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, individually and on behalf of all others similarly situated; HEIDI SAAS, on behalf of her minor child M.C. 3, individually and on behalf of all others similarly situated; and 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' REPLY BRIEF

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INTRODUCTION

Defendant Instructure, Inc. ("Instructure") operates its products in schools throughout the country—collecting, using, and sharing students' personal information for its own and third parties' commercial purposes and benefits—without obtaining parental consent as required by state and federal law. Plaintiffs are required to use Instructure's Canvas Learning Management System ("Canvas") as part of their public education and are among the millions of students subjected to Instructure's exploitative data practices. In its Answering Brief, as in the district court, Instructure makes false and misleading statements in arguing that it is not required to obtain parental consent. But the governing statutes and interpreting legal authority refute Instructure's argument and show that Instructure may not take, use, and share student information without first obtaining effective parental consent.[1]

In arguing that it need not do so, Instructure cites a federal statute and state statute that authorize schools to designate it as a "school official" for purposes of

[1] Instructure's ten-page "STATEMENT OF THE CASE AND FACTS" impermissibly consists largely of substantive arguments responding to Plaintiffs' issues. *See* Answering Br., Dkt. 20.1 at 16–20 (arguments concerning consent), 19 (arguments refuting allegations), 20–22 (arguments concerning the adequacy of the allegations); *see also* Fed. R. App. P. Rule 28(a)(6)–(a)(8) (distinguishing statement of the case and argument). This Court is free to disregard or strike substantive arguments improperly placed in background or statement sections. *See* Fed. R. App. P. Rule 28(a)(6)–(a)(8); 9th Cir. R. 28-1(a) ("Briefs not complying with FRAP and these rules may be stricken by the Court."); *Hart v. Parks*, 450 F.3d 1059, 1061 n.1 (9th Cir. 2006) ("The [FRAP's] requirement of separate sections for facts and argument is mandatory, not suggestive.")

handling student information. In the same breath, however, it dismisses its "school official" status in denying its role as a state actor whose conduct is subject to constitutional limitations. Plaintiffs plausibly alleged—and governing law and Instructure's own statements in the record show—that Instructure engages in state action by providing educational services traditionally and exclusively performed by schools, by acting under (but not in compliance with) federal and state policy, and by operating jointly with schools.

Instructure also contends that Plaintiffs have failed to plausibly allege an injury in fact to support Article III standing, but Plaintiffs' allegations are sufficient under applicable law.[2] Because standing is a threshold issue, Plaintiffs address standing first below.

ARGUMENT

I. Plaintiffs plausibly alleged Article III injuries sufficient to establish standing.

Instructure contends that Plaintiffs lack standing because they failed to allege cognizable injuries under Article III of the United States Constitution. Answering Br., Dkt. 20.1 at 73–83. But Plaintiffs plausibly alleged both tangible and intangible harms.

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[2] Most of the arguments Instructure raises in its Answering Brief were raised in the district court and addressed in Plaintiffs' Opening Brief. This Reply Brief addresses only additional arguments raised in Instructure's Answering Brief or other issues that may benefit from further discussion.

To sufficiently allege an injury in fact under Article III, Plaintiffs must allege that they suffered "an invasion of a legally protected interest" that is (1) concrete, (2) particularized, and (3) actual or imminent. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). A "legally protected interest" may arise from the Constitution, from common law, or "solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Lujan*, 504 U.S. 555, 576–78 (1992) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Both federal and state law "can create interests that support standing in federal courts." *Cantrell v. City of Long Beach*, 241 F.3d 674, 684 (9th Cir. 2001).

A. Plaintiffs plausibly alleged concrete, tangible harm.

Instructure argues that Plaintiffs' allegations regarding the diminution of the value of their personal data did not allege a concrete harm. Answering Br., Dkt. 20.1 at 75–76. Plaintiffs' Opening Brief thoroughly addresses the issue of an injury in fact under the California Unfair Competition Law ("UCL"), which incorporates the established federal meaning under Article III but is qualitatively more restrictive. Opening Br., Dkt. 15.1 at 32–38; *see Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 885–86 (Cal. 2011). Even under the UCL, which requires an economic injury of lost money or property, the California Supreme Court explained in *Kwikset* that the injury-in-fact requirement allows for "innumerable ways" in which economic injury may be shown. *Kwikset,* 246 P.3d at 885. Further, there is a split of authority and a growing trend across courts to recognize the lost value of misappropriated personal information. *A.B. by & through Turner v. Google LLC*, 737 F. Supp. 3d 869, 881 (N.D. Cal. 2024) (noting split of authority and no binding Ninth Circuit precedent); *Griffith v. TikTok, Inc.*, 697 F. Supp. 3d 963, 977 (C.D. Cal. 2023) (stating that "the case law on this issue is not a model of clarity"); *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 diminution of future property interest); *Calhoun v. Google LLC*, 526 F. Supp. 3d 605, 635 (N.D. Cal. 2021) (stating that "courts have recognized the growing trend across courts to recognize the lost property value of personal information") (cleaned up).

