>ISSUE 3</u>: Should this Court decide whether the allegations supported the alleged constitutional violations that underpin Plaintiffs' Section 1983 claims, and do they?

Because the district court dismissed Plaintiffs' Section 1983 claims on state-policy and state-action grounds, it did not reach Instructure's challenges to the alleged constitutional violations. 1-ER-10; 2-ER-90–92. Plaintiffs ask that this Court decide those issues in the first instance, as remand would not serve the interests of justice or judicial economy.

A. This Court can decide purely legal issues without first remanding.

While "[a] district court is usually best positioned to apply the law to the record[,]" an appellate court can decide a "purely legal issue . . . for which the factual record is so fully developed as to render any further development irrelevant." *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs.*, 946 F.3d 1100, 1111 (9th Cir. 2020). Remand is also unnecessary where "[n]othing substantive would be gained, and remand would be an unnecessary waste of judicial and litigant resources." *Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 892 (9th Cir. 2019) (cleaned up). *In Applied Underwriters*, this Court declined to remand where "the district court would presumably either again dismiss Plaintiff's complaint . . . or again grant Plaintiff leave to amend—an opportunity of which Plaintiff would not avail itself, given its stated desire to appeal the district court's original Rule 12(b)(6) dismissal." *Id*. The Court explained that "[r]emand would therefore require the parties to engage in additional and redundant briefing, and would add years to their litigation[,]" and concluded that remand would thus "not serve the interest of judicial economy[.]" *Id*.

Here, the Court can reach the question of whether the FAC supports the alleged constitutional violations because the allegations do not require further factual development, the issues were fully briefed, and the question of whether those allegations state constitutional violations is a "purely legal issue." *Planned Parenthood*, 946 F.3d at 1111. Further, given the district court's resolution of every issue against Plaintiffs and its dismissal of all nine of their claims—including its initial dismissal of Plaintiffs' Section 1983 claims with prejudice—remand would cause considerable undue delay and would not serve the interest of justice or judicial economy. *See Applied Underwriters*, 913 F.3d at 892.

B. The FAC showed a deprivation of Plaintiffs' constitutional rights.

1. Plaintiffs alleged a violation of the Fourth Amendment.

In its motion to dismiss, Instructure made three arguments that Plaintiffs inadequately allege a Fourth Amendment violation. Each should be rejected.

Instructure first argued that courts rarely extend the Fourth Amendment to noncriminal, noninvestigatory governmental conduct. 1-ER-91 (citing *United States v. Attson*, 900 F.2d 1427, 1430 (9th Cir. 1990)). But, as *Attson* observes, the Fourth Amendment has been applied to the conduct of school officials and other civil authorities; the challenged conduct "must be somehow designed to elicit a benefit for the government in an investigatory or, more broadly, an administrative capacity." 900 F.2d at 1429. Thus, determining whether the Fourth Amendment applies to Instructure's conduct requires evaluating "whether such conduct has as its purpose the intention to elicit a benefit for the government in either its investigative or administrative capacities." *Id*. at 1431; *see also Doe ex rel. Doe v. Hawaii Dep't of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003) (administrative purpose includes maintaining safety and order at school).

Instructure next argued that, even if the Fourth Amendment could apply, Plaintiffs did not allege that Instructure assisted the government in any investigatory or administrative purposes. 1-ER-91. But Plaintiffs alleged that schools use Instructure's products, including Canvas, for numerous administrative purposes. 2-ER-185, 201 at ¶¶ 77–78, 160, 168. For example, Plaintiffs alleged that Instructure collects and maintains comprehensive records relevant to the safe and orderly administration of school, such as students' biographical and location information, attendance records, family and socioeconomic information, health records, disciplinary records, behavioral information, search activity, and student-generated content. 2-ER-148 (Instructure's data privacy addendum defining "student data"), 2-ER-180–81 at ¶ 56. Using those records, Instructure generates information to help schools predict, manage, and oversee student behavior. 2-ER-184–85, 211 at ¶¶ 75–78, 226; 2-ER-87 ("Instructure generates insights about students at the direction of and for the sole use of their schools.").

