No. 24-14

United States Court of Appeals for the Ninth Circuit

ASHLEY POPA,
individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

PSP GROUP LLC AND MICROSOFT CORPORATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington, Case No. 2:23-cv-00294
The Honorable James L. Robart, United States District Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, WASHINGTON LEGAL FOUNDATION, NETCHOICE, LLC, AND THE INTERACTIVE ADVERTISING BUREAU AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 *Amici Curiae* state as follows:

The Chamber of Commerce of the United States of America has no parent corporation, and no publicly held corporation owns more than ten percent of its stock.

Washington Legal Foundation has no parent corporation, and no publicly held corporation owns more than ten percent of its stock.

NetChoice, LLC has no parent corporation, and no publicly held corporation owns more than ten percent of its stock.

The Interactive Advertising Bureau has no parent corporation, and no publicly held corporation owns more than ten percent of its stock.

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INTEREST OF *AMICI CURIAE*[1]

The **Chamber of Commerce of the United States of America** ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Washington Legal Foundation ("WLF") is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears before this Court as an *amicus curiae* to oppose novel theories of civil liability that would unduly hinder investment and innovation in the digital economy. *See, e.g.*, *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946 (9th Cir. 2023); *Patel v. Facebook, Inc.*, 932 F.3d 1264 (9th Cir. 2019).

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

NetChoice, LLC is a national trade association of online businesses that works to protect free expression and promote free enterprise online. NetChoice is engaged in litigation, *amicus curiae* work, and political advocacy to support those ends. NetChoice is a plaintiff in several federal lawsuits challenging state laws that chill free speech and stifle commerce on the internet. NetChoice has a strong interest in this litigation to ensure the internet stays innovative and free.

The **Interactive Advertising Bureau** ("IAB") is an advertising industry trade association representing over 700 leading companies that are responsible for selling, delivering, and optimizing digital advertising and marketing campaigns. IAB develops industry standards, conducts research, and provides legal support for the online advertising industry. Through its public policy advocacy, IAB works to build a sustainable and consumer-centric media and marketing ecosystem and raise the industry's political visibility and profile as a driving force in the global economy through grassroots advocacy, member fly-ins, research, and public affairs campaigns.

Amici Curiae have a strong interest in this case because session replay and similar technologies are important and ubiquitous in the digital economy. Yet uninjured parties—including serial plaintiffs like Popa—represented by fee-seeking lawyers have advanced novel legal theories targeting these technologies and seeking judgments that pose existential risks to businesses. The members or supporters of

each *Amici Curiae* want these beneficial tools in our online economy to remain available to those using their websites without fear of baseless litigation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiff-Appellant Ashley Popa asserts the sort of claims that are proliferating in courts across the United States. In these increasingly common claims, a plaintiff visits a website that uses ubiquitous third-party software to collect data about how visitors use the site. Such plaintiffs do not allege that the website collected their private or sensitive information or that they suffered any actual harm based on the collection of their clicks, scrolls, and other movements. Even so, to assert a claim that they have standing to bring, these plaintiffs allege a violation of a state wiretap law and an invasion-of-privacy tort and seek astronomical damages. Hundreds of these cases are currently pending in state and federal courts across the country. Courts have dismissed many of them for lack of standing and failure to state a claim.[2]

Here, the district court rightly held that Popa lacks standing and dismissed her complaint. Dismissal was consistent with the Supreme Court's recent teaching on Article III and the limitations on clever but harm-free litigation. In *TransUnion LLC*

[2] *See, e.g.*, *Adams v. PSP Grp., LLC*, --- F. Supp. 3d ----, No. 4:22-cv-1210 RLW, 2023 WL 5951784, at *5–8 (E.D. Mo. Sept. 13, 2023) (no standing); *Goldstein v. Costco Wholesale Corp.*, 559 F. Supp. 3d 1318, 1319 (S.D. Fla. 2021) (failure to state a claim); *Cook v. GameStop, Inc.*, 689 F. Supp. 3d 58, 62–72 (W.D. Pa. 2023) (both).

v. Ramirez, 594 U.S. 413 (2021), the Supreme Court held that Article III requires proof of an injury with "a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *See id.* at 417. Popa has not satisfied that standard because her alleged harms are not like those traditionally protected at common law and Pennsylvania's Wiretapping and Electronic Surveillance Control Act ("Wiretap Act") cannot make them so. This Court should affirm on this ground.

