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15  
 16 UNITED STATES DISTRICT COURT  
 17 NORTHERN DISTRICT OF CALIFORNIA  
 18 SAN JOSE DIVISION

19 PATRICK CALHOUN, ELAINE CRESPO,  
 20 HADIYAH JACKSON and CLAUDIA  
 KINDLER, on behalf of themselves and all  
 21 others similarly situated,

22 Plaintiffs,

23 vs.

24 GOOGLE LLC,

25 Defendant.

Case No. 5:20-cv-05146-LHK

**BRIEF OF ANDREW YANG AND THE  
 DATA DIVIDEND PROJECT AS AMICI  
 CURIAE IN OPPOSITION TO GOOGLE'S  
 MOTION TO DISMISS COMPLAINT**

Judge: Hon. Lucy H. Koh  
 Hearing Date: February 18, 2021  
 Time: 1:30 p.m.  
 Courtroom: 8, 4th Floor

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>**

*Amici* are Andrew Yang, Esq., and the Data Dividend Project<sup>2</sup> (the “DDP”). Mr. Yang is a former 2020 U.S. presidential candidate and his ideas inspired the creation of the DDP. The DDP empowers consumers by providing a mechanism through which they can bargain and advocate for the property rights they have in their personal data, including through ensuring that the tech sector compensates consumers for the value of their personal data if consumers choose to share or license their data. DDP now represents the interests of tens of thousands of consumers, many of them in California, who have partnered with the DDP in hopes of protecting the right to their personal data. The DDP is a Delaware public benefit corporation in the process of becoming the wholly owned subsidiary of a 501(c)(3) non-profit organization.

Mr. Yang chaired the Advisory Board for Californians for Consumer Privacy (“CCP”). The CCP sponsored the passage of several key laws governing consumer privacy rights including the California Consumer Privacy Act (“CCPA”) in June 2018 and the recently passed California Privacy Rights Act (“CPRA”), or Proposition 24, on November 3, 2020. Through these and other endeavors, including his call for the establishment of a Data Bill of Rights, Mr. Yang has repeatedly worked to ensure that consumers are able to recognize and capitalize on the property interests they have in their personal data, as established by the California Constitution and recognized by the courts. Having chaired the passage of the CPRA, Mr. Yang can personally attest to the fact that consumers have a property interest in their data and that consumers should, therefore, have the right to negotiate with companies to fairly value their personal data, including the option to not share their data and the ability to control whether and how their data is monetized. Plaintiffs’ allegations in connection with Counts 13 and 14 are consistent with these established principles, and properly state a claim for theft of Plaintiffs’ personal property in the form of personal data.

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<sup>1</sup> *Amici* affirms that no counsel for any party authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund preparing or submitting the brief; and no person, other than *amici*, their members, and counsel, contributed money that was intended to fund preparing or submitting this brief.

<sup>2</sup> Data Dividend Project, PBC, is a Delaware public benefit corporation doing business in California as Data Dividend Project.

1 **SUMMARY OF ARGUMENT**

2 Google wrongly asserts in this lawsuit that Californians have no property interest in their  
3 personal data. Google argues that Counts 13 and 14 of Plaintiffs' Complaint should be dismissed  
4 "because the Data that Google allegedly 'stole' is not 'property.'" Dkt. 57 at 22; *see also id.* at 23  
5 ("Plaintiffs lack statutory standing under the [Unfair Competition Law] because they fail to  
6 plausibly allege that Google caused them to lose 'money or property'"). Google's argument is  
7 meritless. The California Constitution establishes (and courts have recognized) that Californians  
8 have a property interest in their own data, and the CCPA and CPRA explicitly confirm that interest.  
9 California consumers can therefore allege a statutory larceny claim (Cal. Pen. Code §§ 484 and  
10 496) and a claim under the California Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code  
11 §§ 17200, 17204) when businesses misappropriate their personal data.

