No. 25-5438

In the United States Court of Appeals for the Ninth Circuit

JASMINE HERNANDEZ-SILVA, ON BEHALF OF THEIR MINOR CHILDREN M.C. 1 AND M.C. 2, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,
PLAINTIFFS – APPELLANTS

v.

INSTRUCTURE, INC.,
DEFENDANT – APPELLEE

On Appeal from the U.S. District Court
for the Central District of California, Los Angeles
District Court Case No.: 2:25-cv-02711-SB-MAA

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INTRODUCTION

This case is one of at least seven filed by the EdTech Law Center, seeking to achieve through litigation what they could not by lobbying Congress: "industry-wide reforms" regarding how (or whether) schools may use education technology ("EdTech")."[1]

Like in those other cases, Plaintiffs' Complaint here makes sweeping and generic allegations about the EdTech industry in an attempt to paint a grim picture about "surveillance capitalism" and the "datafication" of children based on "the modern internet."

There are many problems with this story, starting with the fact that Instructure is not a social media company, its customers are not kids, and it does not conduct any advertising, much less targeted advertising, to schoolchildren. Rather, Instructure offers education software services ***to schools*** for things like recordkeeping, course management, and communication between teachers, students, and parents. Both federal and state law directly authorize schools to contract for and consent to the

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[1] *See* Decl. Julie Liddell at 1, *Cherkin v. PowerSchool Holdings, Inc.*, No. 3:24-cv-02706-JD (N.D. Cal. May 27, 2025), Dkt. No. 69-1; *see also Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) ("[Courts] may take judicial notice of court filings and other matters of public record.").

use of these services.

Plaintiffs' generalized policy grievances about schools' use of EdTech create two insurmountable and related roadblocks to their claims—plausibility and standing.

First, as the district court correctly recognized, despite their lengthy pleading, Plaintiffs leave out nearly every necessary detail of their nine privacy claims under federal and state law. They do not specify ***what*** data Instructure allegedly has ***about them***, ***with whom*** Instructure allegedly shared this data, or ***what*** Instructure (or any third party) purportedly ***did*** with this data. Nor do Plaintiffs allege how they were supposedly harmed by any of this activity.

In addition to pointing out these overarching errors, the district court also identified claim-specific pleading defects. The court held that Plaintiffs failed to plead the basic elements, such as: "live interception" for their California Invasion of Privacy Act ("CIPA") claim; statutory standing for the Unfair Competition Law ("UCL") and Comprehensive Computer Data Access and Fraud Act ("CDAFA") claims; a "highly offensive" invasion for their common-law claims; and state action for their constitutional claims. Thus, contrary to Plaintiffs' gripes, the district court carefully analyzed all of the Complaint's allegations and concluded that they failed to comply with Rule 8. And when the district court gave Plaintiffs the chance to add allegations to survive dismissal, Plaintiffs did not even try (presumably because they have none). 2-ER-257–59. For this reason, the district court correctly dismissed each of Plaintiffs' generic, conclusory claims under Rule 12(b)(6).

Second, after the district court's decision to dismiss the Complaint, this Court's decision in *Popa v. Microsoft Corporation*, 153 F.4th 784 (9th Cir. 2025), made clear that Plaintiffs have more than a pleading problem—they also lack an Article III injury. In *Popa*, this Court applied the Supreme Court's standing decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), to a data privacy case. *Popa* made clear that in such a case, *TransUnion* requires plaintiffs to demonstrate an injury "particularized" to their circumstances "and benchmarked to a specific [privacy] tort." 153 F.4th at 791. Thus, for the types of privacy claims alleged here, Plaintiffs must show harm that is similar to the "'highly offensive' interferences or disclosures that were actionable at common law," such as photographing someone through a window without their knowledge or publishing a photo of someone nursing their child without their consent. *Id.* Plaintiffs' policy arguments about schools' use of EdTech products for recordkeeping and data analysis come nowhere close to this line. Therefore, Plaintiffs also lack standing—a jurisdictional defect that this Court can consider at any time.

On appeal, instead of addressing these plain deficiencies and the district court's reasons for dismissal, Plaintiffs deflect and defer to class certification. And they extensively rely on the motion-to-dismiss decision in one of Plaintiffs' counsel's other EdTech cases with similar claims—even though after discovery closed in that case, the plaintiffs abandoned nearly all their (baseless) claims. *See Cherkin v. PowerSchool Holdings, Inc.*, No. 3:24-cv-02706-JD (N.D. Cal. May 27, 2025), Dkt. No. 119. Plaintiffs want to pursue a similarly futile fishing expedition in this case, but they cannot wave away basic pleading requirements or Article III's injury requirement. This Court should affirm the district court's dismissal of Plaintiffs' Complaint.

STATEMENT OF JURISDICTION

The Court lacks subject-matter jurisdiction because Plaintiffs do not have an injury in fact under Article III of the Constitution. *See infra*, Argument, Part IV. Instructure otherwise agrees with the Jurisdictional

Statement in the Opening Brief.

STATEMENT OF ISSUES

(1) Did the district court correctly dismiss Plaintiffs' state-law and common-law privacy claims where the Complaint fails to allege what data was collected, what information was disclosed, to whom it was disclosed, or how any Named Plaintiff was harmed?

(2) Did the district court correctly dismiss Plaintiffs' constitutional claims under 42 U.S.C. § 1983 for failure to plead state action based on this Court's precedent stating that the provision of educational services is not a public function and Plaintiffs' claim that Instructure is acting outside of the schools' direction? Alternatively, should the Court affirm dismissal of these claims where the Complaint fails to plead any investigation under the Fourth Amendment or any specific violation of privacy under the Fourteenth Amendment?

(3) Do Plaintiffs have Article III standing where the Complaint alleges no concrete, particularized injury as to any Named Plaintiff and instead relies on generalized allegations about Instructure's products and unspecified risks from the use of those products?

STATEMENT OF THE CASE AND FACTS

I. Legal Background

For decades, a number of federal and state laws have worked together to allow schools to contract with third-party service providers, like Instructure, to help with their technology needs. These laws and their implementing regulations reflect each legislature's balancing of educational and administrative requirements with student data privacy. And they make clear that EdTech providers can rely on schools' consent to provide their services.

In 1974, Congress enacted the Family Educational Rights and Privacy Act ("FERPA") to protect "the access and disclosure of student educational records." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002). In 2008, and again in 2011, the U.S. Department of Education amended FERPA regulations to account for the move from paper to digital records and the increased reliance on third-party support in managing these records. *See* Family Educ. Rights and Priv. Regul. Notice of Proposed Rulemaking, 76 Fed. Reg. 75604, 75607 (Dec. 2, 2011). These regulations allow schools to disclose student data without parental or student consent to a "contractor" for any purpose that the school decides aids "legitimate educational interests." 34 C.F.R. § 99.31(a)(1)(i)(A), (a)(1)(i)(B) (2012).

The Children's Online Privacy Protection Act ("COPPA") likewise governs the storage and use of children's electronic information. *See* 15 U.S.C. §§ 6501-6506; 16 C.F.R. pt. 312 (2025). Enforced by the Federal Trade Commission, COPPA guidance—like the above FERPA regulations—permits online service providers to collect, use, or disclose student information with schools' consent. *See Complying with COPPA: Frequently Asked Questions*, Fed. Trade Comm'n (Jan. 2025), https://tinyurl.com/yc6thhf8 (last visited Apr. 20, 2026). Neither FERPA nor COPPA have a private right of action.

Many state legislatures have also recognized schools' increased need to use third-party vendors for tech services. For example, as "a statutory response" to FERPA, California passed Education Code § 49076, which allows school districts to give "access to pupil records . . . without written parental consent" to a person authorized to have them by FERPA. Cal. Educ. Code § 49076(a); *see BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 751 (2006). Section 49076 separately permits school districts to release student records to contractors providing "outsourced institutional services or functions" to the districts "without written parental consent." *Id.* § 49076(a), (a)(2)(G)(i). Similarly, California's K-12 Pupil Online Personal Information Protection Act ("KOPIPA"), allows EdTech providers to use or disclose students' "personally identifiable information" *without parental consent* for any educational purposes or for certain "legitimate research purposes." Cal. Bus. & Prof. Code § 22584(a)(2), (e)(2). The law even allows providers to develop student profiles for educational purposes. *Id.* § 22584(a)(3), (b)(2), (e)(2). More than 20 states have similar laws modeled after KOPIPA. *See State Student Privacy Laws*, Pub. Int. Priv. Ctr., https://tinyurl.com/z9d4j4vk (last visited Apr. 17, 2026).

All in all, these laws permit private contracts with schools to provide software services and reliance on schools' consent (or schools obtaining parental consent) to implement those services.

II. Factual Background

Instructure is one of the many education technology companies who work with schools under the above statutory frameworks to provide software and data management services. 2-ER-178. The company offers a range of products, from recordkeeping to course management and assignment delivery. *See id.* Each school decides if and how it uses any of Instructure's products and services. *See* 2-ER-136–58.

Should a school request Instructure's services, Instructure's public policies explain what information the school may put into Instructure products. *See* 2-ER-109–35. Importantly, Instructure is clear that it uses a student's personal information only to provide services to the school and "do[es] not sell or rent personal information to third parties." *See* 2-ER-121. To the extent Instructure discloses information to third parties, it does so only at the schools' request. 2-ER-162. Instructure does not permit third parties to use personal information for their own advertising or marketing purposes. 2-ER-138. Instructure allows parents and schools to "review and correct" the information in its products, to "delete it, and to tell [Instructure] to update it or stop using it." 2-ER-163.