Alternatively, this Court should affirm because Popa has failed to state a claim. She alleges that Defendants-Appellees PSP Group LLC and Microsoft Corporation used "session replay code" to watch her navigate PSP's website by using her mouse to click on pet supplies like "dog beds, cat toys, [and] fish food" and that use of session replay technology violates Pennsylvania criminal law. *See* 18 Pa. Cons. Stat. § 5703. But information about her navigation of the website is not the "contents" of any communication as that term is used in the Wiretap Act and, in any event, the rule of lenity would require much more clarity before a common, industry-standard practice that benefits consumers is suddenly criminalized and made a basis for potentially enormous private liability under a law that predates the internet.

At bottom, Popa seeks to hold Defendants-Appellees liable because they use session replay technology, which enhances consumers' web-browsing experiences,

even though she has experienced no cognizable harm from that practice and it has not been outlawed by the Pennsylvania legislature. There is virtually no limit on the number of cases that could be brought under her theory, as short visits to any of the millions of websites using session replay or other website analytics technologies could be cited to manufacture injury-less claims against innocent defendants. Because that result can easily be avoided through either a proper application of the Supreme Court's standing doctrine or a correct interpretation of the Wiretap Act, this Court should affirm.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT SESSION REPLAY TECHNOLOGY DOES NOT HARM CONSUMERS

The use of website analytics tools including session replay technology is a standard practice that benefits consumers. Nevertheless, Popa claims she was harmed when PSP and Microsoft employed session replay technology as she browsed pet supplies on PSP's website. But that supposed harm is not "concrete" within the meaning of *TransUnion* and, in any event, her claimed interest is not "legally protected" as this Court has understood that concept. The district court rightly dismissed for lack of standing.

A. Session Replay Technology Helps Consumers and the Public

The importance of the internet in today's business world cannot be overstated. More than 70 percent of even small American businesses have some online presence,

see U.S. Chamber of Commerce Tech. Engagement Ctr., *The Impact of Technology on U.S. Small Business* 6 (2023), https://perma.cc/VPF9-8E47, and some estimate that nearly one-third of all business activity in the United States is now conducted online, Katherine Haan & Rob Watts, *Top Website Statistics for 2024*, Forbes.com (June 4, 2024), https://perma.cc/LU2A-XN4G. Millions of businesses use the internet to reach their customers, and "consumers increasingly rely[ ] on the internet to make purchasing decisions." *Id.*

In this "competitive online landscape," "a well-designed and optimized website is critical for a business's success." *Id.* Common sense teaches that a website visitor who cannot easily find the information that he or she wants may quickly leave the site, often without completing a transaction or otherwise fulfilling the purpose of his or her visit. And statistics confirm this, showing that nearly two-thirds of website users expect to find what they are looking for within five seconds of landing on a website and will quickly move on to a different site if they are unsuccessful. *See id.*

Website analytics are a tool that many businesses and other organizations use to help them design and maintain an effective online presence. By "[g]athering and analyzing metrics and data on how people use" a website, the U.S. General Services Administration has explained, its owner can "make customer-focused

improvements." U.S. Gen. Servs. Admin., *An Introduction to Analytics*, https://perma.cc/UYL8-LPUB. That improves the online experience for everybody.

Session replay technology is a form of web analytics. As the complaint explains, it "enables website operators to record, save, and replay website visitors' interactions with a given website." ER-027 ¶ 28. This data is used by businesses to design their websites "so that users can perform desired operations efficiently and effectively" rather than "become confused or frustrated" by poor web design and then "'take their business' to competing sites." *See* James J. Cappel & Zhenyu Huang, *A Usability Analysis of Company Websites*, 48(1) J. Comput. Info. Sys. 117, 117 (2007). As even the complaint acknowledges, session replay technology helps businesses understand "how consumers interact with a business's website" in order to "improve customer experiences" on those websites. *See* ER-024 ¶ 18; *see also* ER-027 ¶ 28 (noting that session replay technology provides "website designers with insights into the user experience"). And the complaint concedes that session replay and other web analytics are "critically important to a business's success" in the digital era. *See* ER-024 ¶ 19.

Besides increasing the usability of websites, session replay and other web analytics help businesses detect fraud. "By analyzing large volumes of transactional and behavioral data, data analytics techniques can detect deviations from normal patterns, highlight suspicious activities, and pinpoint potential instances of fraud."