12 Although courts have not uniformly recognized that California consumers have a property  
13 interest in their data, the California legislature passed the CCPA and voters approved the CPRA,  
14 removing any doubt and further clarifying that California consumers have a property interest in  
15 their own data. Both the CCPA and the CPRA conclusively resolve the issue before the Court and  
16 confirm that consumers' data is, indeed, their property. As such, any misappropriation of consumer  
17 data by theft or artifice meets the elements of statutory larceny and can properly form the basis for  
18 a UCL claim, as alleged by Plaintiffs in Counts 13 and 14. Proposition 24 passed by significant  
19 margins just one week ago, on November 3, 2020. The Motion to Dismiss currently pending before  
20 the Court provides the first opportunity to address, since the passage of Proposition 24, whether  
21 misappropriation of consumer data by theft or artifice should be considered statutory larceny and a  
22 violation of the UCL.

23 **DISCUSSION**

24 **I. The California Constitution Created a Right to Privacy Which Has Evolved to**  
25 **Include a Property Interest in Personal Data.**

26 In 1972, Californians amended the California Constitution, creating a constitutional right  
27 that simultaneously protected individuals' rights to acquire and protect property as well as  
28 individuals' rights to obtain privacy, thereby providing the greatest possible protection to the

1 individual right of privacy: “All people are by nature free and independent and have inalienable  
2 rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and  
3 protecting property, and pursuing and obtaining safety, happiness, *and privacy*.” Cal. Const., art. I,  
4 § 1 (hereinafter the “Privacy Amendment”) (emphasis added).

5 The Privacy Amendment was driven by Californians’ desire to protect their personal data.  
6 As the California Supreme Court explained: “a principal aim of the constitutional provision is to  
7 limit the infringement upon personal privacy arising from the government’s increasing collection  
8 and retention of data relating to all facets of an individual’s life.” *White v. Davis*, 13 Cal. 3d 757,  
9 761 (1975). In passing the Privacy Amendment, Californians created constitutional protection from  
10 the private sector’s collection of their personal information and data as Californians voted to protect  
11 against “information-amassing practices of both ‘government’ and ‘business.’” *Hill v. Nat’l*  
12 *Collegiate Athletic Assn.*, 7 Cal. 4th 1, 16-17 (1994) (explaining that the Ballot Argument asserted  
13 that “[e]ach time we apply for a credit card or a life insurance policy, file a tax return, interview for  
14 a job, or get a drivers’ license, a dossier is opened and an information profile is sketched”). Thus  
15 the California Supreme Court ruled that the Privacy Amendment was intended to “create  
16 enforceable privacy rights against *both* government agencies and private entities.” *Id.* at 17.

17 The Privacy Amendment was also enacted to reach the ever-expanding data collection  
18 practices of private corporations like Google. *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th  
19 95, 125 (2006) (“California’s explicit constitutional privacy provision (Cal. Const., art. I, § 1) was  
20 enacted in part specifically to protect Californians from overly intrusive business practices that  
21 were seen to pose a significant and increasing threat to personal privacy.”). With the rise of e-  
22 commerce and the digital economy, the threat to consumers of a massive collection of their personal  
23 data has only increased. Private corporations, like and including Google, are now economically  
24 incentivized to collect consumers’ data on a massive scale, especially as consumers generate and  
25 house enormous amounts of personal data on their devices.

26 Both California state courts and the Ninth Circuit have recognized that consumers have a  
27 property interest in their own data. *See e.g., Davis v. Facebook, Inc. (In re Facebook Inc. Internet*  
28 *Tracking Litig.)*, 956 F.3d 589, 600 (9th Cir. 2020) (holding that “[b]ecause California law

1 recognizes a legal interest in unjustly earned profits, Plaintiffs have adequately pleaded an  
2 entitlement to Facebook’s profits from users’ personal data”); *CTC Real Estate Servs. v. Lepe*, 140  
3 Cal. App. 4th 856, 860-61 (2006) (holding that a woman whose identity was stolen and used to  
4 obtain later-foreclosed-upon property was entitled to surplus funds from the sale at the auction  
5 because she was entitled to the product of identity theft); The CCPA’s recognition of Californians’  
6 right to control their data confirms that consumers have a property interest in their data. *See also*  
7 Dkt. 67 at 20-21. But while courts agree that California consumers have a constitutional right to  
8 protect their property and a right to privacy (that also protects consumer privacy in the age of big  
9 data), they have not consistently resolved the question of whether individuals have a property  
10 interest in their data.

