WRITTEN TESTIMONY OF

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Full Committee Hearing: *23 and You: The Privacy and National Security Implications of the 23andMe Bankruptcy*

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Chairman Grassley, Ranking Member Durbin, and distinguished Members of the Committee:

Thank you for the opportunity to be here. I hope to provide some necessary context to the conversation on how best to protect the privacy of consumers when their personal data is held by corporations in financial distress. The most important concept I wish to convey is that the protection of personal consumer data is not fundamentally nor primarily an issue of bankruptcy law. I encourage the Committee to forego legislation that would introduce new restrictions specific to bankruptcy proceedings and instead pursue methods of protecting personal consumer data that will be broadly applicable. Bankruptcy-specific privacy legislation will not adequately protect consumers' privacy interests and will likely lead to destructive strategic machinations that undermine bankruptcy's core purposes.

The recent bankruptcy of 23andMe Holding Co. has raised awareness of privacy concerns associated with the sale of personal consumer data, but those same privacy concerns also exist when data is sold by non-bankrupt companies. Restrictions on the sale and general use of personal consumer data are typically established by private contractual agreements. Those agreements may be violated whether a sale occurs inside or outside bankruptcy proceedings, harming affected consumers equally in either scenario. Current bankruptcy law provides some oversight that can prevent the worst privacy policy abuses in a bankruptcy sale, but it does not prohibit the sale from taking place. Placing a prohibition on bankruptcy sales would simply push them outside bankruptcy proceedings, where there are fewer protections. The best policy would make any restrictions on the sale of personal consumer data universally applicable.

The sale of valuable assets, including personal consumer data, is frequently associated with severe financial distress; healthy companies are less likely to sell off substantial assets, particularly if doing so raises questions of compliance with their privacy policies. When insolvent companies sell personal consumer data, consumers are limited in their ability to enforce the terms of the privacy policy, whether or not the company is in bankruptcy proceedings. The liquidation of a company ensures that it cannot fulfill the terms of its privacy policy going forward: it makes no difference whether liquidation is accomplished under federal

bankruptcy law or pursuant to state law. Even if an insolvent company continues as a going concern, consumers' rights to enforce their agreements must compete with other claims against the company. An insolvent company cannot satisfy all the claims raised against it.

Bankruptcy provides important advantages when a company is insolvent. The primary goal of bankruptcy is to limit the losses caused by insolvency. It accomplishes this through a coordinated, systematic approach to distribution of assets. This approach minimizes destruction of the debtor's available assets and the costs of recovering those assets, thereby maximizing returns to creditors. The advantages of a bankruptcy system were recognized by the drafters of the Constitution[1] and our nation's bankruptcy laws have subsequently helped to shape the national economy in positive ways.

When a company violates any kind of agreement, including a privacy policy, that violation gives rise to a "claim" in bankruptcy proceedings.[2] Claims include pre-bankruptcy violations but may also arise post-filing.[3] The most common bankruptcy claims are simple rights to payment arising from a deliberate extension of credit, but a claim may also be a right arising from the violation of an agreement. When a bankrupt company has personal consumer data that may be profitably sold in violation of a privacy policy agreement, the interests of consumers in preventing the sale will directly conflict with the interests of other creditors in repayment from the debtor's assets. In other words, selling the data can maximize the return for creditors, but only if consumers' privacy interests are sacrificed. Both groups are considered to have a claim against the bankrupt company, the one for fulfillment of the promises made under the privacy policy, and the other for promises of payment. Under the law, both groups' claims have equal priority.[4]

Since 2005, the question of whether to permit the sale of personal consumer data in violation of a privacy policy is weighed in bankruptcy court by the bankruptcy judge, frequently with the assistance of a consumer privacy ombudsman (CPO). However, the interests of consumers in preserving their rights under a privacy policy are not otherwise afforded priority under the law.[5] Appointing a CPO in these cases is considered necessary in part because it is challenging for a court to interpret the relevant parameters of privacy policies to determine if there is a violation, and if there is, to monetize the cost of privacy losses caused by that violation. The role of the CPO is to assist the court in weighing the costs and benefits of the sale and to explore potential alternatives that would mitigate privacy losses. In most cases, the CPO recommends the court approve the proposed sale of personal consumer data, even if it violates an applicable privacy policy.[6]