III. Proceedings Below

On March 27, 2025, Plaintiffs, a group of parents representing their minor children, filed this lawsuit against Instructure. 2-ER-296–97. Plaintiffs' Complaint asserts nine claims against Instructure on behalf of a putative nationwide class of K-12 students who attended schools that used Instructure products, as well as a California subclass: Violation of the Fourth Amendment (Count I) and Fourteenth Amendment (Count II) under 42 U.S.C. § 1983; Violation of CIPA, Cal. Penal Code §§ 631, 632 (Count III); Violation of CDAFA, Cal. Penal Code §§ 502, et seq. (Count IV); Violation of California's UCL, Cal. Bus. & Prof. Code § 17200, et seq. (Count V); Violation of Cal. Civ. Code § 52.1 (Tom Bane Civil Rights Act) (Count VI); Invasion of Privacy - Public Disclosure of Private Facts (Count VII) and Intrusion Upon Seclusion (Count VIII); and Unjust Enrichment (Count IX). 2-ER-167.

Plaintiffs contend that Instructure's products collect, use, and share students' personal information without "effective" consent by a person with "proper" authority (*i.e.*, parents)—ignoring that federal and state law dictate the consent question. 2-ER-198–200, 217–18. And, as explained above, those laws permit EdTech providers to rely on schools' consent.

The Complaint speaks generally about "digital products" and the "modern internet," then cites Instructure's product capabilities and partnerships with third parties, which facilitate integration across a school's chosen vendors. *See* 2-ER-175, 186–94. The Complaint acknowledges that Instructure "contracts with schools to provide a host of services," including the second-most used learning management system in the country. 2-ER-178–79, ¶¶ 41, 52. The Complaint then makes the illogical and unfounded leap that Instructure profits *not* from selling its learning management system and services, but rather from collecting and "monetizing" data. 2-ER-179, ¶ 45; 2-ER-183, ¶ 67.

The Complaint does not give any concrete facts about Instructure's alleged data sharing: It does not say to ***whom*** Instructure supposedly sells data, ***what*** data it sells, or ***when, where,*** and ***how*** these transactions occur. Instead, the Complaint rehashes the allegation that Instructure is using student data for "commercial purposes," but provides no further details about what those purposes are other than vague statements like "analysis," "disclosure," and "influencing." *See, e.g.*, 2-ER-172, ¶ 11; 2-ER-183, ¶ 72; 2-ER-190, ¶ 99; 2-ER-217, ¶¶ 268–71.

As to ***Plaintiffs'*** use of Instructure products, the Complaint is equally vague. Beyond asserting that all Named Plaintiffs' children used one product, Canvas, on their school-issued devices, *see* 2-ER-217–18, Plaintiffs say nothing specific about any of them. Every allegation is about the group. They do not allege what specific data was collected from any Plaintiff, what information was disclosed, to whom it was disclosed, when any such disclosure occurred, or even which schools the Plaintiffs attend and how they used any Instructure products.

Unsurprisingly, then, their theories of harm also lack specificity. They allege only that they are harmed by an invasion of privacy and an inability to access their data and that Instructure somehow forces them to choose between their education and their other fundamental rights. 2-ER-207–15, ¶¶ 202, 233, 251. Plaintiffs further claim Instructure "diminished the value of" students' data—despite also alleging harm based on students possibly not wanting to "participate in the data market at all." 2-ER-214, ¶¶ 248–49. And they allege only that surveillance, hypothetical security risks, and the supposed use of unspecified algorithms "*can*" "potential[ly]" cause harm—not that any of these things actually harmed or are likely to cause harm to Plaintiffs. 2-ER-209–11, ¶¶ 214, 217, 221, 228 (emphasis added).

On June 2, 2025, Instructure moved to dismiss the Complaint. 2-ER-71. The district court held a hearing on the motion on August 1, 2025. During that hearing, the court repeatedly asked Plaintiffs to identify facts connecting their allegations to any Named Plaintiff. 2-ER-257–59, 265–67, 268, 276–78, 282–85. In response, Plaintiffs acknowledged that they could not identify any specific third party that allegedly intercepted any Named Plaintiff's data. 2-ER-277, at 29:5–10. Plaintiffs also confirmed that they had no additional facts to allege in support of their state action theory. 2-ER-257, at 9:4–8.

On August 4, 2025, the district court granted Instructure's motion to dismiss in its entirety for failing "to satisfy the basic requirements of Rule 8." 1-ER-6. The court concluded that the Complaint contains only "broad, generalized allegations about Defendant's full product line, while offering scant detail about Plaintiffs' own experiences with any of them," including basic information, such as the specific schools Plaintiffs attend or how they use the products at issue. *Id.* This pleading failure "undermine[s] Plaintiffs' ability to plausibly allege ***any*** claim for relief." *Id.* (emphasis added).

The court analyzed the elements of each individual claim, as well. It held that the Complaint failed to state a claim under Section 1983 because the allegations, even if proven, would not show that the government is responsible for Instructure's actions. The Complaint is devoid of facts identifying "which school district's actions or policies are behind each of the alleged violations." 1-ER-8. The district court also relied on this Court's precedent that the "provision of educational services is not a function that is traditionally and exclusively the prerogative of the state." 1-ER-8–9 (quoting *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 816 (9th Cir. 2010)). Instructure's contracts with schools and designation as a "school official" under FERPA were also insufficient to plausibly allege that Instructure acted jointly or was "so entwined with schools that it may fairly be treated as a state actor." 1-ER-9. Indeed, many of Plaintiffs' allegations state the opposite, accusing Instructure of "exceed[ing] any legitimate authority it has to act on the government's behalf." 2-ER-226, ¶ 340; *see also* 2-ER-230, ¶ 369.

Turning to the state-law claims, the court held that the Complaint failed to sufficiently allege a CIPA claim because the Complaint does not contain any facts showing that Instructure "allows real-time interception" or how Instructure allegedly intercepted Plaintiffs' data. 1-ER-11.

Next, the district court dismissed the statutory privacy claims for failure to allege damages in a "nonconclusory fashion." 1-ER-13. The court explained that "general facts regarding the market for user data" and Instructure's alleged profits "from students' data generally"—

without any specific facts about Plaintiffs' desire and ability to sell their data—were insufficient for their UCL and CDAFA claims. *Id.*

Finally, on the common-law claims, the district court held that Plaintiffs' invasion of privacy claims failed because the Complaint did not allege "which products Plaintiffs use (other than one—Canvas LMS), what type of data was collected from them, or to whom Defendant provided the data." 1-ER-15. And the court dismissed the unjust enrichment claim because it is not a standalone cause of action under California law. *Id.*[2]

The district court allowed Plaintiffs to amend their Complaint to fix these deficiencies and ordered a Rule 11 conference. But rather than amend and submit the required statement "at a level of specificity where the Court can understand what the Rule 11 basis is for the specific allegations," 2-ER-283, Plaintiffs appealed.

SUMMARY OF ARGUMENT

This case begins and ends with a fundamental defect: Plaintiffs' Complaint picks a policy fight about EdTech rather than alleging any

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[2] The district court also dismissed Plaintiffs' Bane Act claim, 1-ER-13–14, and Plaintiffs do not appeal the dismissal of that cause of action.

legal claims based on what happened to them from their use of Instructure's products. Thus, this Court has ample reasons to affirm the district court's dismissal:

I.A. The district court correctly dismissed the Complaint for failure to state a claim. Rule 8 and Rule 12(b)(6) require facts showing that the defendant plausibly engaged in misconduct that harmed the plaintiffs. Fed. R. Civ. P. 8, 12(b)(6). Instead of identifying what Instructure did to Plaintiffs with their specific data via a specific product, the Complaint relies on Instructure's hypothetical capabilities and generalized statements regarding its full product line.

B. The district court properly dismissed the CIPA claim because Plaintiffs failed to allege the threshold element of live interception of data. Their allegations concerning potential third-party *access* are insufficient.

C. The district court properly dismissed the UCL claim because the Complaint did not sufficiently allege that Plaintiffs suffered economic injury. Plaintiffs' generalizations about data loss and diminution of value are not enough to establish UCL standing.

D. The Complaint's claim under CDAFA—a law enacted to address computer crimes and hacking—was properly dismissed for similar reasons. Plaintiffs did not plead the necessary facts about the value of their data *to them* or how Instructure diminished that value.

E. The common-law privacy claims fail because Plaintiffs' general allegations about Instructure's data practices omit a crucial component of a public disclosure claim: disclosure of private facts. Indeed, Plaintiffs do not even state what facts Instructure disclosed or to whom. Their intrusion upon seclusion claim also fails to explain how they have a reasonable expectation of privacy in data they voluntarily share with schools, or how the alleged intrusion into this unspecified information is highly offensive.

F. Finally, Plaintiffs' unjust enrichment claim fails for the simple reason that there is no such standalone claim under California law.

II. The district court was also correct in dismissing Plaintiffs' federal claims. Plaintiffs fail to plead facts sufficient to hold Instructure liable as a state actor under Section 1983. Instructure's software services are not a traditional and exclusive state function, dooming Plaintiffs' public-function theory. And Plaintiffs' own allegations suggest that Instructure operates independently—not "inextricably intertwined" with schools.

III. Alternatively, if this court holds that the district court erred in dismissing Plaintiffs' Section 1983 claims for failure to plead state action, the Court should still reject Plaintiffs' constitutional claims. The Fourth Amendment does not apply in this noncriminal, noninvestigatory context. And Instructure and schools cannot violate the Fourteenth Amendment by allegedly using unspecified student information in unspecified ways in furtherance of public education.

IV. For the same reasons Plaintiffs fail to state any claim, they also lack standing to assert any of their claims because they have not alleged any concrete, imminent, or particularized injury. The Complaint alleges only that all Plaintiffs, along with millions of schoolchildren, have suffered vague harms that are not particular to anyone's specific use of Instructure products or any specific actions Instructure took. Even though the issue was not briefed below, this Court can dismiss for lack of standing at any time. *Washington Env't Council v. Bellon*, 732 F.3d 1131, 1138–39 (9th Cir. 2013).

