

No. 23-4122

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

v.

BLOOMINGDALES.COM, LLC,  
*Defendant-Appellee.*

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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

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**OPENING BRIEF FOR PLAINTIFF-APPELLANT**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
JURISDICTIONAL STATEMENT.....	1
ISSUE PRESENTED .....	2
STATEMENT OF THE CASE .....	2
Factual Background.....	2
Procedural Background.....	5
SUMMARY OF ARGUMENT.....	7
STANDARD OF REVIEW.....	8
ARGUMENT .....	8
CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE.....	18
CERTIFICATE OF SERVICE.....	19

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Axiom Foods, Inc. v. Acerchem International, Inc.</i> , 874 F.3d 1064 (9th Cir. 2017) .....	8
<i>Ayla, LLC v. Alya Skin Pty. Ltd.</i> , 11 F.4th 972 (9th Cir. 2021) .....	11, 14, 15
<i>Briskin v. Shopify, Inc.</i> , 87 F.4th 404 (9th Cir. 2023) .....	10
<i>Ford Motor Co. v. Montana Eighth Judicial District Court</i> , 592 U.S. 351 (2021) .....	10, 11
<i>Herbal Brands, Inc. v. Photoplaza, Inc.</i> , 72 F.4th 1085 (9th Cir. 2023) .....	9, 13, 14, 15
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945) .....	16
<i>Keeton v. Hustler Magazine, Inc.</i> , 465 U.S. 770 (1984) .....	13
<i>Schwarzenegger v. Fred Martin Motor Co.</i> , 374 F.3d 797 (9th Cir. 2004) .....	3, 8, 9
<i>Yamashita v. LG Chem, Ltd.</i> , 62 F.4th 496 (9th Cir. 2023) .....	10, 11
<b>Statutes</b>	
28 U.S.C. § 1291 .....	2
28 U.S.C. § 1332 .....	1

## **INTRODUCTION**

Defendant-Appellee Bloomingdales.com, LLC (Bloomingdale's) operates an interactive website through which it markets and sells consumer products to customers in California, one of Bloomingdale's principal markets. Unbeknownst to the California shoppers who visit the website, Bloomingdale's is recording their interactions with the website, disseminating those recordings to third parties, and profiting from the customer insights that it collects and sells. The district court held that Bloomingdale's purposefully avails itself of California by using its website to sell products there. Nonetheless, the court held that California lacks personal jurisdiction over Bloomingdale's with respect to Plaintiff-Appellant Amanda Daghalys claims that the consumer surveillance Bloomingdale's conducts through its retail website violates state privacy laws. According to the district court, such claims do not arise out of or relate to Bloomingdale's commercial contacts with California. This Court should reverse that manifestly incorrect holding.

## **JURISDICTIONAL STATEMENT**

The district court had jurisdiction over this putative class action pursuant to 28 U.S.C. § 1332(d)(2)(A). The district court entered a final

judgment on November 9, 2023, dismissing the action in its entirety. ER 3.<sup>1</sup> Plaintiff-Appellant Daghaly timely filed a notice of appeal on December 11, 2023. ER 43–44. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

### **ISSUE PRESENTED**

Whether Ms. Daghaly’s claims that Bloomingdale’s unlawfully used its interactive retail website to track, record, and disseminate the online activities of California shoppers arise out of or relate to the California sales that Bloomingdale’s conducts through the website, such that Bloomingdale’s is subject to specific personal jurisdiction in California on those claims.

### **STATEMENT OF THE CASE**

#### **Factual Background**

Bloomingdale’s is a commercial retailer that operates a website through which it sells clothing, shoes, accessories, and other goods to the

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<sup>1</sup> Citations with the form “ER [page number]” are to the Excerpts of Record filed with this brief. Where a citation is to an entry on the district court docket, ER 48–51, it takes the form “ER [page number] (DE [docket entry number]).”

public.<sup>2</sup> ER 21. Although Bloomingdale’s is based in Ohio and New York, it “regularly solicit[s] and transact[s] business with California residents.” ER 13. Indeed, California is “a principal market of [Bloomingdale’s] retail and Internet marketing activities.” ER 14.

Amanda Daghaly, a California citizen and resident, visited the Bloomingdale’s website while in California. ER 13, 22. During her visit, Bloomingdale’s recorded her activities on the website without her knowledge and provided the information it captured to third parties for commercial purposes. ER 22, 26. To do this, Bloomingdale’s used two types of software code that it has embedded into its website for purposes of surreptitiously monitoring and recording the online activities of the website’s visitors. ER 11–12.