11 Californians now face companies whose business model entails collecting consumers’  
12 personal data from electronic devices and then monetizing it through selling the information to  
13 marketing and advertising firms or to fuel their own marketing and advertising revenues. The use  
14 of a consumer’s personal data without the consumer’s permission is exactly the kind of privacy and  
15 property interest that the Privacy Amendment was intended to protect, and Google’s motion to  
16 dismiss is inconsistent with those rights and how courts (including in *Davis* and *Lepe*) have treated  
17 such data.

## 18 **II. The CCPA Further Reified California Consumers’ Property Interest in Their** 19 **Own Data.**

20 Recent legislation further confirms the existence of a property interest in personal data. In  
21 June 2018, California passed the CCPA, a consumer privacy act that went into effect on January 1,  
22 2020. The CCPA regulates the private sector’s collection and use of consumers’ personal  
23 information and data state-wide. It also provides California consumers with certain affirmative  
24 protections, including the right to access all of the personal data and information a company has  
25 obtained concerning them, the right to delete data, and obtain a list of third-party buyers and sellers  
26 that have accessed their data.

1           **A.       The plain text of the CCPA recognizes the property interest in data.**

2           As an initial matter, the CCPA empowers California consumers to control their personal  
3 data and restrict the private sector’s use of their personal data. Under the CCPA, “[a] consumer  
4 shall have the right, at any time, to direct a business that sells personal information about the  
5 consumer to third parties not to sell the consumer’s personal information. This right may be  
6 referred to as the right to opt-out.” Cal. Civ. Code § 1798.120 (a). The right to exclude or stop a  
7 business from using a consumer’s personal data is grounded in traditional property rights concepts.  
8 *Blaustein v. Burton*, 9 Cal. App. 3d 161, 177 (1970) (“An essential element of individual property  
9 is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion  
10 may be absolute”). The CCPA also provides that “[a] consumer shall have the right to request that  
11 a business delete any personal information about the consumer which the business has collected  
12 from the consumer.” Cal. Civ. Code § 1798.105(a). The right to demand deletion functions  
13 essentially as a prohibition against trespass, allowing consumers to impede parties from accessing  
14 their consumer data without their permission. It allows consumers to use their data to the exclusion  
15 of others. *Burton*, 9 Cal. App. 3d 161, 177; *See also* Dkt. 67 at 20.

16           Moreover, the CCPA permits companies to pay consumers to elect not to opt out of data  
17 collection, and therefore provides a mechanism for compensating consumers for the value of their  
18 data. Cal. Civ. Code § 1798.125(b)(1) (CCPA allows businesses to purchase information from  
19 consumers); Cal. Civ. Code § 1798.125(a)(2) (businesses have the freedom to assess and appraise  
20 consumer data). The CCPA therefore understands that there is a property interest in personal data  
21 that California consumers can either protect or share with companies in exchange for money. By  
22 creating a framework through which businesses can license consumers’ personal data, the CCPA  
23 affirms and further protects Californians’ property right in their personal data. Indeed, it brings life  
24 to the Privacy Amendment’s dual guarantee that Californians would have a right to “acquire possess  
25 and protect property” while simultaneously ensuring that their right to “pursue and obtain privacy”  
26 is also protected. Cal. Const., art. I, § 1.