STANDARD OF REVIEW

The Court reviews motions to dismiss de novo. *Bodenburg v. Apple*

Inc., 146 F.4th 761, 767 (9th Cir. 2025). To survive a motion to dismiss, Plaintiffs must allege "enough facts" taken as true "to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Courts are not required to accept legal conclusions couched as factual allegations, and conclusory allegations unsupported by sufficient facts do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

For Article III standing, "[t]he plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing the[] elements": (1) injury in fact; (2) traceability; and (3) redressability. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016). When "a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Id.*

ARGUMENT

I. The District Court Properly Applied Rule 8 in Dismissing All of Plaintiffs' Claims.

Given their focus on industry reform, it is unsurprising that on appeal, Plaintiffs expend much of their energy arguing about the application of Rule 8 rather than their actual claims. And when they do address the specific elements of their claims, they continue to make high-level arguments about the fact-intensive nature of privacy claims, citing inapposite cases about social-media apps. In other words, Plaintiffs' opening brief makes the same error as the Complaint by keeping the issues at the 30,000-foot level. But Rule 8 requires on-the-ground allegations, and Plaintiffs' criticisms concerning an entire industry fail to meet that standard.

A. The district court considered the entire Complaint and correctly concluded no claim crossed the plausibility line.

Rather than directly tackle the district court's analysis, Plaintiffs argue that the district court did not view the Complaint holistically (which it did), focused on class certification issues (which it did not), and failed to fault Instructure for withholding information (which is irrelevant when the issue is Plaintiffs' own experience).

Rule 8 requires that a pleading "contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(1)–(3). The Supreme Court has explained this means a pleading must do more than "offer[] labels and conclusions or a formulaic recitation of the elements of a cause of action" or "tender[] naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (cleaned up). Instead, it must cross the line from possibility to plausibility. *Id.*

The district court applied this standard correctly. It held that the Complaint lacked any non-conclusory allegations showing that Instructure plausibly violated Plaintiffs' privacy by collecting and disclosing their data to third parties. The district court pointed out that the Complaint "largely consists of broad, generalized allegations about Defendant's full product line, while offering scant detail about Plaintiffs' own experiences with any of them." 1-ER-6.

As for the few Plaintiff-specific allegations in the Complaint, the court explained that they too were "conclusory" and failed to identify "what information—or even what categories of information—was collected from any plaintiff or to whom it was allegedly disclosed." *Id.* Indeed, the generic allegation that Defendant provided *unnamed* "third parties" with *unspecified* "personally identifying data" purportedly "belonging to plaintiffs" is far afield from what Rule 8 requires. *Id.*

Plaintiffs' arguments challenging the district court's application of Rule 8 have no merit.

First**,** Plaintiffs incorrectly argue that the district court did not view the Complaint holistically because it pointed only to the 35-paragraph "conclusory" Plaintiff-specific allegations. Op. Br. at 10–13; *see also* 1-ER-6. But the district court expressly noted that the entire "82-page pleading largely consists of broad, generalized allegations." 1-ER-6.

Nonetheless, Rule 8 requires Plaintiffs to allege facts showing "the pleader"—Plaintiffs—are entitled to relief. And Plaintiffs point to no allegations that connect their broader story (not just about Instructure but technology at large) to their own experiences. In fact, in the "Plaintiff-Specific Allegations" section, 2-ER-217, Plaintiffs largely treat the four named parents and five minor children as a homogenous whole. Indeed, all but three paragraphs in this section reference the "Plaintiffs" collectively without mentioning their names, schools, products they use, or how they use those products. *See e.g.*, 2-ER-218, ¶ 276 ("Plaintiffs' use of Instructure's products is compulsory"); 2-ER-219, ¶ 289 ("Instructure harmed Plaintiffs by invading their privacy"). The only three paragraphs that are not vaguely and improperly group-pled do nothing to address the Rule 8 concerns: They relate to Plaintiff Saas and her alleged attempts to obtain information about her child's data. 2-ER-218, ¶ 282. Even then, the Complaint provides no details about what information was supposedly sought, how the request was made, or how any response caused harm. The Complaint then extrapolates from that isolated allegation an invented systemwide policy "denying" all parents access to their children's data. *Id.*, ¶ 283.

Next, Plaintiffs point to their generic descriptions of Instructure's products and ask the Court to assume that these allegations apply across the board to "millions of school-aged children" in the thousands of school districts that contract with Instructure for different products. *See* Op. Br. at 11–12; 2-ER-170, ¶ 1. For example, they point to paragraphs in the Complaint that: list the data Instructure may collect from users, *see* 2-ER-180–81, ¶ 56; recite Instructure's general product terms and policies, 2-ER-183–84, ¶ 73; and vaguely allege that the company's data practices "harm children." *See* 2-ER-207, ¶ 197. But these generalized allegations that various products ***could*** collect or share data—at schools' request—do not plausibly allege anything about any Named Plaintiff, particularly where the Complaint acknowledges that these allegations do not necessarily "govern students' use of" every Instructure product. 2-ER-195, ¶ 122.

That Plaintiffs cite one specific product they allegedly used, Canvas, does not change the analysis. *See* Op. Br. at 3, 11. Despite acknowledging at the motion-to-dismiss hearing that their claims are limited to Canvas, the Complaint does not specify how many of the allegations apply to Canvas. *See, e.g.*, 2-ER-207–16 (listing alleged harms, but not connecting any to Canvas); 2-ER-217–20 (listing Plaintiff-specific allegations, but mentioning Canvas only to say generally that "Plaintiffs use Instructure products at their schools, including Canvas LMS"); 2-ER-225–46 (not mentioning Canvas in any of their causes of action). And the Canvas-only allegations still do not allege what data Canvas collected from Plaintiffs and what third parties allegedly received that data.

The proceedings below confirm that these deficiencies are not technical; they're fundamental. At the hearing on the motion to dismiss, the district court asked Plaintiffs to identify facts showing that any Named Plaintiff's data was intercepted or disclosed. Plaintiffs acknowledged that they could not. And rather than amend their Complaint to add such details, as the district court expressly invited them to do, Plaintiffs appealed, maintaining that generalized allegations about Instructure's systems are sufficient. They are not.

Second, Plaintiffs contend that these deficiencies can be addressed later, at class certification or through discovery. That argument misunderstands Rule 8, which states that a pleading must show that "the ***pleader*** is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). Plaintiffs cannot rely on generalized allegations now and defer the required showing of plaintiff-specific harm to a later stage. Nor can Plaintiffs ignore Rule 8 in pursuit of a fishing expedition to obtain voluminous discovery. *Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1204 (9th Cir. 2021) (affirming district court's dismissal for failure to state a claim and noting that the Court "cannot condone the use of discovery to engage in fishing expeditions") (cleaned up).

Third, Plaintiffs argue that the district court ignored their argument that they could not plead more details here because Instructure withheld evidence about what data Plaintiffs disclosed to Instructure. Op. Br. at 14–15. This fails on its face. The district court *did* address this argument but rejected it. *See* 1-ER-7. For good reason: Even according to their own Complaint, ***Plaintiffs*** are the ones that upload information to Instructure products by purportedly using those products on their devices. 1-ER-7. So ***Plaintiffs*** are well-positioned to know, and plead, more detail regarding what information they purportedly disclosed to Instructure.

Thus, their "conclusory allegation[s], made only on information and belief and without supporting factual allegations," are insufficient. *Marcus v. Nationstar Mortg. LLC*, 2022 WL 1486831, at *1 (9th Cir. May 11, 2022). This is not a situation where factual knowledge lies exclusively with Instructure, making the cases that Plaintiffs cite inapposite. *See*, *e.g.*, *Biggs v. Bank of Am. Corp.*, 2017 WL 11648863, at *7 (C.D. Cal. July 28, 2017) (pleading standards are relaxed where facts are within defendant's knowledge and plaintiffs plead enough specifics to put defendant on notice); *Doe v. GoodRx Holdings, Inc.*, 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).

In sum, the district court correctly applied Rule 8 to dismiss the Complaint under Rule 12(b)(6). And, as explained next, the court did so only after analyzing each claim.

B. The district court correctly dismissed Plaintiffs' CIPA claim for failure to plead live interception.

The district court correctly dismissed Plaintiffs' CIPA claim for failing to allege that Instructure intercepted, or allowed third parties to intercept, their communications while in transit.

Section 631(a) of CIPA prohibits the unauthorized interception or "read[ing][] or "attempt[ing] to read" "the contents or meaning of any message, report, or communication while the same is *in transit*." Cal. Penal Code § 631(a) (emphasis added). Section 632(a) prohibits the unauthorized use of an "electronic amplifying or recording device to *eavesdrop upon* or *record* [a] confidential communication." Cal. Penal Code § 632(a) (emphasis added). Both sections "undisputedly require ***live interception*** of [a] confidential communication," 1-ER-10 (emphasis added); mere access to such a communication after transmission is insufficient.

As the district court correctly held, the Complaint fails to allege any facts showing "how [Instructure's] technology allows real-time interception in general or how it was used to intercept Plaintiffs' data in particular." 1-ER-10–11. Plaintiffs' only allegation on this threshold issue is a vague and conclusory statement that "Instructure shares student data in real time and/or near-real time." 2-ER-189, ¶ 94. This is no more than an impermissible "formulaic recitation" of the elements of the claim. *See Twombly*, 550 U.S. at 555.

Plaintiffs argue that their allegations about Instructure's "sprawling data-sharing partner network," its "value to third-party partners," and its "open, extensible learning ecosystem" are sufficient. *See* Op. Br. at 18–19. But these "data-sharing" allegations still leave open the key CIPA question: ***When*** does the alleged access occur? Mere access to data does not equate to intercepting data while it is "in transit." *See Torres v. Prudential Fin., Inc.*, 2025 WL 1135088, at *5 (N.D. Cal. Apr. 17, 2025); *Boulton v. Community.com, Inc.*, 2025 WL 314813, at *1 (9th Cir. Jan. 28, 2025).

Plaintiffs further argue that allegations of "'triggering events' that relay detailed student data in real time" "amply support Plaintiffs' CIPA claim." Op. Br. at 19. But this overstates the allegations, which do not assert that the "triggering events" transmit student data to third parties ***in real time***. 2-ER-191, ¶ 102. Rather, the Complaint alleges that "data [is] transmitted through the system upon the occurrence" of certain events, such as "quiz submissions." *Id.*, ¶ 103. In other words, Plaintiffs allege that someone (not necessarily students) provides data (not necessarily about students) to Instructure, and ***then*** that data is transmitted to third parties—a sequential chain of events that is the opposite of simultaneous (*i.e.*, live) interception. *See, e.g., Upon*, Merriam-Webster, https://tinyurl.com/cyfndtcc (last visited Apr. 15, 2026) (defining "upon" as "thereafter").