An Article III injury in fact is even more expansive and "may be predicated on a broader range of injuries." *Griffith*, 697 F. Supp. 3d at 976. The *Kwikset* court pointed out that the injury-in-fact requirement under Article III "is not a substantial or insurmountable hurdle; as Judge Alito put it: 'Injury-in-fact is not Mount Everest.'" 51 Cal. 4th at 324 (quoting *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005)). It is sufficient for federal-standing purposes to "allege some specific, identifiable trifle of injury." *Id*. (cleaned up).

Here, Plaintiffs plausibly alleged that they 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. *See Kwikset*, 51 Cal. 4th at 323. Specifically, Plaintiffs alleged that they are entitled to a public education (2-ER-171, 172, 200, 201, 214, 216 at ¶¶ 8, 12, 159, 170, 242, 261); they are required to use Instructure's product as part of their education (2-ER-176, 182, 217, 218 at ¶¶ 32, 61, 264, 276); neither they nor their parents receive notice or an opportunity to accept or refuse Instructure's data practices (2-ER-171, 172, 194–202, 207, 216 at ¶¶ 4, 9, 12, 114–174, 201, 260); they thus must forgo their privacy rights to receive the education to which they are already entitled (2-ER-172 at ¶ 12); Instructure admits to collecting a vast array of personal information from them, including their personally-identifiable information, content, test results, grades, evaluations, disabilities, socioeconomic information, geolocation information, and much more (2-ER-180-81 at ¶ 56); Instructure is part of the surveillance-capitalism industry, profits enormously from their data, and intentionally designs its K-12 products for optimal data extraction (2-ER-175–79, 182, 212–14, 216 at ¶¶ 28–47, 61, 231–50, 260–62); and Instructure provides no compensation or other legally adequate benefits to students or their parents in exchange for the valuable data it takes from them (2-ER-171, 201–02, 207, 213–14, 218, 220 at ¶¶ 8, 170–71, 201, 239–50, 277, 297).

These allegations are sufficient to plausibly allege standing under Article III.

B. Plaintiffs plausibly alleged concrete, intangible harms.

Instructure contends that Plaintiffs' remaining allegations of harm—invading their privacy, persistently surveilling them, compromising the security of their personal information, subjecting them to algorithmic profiling, denying them access to their data, and forcing them to choose between their right to an education and other fundamental rights—did not plausibly allege concrete, intangible harms. Answering Br., Dkt. 20.1 at 76–80. That is incorrect.

Instructure first cites to this Court's opinion in *Popa v. Microsoft Corporation*, 153 F.4th 784 (9th Cir. 2025), arguing that Plaintiffs' alleged intangible harms "cannot satisfy the concreteness requirement" in *Popa*. Answering Br., Dkt. 20.1 at 76-77. But Instructure's reliance on *Popa* is misplaced. *Popa* focused on session-replay technology that allowed Microsoft "to capture and reproduce customers' interactions with its website." *Popa*, 153 F.4th at 786. The court noted that, "[a]t most, Popa alleges that [the session-replay technology] gathered her pet-store preferences and her street name." *Id*. at 791. The court concluded that the plaintiff failed to explain how collecting such data "caused her to experience any kind of harm that is remotely similar to the 'highly offensive' interferences or disclosures that were actionable at common law" because the data collected was not "embarrassing, invasive, or otherwise private information." *Id.*

By contrast, Plaintiffs here have alleged privacy invasions that would be actionable at common law, *e.g.*, that Instructure collected, compiled profiles from, and disclosed and sold deeply personal information such as Plaintiffs' date of birth; gender; physical locations; messages; comments; academic information, including test results, grades, evaluations, disabilities, socioeconomic information, and student-created content; search activity; and other online behavioral data, 2-ER-177, 180–81, 185, 212, 217 at ¶¶ 34, 56, 76, 231, 270, in addition to IP addresses, third-party cookies, and metadata, 2-ER-180–81, 190 at ¶¶ 56, 96. *See Dellasala v. Samba TV, Inc.*, 2026 WL 1138358, at *2–3 (N.D. Cal. Apr. 21, 2026) (distinguishing *Popa* where allegations went "well beyond the session-replay technology at issue in *Popa*" because defendant compiled detailed identifying profiles and sold them to third parties); *Gabrielli v. Haleon US Inc,* 2025 WL 2494368, at *7–8 (N.D. Cal. Aug. 29, 2025) (distinguishing *Popa* and finding allegations that use of cookies allowed third parties to collect data such as age, gender, email address, "device information, session information, and/or geolocation data" sufficient to establish Article III standing); *see also Camplisson v. Adidas Am., Inc.*, 809 F.Supp.3d 1095, 1106 (S.D. Cal. 2025) (distinguishing *Popa* "where the collection of Plaintiffs' information concerns their person, is much broader in scope, and has been found to be a privacy harm in a wide variety of cases.").