Finally, Instructure argued that Plaintiffs cannot "allege a legitimate expectation of privacy in information they knowingly share with their schools." 2-ER-91. This argument fails for at least three reasons.

First, because children provide information to Instructure only as required in for compulsory education, it is not "knowing" or "voluntary" under the Fourth Amendment. 2-ER-217 at ¶¶ 264–65; *Olson v. County of Grant*, 127 F.4th 1193, 1201 (9th Cir. 2025) (providing information to law enforcement for limited purpose did not trigger third-party doctrine). And Plaintiffs alleged that any purported consent is ineffective. 2-ER-194–202, 217 at ¶¶ 114–74, 273–79.

Second, student-provided information constitutes only part of the information Instructure collects. Instructure also allegedly obtains student information directly from schools and automatically from students when they use its products. 2-ER-180 at ¶ 56; 1-ER-117–21, 148, 161. Such information cannot be characterized as knowingly shared by Plaintiffs.

Third, knowingly sharing information with another "'does not mean that the Fourth Amendment falls out of the picture entirely.'" *Id*. at 314. Instead, courts consider "'the nature of the particular documents sought' to determine whether 'there is a legitimate "expectation of privacy" concerning their contents.'" *Id*. (rejecting "mechanically applying" third-party doctrine); *Olson*, 127 F.4th 1201 (third-party doctrine largely inapplicable to personally identifying information).

At least one court has held that "students have an objectively reasonable expectation of privacy" in the types of data that Instructure collects. *Cherkin*, 2025 WL 844378, at *2. The *Cherkin* court observed that this "privacy interest is expressly recognized in federal and California state law[,]" citing FERPA and California Education Code section 49076, on which Instructure also relied. *Id*. The court noted that, "[w]hen students voluntarily give information to give their schools . . . they have a reasonable expectation of privacy with respect to how that information will be used for bona fide educational purposes, and by whom." *Id*. at *3. Stating that it saw "no basis for concluding that invasion is any less egregious because students are themselves producing the relevant information by using a pedagogical tool for their public education when it is alleged that neither they nor their parents or guardians had notice," the *Cherkin* court retained all of the plaintiffs' privacy claims. *Id*. at *3–4. Plaintiffs thus adequately alleged a Fourth Amendment violation.

2. Plaintiffs alleged a violation of the Fourteenth Amendment.

Instructure advanced five arguments that Plaintiffs inadequately alleged a Fourteenth Amendment violation. Each fails.

First, Instructure asserted that the Fourteenth Amendment does not explicitly provide for a right to privacy, implying that there is no such right. 1-ER-91. "But the Ninth Circuit has clearly stated, and other circuits agree, that the right exists." *Varo v. Los Angeles Cnty. Dist. Attorney's Off*., 473 F. Supp. 3d 1066, 1072 (C.D. Cal. 2019) (collecting cases). Elsewhere, Instructure has acknowledged that "data privacy is a fundamental right[.]" 2-ER-172, 207 at ¶¶ 12, 205.

Second, Instructure contended that the information it allegedly disclosed is not "highly sensitive" personal information. 2-ER-92. But the types of detailed, personal information Instructure collects—and the fact that it concerns children—can only be described as highly sensitive. Elsewhere, Instructure has acknowledged that "student data is even more sensitive than general personal data." 2-ER-210 at ¶ 222.

As in *Cherkin*, Plaintiffs alleged that Instructure misappropriates "sensitive information about students, including their identities, academics, health, behavior, and web-browsing habits, in which students have an objectively reasonable expectation of privacy." 2025 WL 844378, at *2. Further, "the indiscriminate public disclosure of" identifying information "may implicate the constitutional right to informational privacy." *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999). Plaintiffs alleged that Instructure discloses reams of student data to hundreds of "partners." 2-ER-183, 188, 211, 214 at ¶¶ 6871, 86, 225, 246.

Third, Instructure argued that, even if the information is "highly sensitive," Plaintiffs alleged insufficient detail about what was collected and disclosed. 2-ER-92. However, Plaintiffs' allegations are based on Instructure's policies, which "explain what information Instructure collects when a school elects to use an Instructure product." 2-ER-85–86, 117 (this is "the information our Products collect and process").