First, Bloomingdale’s uses recording software called Session Replay Code to create a real-time video recording of a web user’s interactions with its website. ER 18. According to the software’s developer, FullStory, the video displays “exactly what the user is seeing” and captures “every

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<sup>2</sup> Because Bloomingdale’s did not support its motion to dismiss for lack of personal jurisdiction with affidavits controverting any of the allegations in Ms. Daghaly’s operative complaint, those allegations “must be taken as true” for present purposes. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

imaginable point of user interaction” with the website. ER 18; *see* ER 12. These points of interaction include a user’s “scrolls, zooms, clicks, text input, text edits and deletions, [and] window resizes,” as well as “many other aspects of trying out and transacting with [the] website,” such as “mouse movements” and “hovers.” ER 18–19. Because the software captures the keystrokes that a user enters when filling out an online form, even if the user ultimately decides not to submit the form, it can capture sensitive content like passwords, “credit card data, medical information, and personally identifiable information” that the user does not intend to disclose. ER 19–20. And all of the data that Bloomingdale’s captures can be linked to specific individuals and used to track the activities of those individual users across other websites. ER 20.

Bloomingdale’s derives important commercial insights from the consumer monitoring it conducts through Session Replay Code. ER 21–22. For example, by looking at a user’s “[s]crolling and tapping” activities, Bloomingdale’s can track the user’s “interest and purchase intent second by second.” ER 21. Meanwhile, Bloomingdale’s shares the information gleaned through its monitoring activities, including the “visible appearance of the user’s visit” and private information the user inputs

while visiting the website, with FullStory and other third parties for those third parties' own commercial purposes. ER 19, 21.

Second, Bloomingdale's uses software called Meta Pixel Code to record information about user activity, including "the sub-pages that visitors see, the buttons they click, the options they select (e.g., from a multiple-choice form), and ... the things they type." ER 22–23. Bloomingdale's transmits the "detailed log[s] of ... user interactions" that it compiles using Meta Pixel Code to California-based third party Meta Platforms, Inc. (Meta), which in turn uses the information to create "shadow profiles" of individual web users that can be associated with specific Facebook accounts and used to direct individually targeted advertising toward the owners of those accounts. ER 23–25; *see* ER 12, 14.

### **Procedural Background**

In January 2023, Ms. Daghaly filed a putative class action seeking monetary and equitable relief on behalf of herself and other visitors to the Bloomingdale's website whose interactions with the website Bloomingdale's surreptitiously recorded. ER 49 (DE 1); *see* ER 26, 40–41. The operative First Amended Class Action Complaint alleges that



Bloomingdale's violated California Penal Code § 631, California Business and Professions Code §§ 17200 and 17500, and California Civil Code § 1770(a) by recording and disseminating information about class members' online activities.<sup>3</sup> ER 31–40.

Bloomingdale's moved to dismiss, arguing, as relevant here, that the court lacked personal jurisdiction over Bloomingdale's on Ms. Daghaly's claims.<sup>4</sup> *See* ER 50 (DE 13). The district court agreed and dismissed the case. ER 10. The court recognized that Ms. Daghaly had plausibly alleged that Bloomingdale's purposefully availed itself of California for purposes of personal jurisdiction. ER 9. As the court noted, Bloomingdale's "operates [an] interactive website ... which allows users to purchase merchandise to be delivered or picked up in California," and this retail activity is "a regular part of [Bloomingdale's] business." ER 9. Nonetheless, in the court's view, Ms. Daghaly "failed to show any

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<sup>3</sup> The operative complaint also initially raised a claim under the federal Wiretap Act, 18 U.S.C. § 2510, *et seq.*, *see* ER 30–31, but Ms. Daghaly has since agreed to withdraw that claim without prejudice.

<sup>4</sup> Bloomingdale's also argued that the complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a plausible claim to relief and that equitable relief would be inappropriate. The district court did not reach these arguments.

connection between [Bloomingdale's] forum-related contacts and the harm she suffered" because the "physical sale of merchandise in California" by Bloomingdale's "does not underlie, or even relate to, [her] claim of digital eavesdropping." ER 9.

Although the district court dismissed the case with leave to amend, it expressed "skepticism that pleading additional facts could cure the jurisdictional deficiencies" it perceived. ER 10. Ms. Daghaly thus requested entry of a final judgment in order to take an immediate appeal of the legal issue that the district court found dispositive. ER 4–5. The district court entered final judgment accordingly. ER 3.

### **SUMMARY OF ARGUMENT**

Ms. Daghaly's challenges to Bloomingdale's surveillance of visitors to its website arise out of and relate to the sales that Bloomingdale's conducts through the website. Bloomingdale's subjects online shoppers to the challenged surveillance whenever they visit the website to engage in, or consider engaging in, the sales transactions that the website was built to facilitate. The purpose of that surveillance, moreover, is to improve the quality of Bloomingdale's marketing and sales efforts by providing Bloomingdale's with insights into consumer behavior and preferences.