Instructure next cites this Court's opinion in *Kisil v. Illuminate Education, Inc.*, No. 23-4114, 2025 WL 2589000, at *1 (9th Cir. Sept. 8, 2025), arguing that Plaintiffs' allegations in this case fall short in the same way as those in *Kisil* did. Answering Br., Dkt. 20.1 at 77–78. But *Kisil* is distinguishable. In *Kisil*, this Court held that the plaintiffs failed to demonstrate how the alleged intangible harm from data compromised in a data breach sufficiently related to a traditionally recognized harm. *Id*. There, the plaintiffs argued that the intangible harms from the data breach related to "the general common-law injury of 'intrusion upon personal privacy.'" *Id*. This Court held that it does "not recognize a 'free-roaming' common law right to privacy" and that the plaintiffs failed to benchmark the harm to one of four distinct privacy torts. *Id*.

By contrast, the intangible harms alleged by Plaintiffs here relate to two of the four distinct privacy torts: public disclosure of private facts and intrusion upon seclusion, both of which Plaintiffs bring as claims in this case. Both torts require plausible allegations of conduct that is highly offensive to a reasonable person. *Popa*, 153 F.4th at 791. The FAC includes extensive plausible allegations of disclosures and intrusions that are highly offensive to a reasonable person, including that Instructure collects sensitive and personal information from Plaintiffs and other school children who use its products, 2-ER-179-83 at ¶¶ 48-71, takes the information while the children are engaged in compulsory educational activities at schools, 2-

ER-217 at ¶¶ 263-65, uses and discloses the information for its own and third-party recipients' commercial benefit, including sharing the information with more than 1,000 other companies, 2-ER-183-94, 217 at ¶¶ 72-113, 267-72, does all of this without obtaining parental consent as required by federal law, 2-ER-194–202, 217–18 at ¶¶ 114-174, 273-79, denies Plaintiffs and other school children access to the data it collects, uses, and discloses, 2-ER-218–19 at ¶¶ 280-86, and makes false and misleading statements about its data practices on which it intends the public, schools, and parents to rely, 2-ER-202–06 at ¶¶ 175-196.

C. Plaintiffs plausibly alleged particularized harms.

Instructure contends that Plaintiffs "do not allege any particularized harm." Answering Br., Dkt. 20.1 at 80. But as detailed above, the FAC extensively described how Plaintiffs are subject to the highly offensive conduct of Instructure, as it alleged that Plaintiffs are required to use Instructure's products at school, 2-ER-217 at ¶¶ 263-65, Instructure collects, uses, and shares a wide variety of Plaintiffs' personal and sensitive information for its own and third-parties' commercial benefit all without obtaining parental consent in violation of federal law, 2-ER-179–202, 217–18 at ¶¶ 48-174, 267-79, it denies Plaintiffs access to the data it collects, uses, and discloses, 2-ER-218–19 at ¶¶ 280-86, and it makes false and misleading statements about its data practices on which it intends Plaintiffs' schools and parents to rely, 2-ER-202–06 at ¶¶ 175-196. Thus, Plaintiffs plausibly alleged that

Instructure's highly offensive conduct constituted violations of their privacy and affected them in a "personal and individual way." *See Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560 n.1); *Al-Ahmed v. Twitter, Inc.*, 603 F. Supp. 3d 857, 870 (N.D. Cal. 2022) ("[I]nvasion of privacy is a particularized injury sufficient to establish Article III standing.")

D. Plaintiffs plausibly alleged actual harms.

As addressed above, Plaintiffs plausibly alleged concrete and particularized harms. Because Plaintiffs plausibly alleged that Instructure's conduct violated their privacy in ways benchmarked to traditional privacy harms, they sufficiently alleged actual harm that has occurred and is ongoing. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021); *Six v. IQ Data Int'l, Inc.*, 129 F.4th 630, 635 (9th Cir. 2025), *cert. denied*, 146 S. Ct. 120 (2025); *Brown v. Google LLC*, 685 F. Supp. 3d 909, 923–24 (N.D. Cal. 2023).

II. Nothing in federal or state law absolves Instructure of its duty to obtain parental consent before taking, using, and sharing student information in the manner alleged in the FAC.

Instructure's brief contains numerous false and misleading statements regarding the "legal background" that purportedly authorizes education-technology ("EdTech") companies to collect, use, and share student information by (1) obtaining the consent of schools alone, or (2) wholly shifting the burden of collecting parental consent to schools. Answering Br., Dkt. 20.1 at 16–18. But Instructure's position finds no support in any law, especially laws enacted to *protect* children's information and parents' rights over that information.

