No. 23-4122

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMANDA DAGHALY,
individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

BLOOMINGDALES.COM, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California, No. 3:23-cv-00129-L-BGS
Hon. M. James Lorenz, United States District Judge

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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June 14, 2024

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INTRODUCTION

Defendant-Appellee Bloomingdales.com, LLC (Bloomingdale's) does not dispute that it regularly markets and sells goods to California customers through its interactive web platform. Bloomingdale's also does not dispute that, in this case, Plaintiff-Appellant Amanda Daghaly raises claims challenging surveillance activities that Bloomingdale's directed onto her personal devices while she browsed its platform in California to consider whether to make a purchase. Bloomingdale's nonetheless argues that its California activities are unrelated to Ms. Daghaly's claims—and so cannot form a basis for specific personal jurisdiction—because Ms. Daghaly does not allege that she made an online purchase.

Bloomingdale's is wrong. Where, as here, a defendant uses an interactive web platform to sell goods into a state, claims that the defendant has acted unlawfully in operating its sales platform self-evidently arise out of and relate to the defendant's forum-directed commercial activities. Moreover, Bloomingdale's surveillance activities form a basis for specific personal jurisdiction even if viewed independently of Bloomingdale's California-directed online retail activity. By systematically reaching into California to record and monetize the online

activities of shoppers in that state, Bloomingdale's has purposefully availed itself of California and can be required to defend itself there against claims arising out of this aspect of its operations.

Perhaps given the weakness of its position on personal jurisdiction, Bloomingdale's urges this Court to affirm on an alternative ground, arguing that Ms. Daghaly lacks standing. Bloomingdale's raises three issues: whether Ms. Daghaly has alleged a concrete injury sufficient for Article III standing; whether she has standing to seek injunctive relief; and whether she has statutory standing to raise the subset of her claims that arise under California statutes that require a showing of economic injury. The district court did not rule on these issues. And because the latter two do not go to subject-matter jurisdiction, this Court may choose to remand those issues so that the district court can resolve them in the first instance and, if necessary, consider whether any perceived shortcomings in the complaint's allegations could be remedied by amendment.

In any event, Bloomingdale's standing arguments lack merit. First, this Court's precedents establish that Ms. Daghaly has alleged a concrete Article III injury because she claims that Bloomingdale's has violated statutory rights that protect privacy interests analogous to those

recognized at common law. Second, Ms. Daghaly's allegation that Bloomingdale's surveillance practices keep her from shopping on a website she would otherwise visit creates a basis for her claim to injunctive relief. Finally, Ms. Daghaly's allegation that Bloomingdale's misappropriated her property rights by depriving her of the opportunity to control the commercial exploitation of her data confirms that she has suffered the sort of economic injury that creates statutory standing for her claims under the California Unfair Competition Law and the California Consumers Legal Remedies Act.

ARGUMENT

I. The district court had specific personal jurisdiction.

This Court applies a three-prong test to assess whether specific personal jurisdiction exists in a given case. *See* Opening Br. 8–9. As to the first prong, purposeful availment, the district court here held that the prong is satisfied because Bloomingdale's "operates [an] interactive web-site … which allows users to purchase merchandise to be delivered or picked up in California." ER 9 (citing *Herbal Brands, Inc. v. Photoplaza, Inc.*,72 F.4th 1085, 1094 (9th Cir. 2023)). Bloomingdale's brief does not

challenge this holding. As to the third prong, reasonableness, Bloomingdale's does not dispute—and has never disputed—that the exercise of personal jurisdiction would be reasonable here. *See* Opening Br. 10.

The parties' disagreement turns on the second prong: whether Ms. Daghaly's claims arise out of and relate to Bloomingdale's forum-directed conduct. As explained in the opening brief, this prong is satisfied because "the online retail activities that the district court correctly held to be purposefully directed into California are both the mechanism by which Bloomingdale's inflicted the injuries about which Ms. Daghaly complains and the motivation for inflicting those injuries." *Id.* at 12.