Absent its online retail activities, Bloomingdale’s would lack both the mechanism through which it engages in the challenged conduct and the commercial incentive to engage in that conduct. Because that conduct is thus causally linked with Bloomingdale’s online sales activities, it arises out of, and certainly at least relates to, those activities.

### **STANDARD OF REVIEW**

This Court reviews the district court’s dismissal for lack of personal jurisdiction de novo. *Axiom Foods, Inc. v. Acerchem Int’l, Inc.*, 874 F.3d 1064, 1067 (9th Cir. 2017).

### **ARGUMENT**

The exercise of specific personal jurisdiction over Bloomingdale’s in this case comports with due process as long as Bloomingdale’s “has sufficient ‘minimum [claim-related] contacts’ with California,” such that “the exercise of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’” *Schwarzenegger*, 374 F.3d at 801 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *see id.* at 800–01 (explaining that the statutory requirements for personal jurisdiction in California are “coextensive with federal due process requirements”). This Court has established a three-part test to determine whether these

prerequisites for the exercise of specific personal jurisdiction are met: First, the plaintiff must show that the defendant has “purposefully direct[ed] [its] activities” into the forum state or otherwise “purposefully avail[ed] [itself] of the privilege of conducting activities in the forum.” *Id.* at 802. Second, the plaintiff must show that her claims “arise[] out of or relate[] to the defendant’s forum-related activities.” *Id.* Third, “[i]f the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to ‘present a compelling case’ that the exercise of jurisdiction would not be reasonable.” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

With respect to the first prong, the district court correctly held that Bloomingdale’s “has purposefully availed itself in California” by “operat[ing] [an] interactive website” that “allows users to purchase merchandise to be delivered or picked up in California.” ER 9. As this Court recently explained, “operating a[n] [interactive] website ‘in conjunction with ... conduct directly targeting the forum,’” such as selling products to forum residents during the regular course of business, constitutes purposeful availment. *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1092 (9th Cir. 2023) (quoting *Mavrix Photo, Inc. v.*

*Brand Techs., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011)); *cf. Briskin v. Shopify, Inc.*, 87 F.4th 404, 423 (9th Cir. 2023) (emphasizing that “the nature and structure of a defendant’s business can affect the personal jurisdiction analysis” and distinguishing an online merchant from a back-end payment processor that “d[oes] not interact with [forum-state] consumers except as a result of the third-party decisions” of the online merchants it serves). And as to the third prong, Bloomingdale’s has never argued, let alone attempted to make a “compelling case,” that it would be unreasonable for California to exercise personal jurisdiction in this case. The question, then, is whether Ms. Daghaly’s claims arise out of or relate to the retail activity that Bloomingdale’s has purposefully directed into California through its website. The answer is yes.

A. Prior to the Supreme Court’s decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. 351 (2021), this Court “understood that for an injury to arise out of a defendant’s forum contacts required ‘but for’ causation, in which ‘a direct nexus exists between [a defendant’s] contacts [with the forum state] and the cause of action.’” *Yamashita v. LG Chem, Ltd.*, 62 F.4th 496, 504 (9th Cir. 2023) (alterations in original; quoting *In re W. States Wholesale Nat. Gas*

*Antitrust Litig.*, 715 F.3d 716, 742 (9th Cir. 2013)). But *Ford* made clear that “‘arise out of’ and ‘relate to’ are alternatives: for a claim to arise out of a defendant’s forum contacts requires causation, while a claim can relate to those contacts, even absent causation.” *Id.* at 504–05; see *Ford*, 592 U.S. at 362 (rejecting the proposition that “only a strict causal relationship between the defendant’s in-state activity and the litigation” suffices for specific jurisdiction). As this Court has explained, relatedness exists where injuries similar to the plaintiff’s “will tend to be caused” by the defendant’s forum-state contacts, where a defendant “should have foreseen the risk that its contacts might cause injuries like that of the plaintiff,” or where there is otherwise “a close connection between contacts and injury.” *Yamashita*, 62 F.4th at 505–06.

Application of these principles establishes that Ms. Daghaly’s claims both arise out of and relate to Bloomingdale’s marketing and sale of goods to Californians over the internet. After all, Bloomingdale’s “attempt[] to serve and attract customers in the [California] market” by means of its interactive retail website directly caused the privacy-related injuries that form the basis for each of Ms. Daghaly’s claims. *Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 983 (9th Cir. 2021). Had

Bloomingdale's not created a website to encourage and enable consumers to browse and purchase items, California shoppers like Ms. Daghaly would not be able to interact with Bloomingdale's online, and Bloomingdale's would not be able to capture and disseminate shoppers' website interactions. Highlighting the close causal relationship between Ms. Daghaly's claims and Bloomingdale's online sales and marketing activities, a central purpose behind Bloomingdale's decision to monitor and record the activities of visitors to its website is to gain commercial insights that will enable it to make its sales and marketing activities more effective and better targeted. ER 21–22, 25.

