NO. 24-922

In the
Supreme Court of the United States

JAMES HARPER,

Petitioner,

v.

DOUGLAS O'DONNELL, ACTING COMMISSIONER OF INTERNAL REVENUE SERVICE, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR *AMICUS CURIAE* PROFESSOR ADAM J. MACLEOD IN SUPPORT OF PETITIONER

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March 28, 2025

Professor Adam J. MacLeod respectfully seeks leave of this Court to file an amicus brief in support of the petitioner, despite a failure to provide the required notice under Supreme Court Rule 37.2. Professor MacLeod is Professor of Law at St. Mary's University in Texas. He is also a Research Fellow of the Center for Religion, Culture, and Democracy and a Senior Scholar and former Thomas Edison Fellow in the Center for Intellectual Property x Innovation Policy at George Mason University. He researches and writes about foundational, common-law doctrines and concepts and their application to contemporary legal issues. Professor MacLeod is co-editor of Christie and Martin's *Jurisprudence* (4th edition, West Academic 2020) and *Foundations of Law* (Carolina Academic Press 2017). He is the author of *Property and Practical Reason* (Cambridge University Press 2015), *The Age of Selfies: Reasoning About Rights When the Stakes Are Personal* (Rowman and Littlefield 2020), and articles, essays, and book reviews in peer-reviewed journals and law reviews in the United States, United Kingdom, and Australia. He is interested in helping courts to develop a sound understanding, and to make correct use, of legal doctrines such as the rules that govern property at common law, in order to shape rights in intangible resources, such as personal information and private data.

Lead counsel for Professor MacLeod, A. Kristina Littman, only took over this representation yesterday, after Professor MacLeod's previous counsel withdrew unexpectedly from the representation. Previous counsel for Professor MacLeod had failed to provide the required notice of intent to file this brief under Rule 37.2. Immediately upon discovering this, counsel

for Professor MacLeod emailed counsel for petitioner and counsel for respondents, apologizing for failing to provide the required notice and seeking their consent to file this brief. Counsel for petitioner gave consent, while counsel for respondents has not yet responded to counsel for Professor MacLeod's outreach.

Previous counsel's failure to notify petitioner and respondents as per this Court's Rules was inexcusable. But current counsel for Professor MacLeod took steps to ameliorate that failure as soon as they learned of it. And respondents (who have not consented to filing this brief) will not suffer any prejudice from the late notice; they waived their right to respond to petitioner's brief, and will have ample opportunity to respond to this brief if this Court were to call for response. Under those circumstances, and given the unique and important contribution that Professor MacLeod can offer, this Court should grant the motion and permit the filing of Professor MacLeod's amicus brief in support of petitioner.

For the foregoing reasons, the motion should be granted.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

Adam J. MacLeod is Professor of Law at St. Mary's University in Texas. He is also a Research Fellow of the Center for Religion, Culture, and Democracy and a Senior Scholar and former Thomas Edison Fellow in the Center for Intellectual Property x Innovation Policy at George Mason University. He researches and writes about foundational, common-law doctrines and concepts and their application to contemporary legal issues. Professor MacLeod is co-editor of Christie and Martin's *Jurisprudence* (4th edition, West Academic 2020) and *Foundations of Law* (Carolina Academic Press 2017). He is the author of *Property and Practical Reason* (Cambridge University Press 2015), *The Age of Selfies: Reasoning About Rights When the Stakes Are Personal* (Rowman and Littlefield 2020), and articles, essays, and book reviews in peer-reviewed journals and law reviews in the United States, United Kingdom, and Australia. He is interested in helping courts to develop a sound understanding, and to make correct use, of legal doctrines such as the rules that govern property at common law, in order to shape rights in intangible

[1] Counsel for *amicus curiae* failed to notify the parties of the filing of this brief at least 10 days ahead of time, as Supreme Court Rule 37.2 requires, and as such this brief is preceded by a motion for leave to file it. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and his counsel, made any monetary contribution toward the preparation or submission of this brief.

resources, such as personal information and private data.