Int'l Ass'n of Bus. Analytics Certification, *Fraud Detection Through Data Analytics: Identifying Anomalies and Patterns* (Sept. 20, 2023), https://perma.cc/375C-377T. For example, website analytics can quickly identify credit card fraud by detecting "if a credit card is suddenly used for transactions in different geographical locations within a short time span." *Id.* Likewise, website analytics tools can uncover identify theft "[b]y analyzing login patterns, geographic locations, and device usage." *Id.* These fraud detection tools benefit customers whose credit cards or identities have been stolen by detecting and deterring fraudulent activity.

In short, online tools including session replay technology benefit consumers by facilitating and protecting their online shopping experience. They are essential to a business's success in today's e-commerce landscape.

B. Session Replay Technology Does Not Harm Popa Under *TransUnion*

Because session replay technology helps and does not harm consumers, the district court correctly held that Popa lacks standing. In *TransUnion*, the Supreme Court held that Article III requires proof of an injury with "a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." 594 U.S. at 417. Popa cannot meet that standard because her alleged harms are not like those traditionally protected at common law and the Wiretap Act cannot make them so.

1. *TransUnion Requires an Injury with a Close Relationship to a Traditionally Cognizable Harm*

As the party invoking federal jurisdiction, Popa bears the burden of establishing standing, the first element of which requires her to demonstrate an "injury in fact." *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). To qualify, that injury must be "concrete"—that is, "real, and not abstract." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016).

TransUnion elaborated on the meaning of "concrete." With respect to "intangible harms," *TransUnion* explained that courts should assess whether the alleged injury to the plaintiff has a "close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." 594 U.S. at 425. "That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." *Id.* at 424. Although "an exact duplicate in American history and tradition" is not required, courts may not "loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." *Id.* at 424–25. Thus, a theory of injury that "circumvents a fundamental requirement" of a traditional claim "does not bear [the] sufficiently 'close relationship'" needed "to qualify for Article III standing." *Id.* at 434 n.6.

2. Popa's Alleged Injury Is Not Closely Related to a Traditional Intrusion-upon-Seclusion Tort

Popa tries to satisfy *TransUnion* by characterizing her supposed harms as an invasion of her privacy sufficiently analogous to an intrusion upon seclusion. *See* Appellant's Br. 12–13, 17–18.[3] They are not.

At common law, "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability . . . if the intrusion would be highly offensive to a reasonable person." *Burger v. Blair Med. Assocs., Inc.*, 964 A.2d 374, 379 (Pa. 2009) (quoting Restatement (Second) of Torts § 652B (Am. L. Inst. 1977)); *accord Nayab v. Cap. One Bank (USA), N.A.*, 942 F.3d 480, 491 (9th Cir. 2019) (same); *see also* William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389–92 (1960) (discussing the history and development of intrusion upon seclusion). Here, the gravamen of Popa's complaint is that PSP and Microsoft used session replay technology to watch her "brow[s]e[ ] for pet supplies" on "PSP's website" "unbeknownst" to her. ER-036 ¶¶ 66–67; *see*

[3] Popa also asserts in passing that her alleged privacy harms are like those actionable in trespass or for public disclosure of private facts. *See* Appellant's Br. 12–13, 17–18, 23. Because these theories are undeveloped and were not advanced in the district court, they are forfeited. *See Gonzalez v. U.S. Immigration & Customs Enf't*, 975 F.3d 788, 805 n.10 (9th Cir. 2020) ("[O]rdinary rules of forfeiture apply to standing . . . ." (internal quotation marks omitted)). Regardless, they fail for the reasons argued by PSP and Microsoft. *See* PSP's Br. 23–32; Microsoft's Br. 21–29.

also, e.g., ER-021 ¶¶ 4–5; ER-032 ¶¶ 48–49. But Popa's claimed harm is unlike any that is traditionally cognizable under the common law tort.