In short, 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. Ms. Daghaly's claims thus arise directly out of, and necessarily relate to, Bloomingdale's forum-directed sales efforts.

**B.** Reaching the opposite conclusion, the district court viewed Bloomingdale's "physical sale of merchandise in California" as the only relevant jurisdictional contact and stated without explanation that such

sales “do[] not underlie, or even relate to, [Ms. Daghaly’s] claim of digital eavesdropping.” ER 9. This reasoning is doubly flawed.

First, the district court misapplied *Herbal Brands* by asking only whether Ms. Daghaly’s claims arise out of or relate to Bloomingdale’s in-forum sales of physical goods, without also asking whether the claims arise out of or relate to Bloomingdale’s conduct of “operating a website ‘*in conjunction*’” with those sales. *Herbal Brands*, 72 F.4th at 1092 (emphasis added; quoting *Mavrix Photo*, 647 F.3d at 1229). The jurisdictional significance of the sale of a physical product in *Herbal Brands* lay in the fact that it reflected the culmination of “the efforts of the [seller] to serve directly or indirectly[] the market for its product.” *Id.* at 1094 (alterations in original; quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)); see *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (holding that a publisher could be subject to specific jurisdiction on claims “based on the contents of its magazine” in any state where “a substantial number of copies are regularly sold and distributed” because such sales reflected “continuous[] and deliberate[] exploit[ation]” of the in-state market). Accordingly, rather than looking only to Bloomingdale’s ultimate distribution of physical goods into



California, the court should also have looked to the totality of Bloomingdale's efforts to "capture the attention of a[] [California] audience and thereby sell ... products to that audience" by interacting with that audience online. *Ayla*, 11 F.4th at 983.

Second, contrary to the district court's assertion, Ms. Daghaly's claims that Bloomingdale's unlawfully monitored her activities in California while she was looking at products that Bloomingdale's was offering (and hoping) to send to her in California "clearly arise out of and relate to [Bloomingdale's] conduct of selling those ... products to [California] residents" like her. *Herbal Brands*, 72 F.4th at 1096. Sales do not happen in a vacuum. If the owner of a physical clothing store used a surveillance camera to see how customers interacted with its products and displays, drew on the information it gleaned from the footage to hone its sales efforts, and sold the footage to commercially interested third parties (including forum-based third parties like Meta here), a shopper's claim that the store owner had invaded her privacy would self-evidently arise out of and relate to the owner's operation of the store, the purchase transaction that the customer was considering while visiting the store, and the future transactions the store owner hoped to promote by drawing

on commercial insights derived from the surveillance footage. A virtual storefront does not call for a different result.

Finally, to the extent that the district court's opinion can be read to suggest that relatedness is lacking because Ms. Daghaly did not allege that she herself purchased a physical product that Bloomingdale's shipped into California, this Court has recognized that personal jurisdiction is appropriate where a plaintiff's claims arise out of or relate to a defendant's general conduct in making "sales of products" in the forum state, *id.*, even if the claims are not tied to a specific sale of a specific physical item, as they might be in a products-liability or breach-of-warranty suit. *See, e.g., id.* at 1089, 1096 (holding that claims of trademark infringement, unfair competition, and false advertising arose out of and related to forum-state sales); *Ayla*, 11 F.4th at 977, 983 (holding that trademark infringement, false designation of origin, and unfair competition claims arose out of and related to the defendant's "attempts to serve and attract customers in the [forum] market"). This principle makes good sense, because the touchstone due process inquiry is whether a claim arises out of "operations [that] establish sufficient contacts or ties with the state of the forum to make it reasonable and just

according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which [the defendant] has incurred there.” *Int’l Shoe*, 326 U.S. at 320. Just as it is reasonable to ask Bloomingdale’s to answer in California to claims that the products it sells in California cause injury in California, so too is it reasonable to ask Bloomingdale’s to answer in California to claims that the forum through which it sells its products in California causes injury in California.

This Court should correct the district court’s narrow view of relatedness and remand for consideration of the merits of Ms. Daghaly’s legal claims.

## CONCLUSION

This Court should reverse the district court's judgment.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the Rules of this Court, it contains 3,057 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 Opening Brief for Plaintiff-Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on February 22, 2024, using the Appellate Electronic Filing system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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