Plaintiffs' cited authority likewise fails to rescue their CIPA claim. For example, neither *Frasco v. Flo Health, Inc.*, 2025 WL 2680068 (N.D. Cal. Sep. 17, 2025), nor *D'Angelo v. FCA US, LLC*, 726 F.Supp.3d 1179 (S.D. Cal. 2024), are comparable cases. In *Frasco*, the court denied Meta's post-trial motion for judgment as a matter of law on the plaintiffs' CIPA claim, reasoning: "There was nothing 'secondhand' about Meta's recordings. . . . [W]hen a user clicked 'Next' . . . 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." 2025 WL 2680068, at *16 (citation omitted) (emphasis added). In *D'Angelo*, the court found sufficient the plaintiffs' allegations of "'secret[] intercept[ion] in real time'" via embedded code "that 'direct[ed] [chat] communications to be routed directly to'" a third party. 726 F.Supp.3d at 1198 (citation omitted).

By contrast, here, the Complaint does not allege that student data is transmitted to third parties ***as it is entered***; Plaintiffs instead allege that data is transmitted ***upon*** (or ***after***) the occurrence of certain events. *See* 2-ER-191.[3]

Finally, Plaintiffs' reliance throughout their opening brief, and for their CIPA argument specifically, on *Cherkin* is misplaced. Op. Br. at 19, 28, 31, 33, 35, 55–57. Plaintiffs in that case—brought by the same counsel as Plaintiffs' counsel here and containing similar allegations—voluntarily dropped their CIPA claim after the close of extensive discovery. *See* Plaintiffs' Notice of Mot. and Mot. For Leave to Am. Compl., *Cherkin v. PowerSchool Holdings, Inc.,* No.: 3:24-cv-02706-JD (N.D. Cal. Feb. 27, 2026), Dkt. No. 126 at 2.[4] Plaintiffs thus point to no

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[3] Moreover, Plaintiffs' CIPA claim fails for the independent reason that they do not allege that their purported communications were "read" or "attempted to [be] read" while "in transit." *See Torres*, 2025 WL 1135088, at *5.

[4] Indeed, a few weeks before Plaintiffs filed their opening brief, the plaintiffs in *Cherkin* significantly altered their case theory. *See* Plaintiff's Notice of Mot., Mot. For Class Cert., and Memo of Points and Auths. In Support*, Cherkin v. PowerSchool Holdings, Inc.*, No. 3:24-cv-02706-JD (N.D. Cal. Feb. 11, 2026), Dkt No. 119. Relevant

analogous caselaw to support the survival of their threadbare CIPA claim.

C. The district court correctly held that Plaintiffs' allegations fail to confer UCL standing.

The district court correctly dismissed Plaintiffs' claim under California's UCL for lack of statutory standing because allegations of loss of data and the diminution of its value, which is all the Complaint attempts to plead, 2-ER-235–37, are insufficient. *See also* 1-ER-12. Nor do the cases Plaintiffs cite support their two new theories of economic injury—benefit of the bargain and right to exclude.

The UCL "requires that a plaintiff [has] 'lost money or property' to have standing to sue," which means the plaintiff must "demonstrate some form of economic injury." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 323 (2011) (citation omitted). This requirement "renders standing under [the UCL] substantially narrower than federal standing under article III." *Id.* at 886.

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here, the *Cherkin* plaintiffs dropped their CIPA and CDAFA claims (also asserted here) and abandoned all allegations (also made here) of targeted advertising and data dossiers, presumably because there was no evidence after years of discovery to support these claims. *Id.*

Here, Plaintiffs allege they have suffered concrete injury from loss of data and diminution of its value. But this Court has already held that allegations that a plaintiff is "harmed both by the dissemination of their personal information and by losing the sales value of that information" are inadequate. *See In re Facebook Priv. Litig.*, 572 F.App'x 494 (9th Cir. 2014). Several district courts within this circuit—including *Cherkin*—have faithfully applied that precedent, holding that the plaintiff had no "economic injury." *See, e.g., Griffith v. TikTok, Inc.*, 697 F.Supp.3d 963, 977 (C.D. Cal. 2023); *Cherkin v. PowerSchool Holdings, Inc.*, 2025 WL 844378, at *5 (N.D. Cal. Mar. 17, 2025).

Plaintiffs cite a string of cases that instead follow a district court case, *Calhoun v. Google LLC*, 526 F.Supp.3d 605 (N.D. Cal. 2021), for the proposition that a number of district courts within the Ninth Circuit have concluded that the loss of personal information is an economic injury sufficient for UCL standing. *See* Op. Br. at 22–23 (citing other cases relying on *Calhoun*).

But *Calhoun*'s statement of the law is incorrect. The Ninth Circuit case on which *Calhoun* relies held the opposite: that dissemination of private data and the loss of sales value of such data were ***not*** enough. *In* *re Facebook Priv. Litig.*, 572 F.App'x 494. Thus, Plaintiffs' cited authority is a house of cards: Each case rests upon the false characterization of Ninth Circuit precedent articulated in *Calhoun*.

Next, Plaintiffs argue that the district court erred in not looking beyond the above theory to two additional loss theories purportedly recognized by the California Supreme Court in *Kwikset*: "benefit-of-the-bargain" and "right to exclude." Op. Br. at 23–25. But Plaintiffs' cited cases rely on the same flawed line of cases discussed above and thus do not support Plaintiffs' view. *See In re Meta Pixel Tax Filing Cases*, 724 F.Supp.3d 987, 1024 (N.D. Cal. 2024) (citing *Calhoun*); *Brown v. Google LLC*, 2021 WL 6064009, at *16 (N.D. Cal. Dec. 22, 2021) (same); *In re Tiktok, Inc. Minor Priv. Litig.*, 2025 WL 3628598, at *20 (C.D. Cal. Nov. 5, 2025) (same); *GoodRx Holdings*, 2025 WL 2052302, at *12 (same); *Kis v. Cognism, Inc.*, 2024 WL 3924553, at *7 (N.D. Cal. Aug. 23, 2024) (same).

The only case Plaintiffs rely on that does not cite *Calhoun* is unhelpful to their argument. Op. Br. at 24 (citing *Moore v. Centrelake Med. Grp., Inc.*, 83 Cal. App. 5th 515, 527 (2022)). In *Moore*, the court held that the plaintiffs had adequately alleged a benefit-of-the-bargain theory of economic loss based on allegations that the plaintiffs contracted, and paid more, for defendants' services based on false representations about defendant's data security policies. 83 Cal. App. 5th at 527; *see also In re Meta Pixel Tax Filing Cases*, 724 F.Supp.3d at 1024 (applying *Moore* to free services because the "user transacts with a business or other entity"). Here, there are no allegations that Plaintiffs paid anything to Instructure (they did not), much less that they contracted with Instructure based on Instructure's data policy representations. Rather, the Complaint alleges that Instructure contracts ***with schools*** and that the schools required Plaintiffs to access Instructure products. 2-ER-174, 175, 178. Thus, Plaintiffs' new theories of economic loss fail under their own cases.

As the district court held, the Complaint does not allege that Plaintiffs have sold their own data, attempted or intended to sell their own data, or have been impeded in their ability to sell their own data. Indeed, in the same paragraph claiming this economic harm, Plaintiffs allege that students may not want to "participate in the data market at all." 2-ER-214. The lack of allegations regarding Plaintiffs' money or property interest in their own private data precludes UCL standing.[5]

D. The district court correctly dismissed Plaintiffs' CDAFA claim for failure to plead a CDAFA injury.

The district court correctly held that Plaintiffs failed to adequately plead a CDAFA claim because they do not allege any loss or even that Instructure accessed their data without permission. Plaintiffs try to get around this holding by citing inapposite cases and impermissibly making new arguments for the first time on appeal about their unjust enrichment allegations. Nonetheless, as with their UCL claim, Plaintiffs failed to allege statutory standing and the substantive elements of their claim.

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[5] Further, even if Plaintiffs' allegations are sufficient to confer standing, their UCL claim still fails because they do not plausibly plead the other statutory requirements. *See Pizzuto v. Ramirez*, 783 F.3d 1171, 1175 (9th Cir. 2015) (explaining that this Court "may affirm the district court on any basis supported by the record, whether or not relied on by the district court."). Plaintiffs cannot meet the "unlawful" prong because they must allege a violation of another "borrowed" law, *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012), and the rest of their claims fail. Plaintiffs cannot satisfy the "fraudulent" prong, as they have no specific allegations about the alleged misrepresentations. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009). And Plaintiffs' claim under the "unfair" prong is derivative of both the unlawful and fraudulent prongs, so it fails alongside the other two.

First, Plaintiffs did not plausibly plead a CDAFA injury. Courts have emphasized that CDAFA standing requires facts showing "some damage to the computer system, network, program, or data contained on that computer." *See Heiting v. Taro Pharms. USA, Inc.*, 709 F.Supp.3d 1007, 1021 (C.D. Cal. 2023). This tracks with the purpose of CDAFA "to combat 'computer crime' and hacking." *Id.* at 1020. Thus, allegations about loss of private data and diminution of its value are inadequate. *See, e.g., Shah v. Cap. One Fin. Corp.*, 2025 WL 714252, at *8 (N.D. Cal. Mar. 3, 2025).[6]

Yet this vague "loss" is all that the Complaint alleges here. The Complaint states that Instructure "has caused loss" to Plaintiffs, that Instructure has "unfairly diminished the value" of their data, and that "Instructure's actions caused damage to and loss of students' property." 2-ER-214, ¶¶ 248, 250. As the district court held, the Complaint fails to allege "what valuable data Defendant obtained from Plaintiffs or how Defendant's use of the data causes its value to Plaintiffs to diminish." 1-ER-13.