A. COPPA does not permit companies to obtain consent from schools instead of parents or to shift their burden of obtaining parental consent to schools.

Instructure contends under the Children's Online Privacy Protection Act ("COPPA") that it may rely on the consent of schools alone. Answering Br., Dkt. 20.1 at 17; 15 U.S.C. §§ 6501-6506, 16 C.F.R. § 312. Its argument is refuted by the plain language of COPPA, recent authority from this Court, and unanimous statements by the Commissioners of the Federal Trade Commission ("FTC Commissioners")—the agency tasked with enforcing COPPA.

This Court recently rejected a similar argument brought by another EdTech company. *Shanahan v. IXL Learning, Inc*., No. 24-6985, 2026 WL 982855 (9th Cir. Apr. 13, 2026). In that case, IXL Learning, Inc. ("IXL") argued in the district court that schools can bind parents to its terms of service, which described its student-data practices and contained an arbitration provision. *Shanahan v. IXL Learning, Inc.*, No. 24-cv-02724-RFL, 2024 WL 4658276, at *1–2 (N.D. Cal. Nov. 1, 2024). In support, IXL cited non-binding COPPA guidance issued by FTC staff. *Id.* at *3. The district court denied its motion, and IXL appealed. *Id*. at *7.

At the district court and again on appeal, the FTC Commissioners filed *amicus curiae* briefs stating that operators may *not* rely on schools to provide consent in lieu of parents. *Id*. at *3, *Shanahan*, 2026 WL 982855, at *3 & n.1; Brief for Amicus Curiae Federal Trade Commission, *Shanahan v. IXL Learning, Inc*., No. 3:24-cv-02724-RFL (N.D. Cal. Nov. 1, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p163500shanahanamicus.pdf (last visited May 11, 2026); Brief for Amicus Curiae Federal Trade Commission in Support of Appellees, *Shanahan v. IXL Learning, Inc.*, No. 24-6985 (9th Cir. Apr. 13, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ShanahanAmicusBriefFiled.pdf (last visited May 11, 2026). The FTC Commissioners unequivocally refuted IXL's argument as not "remotely support[ed]" by the COPPA statute, Rule, or agency guidance. Brief for Amicus Curiae FTC, No. 24-6985, at 18–19. Explaining that the purpose of COPPA was to enhance parental rights and children's privacy, *id*. at 11, the FTC Commissioners stated that EdTech companies may not rely exclusively on the consent of schools to any "contractual terms of educational technology service agreements between schools and service providers like IXL," *id*. at 8, which would include those governing the provider's collection, use, and disclosure of student information.

This Court affirmed the district court's order on that ground. *Shanahan*, 2026 WL 982855, at *3. The Court quoted the text of COPPA and the Rule requiring that operators undertake reasonable efforts to obtain verifiable parental consent for the collection, use, or disclosure of personal information from children. *Id*. at *2. The Court observed that "[t]he COPPA Rule lists the '[e]xisting methods to obtain verifiable parental consent that satisfy the requirements of this paragraph,' *id*. § 312.5(b)(2), and it sets out an exhaustive set of exceptions to the requirement of prior parental consent, *id*. § 312.5(c)." *Id.* The methods of obtaining parental consent do not include wholly shifting the burden of obtaining consent to schools, and the exceptions to parental consent do not include providing technology services to schools. *See id.* at *2–3. The Court concluded that "[n]othing in the text of COPPA or of the COPPA Rule even suggests (much less establishes) that operators may treat schools as parents' agents for the purpose of obtaining verifiable parental consent to arbitrate." *Id*. at *3.

Despite the plain language of COPPA, the FTC Commissioners' briefs, and this Court's recent opinion, Instructure argues that COPPA guidance "permits online service providers to collect, use, or disclose student information with schools' consent." Answering Br., Dkt. 20.1 at 17. In support, it cites an FTC "Frequently Asked Questions" business guide created by FTC staff posted on the FTC's website ("FAQ"). *Id.* The FAQ is subtitled "A GUIDE FOR BUSINESS AND PARENTS AND SMALL ENTITY COMPLIANCE GUIDE." *See id*. The FAQ opens by stating that it is not binding on the FTC, is distinct from the Rule and compliance materials, and pertains only to small entities:

> **This document represents the views of FTC staff and is not binding on the Commission.** To view the Rule and compliance materials, go to the FTC's Children's Privacy page for businesses. This document serves as a small entity compliance guide pursuant to the Small Business Regulatory Enforcement Fairness Act.

See id. (emphasis in original). A non-binding guide for small businesses—which would not include multibillion-dollar businesses like Instructure[3]—does not support Instructure's contention that it is permitted to rely on school consent alone in lieu of parental consent.