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[1] U.S. CONSTITUTION, Art. I, sec. 8, cl. 4.
[2] *See* 11 U.S.C. § 101(5) (defining "claim" to include any right to payment or equitable remedy for breach).
[3] For example, a debtor may reject an executory contract, giving rise to a claim for damages as if the debtor had breached the contract just prior to the bankruptcy filing. *See* 11 U.S.C. § 365(g).
[4] Some types of claims have priority over others. Most notably, claims that are secured by specific collateral are paid from that collateral ahead of all other claims. *See* 11 U.S.C § 506(a). Priority unsecured claims include domestic support obligations, employee wages, and taxes. *See generally* 11 U.S.C. § 507.
[5] *See generally* 11 U.S.C. § 332. This provision was added to the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).
[6] *See* Christopher G. Bradley, *Privacy for Sale: The Law of Transactions in Consumers' Private Data*, 40 YALE J. ON REG. 127, 135 (2023).

Congress could pass a law that would prohibit the sale of personal consumer data in bankruptcy. Such a prohibition would create a scenario in which distressed companies who cannot profitably use their data could not invoke the protections of the bankruptcy statute, including the automatic stay and an approving order from the bankruptcy judge, to sell those assets. Bankruptcy protections are intended to facilitate the sale of assets, so the sale will obtain the maximum price possible. If sale in bankruptcy is impossible, distressed companies in need of cash will probably just sell personal consumer data outside bankruptcy proceedings, where there is less transparency and very little oversight. The sale will likely result in a lower price and therefore a lower recovery for creditors, but it can still take place absent any legal prohibition outside of bankruptcy.

A sale of personal consumer data conducted outside bankruptcy could proceed even if the sale violated an applicable privacy policy. Consumers would then find themselves in the same position as they would be in if the sale had occurred in bankruptcy, except without bankruptcy's characteristic structure, transparency, and oversight. The primary remedy for consumers when a privacy policy is violated is a claim for breach against the selling company. While the damages associated with such a breach might deter a solvent company from violating its privacy policies, an insolvent company cannot fulfill all its obligations and so is likely to breach whichever agreements are least costly. In many cases, given the difficulty of enforcing privacy policies for the average consumer, the least costly option is to conduct the sale and incur whatever damages may be associated. Unless the breach catches the attention of government enforcement, such as the Federal Trade Commission or a state attorney general, a sale in violation of the applicable privacy policy may be accomplished without repercussion.[7]

Outside bankruptcy proceedings, those with claims against an insolvent debtor find themselves in competition for satisfaction, because every dollar paid to one creditor is a dollar less available for the others. This competition among creditors is costly and socially wasteful; avoiding the costs of zero-sum competition among creditors is a primary reason for bankruptcy law. In bankruptcy, all claims against the debtor are resolved through an orderly distribution of assets, removing the opportunity for competition. Whether claims arise before or after a bankruptcy filing, they are treated the same. Consumers have the same rights whether a company violates its privacy policy through a sale before or after its bankruptcy filing. The primary difference is that bankruptcy proceedings allow the sale to obtain the best price possible with the least invasion of consumer privacy possible, thus maximizing the assets available to compensate consumers for the sale of their data.

I recommend against any proposal that would create a bankruptcy-specific limitation on the sale of personal consumer data. Such a prohibition would merely encourage the sale of data outside bankruptcy proceedings. Bankruptcy law is frequently the best means of managing an insolvent company's assets and resolving its liabilities. When an insolvent company holds personal consumer data, bankruptcy provides the best chance to dispose of that data in a way that is in the best interests of all parties. Bankruptcy sales are preferable to disposition outside bankruptcy,

[7] *See generally* Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747 (2016).

because they allow for greater oversight, transparency, and the maximization of return for creditors.