First, Popa's alleged injury does not involve an intrusion upon her "solitude," "seclusion," or "private affairs or concerns." As traditionally understood, this element does not protect a plaintiff's "subjective expectation" of privacy but only those that are "objectively reasonable." *See Med. Lab'y Mgmt. Consultants v. Am. Broadcasting Cos.*, 306 F.3d 806, 812–13 (9th Cir. 2002); *accord* 62A Am. Jur. 2d *Privacy* § 36, text accompanying note 1, Westlaw (2d ed. Updated May 2024); *see also* Prosser, *supra*, at 391 ("It is clear also that the thing into which there is prying or intrusion must be, and be entitled to be, private."). And objective reasonability turns on societal norms. *See, e.g.*, Restatement (Second) of Torts § 652B, cmt. c ("[T]here is no liability for the examination of a public record concerning the plaintiff . . . . Nor is there liability for observing him or even taking his photograph while he is walking on the public highway . . . .").

Longstanding social conventions and expectations defeat the notion that Popa (or the traditional common law plaintiff) could expect privacy, "solitude," or "seclusion" from their retailer (or its providers) with respect to their shopping behavior. Historically, retail shopping largely occurred in general stores where buyers and sellers typically bartered for various goods—hardly an experience shielded from the retailer's (or its providers') observation. *See* Fred Mitchell Jones,

Retail Stores in the United States 1800-1860, 1(2) J. Marketing 134, 134 (1936). And retailers kept detailed account books documenting the specifics of transactions, containing so much information that these sources—more so than even "letters, diaries, or newspapers"—allow researchers today to derive "biographies and autobiographies of individuals" and "patterns of ethnic and/or religious business relationships." *See* Christopher Densmore, *Understanding and Using Early Nineteenth Century Account Books*, 5(1) The Midwestern Archivist 5, 5–6, 17–18 (1980).

Consider also that, until the early twentieth century, grocery shopping generally consisted of going to the store and providing a list of items to a store clerk, who would then do the buyer's shopping for her—hardly a privacy-conducive arrangement. *See, e.g.*, Kat Eschner, *The Bizarre Story of Piggly Wiggly, the First Self-Service Grocery Store*, Smithsonian Magazine (Sept. 6, 2017), https://perma.cc/LM8S-DGDH; *Food and Beverage Retailing in 19th and Early 20th Century America*, U. Mich. Lib., https://tinyurl.com/35fkxztc. Even with the advent of "self service" in-person shopping customary today, a customer's shopping behavior remains inherently public and readily observable to the retailer (and its providers). *See, e.g.*, *Cook*, 689 F. Supp. 3d at 66, 72 (making this point). And though the advent of internet e-commerce may have automated aspects of the shopping experience, the non-private nature of one's shopping activities *vis-à-vis*

one's retailer (or its providers) remains true today, even online. *See, e.g.*, *id.* at 72 (dismissing, for this reason, an intrusion-upon-seclusion claim based on similar allegations as Popa's); *see also United States v. Taylor*, 935 F.3d 1279, 1284 n.4 (11th Cir. 2019) (noting that "browsing the open internet" is the modern "equivalent" of "traveling along . . . 'public highways'"); Prosser, *supra*, at 391 ("On the public streets, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about.").

Second, Popa's alleged injury is not "highly offensive." This element is also an objective standard, asking what would be highly offensive to a "reasonable person." Restatement (Second) of Torts § 652B; *see Boring v. Google Inc.*, 362 F. App'x 273, 279–80 (3d Cir. 2010) (applying an "objective standard" under Pennsylvania tort law); Prosser, *supra*, at 390–91 ("It is . . . clear that the intrusion must be something which would be offensive or objectionable to a reasonable person."). Thus, "[d]etermining whether a defendant's actions were 'highly offensive to a reasonable person'" turns on factors such as "the likelihood of serious harm to the victim, the degree and setting of the intrusion, the intruder's motives and objectives, and whether countervailing interests or social norms render the intrusion inoffensive." *See In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 606 (9th Cir. 2020); *accord Stevenson v. Ellis*, No. 1:23-cv-00573-JPW, 2023 WL 8879344, at *9 (M.D. Pa. Dec. 22, 2023).

None of these factors support finding offensiveness here. For one, as noted above, the collection of browsing-related data *benefits* consumers by enabling businesses to make their websites more functional for consumers. The ubiquity of such collection undercuts any specter of offensiveness. More fundamentally, the supposed "intrusion" occurs on PSP's website, not on Popa's "solitude," and is effectively no different from what any retailer (and its providers) could observe about a customer's "shopping behavior" in a "brick-and-mortar store." *Cook*, 689 F. Supp. 3d at 66. Numerous courts confronting novel claims like Popa's have agreed.