Bloomingdale's does not confront this reasoning on its own terms. Specifically, Bloomingdale's does not dispute that Ms. Daghaly's claims arise out of and relate to its operation of a retail website through which it markets and sells goods to California shoppers like Ms. Daghaly. Instead, citing the now-vacated panel opinion in *Briskin v. Shopify, Inc.*, 87 F.4th 404 (9th Cir. 2023), *vacated and reh'g en banc granted*, 101 F.4th 706 (9th Cir. 2024), Bloomingdale's argues that its online marketing and sales activities are not pertinent forum-state contacts, and that the "only potentially relevant" forum-state contact is its "collection, retention, and

use of consumer data." Response Br. 14 (second quoting *Briskin*, 87 F.4th at 415). Having restricted its focus to just one element of the unified course of commercial conduct that the district court held to be purposefully directed into California, Bloomingdale's then relies again on *Briskin* to argue that its "data collection" practices are by themselves insufficient to establish that it "expressly aimed" its conduct at California. *Id.* at 19.

Neither step of Bloomingdale's argument holds up. First, *Herbal Brands* teaches that when a court assesses the jurisdictional significance of an interactive website, it must consider the website "in conjunction" with the in-state commercial conduct that the website facilitates. *Herbal Brands*, 72 F.4th at 1092 (quoting *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011)). Second, even shorn of the context that *Herbal Brands* requires a court to consider, the continuous, systematic surveillance of California shoppers to glean profitable consumer data is expressly aimed at California. Bloomingdale's does not—and could not—dispute that Ms. Daghaly's claims arise directly out of this aspect of Bloomingdale's operations.

A. Ms. Daghaly's claims arise out of and relate to Bloomingdale's operation of an online platform to market and sell products to California shoppers.

Bloomingdale's does not dispute the district court's holding that its "sale of … physical product[s] into [California] via [its] interactive website" constitutes the purposeful availment required for specific personal jurisdiction. ER 9 (citing *Herbal Brands*, 72 F.4th at 1094). Bloomingdale's argues, however, that Ms. Daghaly's "claims do not relate to Bloomingdale's product sales," Response Br. 13, because she was "harmed immediately upon accessing Bloomingdale's website" and her privacy-related harms "d[id] not require making a purchase," *id.* at 16. This Court's decision in *Herbal Brands* forecloses that argument.

In *Herbal Brands*, an Arizona retailer called Herbal Brands filed suit in Arizona against New York companies that allegedly offered Herbal Brands' products for unauthorized sale through an online storefront. 72 F.4th at 1088. Herbal Brands asserted Lanham Act claims for trademark infringement, unfair competition, and false advertising, along with related state-law claims. *Id.* at 1089. This Court held that the defendants were subject to personal jurisdiction in Arizona on these claims. *Id.* at 1097. The Court held that the defendants had expressly

aimed their operations into Arizona by using an interactive website to make sales to Arizona shoppers "as part of the defendant[s'] regular course of business," *id.* at 1094, and that Herbal Brands' claims "clearly ar[ose] out of and relate[d] to" this forum-directed conduct, *id.* at 1096.

Critically, Herbal Brands' Lanham Act claims did not depend on the defendants' consummation of any Arizona sales—or any sales at all. The focus of such claims, after all, is on how a defendant *markets* its products. *See Lodestar Anstalt v. Bacardi & Co. Ltd.*, 31 F.4th 1228, 1245 (9th Cir. 2022) (explaining that trademark infringement and unfair competition claims are based on a defendant's use of an infringing mark in a way likely to cause consumer confusion); *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (explaining that a false advertising claim is based on a defendant's "commercial speech"). Herbal Brands would have suffered the same injury—and could have asserted the same legal claims—based on the defendants' online marketing efforts even if the defendants had not sold any goods into Arizona.

Bloomingdale's is wrong, then, to claim that jurisdiction was proper in *Herbal Brands* because "the plaintiff alleged harm from [a] product" that was shipped into the forum state. Response Br. 20. Rather, this

Court found the defendants' sale of goods into Arizona jurisdictionally relevant because those sales showed that the defendants were "attempt[ing] to serve the [in-state] market" and that Arizona was therefore a proper forum for Herbal Brands' challenges to the defendants' online marketing efforts. *Herbal Brands*, 72 F.4th at 1095; *see also Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 983 (9th Cir. 2021) (holding that a plaintiff's Lanham Act claims arose out of and related to an out-of-state defendant's online efforts to "capture the attention of an [in-forum] audience" and to "serve and attract customers in the [forum] market").