Because Plaintiffs rely on Instructure's own privacy policies, this case is unlike *Doe I v. Google LLC*, in which plaintiffs alleged hypothetical examples of how product features could be used in privacy-violating ways based on "generic product descriptions." 741 F. Supp. 3d 828, 839 (N.D. Cal. 2024) (no allegation that defendant's products were even in use).

Further, although fulsome, the allegations would have included even greater detail had Instructure not unlawfully withheld information from Plaintiffs. 2-ER-197, 218 at ¶¶ 129–30, 280–283. Instructure also fails to enable schools to provide parents that information, 2-ER-197, 218 at ¶¶ 131, 284-85, and prohibits its partners from responding to parents' data requests, 2-ER-194 at ¶ 111. Thus, "Instructure and innumerable third parties generate and gain access to an enormous volume of data from and about students and their families, while preventing them from even accessing their own information." 2-ER-194 at ¶ 113. "Students and parents do not and cannot know the full extent of the data Instructure obtains about them, whether that data is accurate, how that data is stored, how long that data is retained, who has access to that data, or how that data or data-derivative information or products are used." *Id.* Instructure may not unlawfully withhold information from Plaintiffs and then fault them for not having it. *See United States v. Eastern Mun. Water Dist.*, 2008 WL 11333849, *4 (C.D. Cal. Apr. 3, 2008) ("[E]quity will not permit one to rely on one's own misconduct.").

Fourth, Instructure argued that any violation of Plaintiffs' privacy was supported by a governmental interest. 2-ER-92. If state action compels disclosure of private information, the actor must show "that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Crawford*, 194 F.3d at 959. Instructure contended that "[s]chools and students have a strong interest in" using technology to communicate and manage records, 2-ER-92, but it failed to even argue that its policies and practices are narrowly tailored to meet that interest.

Moreover, the FAC extensively described Instructure's data-harvesting scheme as far exceeding the state's interest in maintaining education records and facilitating school communications. 2-ER-178 at ¶¶ 43-44, *passim*; *Doe by & through Tanis v. County of San Diego*, 576 F. Supp. 3d 721, 736 (S.D. Cal. 2021) ("[T]he County has not shown how *automatically* allowing access to . . . private details as to where the minor victim of a sexual assault lives, goes to school, and can be contacted [ ] is narrowly tailored to this interest.") (emphasis in original). Further, weighing the state's pro-disclosure interests typically requires a level of factual analysis that is impermissible at the pleading stage. *Varo*, 473 F. Supp. 3d at 1075.

Fifth, Instructure argued that the risk of identity theft is irrelevant without allegations that information was actually misused. 1-ER-92. Not so: disclosure of identifying information "could implicate the constitutional right to informational privacy because such disclosure exposes individuals to harms such as identity theft." *Varo*, 473 F. Supp. 3d at 1073 (cleaned up); 2-ER-210 at ¶¶ 217–25.

Plaintiffs thus alleged facts showing a violation of their constitutional rights under Rule 8.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the district court's order dismissing the FAC, vacate the court's judgment, and remand for further proceedings on each of Plaintiffs' claims except Count VI.

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Respectfully submitted,

By: */s/ Julie Liddell*

Julie U. Liddell
EDTECH LAW CENTER PLLC
904 Rio Grande Street, Suite 100
Austin, TX 78701
(737) 351-5855
julie.liddell@edtech.law

Lori G. Feldman
GEORGE FELDMAN MCDONALD, PLLC
102 Half Moon Bay Drive
Croton-on-Hudson, NY 10520
(917) 983-9321
LFeldman@4-Justice.com

Brandon M. Wise
PEIFFER WOLF CARR
KANE CONWAY & WISE LLP
One US Bank Plaza, Suite 1950
St. Louis, MO 63101
(314) 833-4825
bwise@peifferwolf.com

Karen Dahlberg O'Connell
ALMEIDA LAW GROUP LLC
157 Columbus Avenue, 4th Floor
New York, NY 10023
(347) 395-5666
karen@almeidalawgroup.com

Counsel for Plaintiffs-Appellants and the Proposed Classes

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