The FAQ also does not support Instructure purporting to shift the burden of obtaining parental consent to schools. Even if the FAQ had any persuasive authority, it expressly prohibits a company from charging schools with COPPA compliance: "Importantly, operators should not state in Terms of Service or anywhere else that the school is responsible for complying with COPPA, as it is the responsibility of the operator to comply with the Rule." *See id*. Thus, the guidance on which Instructure relies makes clear that *Instructure* must obtain parental consent under COPPA, not schools. COPPA thus does not absolve Instructure of its duty to obtain parental consent.

[3] *See* Small Business Regulatory Enforcement Fairness Act of 1996, 1996 HR 3136, Public Law No. 104–121 (Mar. 29, 1996); 5 U.S.C. § 601.

B. Student-privacy laws do not absolve Instructure of its duty to obtain parental consent under COPPA or other state and federal laws.

In addition to COPPA, Instructure contends that federal and state laws governing the collection, use, and disclosure of student information permit it to obtain school consent instead of parental consent. Answering Br., Dkt. 20.1 at 16–18.

a. Neither FERPA nor analogous state law governing disclosure of education records serve as a private defense against failure to obtain parental consent.

Instructure contends that the Family Educational Rights and Privacy Act ("FERPA") and analogous California state law governing education records absolve it of its duty to obtain parental consent before harvesting student data.[4] *Id*. at 17–18. That argument fails for at least three reasons.

First, Instructure argues that FERPA "allow[s] schools to disclose student data without parental or student consent to a 'contractor' for any purpose that the school decides aids 'legitimate educational interests.'" *Id*. at 16–17 (quoting 34 C.F.R. §

[4] For brevity, this reply refers only to FERPA, which does not materially differ from California's student-records law. *See BRV, Inc. v. Super. Ct.*, 143 Cal. App. 4th 742, 751–52 (2006). To the extent Instructure suggests it is less protective of student information than FERPA, California courts have rejected that argument. *See id.* at 752 (California law adopted "to eliminate potential conflicts between FERPA and state law"). Further, more permissive state law is preempted by FERPA. *See*, *e.g.*, *Rim of the World Unified Sch. Dist. v. Super. Ct.*, 104 Cal.App.4th 1393, 1399–1400 (2002) (holding FERPA sets minimum protections against disclosure of student information that preempt less protective state law governing such disclosure) (citing *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987)).

99.31(a)(1)(i)(A), (a)(1)(i)(B) (2012)). But FERPA regulates schools, not private companies, and it allows a *school* to share data with EdTech companies without obtaining parental consent if the school designates the company as a "school official" and determines it has "legitimate educational interests." 20 U.S.C. § 1232g(a), (b)(1)(A). It is a funding statute that "seeks to deter schools from adopting policies of releasing student records." *Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 291 (E.D.N.Y. 2008). Accordingly, the U.S. Supreme Court has held that FERPA creates no private rights. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002).

Second, construing FERPA as Instructure advocates would produce the absurd result of creating rights for private companies but not for students and their parents—those for whom the statute was enacted to protect—leaving them *less* protected than if the statute had not been enacted. *See Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67–68 (1st Cir. 2002) (FERPA enacted to assure student privacy by requiring parental consent). It would insulate EdTech companies against liability without providing a mechanism for holding them accountable. An interpretation so fundamentally at odds with the statute's express purpose is impermissible. *Pressley v. Cap. Credit & Collection Serv., Inc.*, 760 F.2d 922, 924 (9th Cir. 1985) ("In interpreting statutes the court's objective is to ascertain the congressional intent and give effect to the legislative will.") (cleaned up); *Cherkin* *v. PowerSchool Holdings, Inc.*, 2025 WL 844378, *2 (N.D. Cal. Mar. 17, 2025) (rejecting similar arguments).

Third, even if FERPA and state law could be construed as creating a private defense, analysis of whether a service provider like Instructure handles student information in compliance with the so-called "school official" exception is fact intensive, *see* 20 U.S.C. § 1232g(b)(1)(A); § 99.33(a), and Plaintiffs plausibly alleged that it does not. *See*, *e.g.*, 2-ER-200 at ¶¶ 152 (Instructure takes, uses, and shares student information in excess of legitimate educational purposes), 2-ER-183-88 at ¶¶ 72–85 (same); 2-ER-200 at ¶ 153 (Instructure rediscloses student information to more than 1,000 other companies without parental consent); 2-ER-188-94 at ¶¶ 86–113 (same). Plaintiffs also plausibly alleged that Instructure takes information beyond "education records" governed by FERPA and state law. *See, e.g.*, 2-ER-200 at ¶ 151 (Instructure takes student information in excess of education records); 2-ER-180-81 at ¶¶ 56–57 (Instructure lists FERPA information and "educational records" among dozens of categories of student information it collects, which also includes student messages and files shared among students, search activity, and expansive student device and usage information); *see also Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 435, 436 (2002) (narrowly interpreting "education records" as used in FERPA, holding that "[e]ven assuming a teacher's grade book is an education record, . . . the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book," and observing that to hold otherwise "would impose a substantial burden" of confidentiality on school staff).