1                   **B. The plain text of the CCPA describes data as containing a property**  
 2                   **interest.**

3                   The CCPA broadly defines what constitutes consumers’ “personal information” to include  
 4                   valuable categories of personal information: a consumer’s real name, postal address, unique  
 5                   personal identifier, online identifier, internet protocol address, email address, account name, social  
 6                   security number, driver’s license number, passport number, geolocation data, records of personal  
 7                   services, products or property purchased, biometric information, internet activity, browsing history,  
 8                   search history, and professional or employment-related information. Cal. Civ. Code §  
 9                   1798.140(o)(a)(A-K). In the digital age where data is mined and used to generate huge profits,  
 10                  including from advertising, this kind of information has economic value analogous to other types  
 11                  of property. As Mr. Yang explained in a recent Op-Ed, “Google is worth nearly \$1 trillion, with  
 12                  annual revenue of \$160 billion. The business of these companies is primarily based on advertising  
 13                  directed at us, built on the backs of our data.”<sup>3</sup> A recent study estimated that corporations made  
 14                  \$76 billion in 2018 from collecting personal data from Americans online and that this amount will  
 15                  continue to increase substantially in the future.<sup>4</sup> In passing the CCPA, the California legislature  
 16                  recognized the windfalls corporations were receiving from using the personal data, and  
 17                  affirmatively stated that this kind of personal data has real value and deserves protection.

18                   **C. The CCPA’s anti-discriminatory provisions demonstrate that consumers**  
 19                   **have a protected property interest in their data.**

20                  The CCPA’s anti-discriminatory provisions also demonstrate that the CCPA seeks to  
 21                  protect the property interests found in consumers’ data. The CCPA includes a non-discrimination  
 22                  prohibition, which states that a “business shall not discriminate against a consumer because the  
 23                  consumer exercised any of the consumer’s rights under this title.” Cal Civ. Code § 1798.125(a).  
 24                  The CCPA’s non-discrimination prohibition allows consumers to withhold their data from third

25                  <sup>3</sup> Andrew Yang, *Op-Ed: Andrew Yang: Make Tech Companies Pay You for Your Data*, L.A.  
 26                  Times, (Jun. 23, 2020 3:00 AM) available at <https://www.latimes.com/opinion/story/2020-06-23/andrew-yang-data-dividend-tech-privacy>. (Last visited November 9, 2020).

27                  <sup>4</sup> Steve Lohr, *Calls Mount to Ease Big Tech’s Grip on Your Data*, N.Y. Times, (Jul. 25, 2019),  
 28                  available at <https://www.nytimes.com/2019/07/25/business/calls-mount-to-ease-big-techs-grip-on-your-data.html>. (Last visited November 9, 2020).

1 parties in a manner that expressly demonstrates that consumers have control over their data and  
 2 buttresses the right to control and exclude. The non-discrimination provision protects consumers  
 3 from facing retribution for exercising their data privacy rights.

4 This protective provision reinforces the reality that consumers have a property interest  
 5 contained in their data because it prevents any attempts by third parties to abridge the ownership  
 6 interest that consumers are given under the California Constitution and the CCPA. The plain text  
 7 of the CCPA, therefore, demonstrates that consumers have both a property interest in their own  
 8 data and that the CCPA intended to protect those interests.

9 **III. The Recently Passed CPRA Further Strengthens Consumers’ Property Interests**  
 10 **in Their Personal Data, and Clarifies and Fills in Perceived Gaps in Privacy**  
 11 **Protections Established by the CCPA.**

12 After the California legislature passed the CCPA in 2018, industry lobbyists attacked the  
 13 law and sought to weaken it.<sup>5</sup> As one article summarized: “After the passage of the CCPA, the  
 14 California Chamber of Commerce and other big business lobbies inundated the Legislature with  
 15 measures to gut it, to the point where fighting the bills and getting them watered down became  
 16 nearly a full-time job for privacy advocates.”<sup>6</sup>

17 On November 3, 2020, California voters passed the CPRA (Proposition 24) to further  
 18 protect the property rights in their own data. Upon the passage of Proposition 24, Senate Majority  
 19 Leader Robert Hertzberg stated that “California voters have sent a message loud and clear that  
 20 consumers own their data.”<sup>7</sup> The CPRA marketed itself on the basis that consumers fundamentally

21 <sup>5</sup> California General Election Voter Guide, Proposition 24 (“In 2018, the Legislature enacted the  
 22 California Consumer Privacy Act. But since then, the industry has repeatedly tried to weaken and  
 23 limit enforcement of this law.”), available at  
 24 <https://voterguide.sos.ca.gov/propositions/24/arguments-rebuttals.htm>. (Last visited November 9,  
 25 2020).