INTRODUCTION AND SUMMARY OF ARGUMENT

Fundamental property law answers the question who may access personal information, without resort to judicial assessments of privacy rights. The rights of property in personal information are defined and alienated by classic property institutions, such as bailment, license, and assignment. The doctrine of bailment, in particular, has long played a crucial role in defining and identifying rights in personal information. Under that doctrine, persons entrusted with personal information, such as telephone companies and cryptocurrency exchanges, have the right to prevent persons foreign to the bailment from accessing the information entrusted to them.

The First Circuit did not address that longstanding interest in the decision below, instead asserting that Harper failed to define a property interest that could be bailed. This was error. Such error could result in courts concluding that personal information is not private property subject to the rights and protections afforded by the doctrine of bailment. This Court should grant the petition and correct such error.

ARGUMENT

I. Personal Information is Private Property in Our Fundamental Law

For centuries, our fundamental law has understood private information to be private property

in certain circumstances. Rather than using an abstract notion of privacy, the law employs long-established property concepts to draw the boundary between mine and yours, private and public. The rights and duties of trespass, bailment, carriage, and license determine what belongs to different persons, what remains private, and what has been made public. This history and tradition of dealing with information as property can be traced from eighteenth-century English cases about illegal searches and common law copyright through twentieth-century laws that govern telephone companies as carriers to contemporary cases concerning private data entrusted to Internet service providers and email services.

Property at common law and in American constitutional doctrine includes, and always has included, both tangible and intangible resources. In his *Commentaries*, Blackstone devoted an entire chapter of the volume concerning property to the law of incorporeal hereditaments. 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *20–43. These are property rights in things that cannot be "seen and handled by the body" but "are creatures of the mind." *Id.* at *17. They are nonetheless objects of property. Personal and intellectual property became more important in the decades after Blackstone wrote his *Commentaries*, and later treatises emphasize choses in action, debts, and other forms of intangible property not tied to land. *See* JAMES SCHOULER, A TREATISE ON THE LAW OF PERSONAL PROPERTY 9–16 (5th ed. 1918); MICHAEL BRIDGE, PERSONAL PROPERTY LAW 144–47 (3d ed. 2002). As new types of property have entered mainstream culture and commerce,

jurists have repeatedly employed established property concepts to identify them and to discern the rights people have in them.

Property is a source of legal concepts for defining rights and duties in personal information and data. Our fundamental law, the common law, has secured private rights in personal information, opinions, and records for many centuries. Since at least the eighteenth century (and probably earlier), information that could reveal a person's opinions and expressions remains protected property of the person unless and until it is published, that is, until the person whose information it is makes it public. This fundamental doctrine of our law is an important legal safeguard for intangible, personal property. It is specified in distinct, fundamental, legal rights which American constitutions take as given, including the common law copyright, the right against seizure of papers, the right against illegal searches, and the right against self-incrimination.

The modern right now known as the "right to privacy" is plausible insofar as it is derived from the common law right to keep one's information to oneself. Today, the term "right to privacy" is associated with the judicially-created doctrine of substantive due process, as stated in judicial opinions in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Roe v. Wade*, 410 U.S. 113 (1973). But the fundamental common law secured a right to keep one's personal information private centuries before this Court considered challenges to contraception and abortion laws. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–202 (1890). The

more fundamental and older right is a right to keep one's written expressions and personal information to oneself. *Id*. at 198–204.

At common law, every person has the right to keep his writings, correspondence, opinions, intellectual creations, and other personal data secret and to determine the conditions on which he is willing to make them public. Warren and Brandeis, at 198–204; Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 882 (1985); Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC'Y U.S.A. 585, 594–604 (2011). The right is a fundamental, common-law right because it is grounded in natural right, custom, and usage, as contrasted with the statutory privilege of copyright protection in intellectual works after publication, which is contingent upon positive law. Indeed, English courts, which declared the right in landmark decisions in the eighteenth century, dated its authority at least as far back as Magna Carta. Schnapper, at 877, 912.

One instance of this fundamental right is sometimes known as the common law copyright. H. Tomás Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 CONN. L. REV. 1, 5–6 (2014). Like the rights against illegal searches and seizures, jurists understood this right to be grounded in natural law and usage, rather than to be contingent on positive enactments. *Id*. at 28–46. The common law copyright is particularly important during times of social appeal and civic division, such as ours. The privacy of personal information is never more important than

when information can be used unjustly against a person.