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[6] *See also Doe v. Tenet Healthcare Corp.*, 789 F Supp.3d 814 (E.D. Cal. 2025) (same); *Doe v. Meta Platforms, Inc.*, 690 F.Supp.3d 1064 (N.D. Cal. 2023) (same).

To defend their claim, Plaintiffs cite cases that are easily distinguishable, *see* Op. Br. at 27-29, as the plaintiffs in those other cases alleged far more specifics about the potential markets for their data and other concrete losses. For example, in *In re Facebook, Inc. Internet Tracking Litigation*, the plaintiffs pled specific facts showing the value of plaintiffs' data, including a study "that values users' browsing histories at $52 per year, as well as research panels that pay participants for access to their browsing histories." 956 F.3d 589, 600 (9th Cir. 2020). And in *Brown v. Google LLC*, 685 F.Supp.3d 909 (N.D. Cal. 2023), the plaintiffs alleged that Google surreptitiously collected browsing history data while plaintiffs were in private mode. *Id.* at 919. The plaintiffs' alleged injury was more than just the loss of their data. They alleged a specific market and quantified its value: Google itself had piloted a program to pay users $3 per hour to track their browsing. *Id.* at 920; *see also Frasco v. Flo Health, Inc.*, 2024 WL 4280933 (N.D. Cal. Sep. 23, 2024) (complaint had a 16-paragraph section explaining the market for and value of the particular data at issue). Plaintiffs' allegations here lack any similar facts.

Plaintiffs' other cases fare no better. Plaintiffs cite *Biden v. Ziegler* despite obvious differences from top to bottom. For starters, that case involved a hacker who secretly used Hunter Biden's computer passwords to obtain sensitive data, including personal photographs, even after receiving cease-and-desist orders. 737 F.Supp.3d 958, 975 (C.D. Cal. 2024). Moreover, the harm alleged in that case wasn't the loss of the data by itself. It was the direct costs incurred from having to investigate and respond to the hacking—the exact injury CDAFA contemplates. *See* Cal. Penal Code § 502(e)(1). And Plaintiffs' reliance on *Cherkin*, Op. Br. at 28, is misplaced, as the plaintiffs in that case voluntarily dropped their CDAFA claim. *Cherkin v. PowerSchool Holdings, Inc.*, No. 3:24-cv-02706-JD (N.D. Cal. May 27, 2025), Dkt. No. 119.

In short, ***not a single case*** supports Plaintiffs' argument that the district court erred in finding no CDAFA injury.

Plaintiffs try to get around their pleading failure by pointing to their unjust enrichment allegations. Op. Br. at 28–29. But Plaintiffs raise this argument for the first time on appeal, and for that reason alone, the Court should not address it. *See State of Ariz. v. Components Inc.*, 66 F.3d 213, 217 (9th Cir. 1995). Regardless, the argument fails because the

Complaint also fails to plead an unjust enrichment claim. *See infra* Argument, Part I.F.

Second, the Complaint also fails to allege an essential element of a CDAFA claim—that Instructure "accesse[d]" or "use[d]" their data without permission. *See* Cal. Penal Code § 502(c)(2). As noted above, federal and state laws allow schools to consent to the use of certain EdTech services on students' behalf. And the schools contractually authorize Instructure to use and share data. No allegations in the Complaint dispute this other than the bald statements that Plaintiffs did not provide "effective consent." *See* 2-ER-200, ¶ 156. Effective consent is different from permission, so even taking Plaintiffs' conclusory allegations as true, they failed to plead the "without permission" element of their claim.

Because Plaintiffs fail to allege facts establishing both standing and substantive elements of CDAFA, the district court properly dismissed the CDAFA claim.

E. The district court correctly held that Plaintiffs fail to plead the basic elements of their common-law claims for invasion of privacy.

Plaintiffs alleged that Instructure violated their privacy based on two theories—public disclosure and intrusion upon seclusion. But Plaintiffs fail to allege the basic facts necessary for these claims: "[W]hat type of data was collected from them, or to whom Defendant provided the data." 1-ER-15. In response, Plaintiffs rely on their allegations of Instructure's general practices and deflect based on the fact that privacy claims are fact intensive. Op. Br. at 29–33. These arguments miss the point.

1. ***Public disclosure***

To survive a motion to dismiss on a public disclosure claim, a plaintiff must plausibly plead: a "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." *Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App. 4th 1125, 1129–30 (2009) (citation omitted). Plaintiffs failed to adequately plead any element of this claim.

First, the Complaint does not allege a "crucial ingredient": the "public disclosure of ***private facts***." *Id.* The Complaint does not even say

what facts Instructure disclosed about Plaintiffs, much less that they were private. At most, the Complaint lists one product Plaintiffs used but includes no facts about the "data collected from them." 1-ER-15; 2-ER-263–72. Plaintiffs assert that it is sufficient that the Complaint alleges general details about "Instructure's data practice" across various products. Op. Br. at 29–31. But again, they fail to grasp that Rule 8 requires them to show how ***they*** are entitled to relief, which includes facts about ***their*** data. Allegations about how a product generally works do not meet that standard. This is especially true here, as the Complaint alleges that Instructure may collect information that is likely public or otherwise not considered private. *See* 2-ER-180–81, ¶ 56. *See Popa v. Microsoft Corp.*, 153 F.4th at 786.

Second, because the Complaint does not specify to whom Instructure publicly disclosed Plaintiffs' data, Plaintiffs do not plead any facts from which the Court can infer that their information was "widely published." *Hill v. Nat'l Collegiate Athletic Ass'n.*, 7 Cal. 4th 1, 27 (1994). The Complaint only vaguely alleges that Instructure discloses information to "more than a thousand" partners. 2-ER-188, ¶ 86. But *the school* directs the sharing in every instance, and Plaintiffs provide no reasonable "grounds to infer" that schools share each particular student's data with *all* those partners. *Twombly*, 550 U.S. at 556; 2-ER-111 (Privacy Policy disclosing that "[i]f you are an end user of an Academic Institution or company that uses our Products, it means that *your institution determines how your personal information is used*." (emphasis added)). Even for the partners that Plaintiffs specifically name, *see* Op. Br. at 30, Plaintiffs fail to plead that Instructure shared *their data* (or anyone else's) with these partners.

Third, Plaintiffs incorrectly argue that "[w]hether 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." Op. Br. at 30. The district court correctly addressed these failures below because whether the data was collected or processed for "legitimate educational purposes" goes directly to the third element of Plaintiffs' claim—that the disclosure "would be offensive and objectionable to the reasonable person." *Moreno*, 172 Cal. App. 4th at 1129–1130. Thus, without allegations that the data was used outside of the educational context, Plaintiffs' public disclosure claim fails.

2. *Intrusion upon seclusion*

For intrusion upon seclusion, Plaintiffs must show that (1) Instructure "intentionally intrude[d] into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy," and (2) the intrusion "occur[ed] in a manner highly offensive to a reasonable person." *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 286 (2009). The district court correctly held that this privacy theory, too, fails for lack of specific allegations about what type of information Instructure purportedly disclosed and to whom. *See* 1-ER-6, 15.

First, Plaintiffs do not allege facts showing the first element—that they had an objectively reasonable expectation of privacy for information they divulged to their schools. The Complaint itself acknowledges that "[s]chools have always collected certain personal information belonging to students and their parents in order to provide educational services." 2-ER-172, ¶ 10. Plaintiffs do not allege any facts showing why they had an expectation that this information would not reach administrative service providers like Instructure. As evidenced by FERPA, it is consistent with community norms for schools to hire contractors like Instructure to maintain and process that information. *See* 20 U.S.C. § 1232g.

Second, the Complaint fails to allege the second element, that the intrusion is "highly offensive," which requires that the alleged intrusion be "sufficiently serious in [its] nature, scope, and actual or potential impact to constitute an *egregious breach* of the social norms underlying the privacy right." *In re iPhone Application Litig.,* 844 F.Supp.2d 1040, 1063 (N.D. Cal. 2012) (citation omitted).

The Complaint alleges that Instructure collects "information that the students share as part of their legally required education." 2-ER-208, ¶ 207. It further alleges that Instructure uses this data "to develop, improve, and market its products and for other commercial purposes." 2-ER-217, ¶ 269. The Complaint then leaps to the conclusion that the intrusion is "highly offensive" because the information is "highly sensitive and personal." 2-ER-243, ¶ 445. But, again, these allegations say nothing about what ***specific*** information Instructure disclosed about ***Plaintiffs*** that was sensitive or personal or ***to whom*** Instructure disclosed this data to gain profit other than to schools—who would ordinarily have this data—and unspecified third parties—who receive this data only at the schools' direction.

Additionally, Plaintiffs are wrong that their allegations about Instructure supposedly violating COPPA or creating "comprehensive behavioral profiles" plausibly pleads the "highly offensive" element. Op. Br. at 30–32.

Regarding COPPA, Plaintiffs did not argue below that they adequately alleged a violation of COPPA, and thus they cannot make that argument for the first time on appeal. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010). In any event, the cases Plaintiffs rely on are inapposite. In *In re TikTok*, the United States filed a complaint alleging that TikTok violated COPPA, and then the parties "stipulated to a permanent injunction," enjoining TikTok from violating the "COPPA Rule" and imposing "a $5.7 million civil penalty to resolve the case." *In re TikTok*, 2025 WL 3628598, at *2. And in *Turner*, "security researchers from the University of California, Berkeley purportedly informed defendants of surreptitious tracking and data collection in violation of COPPA by developers of apps included in Google's [] program." *See A.B. by & Through Turner v. Google LLC*, 737 F.Supp.3d 869, 875 (N.D. Cal. 2024).

In contrast to these cases with specific allegations of COPPA violations—made by the United States or university researchers—for certain apps having nothing to do with education technology, the Complaint here does not specify that Instructure collected and disclosed any of Plaintiffs' data, much less that they did so outside of what COPPA permits.