26 <sup>6</sup> Michael Hiltzik, *Column: Business’s Attack on California’s Landmark Privacy Law Moves to*  
 27 *the Ballot Box*, L.A. Times, (Aug. 28, 2020 6:00 AM), available at  
 28 [https://www.latimes.com/business/story/2020-08-28/industrys-attack-californias-landmark-  
 privacy-law](https://www.latimes.com/business/story/2020-08-28/industrys-attack-californias-landmark-privacy-law). (Last visited November 9, 2020).

<sup>7</sup> Californians for Consumer Privacy, 2020. *California Voters Decisively Approve Prop 24, The*  
*California Privacy Rights Act*, (Nov. 4, 2020), available at [https://www.caprivacy.org/california-  
 voters-decisively-approve-prop-24/](https://www.caprivacy.org/california-voters-decisively-approve-prop-24/). (Last visited November 9, 2020).

1 wanted and needed better control over their personal data and more concrete protections to allow  
2 consumers to actually enforce their property rights over their data. The California General Election  
3 Voter Guide explained that:

4 Giant corporations make billions buying and selling our personal information—  
5 apps, phones, and cars sell your location constantly. The California Privacy Rights  
6 Act gives you the power to stop businesses tracking you precisely, like selling how  
7 many times you go to the gym or fast food restaurants to health insurers—without  
8 your knowledge or permission.<sup>8</sup>

8 The plain text of the CPRA prevents large technology companies and their lobbyists from  
9 undercutting the privacy protections affirmed in the CPRA, stating:

10 The provisions of this Act may be amended after its approval by the voters by a  
11 statute that is passed by a vote of a majority of the members of each house of the  
12 Legislature and signed by the Governor, provided that such amendments are  
13 consistent with and further the purpose and intent of this Act as set forth in Section  
14 3, including amendments to the exemptions in Section 1798.145 if the laws upon  
15 which the exemptions are based are amended to enhance privacy and are consistent  
16 with and further the purposes and intent of this Act...

15 CPRA, Sec. 25(a). This provision acts as a safeguard against the dilution of consumers' privacy  
16 rights by stating that amendments to the CPRA could only "enhance privacy" and not dilute it. The  
17 CPRA also strengthens privacy rights by designating "sensitive personal information," which  
18 includes consumer data related to racial origin, sexual orientation, religious beliefs and the contents  
19 of a consumer's mail, email and text messages, as a new category of data receiving even stronger  
20 protections. CPRA, Sec. 14(ae).

21 The CPRA closed the perceived loopholes in the CCPA that tech companies had attempted  
22 to exploit. For example, under the CCPA's exception for "service providers," companies argued  
23 that they were allowed to access and share consumer data "as long as every company that handled  
24 a person's data signed a contract saying that it was doing so to provide other companies a service."<sup>9</sup>

25 \_\_\_\_\_  
26 <sup>8</sup> California General Election Voter Guide, Proposition 24.

27 <sup>9</sup> Sam Dean, *With Prop. 24, California is Trying to Rewrite the Rules of Online Privacy. Again.*,  
28 L.A. Times, (Oct. 15, 2020 6:00 AM), available at <https://www.latimes.com/business/story/2020-10-15/prop-24-california-internet-privacy-ballot-measure>. (Last visited November 9, 2020).