Consider *Adams*. There, the plaintiff alleged that PSP, through third parties including Microsoft, used session replay technology on its website to track and record users' "'mouse or finger movements, clicks, keystrokes (such as text being entered into an information field or text box), URL of web pages visited, and/or other electronic communications.'" 2023 WL 5951784, at *1–2; *see also* ER-020–21 ¶¶ 3–4 (same). Based on that conduct, the plaintiff there brought wiretapping and invasion-of-privacy claims like those here. *See* 2023 WL 5951784, at *2; *see also* ER-021 ¶ 7 (same). Like here, the plaintiff there argued that she had standing under *TransUnion* because her claims were supposedly "related to the tort of intrusion upon seclusion." *See* 2023 WL 5951784, at *6; *see also* Appellant's Br. 12–13, 17–18 (same). And just like the district court here, the court there disagreed, recognizing

that under *TransUnion* there must be a "close relationship" with the proffered common-law analog and finding "none" based on session replay technology. *See* 2023 WL 5951784, at *7 (internal quotation marks omitted).

Here, just like there, nothing about Popa's purported injury resembles the harm actionable at common law as intrusion upon seclusion. Thus, Popa cannot establish concreteness based on the asserted "close relationship" between her claimed injury and the one that that tort traditionally protects. *See TransUnion*, 594 U.S. at 425, 434 n.6.

3. The Wiretap Act Does Not Elevate Popa's Alleged Injury to a Cognizable Status

Popa next tries to satisfy *TransUnion* by characterizing her supposed harms as a statutory violation, arguing that the Wiretap Act "slightly elevates privacy protections beyond what is arguably covered already by traditional common-law privacy torts." Appellant's Br. 25. This argument misses the mark, just as it proves too much.

First, in *TransUnion*, the Supreme Court recognized that "Congress's views may be 'instructive'" in "determining whether a harm is sufficiently concrete to qualify as an injury in fact." 594 U.S. at 425. That was so because Congress, as a coordinate branch of the Federal Government, has a separate and independent responsibility when it enacts federal statutory causes of action to "assess for itself whether" it believes Article III "ha[s] been met." *Trichell v. Midland Credit Mgmt.,*

Inc., 964 F.3d 990, 999 (11th Cir. 2020); *see TransUnion*, 594 U.S. at 426 (discussing *Trichell*'s analysis with approval). But the Pennsylvania legislature is under no such obligation, and has no such role, when it enacts a state law cause of action. *See Allegheny Reproductive Health Ctr. v. Pa. Dep't of Human Servs.*, 309 A.3d 808, 832 (Pa. 2024) (noting that "Pennsylvania's standing doctrine is judicially created," "not constitutionally compelled"); *Budai v. Country Fair, Inc.*, 296 A.3d 20, 24 (Pa. Super. Ct. 2023) (explaining that, under Pennsylvania law, the legislature can create standing simply by authorizing persons to "pursue a particular action" under a statute). So its views are irrelevant in assessing whether an injury qualifies as "concrete" under Article III.[4]

Second, in *TransUnion*, the Supreme Court held that even "Congress . . . may not simply enact an injury into existence." 594 U.S. at 426; *see id.* ("[W]e cannot treat an injury as concrete for Article III purposes based only on Congress's say-so." (internal quotation marks omitted)). Nevertheless, Popa asserts that, under "settled" circuit law, the violation of "[a] statute that codifies a common law privacy right

[4] A panel of this Court opined in dicta that a state legislature's "judgment" could be equally "instructive and important" to the concreteness inquiry. *See Patel*, 932 F.3d at 1273. That erroneous observation, "made casually and without analysis," should have been disregarded. *See United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019) (internal quotation marks omitted). If subsequent decisions turned that mistake into circuit law, *see Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1116–18 (9th Cir. 2020), this Court should undo that error *en banc* at the next opportunity.

gives rise to a concrete injury sufficient to confer standing." Appellant's Br. 22 (quoting *Jones v. Ford Motor Co.*, 85 F.4th 570, 574 (9th Cir. 2023) (per curiam) (internal quotation marks omitted)). But that assertion is a red herring.