Bloomingdale's suggests that *Herbal Brands* and *Ayla* are inapposite because Ms. Daghaly's claims "do not 'relate to' any purchases made on Bloomingdale's website," Response Br. 16, and "do not depend on Bloomingdale's marketing or any sale or distribution of goods," *id.* at 23. Bloomingdale's marketing and sales operations, however, are both the purpose for its website and the activities that its consumer surveillance is intended to serve. Although Ms. Daghaly's claims, like the claims in *Herbal Brands* and *Ayla*, do not relate to a particular purchase made through an online retail platform, her claims, like the claims in *Herbal Brands* and *Ayla*, arise out of and relate to a defendant's systematic

efforts to use such a platform to market and sell products to in-state shoppers. And the fact that Bloomingdale's, like the defendants in *Herbal Brands* and *Ayla*, in fact *did* sell products into the forum defeats any argument that it did not expressly aim its online sales efforts there.

Mischaracterizing Ms. Daghaly's position, Bloomingdale's contends that her view of *Herbal Brands* embraces a result that the decision rejected because, "[u]nder [her] reasoning, a website operator is subject to specific jurisdiction 'every time [it] offered a product for sale.'" Response Br. 21 (quoting *Herbal Brands*, 72 F.4th at 1091). Ms. Daghaly, however, agrees that, under *Herbal Brands*, personal jurisdiction over an online retailer that makes no in-state sales during its regular course of business would be improper, absent some indication that the retailer otherwise expressly aimed its online platform into the forum. But where (as here) personal jurisdiction's express-aiming requirement is satisfied through the regular online sale of products, *Herbal Brands* makes clear that the forum state can take jurisdiction over the defendant on claims arising out of or related to the defendant's online retail operations, irrespective of whether the claims have a consummated sale as an element.

Bloomingdale's glides over *Herbal Brand*'s recognition that a court addressing personal jurisdiction must view an online retailer's in-state sales "in conjunction" with its operation of the sales platform through which those sales occur. 72 F.4th at 1092 (quoting *Mavrix Photo*, 647 F.3d at 1229). Addressing the point only in a footnote, Bloomingdale's points out that *Herbal Brands* made this statement while analyzing personal jurisdiction's express-aiming requirement, not relatedness. *See* Response Br. 21 n.3. But Bloomingdale's admits that relatedness asks whether a plaintiff's claims arise out of or relate to "the contacts expressly aimed at the forum." *Id.* Here, therefore, where Bloomingdale's expressly aimed into California by "operating a website 'in conjunction with'" in-state sales, *Herbal Brands*, 72 F.4th at 1092 (quoting *Mavrix Photo*, 647 F.3d at 1229), the relatedness inquiry asks whether Ms. Daghaly's claims arise out of or relate to that entire course of forum-directed conduct.

Notably, Bloomingdale's also overlooks *Herbal Brands* when attempting to respond to the analogy drawn in the opening brief between Ms. Daghaly's claims and the claims of a shopper in a brick-and-mortar store who challenges the store's use of a surveillance camera. As Ms. Daghaly explained, "a shopper's claim that the store owner had invaded

her privacy would self-evidently arise out of and relate to," among other things, "the owner's operation of the store." Opening Br. 14. Bloomingdale's responds that "[b]y opening a physical clothing store in a particular forum, the owner of that store has purposefully directed its activity at the forum," whereas the operator of an online retail website "does not similarly target a forum." Response Br. 24. But *Herbal Brands* held exactly the opposite: An online retailer *does* "expressly aim[]" at the forum state when it operates a web platform through which it sells goods into the forum state. 72 F.4th at 1093. And just as a shopper's claim of unlawful surveillance while visiting a physical store is inextricably related to the defendant's operation of that store, so too is a shopper's claim of unlawful surveillance while visiting a store online.

Relying on the now-vacated panel opinion in *Briskin,* Bloomingdale's argues that precedent requires this Court to focus the relatedness inquiry exclusively on Bloomingdale's "alleged 'data extraction, retention, and processing,'" without considering the forum-directed online retail activities through which this challenged conduct occurs. Response Br. 13 (quoting *Briskin*, 87 F.4th at 413). *Briskin*, of course, no longer has precedential value. In any event, the defendants in *Briskin*—

unlike Bloomingdale's—did not use their online platform to market and sell their products to in-forum shoppers. Rather, they provided payment-processing services to facilitate transactions occurring between third-party merchants and end consumers. *See* 87 F.4th at 409. In that context, the *Briskin* panel held that certain forum-state contacts that the defendants had created to "promote[] [their] *merchant* relations" were insufficiently related to claims that arose out of the relationship between the defendants and those merchants' *customers*. *Id.* at 413 (emphasis added). Whatever persuasive value the vacated *Briskin* opinion might have, the opinion did not consider the situation presented here, where a shopper's claims arise out of the online platform that a retailer uses to solicit and transact with *its own* potential in-state customers.