FERPA thus does not absolve Instructure of its duty to obtain parent consent before taking, using, and sharing all manner of student information.

b. KOPIPA does not obviate parental-consent requirements.

Instructure cites another student-privacy law it contends obviates all parental-consent requirements: California's K–12 Online Personal Information Protection Act ("KOPIPA"). Answering Br., Dkt. 20.1 at 18 (citing Cal. Bus. & Prof. Code § 22584). It notes that KOPIPA permits it to take and use student information for "legitimate research purposes." *Id*. But Plaintiffs alleged that Instructure's data practices do not comport with that narrow exception: they alleged that Instructure takes, uses, and shares student information to create invasive, persistent digital student profiles, which it shares for commercial purposes, 2-ER-184-85 at ¶¶ 75–78, 86-87; for marketing its products, 2-ER-170, 186, 189 at ¶¶ 2, 79, 91; to test and build new products, including AI technologies, 2-ER-186-88 at ¶¶ 80-85; and to secure commercially valuable third-party data-sharing agreements with companies seeking "to maximize profits and education," 2-ER-186, 188-90 at ¶¶ 80, 86–100. In its brief, Instructure states only that it "does not permit *third parties* to use [students'] personal information for their own advertising or marketing purposes[,]" not that Instructure does not use student information for its own commercial purposes. Answering Br., Dkt. 20.1 at 19 (emphasis added).

Instructure also argues that KOPIPA permits companies to amass student profiles without parental consent for "school purposes." *Id*. at 18 (citing Cal. Bus. & Prof. Code § 22584(a)(3), (b)(2), (e)(2)). ***First***, the question of whether a profile is amassed for "school purposes" is fact intensive, and Plaintiffs alleged that Instructure creates and uses student profiles in excess of school purposes, including for marketing purposes and procuring valuable third-party data-sharing agreements. 2-ER-170, 189 at ¶¶ 2, 88–92. ***Second***, compliance with KOPIPA is but one consideration in evaluating a privacy claim under California law. *See Mathews v. Becerra*, 455 P.3d 277, 286 (Cal. 2019). ***Third***, an expansive reading of KOPIPA would be preempted by COPPA's parental-consent requirements. *Jones v. Google LLC*, 73 F.4th 636, 639 (9th Cir. 2023) (COPPA preempts less protective state law). ***Fourth***, Plaintiffs challenge the constitutionality of Instructure's data practices, including those that may be permitted under state law, 2-ER-211-12 at ¶¶ 228–32 (discussing harms of Instructure's profiling); 2-ER-212-13 at ¶¶ 233–38 (discussing opacity of profiling practices); 2-ER-225-231 at ¶¶ 327–80 (bringing claims under the Fourth and Fourteenth Amendment); *A.C. by & through Park v. Cortez*, 34 F.4th 783, 787 (9th Cir. 2022) ("statutory mandate" is just one factor in evaluating information-privacy claim under Fourth Amendment).

Nothing in these student-privacy laws imbues schools or their vendors with virtually unlimited authority to exploit student information for undefined "education purposes," "research purposes," or any of the other non-educational purposes alleged in the FAC. Instructure's interpretation of these statutes would wholly subvert their legislative intent, transforming limited exceptions to parental consent into gaping pathways for the undisclosed, nonconsensual, mass transfer of student information to the private sector. Basic canons of statutory construction preclude Instructure's ends-driven interpretation of these privacy laws.

The absence of valid consent is the throughline of every claim in this case: it renders Instructure's data practices unauthorized, unjust, and unfair under state law, and confirms the highly offensive nature of Instructure's intrusion into Plaintiffs' privacy. Because Plaintiffs plausibly alleged that Instructure did not obtain effective consent before taking, using, and sharing Plaintiffs' personal information, dismissal of the FAC was unsupported.

III. Plaintiffs plausibly alleged state action.

Instructure contends that Plaintiffs failed to allege state action for their constitutional claims under 42 U.S.C. § 1983 by failing to sufficiently allege the "state policy" and "state actor" requirements. Answering Br., Dkt. 20.1 at 60–61. But Plaintiffs plausibly alleged both.

A. Plaintiffs plausibly alleged that Instructure is a state actor under the public-function test.

In arguing that Plaintiffs failed to allege that Instructure performs a public function in schools, Instructure mischaracterizes the services it provides in schools. In its brief, Instructure downplays its school services, characterizing them as "software and data management services" and contending that it merely "provides [the] software service[s] for schools who then provide educational services." Answering Br., Dkt. 20.1 at 62–63. But Instructure's statements in its motion to dismiss in the district court more accurately describe its services, which are consistent with Plaintiffs' allegations that the software services *are* educational services traditionally and exclusively provided by schools. 2-ER-172, 178, 201 at ¶¶ 10, 41–42, 166. Specifically, Instructure stated in its motion to dismiss that its services "range from course management to assignment delivery and submission, grading, communication between teachers, students, and parents, and student-data analytics[,]" and correctly asserted that "[o]f course, schools have always provided these types of services[.]" 2-ER-84-85.