As the cases Popa relies upon explain, even where a statute codifies a common law privacy right, the plaintiff invoking that statute still must plausibly allege a violation of that "substantive"—*i.e.*, "common law"—"privacy right" embodied within the statute to have standing. *See Jones*, 85 F.4th at 574; *see also In re Facebook*, 956 F.3d at 598–99 (finding standing because the plaintiffs had "sufficiently alleged a clear invasion of the *historically recognized* right to privacy" codified in the statute at issue (emphasis added)). And that is exactly what *TransUnion* said, when it explained that even though Congress can grant an existing injury "actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." 594 U.S. at 426 (citation omitted).

What gives rise to a concrete injury is not merely a right of action but the existence of a legally cognizable harm in the real world—in this Court's parlance, the violation of an inherently "substantive right," *see In re Facebook*, 956 F.3d at 598—that simply was "previously inadequate in law" and that codification made actionable. *See Lujan*, 504 U.S. at 578. After all, "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 578 U.S. at 341.

Thus, in all situations, a plaintiff still needs to allege facts showing that her harm that purportedly may be remedied under a statute is independently concrete for standing purposes. *See, e.g.*, *Jones*, 85 F.4th at 574 (looking to the specific facts alleged before concluding that the plaintiffs "plausibly articulate[d] an Article III injury"); *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 982–84 (9th Cir. 2017) (finding standing where the plaintiff alleged the disclosure of his "private information"); *see also* PSP's Br. 32–39 (explaining how the facts of the cases that Popa relies on demonstrate this); Microsoft's Br. 30–33 (same).

As discussed above, Popa's asserted harm is not by itself a concrete, *de facto* injury. Thus, even assuming she has plausibly alleged some Wiretap Act violation—though she has not, *see infra* Section II—that alleged violation cannot bridge the gap to give her standing that she otherwise lacks.

C. Popa's Alleged Harm Is Too Trivial to Support Standing in Federal Court

Popa also lacks standing for another reason. At bottom, the interest she seeks to vindicate here is having her pet-supplies-shopping-related online movements shielded from observation by the very retailer (and its providers) to whom she directed her movements by using their site. This simply "is too trifling of an injury to support constitutional standing." *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 839–40 (9th Cir. 2007) (per curiam).

Article III demands the "invasion of a legally protected interest." *See Lujan*, 504 U.S. at 560. "That 'requires, among other things,' that the 'dispute is traditionally thought to be capable of resolution through the judicial process.'" *United States v. Texas*, 599 U.S. 670, 676 (2023) (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). This Court has thus affirmed in the context of its standing analysis that because "the law cares not about trifles," *Skaff*, 506 F.3d at 840, some alleged interests are simply not "of sufficient moment to justify judicial intervention," *see E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 665 (9th Cir. 2021) (internal quotation marks omitted). Accordingly, "a plaintiff whose claimed legal right is so preposterous as to be legally frivolous may lack standing on the ground that the right is not 'legally protected.'" *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) (en banc).

That is the case here. Popa asserts that PSP and Microsoft used session replay technology to view her mouse "hover and click" on "dog beds, cat toys, [and] fish food." ER-032 ¶ 48; ER-036 ¶ 66. On any conception, these are not sensitive activities. And—seemingly recognizing, given what she has alleged, that the sorts of more specific allegations that might implicate a legally protected interest would also eliminate commonality or typicality for class certification—Popa is careful not to allege more. Thus, even if there could be some legally protected interest in shielding some information about some types of shopping behavior from the retailer

that makes the shopping opportunity available, *but see supra* Section I.B.2, the allegations here are so trivial that any such hypothetical concerns would not be implicated.

II. ALTERNATIVELY, THIS COURT SHOULD AFFIRM BECAUSE PENNSYLVANIA LAW DOES NOT PROHIBIT BUSINESSES FROM USING SESSION REPLAY TECHNOLOGY

This Court can affirm dismissal on any ground supported by the record, including failure to state a claim. *See, e.g.*, *In re Century Aluminum Co. Secs. Litig.*, 729 F.3d 1104, 1109–10 (9th Cir. 2013) (disagreeing with the district court's holding that the plaintiffs lacked Article III standing but affirming dismissal under Rule 12(b)(6)). Thus, if the Court were to find that Popa has standing, then the Court should affirm dismissal because Popa has not alleged that the contents of any communications were acquired and because the rule of lenity requires clarity before ordinary business practices are criminalized.[5]

A. Popa Has Not Alleged That "Contents" Were Acquired

Popa contends that Defendants-Appellees' session replay technology violates the Wiretap Act, which prohibits the unauthorized "acquisition of the contents of any wire, electronic or oral communication." 18 Pa. Cons. Stat. § 5702 (defining "intercept"); *see id.* § 5703 (prohibiting unauthorized intercepts). The statute

[5] Popa's intrusion-upon-seclusion claim also fails to state a claim. *See* PSP's Br. 40–42; Microsoft's Br. 34–35.

defines "contents" as "any information concerning the substance, purport, or meaning" of a communication. *See id.* § 5702.