The out-of-circuit opinions that Bloomingdale's invokes to support its unduly restrictive approach to relatedness are also readily distinguishable. Two of the cases found that a defendant's online product sales into the forum-state were unrelated to claims based on the defendant's publication of objectionable content outside the sales context. *See Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 320 (5th Cir. 2021) (holding that a defendant's online sales were unrelated to a claim that

the defendant had published an allegedly libelous article about the plaintiff); *Hepp v. Facebook*, 14 F.4th 204, 208 (3d Cir. 2021) (holding that a defendant's "online merchandise store" was unrelated to a claim that one of the defendant's users had uploaded a photograph of the plaintiff to a separate page without authorization). The other two cases held that a defendant's in-state operations were unrelated to an out-of-state injury arising from the defendant's out-of-state operations. *See Cappello v. Rest. Depot, LLC*, 89 F.4th 238, 246 (1st Cir. 2023) (holding that a defendant's sale of lettuce to in-forum businesses was unrelated to "a retail customer (a type of customer [the defendant] d[id] not and [could not] serve) purchasing a salad" from one of the defendant's out-of-state business customers); *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 140 (4th Cir. 2020) (holding that a defendant's operation of ninety in-state hotels had "nothing to do" with a personal injury the plaintiff suffered at one of the defendant's foreign hotels). Here, in contrast, the defendant operates an online platform through which it markets and sells goods to forum-state

consumers, and the plaintiff is a forum-state shopper whose claims arise out of the defendant's conduct in operating that sales platform.[1]

B. Ms. Daghaly's claims arise out of and relate to Bloomingdale's extraction of profitable data out of California through the online surveillance of in-state shoppers.

As explained above, Bloomingdale's argument that "the only potentially relevant contact" for the relatedness inquiry is its "collection, retention, and use of consumer data," Response Br. 14 (second quoting *Briskin*, 87 F.4th at 415), fails as a matter of law and logic. Even consideration of this subset of forum-state contacts alone, however, establishes personal jurisdiction. Bloomingdale's does not dispute that Ms. Daghaly's claims arise out of these contacts; it argues only that its data-collection activities were not expressly aimed at California. *Id.* at 17–19. This argument is meritless.

According to Ms. Daghaly's complaint, Bloomingdale's intentionally operated its website "on a daily basis" in a way that would "continuously … capture[] and intercept[]" the activities of shoppers in California, one

[1] Contrary to Bloomingdale's suggestion, Ms. Daghaly does not claim that Bloomingdale's "decision to create a website" itself forms a basis for specific jurisdiction. Response Br. 23. Rather, Ms. Daghaly's claims arise out of and relate to Bloomingdale's ongoing use of its online retail platform to attract and serve California shoppers.

of Bloomingdale's "principal market[s]." ER 14–15. Had Bloomingdale's placed a physical surveillance camera in a California store and used it to view customer activity there, its action certainly would have been aimed at California. There is no reason why the online nature of Bloomingdale's equivalent conduct calls for a different analysis. *See CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1076–79 (9th Cir. 2011) (holding that an out-of-state defendant purposefully directed its activities into the forum state where it downloaded materials from an in-state competitor's website to make unlawful commercial use of them).

Relying again on *Briskin*, Bloomingdale's argues that its surveillance activities were not expressly aimed at California because Bloomingdale's did not "prioritiz[e]" California or "'differentiat[e]' it 'from other locations.'" Response Br. 18 (quoting *Briskin*, 87 F.4th at 420). Both this Court and the Supreme Court, however, have held that a defendant whose misconduct extends into multiple states is subject to personal jurisdiction in each of them. *See, e.g.*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (holding that a defendant that "produce[d] a national publication aimed at a nationwide audience" could be called to "answer for the contents of that publication wherever a substantial

number of copies are regularly sold and distributed"); *Herbal Brands*, 72 F.4th at 1095 (holding that an online retailer can be subject to jurisdiction based on forum-state sales that "occur in the defendant's regular course of business," no matter how small a percentage of total sales they represent). Accepting Bloomingdale's argument would perversely insulate a defendant from *any* state's specific personal jurisdiction as long as it aimed its unlawful conduct into *every* state.