Further, in arguing in its motion to dismiss that "community norms" allow it to contract with schools to provide services, it characterizes the services as "keep[ing] students' school records such as enrollment data, assignments, grades, contact information, disciplinary records, medical information, and communications with parents" and "maintaining and processing that information." 2-ER-101. It also states on appeal that it "offers a range of products, from recordkeeping to course management and assignment delivery." Answering Br., Dkt. 20.1 at 18–19. Instructure thus describes and acknowledges its services as providing functions traditionally and exclusively performed by schools, which is entirely consistent with Plaintiffs' allegations. 2-ER-172, 178, 201 at ¶¶ 10, 41–42, 166.

Instructure also contends that Plaintiffs' allegations that it offers other products that do not provide direct education to children—for example, a product that "assesses all district data for quality to support decision-making and fundraising"—support a finding that it is not a "state actor." Answering Brief, Dkt. 20.1 at 63. But that is not consistent with courts' state-actor analysis. Even assuming that assessing district data for those purposes means Instructure was not a state actor for those purposes, this Court has explained 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[,]" and the "inquiry begins by identifying the specific conduct of which the plaintiff complains." *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812–13 (9th Cir. 2010) (cleaned up). Here, Plaintiffs challenge Instructure's collection, use, and disclosure of their personal data without consent, not Instructure's conduct in assessing district data for decision-making and fundraising.

Plaintiffs plausibly alleged that Instructure is a state actor under the public-function test in its collection, use, and disclosure of Plaintiffs' and other school children's personal information.

B. The FAC sufficiently alleged a state-actor finding under the joint-action and entwinement tests.

Instructure contends that the FAC "alleg[es] nothing related to nexus or joint action." Answering Br., Dkt. 20.1 at 55. That is untrue, as explained in Plaintiffs' opening brief. Opening Br., Dkt. 15.1 at 56-62; 2-ER-178 at ¶¶ 41-42 (schools contract with Instructure and pay for its services with government funds), 2-ER-179, 198 at ¶¶ 50-51, 137 (Instructure gains virtually unfettered access to student data through its contracts with schools), 2-ER-179–80 at ¶ 53 (Instructure provides schools with massive amounts of data for various purposes), 2-ER-184–85 at ¶¶ 75-77 (Instructure creates highly detailed and intimately personal dossiers of students and sells predictions and "insights" about them for schools), 2-ER-195–96 at ¶¶ 122-23 (Instructure claims its data practices are controlled by schools, as defined by its contracts with schools, its policies, and the school's policies), 2-ER-197, 218 at ¶ 131, 280-85 (Instructure and schools point to each other when parents request access to children's data), 2-ER-200–02, 217 at ¶¶ 159-61, 169-71, 263-65 (students interact with Instructure only because they are legally required to attend school, and schools mandate the use of Instructure's products), 2-ER-226, 228 at ¶¶ 333–34, 356–57 (Instructure deems itself a school official under FERPA, thus admitting that it acts as a school employee under the schools' control, and has been authorized by schools to perform public functions traditionally and exclusively performed by schools).

Instructure further argues that Plaintiffs "rely heavily" on its contracts with schools and argue that its classification as a "school official" under FERPA "is dispositive." Answering Br., Dkt. 20.1 at 67. Plaintiffs do not argue that any one fact is dispositive; rather, they argue that they have alleged sufficient facts that, when taken together, show a close nexus between Instructure and schools and that the two parties are joint participants in Instructure's ongoing operations in collecting, using, and sharing Plaintiffs' personal information without parental consent.

The federal laws that Instructure erroneously cites as absolving it from obtaining parental consent—COPPA and FERPA—are the very laws that require both it and schools to obtain parental consent before engaging in their agreed-upon operations. FERPA, the law governing schools, was enacted to safeguard children's privacy in their own education records, as well as parents' rights over those records. Indeed, "[t]he constitutional right of parents to direct their child's education is [] protected through Congressional policy, as exemplified by [FERPA]." *Mirabelli v. Olson*, 691 F. Supp. 3d 1197, 1211 (S.D. Cal. 2023).

The sponsor of the bill, Senator Buckley, made prescient observations—highly relevant to the present case—about the severe privacy threats posed by the growing use of "computer data banks on students":

> In addition, the growth of the use of computer data banks on students and individuals in general has threatened to tear away most of the few remaining veils guarding personal privacy, and to place enormous, dangerous power in the hands of the government, as well as private organizations.