Next, as to purported behavior profiles, Plaintiffs once again provide no details about their own data or experiences. Indeed, many of these allegations have nothing to do with Instructure at all and are just about the supposed "surveillance business model" in all "digital-technology products used in K-12 schools." 2-ER-176–77, ¶¶ 33–34. Plaintiffs also provide no details as to how unspecified third parties are supposedly influencing their "decision-making." Op. Br. at 31. The "Plaintiff-Specific Allegation" on this point is just that it is allegedly happening. *See* 2-ER-217, ¶ 271 ("Instructure has provided third parties personally identifying data belonging to Plaintiffs for commercial purposes, including identification, targeting, influencing, and decision-making purposes."). How, when, where? The Complaint does not say.[7]

Plaintiffs make a last-ditch effort to save their claims by arguing that privacy claims, in general, are "fact intensive." Op. Br. at 32–33. But even their case on this general point is unhelpful. In *Riganian v. LiveRamp Holdings, Inc.*, the plaintiffs had files revealing that the defendant "had compiled decades of offline data." 791 F.Supp.3d 1075, 1082–83 (N.D. Cal. 2025). Moreover, the plaintiffs pled specific allegations concerning their interactions with the relevant websites and what happened during those interactions. Plaintiffs include no similar allegations here.

F. Plaintiffs' unjust enrichment claim fails as a matter of law because there is no such standalone claim.

Finally, the district court properly dismissed Plaintiffs' unjust enrichment claim because it is not a standalone claim under California law, nor does the Complaint allege facts showing that this case falls under

[7] Plaintiffs' data-access allegations also lack the specificity required by Rule 8. *See* Op. Br. at 32. They merely allege that one plaintiff "requested access," and "Instructure did not provide her access." 2-ER-197, ¶ 129. Plaintiffs then make the giant leap—without any allegations to support it—that "Instructure has a policy of denying parents access to their children's data." 2-ER-197, ¶ 130.

the narrow exception to that rule.

First, as this Court has recognized, "unjust enrichment is not a cause of action" under California law." *Baiul-Farina v. Lemire*, 804 F.App'x 533, 537 (9th Cir. 2020) (citation modified); *see also Sepanossian v. Nat'l Ready Mixed Concrete Co.*, 97 Cal. App. 5th 192, 206 (2023). The cases that Plaintiffs cite do not say otherwise.

Plaintiffs latch onto language in a handful of cases to argue that they can bring an unjust enrichment claim here, but those cases applied the doctrine as a theory of damages computation—not as a standalone claim. *See Cnty. of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 541 (2007) (noting that the district court "applied the principle of unjust enrichment" in calculating the damages award); *see also Facebook Tracking*, 956 F.3d at 599–600 (discussing unjust enrichment in the context of restitution and thus whether the plaintiffs had an interest for standing purposes). For its part, *Shin v. ICON Foundation* does not address whether California has recognized unjust enrichment as a standalone claim, as the parties did not raise that argument. 2024 WL 2883659, at *9–11 (N.D. Cal. June 6, 2024).

Second, at most, California courts have allowed an unjust enrichment claim to proceed in the context of quasi-contract theories of recovery (or claims involving real estate transactions—which are clearly inapplicable here). *See ESG Cap. Partners, LP v. Stratos*, 828 F.3d 1023, 1039 (9th Cir. 2016) (which Plaintiffs rely on in their opening brief at 33–34); *Bruton v. Gerber Prods. Co.*, 703 F.App'x 468, 470 (9th Cir. 2017) (citing *Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 61 Cal. 4th 988, 1000 (2015); *Ghirardo v. Antonioli*, 14 Cal. 4th 39, 54 (1996)). This makes sense given that, as the Complaint acknowledges, equitable relief, like unjust enrichment, is only available if there is ***no*** "***adequate remedy at law***." *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020) (emphasis added); *see* 2-ER-246, ¶ 464.

This narrow carve-out for unjust enrichment claims does not help Plaintiffs because, as the district court held, "Plaintiffs make no suggestion that their unjust enrichment claim presents a viable quasi-contract theory of recovery." 1-ER-15. Plaintiffs are not in any kind of relationship with Instructure, nor have they paid any money to Instructure.

But even reading the Complaint as attempting to allege a quasi-contract theory, it is still deficient. California courts will award restitution based on a quasi-contract theory when a defendant obtains a benefit from a plaintiff by "mistake, fraud, coercion, or request." *Astiana v. Hain*

Celestial Grp., Inc., 783 F.3d 753, 762 (9th Cir. 2015) (quoting 55 Cal. Jur. 3d Restitution § 2). The Complaint does nothing to allege facts showing any of these factors. Accordingly, Plaintiffs offer no grounds to depart from the district court's dismissal of their unjust enrichment claim.

II. The District Court Correctly Dismissed Plaintiffs' Section 1983 Claims for Failure to Plead State Action.

Plaintiffs failed to allege the "formidable threshold hurdle" of state action. *Prager Univ. v. Google LLC*, 951 F.3d 991, 996 (9th Cir. 2020). The Court should thus affirm and not address the merits of their constitutional claims. Even so, Plaintiffs have failed to adequately plead any constitutional violation.

A. Plaintiffs fail to allege that Instructure is a state actor.

By default, private companies like Instructure cannot be held liable for the deprivation of constitutional rights under Section 1983, *O'Handley v. Weber*, 62 F.4th 1145, 1155 (9th Cir. 2023), because "most rights secured by the Constitution are protected only against infringement by governments." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982) (citation omitted). The only exception is if a plaintiff can clear the high bar of showing "that the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." *Id.* at

937. Courts "presum[e] that private conduct does not constitute governmental action," *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999), absent "exceptional cases." *O'Handley*, 62 F.4th at 1155.

To allege state action, Plaintiffs must allege facts that meet (1) the "state policy requirement" and (2) the "state actor" requirement. *Children's Health Def. v. Meta Platforms, Inc.*, 112 F.4th 742, 754 (9th Cir. 2024) (citation omitted), *cert. denied,* 145 S. Ct. 2846 (2025). Plaintiffs fail to adequately allege either.

To start, the district court correctly held that the Complaint fails to adequately allege that Instructure was a state actor. The Supreme Court has identified four narrow instances when a private entity can be considered a state actor: (1) the private entity performs a *public function*, (2) the state *compels* the private entity to take a particular action, (3) there is a *close nexus* between the private entity and the state, or (4) the state *acts jointly* with the private entity. *See Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019); *O'Handley*, 62 F.4th at 1155–1156 (citing *Lugar*, 457 U.S. at 937). Plaintiffs rely on a public function theory and a combination of the nexus and joint action theories. None are persuasive.

1. *Public function*

To satisfy the "public function" test, Plaintiffs must allege that Instructure performs a function "traditionally *and* exclusively" performed by the government. *Manhattan*, 587 U.S. at 809. This requires more than just a showing that the government currently performs, or has performed, the function, or that the function serves the public interest in some way. *Id.* This test is difficult to meet because "very few" functions qualify. *Prager Univ.*, 951 F.3d at 998.

Instructure's software and data management services are not one of these "very few" functions. This Court decided the issue in *Caviness*, 590 F.3d at 812. There, the Court addressed the question of whether a charter school, which "serve[d] as [an] alternative[] to traditional public schools" and was designated a "public school" under state law, was a state actor. *Id.* at 809 (citation omitted). Applying the Supreme Court's decision in *Rendell-Baker*, which held that an "almost wholly state-funded" private school was not a state actor, this Court held that the "provision of educational services is not a function that is traditionally and exclusively the prerogative of the state." *Id.* at 815–816 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)).

Here, Instructure provides much less than "educational services." Instructure provides certain software services for schools who then provide educational services. As Plaintiffs concede, some of those services have nothing to do with direct education. *See* 2-ER-186–87, ¶ 81 (describing Instructure products that do things like "assess[] all district data for quality to support decision-making and fundraising"). If "providing public education" is insufficient for state action, *Caviness*, 590 F.3d at 811, how could providing software services be enough?

Plaintiffs attempt to cabin *Caviness*'s holding to the specific facts at issue there—a private charter school's decision to fire an employee. Op. Br. at 43–44. But *Caviness* is not so limited. Regardless, this argument undercuts Plaintiffs' position. Plaintiffs, quoting *Caviness*, argue that the court must "identify the function at issue because an entity may be a State actor for some purposes but not for others." Op. Br. at 43 (citing *Caviness,* 590 F.3d at 812–813). And thus, they conclude that "Instructure is a state actor for the purpose of collecting and managing student information for public schools." *Id.* at 44. Plaintiffs, however, leave out the crucial element of the public-function test—that the "function at issue must be both traditionally and exclusively governmental." *Caviness*, 590 F.3d at 814 (citation omitted). Providing software services for records collection and management is not one of those functions.

The only case Plaintiffs cite in support of their position, *Peltier v. Charter Day Sch., Inc.*, is not to the contrary. 37 F.4th 104 (4th Cir. 2022). There, the Fourth Circuit held that a *charter school* was a state actor for purposes of an equal protection claim about the school's dress code because it "operat[ed] a school that is part of the North Carolina public school system." *Id.* at 119, 154. This out-of-circuit holding is in direct conflict with this Court's holding in *Caviness*, which is binding on this panel unless it is overruled en banc. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Nonetheless, *Peltier* is also factually distinct, as Instructure is not a school. Nor is Instructure involved in creating a school policy. In fact, *Peltier* distinguishes the types of administrative functions Instructure offers—which are not state actions—from functions that *are* state action. *Peltier,* 37 F.4th at 123.

More broadly, if providing educational software services to public schools suffices to transform Instructure into a state actor, "a large swath of private entities"—from textbook suppliers to cafeteria operators—"would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities." *Manhattan*, 587 U.S. at 814–15. The Court should thus follow its own precedent in *Caviness*, as the district court did, and decline to hold that Instructure is a state actor performing a public function.[8] *See* 1-ER-9.