If Congress determines that regulation is required, it should instead impose restrictions on the sale of personal consumer data more generally. It is my recommendation that the law provide greater clarification to consumers of their rights to privacy, facilitating enforcement of those rights both inside and outside bankruptcy proceedings. Clarification could be achieved by creating a set of regulations or standardized expectations for the sale and other use of personal consumer data, including a statutory penalty for violations. This would prove beneficial to all consumers by providing them with the tools they need to meaningfully hold companies accountable to the terms of their privacy policies. It would also lead to greater efficiencies when personal consumer data is sold in bankruptcy proceedings by establishing a set value for the cost of privacy loss. Privacy concerns, thus monetized, could then be more consistently balanced against the interests of other creditors in the sale. This would further the bankruptcy goal of minimizing the harm caused by a debtor's insolvency.

I. Private Data as a Transferable Asset

Current federal law imposes relatively few restrictions on a company's ability to gather, aggregate, anonymize, and sell consumer data. Some notable exceptions to this statement include protection of individuals' medical records (HIPAA)[8] and the data provided by children under the age of 13 (COPPA).[9] Federal law also provides a general backstop of consumer protection, but the application of these legal generalities to any particular scenario is often uncertain at best. Most legal challenges result in settlement, which means that parties lack the certainty of judicial precedent.[10] State-specific privacy laws may apply, but these frequently contribute to the confusion over what is or is not permissible by creating inconsistent and potentially conflicting regimes for companies operating across state lines.

Thus, for the most part, consumer data gathered by a company may be transferred, sold, and leveraged like any other form of corporate property. This freedom permits the holders of the data to capitalize on its value, creating economic wealth. It is a matter of public policy, beyond the scope of my comments, whether such free exchange of consumers' personal information is ultimately a social good.

The relevant legal status of consumer data, including whether it can be bought or sold, is determined by law that applies equally inside and outside bankruptcy proceedings. If property would be available to satisfy a creditor's claims under state or federal law, it is available to satisfy creditors under bankruptcy law. On the other hand, property that is heavily regulated by state and federal law, such as an attorney's license to practice law, a doctor's license to practice

[8] The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191; 45 C.F.R. §§ 160-164 (2013).
[9] The Children's Online Privacy Protection Act of 1998, 15 U.S.C. 6501-6505; 16 C.F.R. Part 312.
[10] *See generally* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

medicine, or a liquor license, is often not considered an asset and is therefore nontransferable in bankruptcy.[11]

Congress could impose additional restrictions on the use and sale of personal consumer data generally, as it has with HIPAA and COPPA. Those restrictions would be applicable in any bankruptcy proceeding in which the regulated data was implicated.[12] Although concerns regarding personal consumer data frequently arise in bankruptcy cases, Congress should not create bankruptcy-specific restrictions on the sale of personal consumer data. Bankruptcy-specific restrictions would promote strategic workarounds that would not protect consumers but would impose additional costs on creditors in bankruptcy.[13]

II. Contractual Regulation of Personal Consumer Information

Absent a formal legal prohibition on the use of personal consumer information, the exchange of personal consumer data is governed by private contractual agreement between companies and customers. In most cases, consumers provide personal information to companies under a system of "notice and consent": the company provides an explanation of its privacy policy and the consumer agrees to it. Privacy policies are often difficult to understand and may be internally inconsistent.[14] Conventional wisdom is that consumers rarely even read privacy policies before consenting to them.

Privacy policies often afford the company gathering personal consumer data the freedom to sell it in the interest of business continuity. A business continuity provision envisions a scenario in which the original business will be sold, merged, or otherwise transferred to a new buyer, and reserves the right to transfer data along with the rest of the business. Frequently, but not always, the provision may guarantee that the buyer will continue to respect the same privacy terms to which the consumer originally agreed. The privacy policy adopted by 23andMe in June of 2022 is typical. It reads:

> **Commonly owned entities, affiliates and change of ownership**: If we are involved in a bankruptcy, merger, acquisition, reorganization, or sale of assets, your Personal Information may be accessed, sold or transferred as part of that transaction and this Privacy Statement will apply to your Personal Information as transferred to the new entity. We may also disclose Personal