Critically, "contents" are distinct from the navigational information Popa alleges was captured here. In *Smith v. Maryland*, the Supreme Court held that the Government's warrantless use of a "pen register" (a device that records numbers dialed from a phone line) does not violate the Fourth Amendment. *See* 442 U.S. 735, 745–46 (1979). Distinguishing its prior decision in *Katz v. United States*, 389 U.S. 347 (1967), the *Smith* Court explained that "a pen register differs significantly" from the warrantless wiretap employed in *Katz* because "pen registers do not acquire the *contents* of communications." *Smith*, 442 U.S. at 741. Rather, pen registers "disclose only the telephone numbers that have been dialed—a means of establishing communication" and not "the purport of any communication between the caller and the recipient of the call." *Id.*

The Wiretap Act adopts the fundamental distinction recognized by the Supreme Court between the means of establishing a communication and the communication itself. Like the federal statutes on which it is modeled, the Wiretap Act distinguishes between "contents" and other information. *See In re Zynga Priv. Litig.*, 750 F.3d 1098, 1103–05 (9th Cir. 2014) (discussing federal statutes); *Commonwealth v. Spangler*, 809 A.2d 234, 237 (Pa. 2002) ("[The] Wiretap Act is generally modeled after the federal analogue."). Thus, while the Wiretap Act

prohibits the unauthorized acquisition of the "contents" of any communication, *see* 18 Pa. Cons. Stat. §§ 5702–03, the statute does not subject non-content information to that same prohibition.

Here, Popa has not plausibly alleged that the "contents" of any of her communications were captured. As Microsoft and PSP explain, Popa *at most* alleges that certain non-content navigational information was acquired. For example, she says that she "brow[s]ed for pet supplies" on PSP's website "using her mouse to hover and click on certain products." *See* ER-036 ¶¶ 66–67. But she does not plausibly allege that she typed any text or otherwise provided any information to the website. And even if Popa is correct that the session replay technology collected the URLs of web pages visited, *see* ER-021 ¶ 3, that is exactly the type of information that this Court has said falls on the non-content side of the line. *See, e.g.*, *In re Zynga*, 750 F.3d at 1107 (concluding that a "webpage address identifies the location of a webpage a user is viewing on the internet, and therefore functions like an 'address'" such that webpages are non-content "record information"); *accord Cook*, 689 F. Supp. 3d at 70 (explaining that "mouse movements and clicks" are the "cyber analog to record information" (internal quotation marks omitted)).

To be sure, Popa asserts in conclusory fashion that "contents" were captured, but these bare statements are unsupported by sufficient facts that would entitle them to a presumption of truth. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–81 (2009). For

example, Popa says that "if a user enters their address for delivery, that information is captured by Microsoft Clarity embedded on the website." ER-037 ¶ 69. But even if a possible delivery address might qualify as content under the Wiretap Act, the district court correctly observed that "Popa does not allege that she entered her own address during her visits to PSP's website." ER-008. Nor does Popa say that anyone else did so. Because the complaint lacks any plausible allegation that Defendants-Appellees captured the contents of any communications by Popa or anyone else, this Court can affirm on the alternative ground that Popa failed to state a statutory claim.

B. The Rule of Lenity Requires Clarity Before Session Replay Technology Is Criminalized

Because the Wiretap Act unambiguously does not prohibit acquisition of the non-content information Popa alleges PSP and Microsoft captured through session replay technology, the plain language of the statute requires dismissal. And to the extent there is any doubt about the Wiretap Act's scope, the rule of lenity requires the Court to resolve that doubt in favor of PSP and Microsoft.