121 Cong. Rec. 13991 (1975).

FERPA allows schools to share student information with a third party without parental consent only if the third party is a "school official" with legitimate educational interests as determined by the schools. 34 C.F.R. § 99.31(a)(1)(i)(A), (a)(1)(i)(B). Thus, the schools in which Instructure operates must agree to deem Instructure a "school official" with legitimate educational interests before entering into a contract with Instructure to allow Instructure access to students' personal information without *the schools'* first obtaining parental consent. *Id*. FERPA requires that a school official be "under the direct control of the [school] with respect to the use and maintenance of education records" § 99.31(a)(1)(i)(B), and that it may not redisclose students' personal information without parental consent. § 99.33(a)(1).

COPPA, a federal law intended to place parents in control over what information is collected from their young children online, requires that companies like Instructure obtain parental consent before taking, using, or sharing personal information about children under 13. 15 U.S.C. § 6502(a)(1), (b)(1)(A), 16 C.F.R. § 312.5. As alleged, neither Instructure nor its school customers obtain parental consent or confirm that the other party obtains parental consent for any of Instructure's operations in schools. 2-ER-171, 198-200, 217-18 at ¶¶ 9, 140-44, 136-566, 273-79. Thus, they are both jointly and continuously violating federal laws requiring them to obtain parental consent—FERPA with respect to schools and COPPA with respect to Instructure—to carry on their operations in schools. In other words, both parties' active cooperation is continuously necessary, and schools are required to maintain control over Instructure's use and maintenance of student data throughout the ongoing operations. It is a joint enterprise that allows Instructure to continue to extract, generate, use, and share students' personal information for its own and third parties' commercial benefits without either party obtaining parental consent.

Instructure embraces its "school official" designation under FERPA to acquire the student data central to its business without parental involvement and to argue that it need not obtain parental consent for its data practices (despite that FERPA governs schools, not Instructure). Answering Br., Dkt. 20.1 at 16–18. It also admits that "[e]ach school decides if and how it uses any of Instructure's products and services" and that "[t]o the extent Instructure discloses information to third parties, it does so only at the schools' request." *Id*. at 19. Yet when students seek to hold Instructure accountable for its data practices and violations, as they do here, Instructure denies acting "under color of law," claims its "school official" designation has little meaning, and contends it is merely a software provider with no real relationship with schools. It is inequitable for Instructure to 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.

Plaintiffs alleged 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. Allowing this scheme to continue unchecked would strip students of significant constitution protections simply because schools delegated their duty to collect, manage, and use student information to a private entity. *See Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 118 (4th Cir. 2022) ("[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.") (cleaned up). 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).

As the U.S. Supreme Court stated: "[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed by the constitution by simply resorting to corporate form." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995). "The constitution constrains governmental action by whatever instruments or in whatever modes that action may be taken." *Id.* at 392 (cleaned up).

C. The FAC sufficiently alleged the state-policy requirement.

Instructure contends that "[n]either the [FAC] nor Plaintiffs' opening brief explains what state-created right, privilege, or rule of conduct Instructure exercises when it collects student data." Answering Br., Dkt. 20.1 at 70. That is untrue. Plaintiffs sufficiently alleged that the source of Instructure's data practices is federal law and accompanying authorization from public schools. Specifically, Plaintiffs alleged that Instructure deems itself a "school official" under federal law and was authorized by schools and school districts to perform the collection and management of public-school-related data. 2-ER-226 at ¶¶ 333-34. Indeed, as explained above, schools *must* agree to designate Instructure as a "school official" to enter into the agreement in the first place without parental consent and then to continue to operate with Instructure in schools without parental consent. 34 C.F.R. § 99.31(a)(1)(i)(A), (a)(1)(i)(B). The FAC further alleged that Instructure contracts with schools and school districts to provide its services, which include student-data management, and that schools and school districts pay for the services with government funds. 2-ER-178–79, 184–85, 201 at ¶¶ 41–42, 53, 75–77, 160.

In evaluating the state-policy requirements, courts "first look to whether the source of the alleged constitutional harm is a state statute or policy." *Children's Health Def. v. Meta Platforms, Inc.*, 112 F.4th 742, 754 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 2846 (2025). Here, the alleged harm is the violation of Plaintiffs privacy rights and the violation of their right to be free from unreasonable searches and seizures caused by Instructure's data practices in collecting, using, and disclosing Plaintiffs' personal information without parental consent. 2-ER-225-31 at ¶¶ 327-380. The source of Instructure's data practices regarding school children's personal information *is* a government statute or policy—namely, FERPA and accompanying authorization from and contracts with schools. If not for a government policy authorizing schools to designate Instructure as a "school official" and enter into an agreement to share student information with it, Instructure would not have access to Plaintiffs' and other school children's personal information in the first place and would be unable to carry on its operations without parental consent in violation of federal law.

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,

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