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[11] *See, e.g.*, Wade v. State Bar of Arizona (*In re* Wade), 115 B.R. 222, 228 (B.A.P. 9th Cir. 1990) aff'd 948 B.2d 1122 (9th Cir. 1991) (attorney's license is not property); *In re* Circle 10 Rest., LLC, 519 B.R. 95, 129 (Bankr. D. N.J. 2014) (a liquor licenses is a temporary permit or privilege and not property); Ryan v. Lynn, (*In re* Lynn), 18 B.R. 501, 503 (Bankr. D. Conn. 1982) (a license to practice medicine is not property for the purposes of bankruptcy law). Other courts have concluded that a liquor license is property of the bankruptcy estate, and the question is somewhat unsettled. *See, e.g., In re* The Ground Round, Inc., 482 F.3d 15, 17 (1st Cir. 2007).

[12] *See* 11 U.S.C. § 363(b)(1)(B)(ii) (a bankruptcy sale cannot violate applicable nonbankruptcy law).

[13] Consider, for example, the numerous loopholes and workarounds apparently permitted under the current CPO provisions. *See* Christopher G. Bradley, *Privacy Theater in the Bankruptcy Courts,* 74 HASTINGS L.J. 607, 622-30 (2023).

[14] *See* Christopher G. Bradley, *Privacy Policy Indeterminacy*, 56 CONN. L. REV. 407, 411, 424 (2024).

> Information about you to our corporate affiliates to help operate our services and our affiliates' services.[15]

Despite this language, several parties objected to 23andMe's proposal to sell personal consumer data in its bankruptcy filing, alleging that the sale violated the terms of the company's privacy policy, in addition to several state privacy laws.[16]

The legal and factual issues associated with this objection are complex, and unlikely to be finally resolved or even fully litigated in the bankruptcy proceedings.

III. Enforcement of Privacy Policies

The legality of 23andMe's proposed bankruptcy sale is unlikely to be fully litigated because doing so would require an unsupportable dedication of resources to the legal dispute, in a situation where the company is already financially distressed and its creditors unlikely to be repaid in full. However, similar litigation is unlikely to occur even outside bankruptcy proceedings because of the complexity of the legal issues involved and the uncertainty of any recovery for plaintiffs.

Individual consumers are legally entitled to enforce agreements to preserve the privacy of their data. But individuals are unlikely, even in the best of circumstances, to successfully bring a legal claim to defend their rights when a business fails to fulfill the promises made in its privacy policy. For example, a consumer could not prevail in a bid to force a failing company to preserve personal consumer data as envisioned under the privacy policy. A defunct company cannot be held responsible for the safe storage of personal consumer data – if the company fails, there is no one to hold accountable for this obligation. Accordingly, consumers may be harmed even if a company does not sell its personal consumer data, because a failure to maintain adequate safety precautions could subject the data to inadvertent disclosure. Often the harm caused by a violation of the privacy policy is difficult to quantify, and any damages equally difficult to prove. In nearly every imaginable scenario, the cost of filing a lawsuit will be prohibitively expensive for any given individual whose data is implicated in a privacy policy violation, especially when there is no guarantee of success. This is particularly true when the defendant company is financially distressed.

The Federal Trade Commission or state attorneys general are more likely to successfully raise complaints associated with the mismanagement or sale of personal consumer data. They have the advantages of public resources and can represent the interests of a large number of affected consumers. But they face many of the same challenges to establishing a violation of an applicable privacy policy and proving damages.

Current privacy policies are not standardized, but use individualized contractual language from policy to policy. This requires litigants to establish the parameters of each individual policy as a

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[15] https://www.23andme.com/legal/privacy/full-version/ (last updated March 14, 2025).

[16] *See, e.g.,* Motion for the Appointment of a Consumer Privacy Ombudsman and a Security Examiner Pursuant to 11 U.S.C. Sections 105(a), 332, 363(b)(1) and Federal Rule of Bankruptcy Procedure 6004(G) and Notice of Hearing, Doc. 239, *In re* 23andMeHolding Co., Case No. 25-40976 (Bankr. E.D. Mo. Apr. 15, 2025).

matter of contractual interpretation before a violation can be established. The diversity of language used in privacy policies also virtually assures that consumers, who regularly agree to privacy policies without reading them, have little hope of knowing what each individual privacy policy permits the contracting company to do with the data it gathers. This increases the difficulty of recognizing when a violation has taken place.