1 Companies also attempted to evade compliance with the CCPA by defining their activities as  
 2 “sharing” data with third parties, as opposed to “selling” it to them. The CPRA forecloses these  
 3 arguments and strengthens the rights already enshrined in the CCPA by clarifying that “service  
 4 providers” have the same data protection obligations as contractors and third parties. CPRA, Sec.  
 5 4(3)(d). The CPRA also clarifies that its provisions apply whether a company defines its activities  
 6 as “sharing” or “selling” data. CPRA, Sec. 9(a).

7 The CPRA sought to cure the “asymmetry of information” that existed between consumers  
 8 and big tech, which prevented consumers from properly valuing their personal data—a necessary  
 9 prerequisite to licensing it for a fair price. CPRA, Sec. 2(f). The CPRA’s description of this  
 10 problem leaves zero doubt that by passing Proposition 24 into law, Californians knowingly affirmed  
 11 the fact that there is a property interest in personal data. Proposition 24 states that:

12 [b]ecause the value of the personal information they are exchanging for the good or  
 13 service is often opaque, depending on the practices of the business, consumers often  
 14 have no good way to value the transaction. In addition, the terms of agreement or  
 15 policies in which the arrangements are spelled out, are often complex, unclear, and  
 16 as a result most consumers never have the time to read or understand them. This  
 asymmetry of information makes it difficult for consumers to understand what they  
 are exchanging and therefore to negotiate effectively with businesses.

17 CPRA, Sec. 2(e)(f). Indeed, the tech sector was keenly focused on Proposition 24 as it—perhaps  
 18 more than any other sector—is well aware of the property value inherent in consumers’ personal  
 19 data, where Google alone is estimated to have made hundreds of billions of dollars<sup>10</sup> in revenue  
 20 from harvesting personal data.<sup>11</sup>

21 \_\_\_\_\_  
 22 <sup>10</sup> Andrew Yang, *Op-Ed: Andrew Yang: Make Tech Companies Pay You for Your Data*, L.A.  
 Times, (Jun. 23, 2020 3:00 AM), available at <https://www.latimes.com/opinion/story/2020-06-23/andrew-yang-data-dividend-tech-privacy>.

23 \_\_\_\_\_  
 24 <sup>11</sup> Consumer Watchdog, *Google Algorithm Biased Against California Privacy Initiative Prop 24;*  
 Consumer Watchdog Calls For Investigation And Hearings, PR Newswire, (Oct. 30, 2020 4:16  
 25 ET), available at <https://www.prnewswire.com/news-releases/google-algorithm-biased-against-california-privacy-initiative-prop-24-consumer-watchdog-calls-for-investigation-and-hearings-301164123.html>. Google was not only focused on Proposition 24. It is also believed to have  
 26 actively sought to prevent its passage through the manipulation of its search engine to direct users  
 27 to websites that represented the considerations against Prop 24. Users were directed to pages  
 28 encouraging them to “vote no” when searching for information regarding Prop 24 while all other  
 propositions had neutral or positive search results. *Id.*

1 **CONCLUSION**

2 The California Constitution, the courts, the CCPA, and the CPRA all recognize that  
3 Californians have a property right in their personal data. Under California law, the  
4 misappropriation of consumer data constitutes theft of property for the purposes of causes of action  
5 that require the loss of a property right.

6 This Court should respectfully continue to effectuate the mandate to protect data privacy  
7 enacted by California voters and lawmakers. The California Constitution, the CCPA, and the  
8 CPRA jointly reflect the will of California consumers to receive protection from unscrupulous  
9 businesses who have both historically and presently seized their valuable personal information with  
10 impunity. The people of California have spoken through both their elected officials and the ballot  
11 box and have clearly articulated the desire for heightened protections over their data. Mr. Yang  
12 and the DPP respectfully submit that this Court should affirm this mandate through the recognition  
13 of the property interest in consumer data already established in California law, and deny Google’s  
14 Motion to Dismiss Counts 13 and 14 on these grounds.

15  
16 Dated: November 10, 2020

Respectfully Submitted,

17  
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