Bloomingdale's also invokes the principle that specific jurisdiction cannot be based on "a plaintiff's unilateral activity." Response Br. 25 n.4. That uncontroversial proposition has no application here. Ms. Daghaly's claims challenge *the defendant's* decisions to surreptitiously record the activities of people shopping online in California, to use the insights it gleans from this California-directed surveillance to enhance its own marketing efforts, and to transmit the data that it extracts out of California to third parties for commercial purposes. This case is therefore not like *Walden v. Fiore*, 571 U.S. 277 (2014), *cited in* Response Br. 25 n.4, which held that Nevada could not take personal jurisdiction over a Georgia-based defendant on a claim that he unlawfully seized funds from Nevada-based plaintiffs while they were in Georgia. 571 U.S. at 279–80.

There, "no part of [the defendant's] course of conduct occurred in Nevada," and the defendant "never … contacted anyone" in Nevada. *Id.* at 288–89. Here, Bloomingdale's reached into California to record the activities of shoppers present there. Unlike the *Walden* plaintiffs, Ms. Daghaly does not rely for jurisdiction on *her own* relationship to the forum state or on the incidental in-forum effects of an out-of-state tort.

Finally, Bloomingdale's suggests that Ms. Daghaly "does not even argue … that Bloomingdale's alleged collection of her data was expressly aimed at California." Response Br. 13–14. That suggestion is wrong. In opposing Bloomingdale's motion to dismiss, Ms. Daghaly argued that Bloomingdale's "aimed its conduct at California by intercepting and/or aiding and abetting the interception of data of California residents." D. Ct. Dkt. No. 16 at 5. The district court did not rule on the issue, however, because it found Bloomingdale's "sale of … physical product[s] into the forum via an interactive website" sufficient to establish express aiming. ER 9.

Because Ms. Daghaly's claims arise out of and relate to Bloomingdale's operation of a forum-directed online retail platform, this Court need not decide whether Bloomingdale's surveillance activities, viewed

in isolation, suffice to establish jurisdiction. Should this Court reach that question, however, it should answer in the affirmative.

II. Ms. Daghaly has standing to pursue her claims.

As an alternate basis for affirmance, Bloomingdale's contends that Ms. Daghaly lacks standing. Bloomingdale's offers three arguments in this respect: first, that Ms. Daghaly has not alleged an Article III injury; second, that Ms. Daghaly lacks standing to seek injunctive relief; and third, that Ms. Daghaly has not met the statutory standing requirements for some (but not all) of her claims.

The district court did not address any of these arguments and, as a "general rule, ... a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Shirk v. United States ex rel. Dep't of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014) ("As a federal court of appeals, we must always be mindful that 'we are a court of review, not first view.'" (quoting *Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038, 1043 n.4 (9th Cir. 2011))). Of course, this Court has "an independent obligation to examine [its] own and the district court's jurisdiction," and to ensure that Ms. Daghaly has plausibly alleged Article III standing. *Rivas v. Rail Delivery Serv., Inc.*,

423 F.3d 1079, 1082 (9th Cir. 2005). But because Ms. Daghaly has alleged a cognizable Article III injury caused by Bloomingdale's surveillance practices and redressable by a judgment in her favor, this case presents a justiciable case or controversy that falls within this Court's jurisdiction.

Once this Court has satisfied itself on that point and thus rejected Bloomingdale's first standing argument, the Court may choose to remand the case for the district court to consider Bloomingdale's two non-jurisdictional standing arguments in the first instance and, if necessary, to consider whether any perceived deficiencies in the complaint's allegations could be remedied through amendment.[2] *See, e.g.*, *DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223, 1241 (9th Cir. 2024) (remanding the issue of a plaintiff's standing to seek injunctive relief); *Jones v. Ford Motor Co.*, 85 F.4th 570, 574 (9th Cir. 2023) (per curiam) (explaining that statutory standing is not jurisdictional). Should this Court address the non-jurisdictional standing arguments, however, it should reject them.