2. *Joint action and nexus*

Plaintiffs' second theory of state action also fails. To start, the Complaint lacks any mention of joint action or nexus, focusing instead on Plaintiffs' doomed public function theory. *See* 2-ER-225–31, ¶¶ 327–380 (constitutional claims alleging Instructure performs a function that is "traditionally and exclusively a public function" but alleging nothing related to nexus or joint action). The Court can reject these secondary

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[8] This Court's recent decision in *Woolard v. Thurmond*, 170 F.4th 701, 710 (9th Cir. 2026), which characterized certain "charter schools' independent study programs" as "public-school programs" in the First Amendment context, does not change the analysis. The Court did not address the state-action question in *Woolard*. And the opinion concerns the selection and substance of school curriculum, which is far afield from the software services Instructure provides.

theories on that basis alone. *See Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1167 n.3 (9th Cir. 2021) (where plaintiffs relied exclusively on one theory, the court declined to decide if any other state action theory applied).

Further, no other allegations in the Complaint implicitly support either a joint action or a nexus theory. To satisfy these tests, Plaintiffs must allege that Instructure and schools are so interdependent that Instructure "must be recognized as a joint participant in the challenged activity." *Brunette v. Humane Soc'y of Ventura Cnty.*, 294 F.3d 1205, 1210 (9th Cir. 2002). Put differently, Instructure's and the state's actions must be "inextricably intertwined." *Id.* at 1211.

Plaintiffs' allegations about the relationship between Instructure and schools lack the "hallmarks" of joint action and nexus. *Pasadena*, 985 F.3d at 1168. The Complaint contains no allegations that there was "substantial coordination" or "financial integration" between Instructure and schools. *Id.* (citing *Brunette*, 294 F.3d at 1213).

In fact, as the district court pointed out, many of Plaintiffs' allegations suggest the ***opposite of joint action***. For example, Plaintiffs allege that "Instructure does not merely follow government specifications," 2-ER-227, ¶ 343; 2-ER-230, ¶ 372, and "Instructure has far exceeded any legitimate authority it has to act on the government's behalf." 2-ER-226, ¶ 340; 2-ER-230, ¶ 369. *See Lugar*, 457 U.S. at 940 (unlawful conduct of private actor "could not be ascribed to any governmental decision").

Plaintiffs also rely heavily on Instructure's contracts with schools as evidence of coordination, but Supreme Court precedent is clear that the mere fact that "the government . . . contracts with" "a private entity does not convert the private entity into a state actor." *Manhattan*, 587 U.S. at 814.

As the district court pointed out, this Court has also rejected Plaintiffs' secondary argument that Instructure's classification as a "school official" under FERPA is dispositive. *Caviness* expressly held that "a state's statutory characterization of a private entity as a public actor for some purposes is not necessarily dispositive with respect to all of that entity's conduct." 590 F.3d at 814.

Plaintiffs' reliance on *Brannum v. Overton Cnty. Sch. Bd.*, which involved the close relationship between a particular school district and a private company, is also misplaced. *See* Op. Br. at 49–50 (citing *Brannum* *v. Overton Cnty. Sch. Bd.*, 2006 WL 8445313 (M.D. Tenn. June 20, 2006)). As the district court noted, Plaintiffs do not make any allegations about any specific school district's relationship with Instructure—not even their own. 1-ER-8. Rather, they make the broad statement that Instructure is a state actor on behalf of every single school district across the country that it works with based on statements concerning Instructure's supposed general practices. 2-ER-178, ¶¶ 41–42; 2-ER-226, ¶ 336. This is not, as Plaintiffs argue, a question "for class certification." Op. Br. at 50. It is a question of plausibility.[9]

B. Plaintiffs fail to allege a state policy.

Failure to meet the "state actor" requirement is fatal to Plaintiffs' Section 1983 claims. Yet Plaintiffs incorrectly argue that this Court should reverse because the district court improperly decided the "state policy" requirement *sua sponte*.

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[9] Plaintiffs also take issue with the district court's citation to *Pasadena,* arguing that *Pasadena* considered the "symbiotic relationship test" rather than joint action and nexus. Op. Br. at 48. However, *Pasadena* used the terms "joint action" and "symbiotic relationship" interchangeably. 985 F.3d at 1167; *see also Brannum*, 2006 WL 8445313, at *8, *9.

As an initial matter, the district court did not say anything about state policy. Instead, it decided the state actor question and cited some language from this Court's decision in *Children's Health* about standards that apply to both the state-actor and state-policy analysis. 1-ER-7–8.

Nevertheless, this Court need not address Plaintiffs' state policy arguments because the district court's holding that the Complaint fails to allege that Instructure is a state actor is independently dispositive of Plaintiffs' Section 1983 claims. *Lugar*, 457 U.S. at 938; *Children's Health*, 112 F.4th at 755. That is because state policy and state actor are "two distinct requirements" of the test, and "the private party must meet" both. *Children's Health*, 112 F.4th at 754.

In any case, Plaintiffs have not pled a "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.'" *Children's Health*, 112 F.4th at 754 (quoting *Lugar*, 457 U.S. at 937). The "source of the alleged constitutional harm" must be "a state statute or policy." *Id.* (citation omitted). Essentially, plaintiffs must plead that Instructure "enforce[s] a state-imposed rule" rather than "the terms of its own rules" when it collects student data. *O'Handley*, 62 F.4th at 1156.

Neither the Complaint nor Plaintiffs' opening brief explains what state-created right, privilege, or rule of conduct Instructure exercises when it collects student data. *See* Op. Br. at 38–39 (merely reciting allegations in the Complaint about how Instructure uses student data). Indeed, Plaintiffs allege that Instructure violates their privacy by collecting student data *on its own terms*, acting outside any authority schools confer on it. *See, e.g.*, 2-ER-179, ¶ 49; 2-ER-197, ¶ 131; 2-ER-226, ¶ 340; 2-ER-230, ¶ 369. Plaintiffs again rely on Instructure's contracts with schools for their argument that Instructure's conduct resulted from a state-created right or privilege. Op. Br. at 38. But again, those contracts alone cannot transform Instructure's private conduct into state action. *Manhattan*, 587 U.S. at 814.

* * *

Consequently, Plaintiffs have not sufficiently pled that Instructure is a state actor, or that Instructure exercises any state-created right or privilege when providing its software services to schools. Their failure to plead either component of state action defeats their constitutional claims.

III. Plaintiffs' Constitutional Claims Fail on the Merits.

Because the Complaint fails to allege state action, the district court did not reach the merits of the constitutional claims. Plaintiffs now ask the Court to decide these claims in the first instance. If the Court does so, it should affirm dismissal on the alternative grounds that Plaintiffs have not plausibly alleged a cognizable deprivation of a Fourth or Fourteenth Amendment right. *See Pizzuto v. Ramirez*, 783 F.3d 1171, 1175 (9th Cir. 2015) (this Court "may affirm the district court on any basis supported by the record, whether or not relied on by the district court.").

Regarding the Fourth Amendment claim, "[o]nly rarely" has a court applied the Fourth Amendment to "noncriminal ***noninvestigatory*** . . . conduct." *U.S. v. Attson*, 900 F.2d 1427, 1430 (9th Cir. 1990) (citation omitted). To succeed on such a claim, Plaintiffs must allege that Instructure had "the intent to assist the government in its investigatory or administrative purposes, and not for an independent purpose." *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 924 (9th Cir. 2001) (citation omitted).

Plaintiffs do not allege that Instructure assisted schools with any physical search or seizure, criminal investigation, administrative inspection, or disciplinary action within the scope of the Fourth Amendment. *Attson*, 900 F.2d at 1430–1431; *see also Doe ex rel. Doe v. Hawaii Dep't of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003).

Plus, Plaintiffs cannot have a legitimate expectation of privacy—a key component of their claim—in information they knowingly give to their schools. *Katz v. U.S.*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"); *Smith v. Md.*, 442 U.S. 735, 743–44 (1979) ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties").

Plaintiffs' Fourteenth Amendment privacy claim fares no better. Though the Constitution does not expressly guarantee a right to privacy, *Fugate v. Phoenix Civ. Serv. Bd.*, 791 F.2d 736, 738 (9th Cir. 1986), the Ninth Circuit has recognized a limited right to informational privacy under the Fourteenth Amendment. *Doe v. Bonta*, 101 F.4th 633, 638 (9th Cir. 2024). But that right extends only to "highly sensitive" information, *id.* at 637, not the broad categories of information listed in the

Complaint—none of which Plaintiffs specify Instructure even has about them. *See* 2-ER-180–81.

Whether the data is characterized as sensitive or not, Plaintiffs' abstract speculations that Instructure misuses this data are insufficient to allege that their rights were violated. *See* 2-ER-210, ¶ 220 (speculating about risks of cybercrimes based on incident involving another company). The kind of data collection described in the Complaint is the norm in schools around the country.

Accordingly, Plaintiffs fail to state Fourth or Fourteenth Amendment claims.

IV. Plaintiffs Have Not Alleged a Cognizable Harm Sufficient for Article III Standing.

For all of the reasons above, the district court properly dismissed Plaintiffs' claims for failing to meet Rule 8's pleading requirements. After the district court's decision, this Court decided *Popa*, which clarified the Article III injury requirements for privacy cases and held that a plaintiff must plead a harm "similar to the 'highly offensive' interferences or disclosures that were actionable at common law." *Popa*, 153 F.4th at 791. As applied here, *Popa* means that Plaintiffs have more than a pleading problem. Plaintiffs' failure to allege the basic elements of their privacy claims, namely that the alleged invasion was "highly offensive," also means that Plaintiffs lack standing. *Id.*

Although not briefed below, the absence of standing here requires the Court to dismiss this entire case for lack of subject-matter jurisdiction. *Washington Env't Council*, 732 F.3d at 1139 (because standing is jurisdictional, court can dismiss for lack of standing even if raised for the first time on appeal).

Article III requires Plaintiffs to allege they "suffered an injury in fact." *Spokeo,* 578 U.S. at 338. Such an injury must be "an invasion of a legally protected interest that is [1] concrete and [2] particularized and [3] actual or imminent." *Id.* at 339 (citation omitted).