One legal approach to these problems, as noted above, is simply to introduce a body of regulation like the area-specific regulations governing certain health data or data on children. Another more flexible method to improve the enforcement of privacy policies both inside and outside bankruptcy might be to establish a standardized set of privacy policies associated with personal consumer data.[17] These privacy policies could cover a range of options, from the most permissive use of personal consumer data permitted under the law to the most restrictive use feasible. For example, Privacy Policy A might mirror the stated policy of Skipity.com, which begins, "[w]e firmly believe that privacy [is] both inconsequential and unimportant to you. . . . If you're one of those tin-foil-hat wearing crazies that actually cares about privacy: stop using our services and get a life."[18] On the other hand, Privacy Policy D might guarantee that all personal consumer data would remain with the company for the duration of the company's existence, never be sold despite any other asset sale or merger, and be destroyed should the company cease to operate.

With relatively few standardized provisions in circulation, individual consumers would be far more likely to recognize and understand the ramifications of a given privacy policy. Standardization would also greatly simplify the enforcement of privacy policies by clarifying their parameters. This clarification would make it easier to recognize when a violation of a privacy policy has occurred.

IV. Bankruptcy Law's Alteration of Nonbankruptcy Rights

Although personal consumer data is sold on a regular basis in standard business transactions, concerns regarding the sale of personal consumer data tend to arise with greater frequency in the bankruptcy context. This may be, in part, a function of the increased public scrutiny afforded to such sales by virtue of the public notices required in bankruptcy. In bankruptcy proceedings, a distressed company must provide notice of its intent to sell personal consumer data. A judge must approve any sale of assets by a bankrupt debtor, commonly through proceedings outlined in Section 363 of the Bankruptcy Code.[19] These are accordingly referred to as "363 sales." Alternatively, a debtor's assets might be sold following approval of a plan of reorganization.

The primary difference between a 363 sale and a plan of reorganization is the involvement of individuals with claims against the debtor, collectively referred to as creditors.[20] In order to

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[17] I largely echo another scholar's recommendation on this issue. *See* Christopher G. Bradley, *Privacy Policy Indeterminacy*, 56 CONN. L. REV. 407, 430-32 (2024).
[18] *Skipity.com*, *Privacy Policy Terms and Conditions*, INTERNET ARCHIVE: WAYBACK MACHINE (Feb. 13, 2016), https://web.archive.org/web/20160213180839/skipity.com/privacy (cited in Christopher G. Bradley, *Privacy Policy Indeterminacy*, 56 CONN. L. REV. 407, 407 (2024).
[19] 11 U.S.C. § 363.
[20] *See* 11 U.S.C. § 101(10).

approve a plan, all creditors must have the opportunity to vote for or against the proposed plan. A plan of reorganization must be approved by a majority of voting creditors, separated into classes based on the similarity of their legal rights against the debtor.[21] Most of the sales of personal consumer data that attract the concern of the public are 363 sales, in which creditors do not have the opportunity to vote for or against the sale. This is the type of sale at issue in the 23andMe bankruptcy.

The purpose of the 363 sale is to preserve the value of the debtor's assets to the extent possible. A plan of reorganization may take several months to confirm,[22] during which time assets can depreciate in value.[23] A higher sale price ensures a larger recovery for creditors, minimizing the loss they must bear as a consequence of the debtor's insolvency.