[2] Ms. Daghaly earlier declined to amend her complaint in response to the district court's dismissal for lack of personal jurisdiction, ER 4, based on the district court's indication that amendment would likely be futile as to that issue, *see* ER 10. Ms. Daghaly accordingly does not suggest that a further opportunity to amend to introduce allegations related to personal jurisdiction would now be appropriate.

A. Ms Daghaly has alleged a concrete Article III injury to her privacy.

Ms. Daghaly has alleged a sufficiently concrete injury to establish Article III standing: an invasion of privacy suffered when Bloomingdale's surreptitiously created and shared a video recording of her actions while she was privately browsing its website and when Bloomingdale's sent a record of her activities to Meta so that Meta could build a consumer profile of her. As this Court has held, such an invasion "gives rise to a concrete injury sufficient to confer standing." *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 598 (9th Cir. 2020).

1. To establish Article III standing at the pleading stage, a plaintiff must allege a "concrete" injury bearing a "'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)); *see also Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (noting that "general factual allegations of injury … may suffice" to establish standing at the pleading stage (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992))). Importantly, however, "[a] concrete injury need not be tangible." *Phillips v. U.S. Customs & Border Protection*, 74 F.4th 986, 991 (9th Cir. 2023)

(quoting *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270 (9th Cir. 2019)). The Supreme Court has emphasized that privacy harms and other traditional intangible harms such as "reputational harms, disclosure of private information, and intrusion upon seclusion" can all constitute concrete injuries that satisfy Article III. *TransUnion*, 594 U.S. at 425.

Here, Ms. Daghaly alleges, among other things, that Bloomingdale's has violated privacy rights protected by the California Invasion of Privacy Act (CIPA). As Bloomingdale's emphasizes, Response Br. 30, a statutory violation does not, on its own, constitute an injury in fact. Nonetheless, a legislature's views are "instructive" in determining whether an intangible harm is sufficiently concrete to be justiciable. *TransUnion*, 594 U.S. at 425 (quoting *Spokeo*, 578 U.S. at 341). By conferring specific statutory protections on the public, a legislature may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* (quoting *Spokeo*, 578 U.S. at 341). And in this Circuit, the law is "settled" that the violation of a statute that "codifies a common law privacy right 'gives rise to a concrete injury sufficient to confer standing.'" *Jones*, 85 F.4th at 574 (quoting *In re Facebook*, 956 F.3d at 598); *see also Campbell v. Facebook,*

Inc., 951 F.3d 1106, 1119 n.8 (9th Cir. 2020) (recognizing that the CIPA "codif[ies] 'a *substantive* right to privacy' the intrusion of which causes concrete harm '*any time*' there is a violation" (quoting *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983–84 (9th Cir. 2017))).

As this Court has recognized, the CIPA's private right of action embodies a legislative effort to bring common-law harms into the age of modern technology. *See, e.g.*, *In re Facebook*, 956 F.3d at 598 ("[T]he California legislature intended to protect … historical privacy rights when [it] passed the ... CIPA."); *Campbell*, 951 F.3d at 1118 (noting that the CIPA "reflect[s] statutory modernization[] of the privacy protections available at common law"). Such efforts to modernize traditional legal protections are precisely the sort of legislative interventions that *TransUnion* instructs courts to "respect" for purposes of Article III standing. *TransUnion*, 594 U.S. at 425. Accordingly, this Court and others have regularly held that statutory efforts to "control or prevent the unauthorized exploration of [individuals'] private lives" in the face of "[a]dvances in technology [that] can increase the potential for unreasonable intrusions into personal privacy" protect cognizable Article III interests. *In re Facebook*, 956 F.3d at 599 (second quoting

Patel, 932 F.3d at 1272); *see also In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 325 (3d Cir. 2019) (rejecting the notion that "federal courts are powerless to provide a remedy when an internet company surreptitiously collects private data").