Here, Plaintiffs allege that Instructure's practices have caused the following injuries: invasion of privacy, persistent surveillance, compromised "security of their personal information," affected "access to information and opportunities through algorithmic profiling," denied access to their data, loss of the value of their data, and having to choose between their education and other fundamental rights. 2-ER-207-15. None of these purported harms meets the three requirements of an Article III injury.

A. Plaintiffs have no concrete injury.

A concrete injury is one that is "real" or "actually exist[s]." *Spokeo*, 578 U.S. at 340. A concrete injury can be tangible—like monetary loss or physical injury. *TransUnion, LLC v. Ramirez*, 594 U.S. at 425. Or it can be intangible, such as reputational harm. *Id.* Here, Plaintiffs have no plausible allegations of tangible or intangible harm.

1. *Tangible harm*

Starting with tangible harm, Plaintiffs allege only one—the loss or diminution of value of their data. But this is not a concrete harm. As discussed above, the district court correctly held that the Complaint did not allege that Plaintiffs suffered a concrete economic injury sufficient for statutory standing under the UCL or CDAFA. *See supra*, Argument, Parts II.C, II.D. That is because Plaintiffs only "allege general facts regarding the market for user data" and fail to allege specific facts showing they could have sold their data, have ever attempted or intended to sell their data, or that Instructure's collection of any of their data impeded their ability to sell data. 1-ER-13.

Even worse, Plaintiffs fail to allege what "valuable data Defendant obtained from" them "or how Defendant's use of the data causes its value to Plaintiffs to diminish." *Id.* Plaintiffs also fail to offer specifics about Instructure's alleged profits from selling data; in fact, Plaintiffs acknowledge that the core of Instructure's business is its contracts with schools, not unlawful data sales. 2-ER-179, ¶¶ 50-52. *Cf. Facebook Tracking*, 956 F.3d at 600 (finding Article III standing where plaintiffs alleged "Facebook's ad sales constituted over 90% of the social media platform's revenue," and plaintiffs "point[ed] to the existence of a study that values users' browsing histories at $52 per year, as well as research panels that pay participants for access to their browsing histories").

Although the Article III standing inquiry is broader than statutory standing under the UCL and CDAFA, Plaintiffs' loss-of-value-of-data allegations have also been squarely rejected on Article III grounds. *In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 402 F.Supp.3d 767, 784 (N.D. Cal. 2019) (holding such a claim was "purely hypothetical" and "[did] not give rise to standing").

2. *Intangible harm*

The remaining harms Plaintiffs allege, such as "invading their privacy" and compromising their access to information," are intangible.

2-ER-207, 211. These harms cannot satisfy the concreteness requirement as laid out in this Court's recent decision in *Popa* and its progeny.

This Court recently made clear in *Popa* that, for an invasion of privacy to create a cognizable intangible harm, it must injure the plaintiff in a way that is "similar to the 'highly offensive' interferences or disclosures that were actionable at common law." *Popa*, 153 F.4th at 791. Merely alleging a statutory violation of state privacy laws, or a common law privacy claim, is not enough. *Popa*, 153 F.4th at 790–91.

Thus, in *Popa*, the Court rejected a "free-roaming privacy right" in a data privacy case and affirmed the dismissal of claims, based on a lack of concrete injury, that Microsoft collected data on a user's interactions with a website to create a video replay of her behavior. *Id.* at 791–93.

More recently in *Kisil v. Illuminate Educ., Inc.*, this Court held that a plaintiff in a data breach case could not establish standing merely by bringing "common law [invasion of privacy] actions that are supposedly 'injuries in themselves.'" 2025 WL 2589000, at *1 (9th Cir. Sep. 8, 2025) (citing *Popa*, 135 F.4th at 789). This was true even though the plaintiffs alleged that the data breach included sensitive student information of the exact same type Plaintiffs suggest Instructure may collect here, such as grades, socioeconomic status, and special education info. 2-ER-180, ¶ 56; 2-ER-239, ¶ 428. In other words, even when this type of information was in the hands of *criminal hackers*, it was insufficient to establish a concrete injury.

Missing in both *Popa* and *Kisil* were allegations that the defendant or hackers collected information that was "embarrassing [or] invasive" or gave "publicity to a matter that concerns the [plaintiff's] private life." *Popa*, 153 F.4th at 791 (citation modified).

Here, Plaintiffs' supposed harms suffer from the same flaw. None reveal what type of information Instructure allegedly has about the Plaintiffs or what Instructure (or a third party) allegedly did with that information. All Plaintiffs point to are the types of information Instructure might have about someone in some product. 2-ER-111-20.

For example, Plaintiffs pled not a single specific fact about the supposed use of "algorithmic profiling." 2-ER-211, ¶ 227. They do not allege that Instructure uses any of their sensitive data for the algorithm-based tools or even that algorithms have been applied to them in any way. 2-ER-211, ¶ 227. Nor do they allege how they were harmed from any purported "profiling." They only refer to the possibility of "consequential decisions" and the "datafication" of children. 2-ER-212, ¶¶ 231-32. Without more specific allegations, Plaintiffs cannot show that Instructure even has "embarrassing or invasive" information about them or that any unspecified action taken with that information was "highly offensive." *Popa*, 153 F.4th at 791.

In fact, Plaintiffs acknowledge that they voluntarily handed over information by purportedly entering it into Instructure products, and that Instructure has policies in place such that it shares data with educational partners ***only*** when directed by a school customer. 2-ER-195–96, ¶ 122; 2-ER-199, ¶ 142. This is hardly as invasive as photographing a person's bedroom through a window or publishing without consent a picture of someone nursing their child. *See Popa*, 153 F.4th at 791. Nor is it similar to collecting a "cradle-to-grave profile" of a social media user who has logged out of their account. *See Facebook Tracking*, 956 F.3d at 599.[10] In short, Plaintiffs' extremely speculative

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[10] Moreover, aside from the dissimilarity in allegations here compared to the social media app in *Facebook Tracking*, *Popa* noted that *Facebook Tracking* is a "pre-*TransUnion* case." *Popa*, 153 F.4th at 793–94 (citing *TransUnion LLC*, 594 U.S. 413). And "[d]espite the broad statements" made in *Facebook Tracking* about privacy standing, that decision "still accounted for the individual circumstances giving rise to the plaintiffs'

allegations come nowhere close to the "highly offensive" conduct necessary for concreteness. *See Popa*, 153 F.4th at 791.

B. Plaintiffs' purported injuries are not particularized.

Next, and relatedly, Plaintiffs do not allege any particularized harm. A particularized injury is one that "affect[s]" a plaintiff "in a personal and individual way." *Spokeo*, 578 U.S. at 339 (citation omitted). Even at the motion-to-dismiss stage, standing requires allegations about "*specific* . . . harm[s]" and the "*specific* plaintiffs" who experienced them. *Popa*, 153 F.4th at 791–92. This Court has already rejected the "one-size-fits all approach" that Plaintiffs attempt here; Plaintiffs must instead allege harms concerning their "individual circumstances." *Id.* at 794 (distinguishing *Facebook Tracking*, 956 F.3d at 598).

The Complaint fails to do this. Plaintiffs do not plead any facts about specific harms, and they certainly do not plead facts about their specific circumstances. For example, Plaintiffs claim that Instructure's alleged creation of algorithmic profiles "negatively affects" children's education, but they never allege that Instructure created algorithmic

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alleged injuries rather than simply greenlighting a per se rule for privacy statutes." *Popa*, 153 F.4th at 794.

profiles of them or what the supposed algorithms predicted. *See* 2-ER-212, ¶¶ 231–32. Nor do they explain how Instructure allegedly denying them access to data has harmed *them*, 2-ER-213, ¶¶ 237–38, or how or whether *they* were forced to choose between their "right to an education and other fundamental rights." 2-ER-215, ¶¶ 251–259. Such generalized allegations are the opposite of particularized harm.

C. Plaintiffs have no actual or imminent harm.

Plaintiffs also fail to demonstrate the third and final requirement of injury—actual or imminent harm. For damages, Plaintiffs must prove that their asserted harm materialized in some way; the "mere risk" of future harm is not enough. *TransUnion*, 594 U.S. at 436. For injunctive relief, Plaintiffs "must establish a *substantial* risk of future injury." *Murthy v. Mo.,* 603 U.S. 43, 69 (2024) (emphasis added). Claims "of possible future injury" are insufficient. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted).

Yet all Plaintiffs allege here are abstract harms that have happened or could happen to some students somewhere whose schools use some Instructure products. 2-ER-210, ¶ 217; *see also id.*, ¶ 221 (exposure from data breaches "*can* have immediate and long-term consequences for children" (emphasis added)); 2-ER-214, ¶ 247 ("Instructure's actions have thus caused students economic injury").

Thus, Plaintiffs have not demonstrated that any harm has materialized or will materialize in some way *for them*. *See Popa*, 153 F.4th at 791 n.5 ("potential harms that *might* be associated with session-replay technology, such as identity theft," were insufficient without "allegations plausibly linking these potential, generalized harms" to plaintiff).

* * *

Plaintiffs cannot meet any of Article III's injury requirements. It is telling that Plaintiffs' constant refrain in their opening brief is that any questions about Plaintiffs' specific experiences can wait for class certification and have nothing to do with Rule 8's pleadings standards. Op. Br. at 7–8, 12–14, 36, 50. As explained above, Plaintiffs are wrong about Rule 8. Even so, standing certainly cannot wait for class certification. *Murthy*, 603 U.S. at 58 ("The plaintiff bears the burden of establishing standing as of the time she brought the lawsuit and maintaining it thereafter.") (citation modified); *Spokeo*, 578 U.S. at 338 n.6 (at the pleading stage, "even named plaintiffs who represent a class must allege and show that they personally have been injured") (citation modified). The Court should therefore dismiss all Plaintiffs' claims for lack of standing.

CONCLUSION

Plaintiffs' broad policy-related allegations, focused on the technology industry at large and Instructure's general practices, are insufficient to demonstrate Article III standing or survive Rule 8 and Rule 12(b)(6)'s plausibility requirement. For these reasons, the Court should affirm the dismissal of all Plaintiffs' claims.

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Respectfully submitted,

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