Although creditors do not vote in a 363 sale, bankruptcy proceedings do provide the oversight of the bankruptcy judge, who conducts a hearing to consider the sale and may approve or deny it. In 363 sale situations where personal consumer data is implicated, a CPO may also be appointed to assist the bankruptcy judge; there is no CPO when a sale takes place as part of a reorganization plan.[24] The legislative history suggests that the CPO position was created to prevent the sale of personal consumer data in bankruptcy in violation of established privacy policies.[25] Empirical research has indicated that in most cases where a CPO is appointed, the sale of personal consumer data in violation of a privacy policy is nevertheless approved, in nearly every instance at the CPO's recommendation.[26]

The CPO's charge is primarily to provide the judge with information regarding the privacy ramifications of the sale, and to identify potential alternatives that would mitigate privacy losses.[27] The CPO does not typically assign a dollar value to the privacy losses, likely because any attempt to do so would be at best a shot in the dark. The CPO may have very little time – as little as seven days – to conduct the necessary review prior to the hearing on the sale.[28] The expenses of that review are paid out by the bankruptcy estate and accordingly borne by the creditors, creating pressure to keep the review narrow.[29] Although the CPO may provide value to the court in weighing the costs and benefits of permitting the sale, he or she must usually do so in the absence of a final adjudicated determination that the sale violates the relevant privacy policy. Because the CPO increases the costs of the sale and potentially delays its consummation,

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[21] *See* 11 U.S.C. §§ 1122; 1126; 1129(a)(8).
[22] *See* Foteini Teloni, *Chapter 11 Duration, Pre-Planned Cases, and Refiling Rates: An Empirical Analysis in the Post BAPCPA Era*, 23 ABI L. REV. 571, 582 (2015) (concluding from an empirical study of public companies that the duration of traditional chapter 11 cases after 2005 is 430 days).
[23] The extent to which this occurs may be overstated, but the possibility is undisputed. *See generally* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L. J. 862 (2014).
[24] *See* 11 U.S.C. § 332(a).
[25] *See* Congressional Record 107 Cong. 147 (March 5, 2001) (Statement of Orrin Hatch) at S1795.
[26] *See* Christopher G. Bradley, *Privacy Theater in the Bankruptcy Courts*, 74 HASTINGS L. J. 607, 653 (2023) ("nearly every report reflects the [CPO] tinkering with aspects of proposed sales while ultimately letting them proceed").
[27] 11 U.S.C. § 332(b).
[28] *See* 11 U.S.C. § 332(a).
[29] *See* 11 U.S.C. § 330(a)(1).

both the debtor and creditors in bankruptcy proceedings often seek to avoid a CPO appointment, as 23andMe did.[30]

Balancing the interests of consumers in the enforcement of a company's privacy policy against the interests of creditors in recovering from the debtor's assets is an extremely difficult and complex endeavor. It could be simplified by establishing statutory damages in connection with privacy policy violations. The easier it is to assign damages, the easier it would be for a court to weigh the costs of permitting violation of a privacy policy against the benefit to creditors. Congress could assign statutory damages that would make any sale in violation of a privacy policy prohibitively expensive. In that scenario, such sales would be less likely to occur in or out of bankruptcy. The bankruptcy court would not approve such a sale because it would not be in the best interests of creditors.

Conclusion

In summary, I present the following recommendations to the Committee:

- **Apply one rule to every sale of personal consumer data**. Congress should ensure that any restriction is applicable both inside and outside bankruptcy proceedings to maximize the protections afforded to consumers. A prohibition on bankruptcy sales would leave consumers vulnerable to the sale of their data outside bankruptcy, undermining the protections and advantages bankruptcy proceedings are intended to provide.

- **Create a standardized understanding of consumers' rights to data privacy.** Current contractual agreements make it extremely difficult to understand or enforce the provisions of a privacy policy. Better clarity on what consumers might expect can ensure better enforcement of consumers' rights.

- **Establish statutory damages for violations of privacy agreements involving personal consumer data**. Giving all parties a clear understanding of the cost to violating privacy policies will allow them to make more informed decisions on whether and when data can be sold.

Congress may choose to impose legal restrictions on the sale of personal consumer data. These restrictions might include a total prohibition on the sale of some types of data, requirements that companies standardize their privacy policies, or any number of alternative approaches. Whatever approach taken, Congress should avoid creating a bankruptcy-specific rule that might inadvertently undermine the purposes of bankruptcy.

Respectfully submitted,
Brook Gotberg

[30] *See* Christopher G. Bradley, *Privacy Theater in the Bankruptcy Courts*, 74 HASTING L. J. 607, 635 (2023).

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