"The 'rule of lenity' is a new name for an old idea—the notion that 'penal laws should be construed strictly.'" *Wooden v. United States*, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (quoting *The Adventure*, 1 F. Cas. 202, 204 (C.C.D. Va. 1812) (No. 93) (Marshall, C. J.)); *see also* 1 Pa. Cons. Stat. § 1928(b)(1) (requiring courts to apply the rule of lenity when construing statutes). "[U]nder the rule of lenity, any doubt about a statute's meaning is resolved in favor of the

accused." *Commonwealth v. Graham*, 9 A.3d 196, 202 n.13 (Pa. 2010) (citation omitted). The rule thus "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). And it preserves "the separation of powers 'by maintaining the legislature as the creator of crimes.'" *Cargill v. Garland*, 57 F.4th 447, 470 (5th Cir. 2023), *aff'd*, --- U.S. ---, 2024 WL 2981505 (2024); *accord Commonwealth v. Strafford*, 194 A.3d 168, 172 (Pa. Super. Ct. 2018) ("the General Assembly has the exclusive power to pronounce which acts are crimes" (internal quotation marks omitted)).

The rule applies to the Wiretap Act because the Wiretap Act is a criminal statute that contains a private right of action. *Compare* 18 Pa. Cons. Stat. § 5703 (interception is a third-degree felony) *with id.* § 5725(a) (interception is privately actionable). Where, as here, a statute "has both criminal and noncriminal applications," the Court must apply the rule of lenity in either situation so as to "interpret the statute consistently, whether [the Court] encounter[s] its application in a criminal or noncriminal context." *A.S. v. Pa. State Police*, 143 A.3d 896, 902, 907 (Pa. 2016) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)); *see also United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 (1992) (plurality opinion) (applying lenity to "a tax statute that we construe now in a civil setting" because the statute "has criminal applications"); *see id.* at 523 (Scalia, J., concurring in the

judgment) (agreeing that lenity applies in a civil setting). After all, "a statute is not a chameleon" whose meaning can "change from case to case," so "the 'lowest common denominator, as it were, must govern' all of its applications." *See Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring) (quoting *Clark v. Martinez*, 543 U.S. 371, 380 (2005)).

As explained, Popa's Wiretap Act claim should be rejected because the Wiretap Act does not prohibit acquisition of the information that Popa alleges was captured. *See supra* Section II.A. But even if there were some doubt about that, the statute should be interpreted in favor of PSP and Microsoft because Popa's novel effort to rewrite and repurpose state wiretap laws to prohibit (and financially punish) the use of industry-standard and ubiquitous internet tools like session replay technology would "unintentionally turn ordinary citizens into criminals." *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012); *see also Staples v. United States*, 511 U.S. 600, 610–16 (1994) (rejecting proposed interpretation of a criminal statute because that interpretation would criminalize widespread innocent conduct). The complaint recites that "*Almost Every Website*" on the internet uses session replay technology. *See* ER-027 ¶ 29 n.16. And in hundreds of novel cases being filed in courts across the country to repurpose and make creative use of state surveillance statutes—including several filed by serial plaintiff Popa herself—plaintiffs have alleged similar statutory violations based on businesses' use of similar data analytics

tools. As part of this broader effort, Popa's theory threatens to *criminalize* the practices of countless businesses in every sector of the economy.

The clear statement rule demanded by the rule of lenity prevents this anomalous result. Under lenity, any ambiguity about the reach of the Wiretap Act is for the Pennsylvania legislature to resolve and, for now, this Court must construe the Wiretap Act in favor of PSP and Microsoft. *Cf. Whitman v. United States*, 574 U.S. 1003 (2014) (Scalia, J., statement respecting denial of certiorari) ("Congress cannot, through ambiguity, effectively leave that function to the courts"). Application of lenity here thus ensures that this Court does "not enlarge the scope of [the Wiretap Act] to reach conduct" that the Pennsylvania General Assembly "did not intend to prohibit in enacting" it. *See Commonwealth v. Neckerauer*, 617 A.2d 1281, 1286 (Pa. Super. Ct. 1992), *superseded by statute on other grounds as stated in Commonwealth v. Holt*, 270 A.3d 1230 (Pa. Super. Ct. 2022); *accord Williams v. United States*, 458 U.S. 279, 286, 290 (1982) (applying lenity to avoid making "a surprisingly broad range of unremarkable conduct a violation of federal law").

CONCLUSION

For these reasons and those stated by Defendants-Appellees, the Court should affirm the district court's judgment dismissing this case.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I, Jeremy J. Broggi, certify that on June 21, 2024, I caused the foregoing to be filed with the Clerk of Court of the U.S. Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that all counsel of record will be served by the CM/ECF system.

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