2. Trying to distinguish this case from the numerous other cases in which this Court has found Article III standing based on online privacy intrusions, Bloomingdale's argues that Ms. Daghaly "did not identify any private information that Bloomingdale's collected." Response Br. 31. Ms. Daghaly, though, has alleged that Bloomingdale's, without her knowledge or consent, created real-time screen recordings of her actions as she browsed Bloomingdale's website on her personal devices. *See* ER 19, 22. After creating these recordings, Bloomingdale's stored them and transmitted them to third parties that use such recordings to track and "identify a person across related domains." ER 20; *see* ER 22. Moreover, Bloomingdale's collects additional information about the activities of the visitors to its website using software called Meta Pixel, and it transmits that information to Meta, which in turn uses the information to create individualized "shadow profiles" that link together information gleaned from a particular web user's activities across multiple websites. ER 23;

see ER 25–26. These "tracking and collection practices" implicate the concrete privacy interests that the CIPA was enacted to protect, including one's interest in "controlling [her] personal information," and they facilitate the aggregation of user-specific data that creates a "material risk" of "reveal[ing]" one's "likes, dislikes, interests, and habits over a significant amount of time." *In re Facebook*, 956 F.3d at 599.

Bloomingdale's is similarly wrong to suggest that standing is lacking because Ms. Daghaly did not allege that she affirmatively "provided any private information about herself." Response Br. 35. A person whose activities were secretly filmed would reasonably understand her privacy to have been violated even if the camera caught her engaged in only benign activities. Through the CIPA, California's legislature extended this traditional principle to the online realm. *Cf. Eichenberger*, 876 F.3d at 983 & 984 n.2 (holding that a statute protecting "a consumer's substantive privacy interest in his or her video-viewing history" implicated concrete Article III interests despite having been enacted to protect disclosure of even "decidedly commonplace" histories).

Bloomingdale's also relies on this Court's decision in *Phillips* to support the argument that the information that Bloomingdale's collected

is insufficiently "private" to implicate Article III. Response Br. 35. That decision, however, is inapposite. In *Phillips*, this Court held that the government's compilation and retention of certain records did not implicate traditional privacy rights. 74 F.4th at 993–95. Critically, though, the *Phillips* plaintiffs did not identify any right to exercise control over the "underlying information" that the government used to create the records, all of which "came from publicly available sources or existing law enforcement databases." *Id.* at 996 (Schroeder, J., concurring). Here, Ms. Daghaly invokes a statutory right to be free from Bloomingdale's allegedly unlawful collection of her data in the first place.

Finally, Bloomingdale's argues that it had consent for its surveillance activities because Ms. Daghaly voluntarily conveyed the information that it collected. *See* Response Br. 36–40. This "fact-based defense," which "is not relevant at the pleading stage," goes to the merits of Ms. Daghaly's claims, not her standing to bring them. *In re Facebook*, 956 F.3d at 605; *see also Maya*, 658 F.3d at 1068 ("Standing 'in no way depends on the merits of the … contention that particular conduct is illegal.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975))). Regardless,

Bloomingdale's voluntariness argument strains reason, because Bloomingdale's collects information that an online shopper would not expect a website to record, including what she looks at or hovers over, and what she types but deletes without submitting. ER 19. Indeed, Ms. Daghaly has alleged that she "did not know" of Bloomingdale's surveillance and "did not consent" to it. ER 31. In any event, Bloomingdale's does not even try to argue that, by using its website, Ms. Daghaly voluntarily conveyed information not only to Bloomingdale's, but also to FullStory, Meta, and the other third parties to which Bloomingdale's disclosed her activities.

In sum, Ms. Daghaly has alleged a concrete Article III injury based on Bloomingdale's violation of her privacy rights, thus bringing this case within this Court's and the district court's subject-matter jurisdiction.

B. Ms. Daghaly's allegations establish her standing to seek injunctive relief.

Bloomingdale's claims next that Ms. Daghaly lacks standing to seek injunctive relief. Should this Court reach this argument, *but see supra* at 19, it should hold that the complaint's allegations establish Ms. Daghaly's standing at the pleading stage to seek injunctive relief.

Bloomingdale's argues that Ms. Daghaly cannot claim an injury that would be redressed by forward-looking relief because she "does not

allege any intention to visit Bloomingdale's website again." Response Br. 40. In fact, the complaint expressly states that Ms. Daghaly "would shop at www.bloomingdales.com but for [Bloomingdale's] unfair and deceptive" surveillance activity. ER 40. Ms. Daghaly's allegations that the risk of continued undisclosed surveillance chills her from visiting the Bloomingdale's website states an injury that could be redressed by a court order requiring Bloomingdale's to cease its practices. *Cf. Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969–70 (9th Cir. 2018) (holding that "a previously deceived consumer may have standing to seek an injunction against false advertising" that has undermined her reliance on the seller, such that she "will not purchase the [seller's] product" in the future "although she would like to").

Bloomingdale's is also wrong that Ms. Daghaly lacks standing to seek injunctive relief because, now that she knows about Bloomingdale's surveillance practices, "she could hardly plead ignorance or a lack of consent as to Bloomingdale's data collection practices" if she returned to the site. Response Br. 41. Ms. Daghaly's knowledge of Bloomingdale's practices is precisely why she now refrains from visiting the website that she would otherwise visit. An injunction would enable her to visit the

website in the future, as the complaint states she would do if awarded such relief. Ms. Daghaly thus has standing to seek injunctive relief.[3]

C. Ms. Daghaly has pleaded economic injury that creates statutory standing for her UCL and CLRA claims.

To state a claim under the California Unfair Competition Law (UCL) and the California Consumers Legal Remedies Act (CLRA), a plaintiff must allege "some form of economic injury." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 (9th Cir. 2013) (quoting *Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 885 (Cal. 2011)); *see Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015) (recognizing that the UCL's and the CLRA's requirements are identical). Contrary to Bloomingdale's argument, Ms. Daghaly has plausibly alleged an economic injury within the meaning of the UCL and the CLRA.

The California electorate added the economic-injury requirement to the UCL in a 2004 referendum to weed out lawsuits by individuals "who have not used the defendant's product or service, viewed the defendant's

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[3] Although the allegations in the complaint on this point are adequate, Ms. Daghaly indicated to the district court that, if further elaboration were deemed necessary, she could amend her complaint "to add further detail concerning her desire to purchase from bloomingdales.com once [the district court] has [o]rdered [Bloomingdale's] to stop its practices." D. Ct. Dkt. No. 16 at 16.

advertising, or had any other business dealing with the defendant," not to curtail claims by "those actually injured by a defendant's business practices." *Kwikset,* 246 P.3d at 884 (citation omitted). So, while only injuries to "money or property" can support UCL standing, the statute "plainly preserve[s] standing for those who *ha*[*ve*] had business dealings with a defendant," including by "view[ing] the defendant's advertising," and who "lost money or property as a result of the defendant's unfair business practices." *Id.* (citation omitted). Moreover, an "identifiable trifle of economic injury" suffices, and there are "innumerable ways" in which such an injury can occur. *Cal. Med. Ass'n v. Aetna Health of Cal. Inc.*, 532 P.3d 250, 258 (Cal. 2023) (quoting *Kwikset*, 246 P.3d at 885–86). California courts take a broad view of what constitutes economic harm and have left the door open for novel, but real, forms of economic injury. *See id.* at 258–59; *Kwikset,* 246 P.3d at 886 (declining to "supply an exhaustive list of the ways" in which economic harm may occur).

Here, Ms. Daghaly suffered an economic injury when Bloomingdale's misappropriated her economically valuable data. *Cf. Taylor v. Google, LLC*, 2024 WL 837044, at *1–2 (9th Cir. Feb. 28, 2024) (recognizing that "cellular data," while "intangible," is valuable property

that can be the subject of a conversion claim under California law). By capturing some of the economic possibilities for exploiting Ms. Daghaly's data, Bloomingdale's deprived Ms. Daghaly of those possibilities, thus "diminish[ing]" her "present or future property interest" in the data. *Kwikset,* 246 P.3d at 885–86; *see also Cal. Med. Ass'n*, 532 P.3d at 259–60 (recognizing that a reduction in the economic value a plaintiff can receive for her labor or property constitutes economic injury under the UCL). While the California Supreme Court has yet to confront the specific question whether a defendant's unlawful collection and sale of consumer data satisfies the UCL's and the CLRA's economic-harm requirement, that court's capacious view of the requirement supports a confident prediction that it would decide that issue in the affirmative.

In sum, all three of Bloomingdale's standing arguments lack merit.

CONCLUSION

This Court should reverse the district court's judgment.

Respectfully submitted,

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June 14, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) and Ninth Circuit Rule 32-1(b) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the Rules of this Court, it contains 6,003 words.

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Reply Brief for Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on June 14, 2024, using the Appellate Case Management System (ACMS). I certify that all participants in this case are registered ACMS users and that service will be accomplished by ACMS.

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