The right to keep personal information private became the official doctrine of our fundamental law long before this Court's twentieth-century privacy decisions. The constitutions of the United States and of the several states declare some specific instances of the right, such as the prohibitions against illegal searches and seizures. Schnapper, at 912–24. Others, such as the right to determine the first publication of one's writings and the right against self-incrimination, are simply taken as given. Linford, at 604–20; Schnapper, at 924–28.

All of the specific instances of the right to keep one's information private share a common feature—they all treat one's private information, expressions, and writings as private property. Linford, at 621–22. Like other forms of property, the common law copyright can be alienated. But simply entrusting a copy of one's writings to a second person is not an act of publication that would alienate or abolish the private right. *Id.* at 597. Similarly, jurists have long thought of the right to keep one's papers free from search or seizure by public officials as a type of property. Schnapper, at 866, 882, 890–91, 902–03. As one jurist expressed the idea in a landmark case, private "papers are often the dearest property a man can have." *Entick* v. *Carrington* (1765), 95 Eng. Rep. 807, 817–18 (KB).

II. Property Norms and Institutions Determine Who Has Rights to Access Private Data.

A. Property Defines Rights in Intangible as Well as Tangible Personal Property.

As members of this Court have recognized in earlier decisions, personal property concepts, such as bailment and assignment, can explain a lot about rights and duties with respect to intangible resources, such as personal data, commercial data, and trade secrets. *See Carpenter v. United States*, 484 U.S. 19, 25–26 (1987) ("Confidential business information has long been recognized as property."); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1002–04 (1984); *see also Carpenter v. United States*, 585 U.S. 296, 383–85 (2018) (Alito, J., dissenting); *id.* at 399–400 (Gorsuch, J., dissenting). See generally Jim Harper, *Personal Information is Property*, 73 U. KAN. L. REV. 113, 136–43 (2024). The doctrine of trespass can determine, for example, who has a right to exclude whom from certain confidential information. Orin S. Kerr, *Norms of Computer Trespass*, 116 COLUM. L. REV. 1143 (2016). The doctrines of bailment and license determine who has access to it and on what terms. Adam J. MacLeod, *Cyber Trespass and Property Concepts*, 10 IP THEORY 4 (2021).

The information created in a cryptocurrency exchange differs from the personal papers and effects that were at issue in the seventeenth and eighteenth centuries in a couple of respects. But neither respect makes an important difference. First, the data are stored as intangible things rather than on tangible papers. But as with the private papers at issue in eighteenth-century England and in copyright cases

throughout the centuries, it is the intangible information that is of interest, not the medium on which is it stored or expressed.

Second, some intangible data are created by two or more persons rather than one. Traders of digital currency and the host of the exchange collaborate to generate data about the transaction and its participants. But the data they generate are not public; the information remains private, unless it is published. So, it is jointly owned by its creators. Information created and owned jointly by more than one person is much like the concurrent ownership of siblings in a family business, or husband and wife in the marital home. That more than one person has access to it does not destroy the private rights in it. Though the co-creators may share access, and may exercise their powers of ownership to allow third persons to access the information, they may also exclude third persons.

B. Bailments of Personal Information Are Bailments.

Owners of property rights assign rights and duties using established property institutions. One of the most important property rights for both personal and intangible property is the bailment. A bailment can function in a similar way for intangible things, such as telephone messages and emails, as it does for tangible things, such as cars and coins. This is because the bailment is not the thing itself but the rights and duties that are transferred from the bailor to the bailee. MICHAEL BRIDGE, PERSONAL PROPERTY LAW 33–43 (3d ed. 2002); RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY 209–389 (Walter B.

Raushenbush ed., 3d ed. 1975); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS (8th ed. 1870).

In all bailments, the bailor yields rights of possession and control of the resource to the bailee subject to the bailee's duty either to redeliver the resource or to deliver it to another person at the bailor's direction. THOMAS W. MERRILL AND HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 87–89 (2010); R.H. Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 U. KAN. L. REV. 97, 124–29 (1992). During the course of the bailment, the bailee has possessory rights *in rem*, meaning he has the right to prohibit third parties from accessing or using the resource and responsibilities to avoid injuries to the resource. *Law of Personal Property*, *supra*, 300–08, 311–18.

A bailment can structure the rights and duties of the parties in these familiar forms regardless whether the thing entrusted to the bailee is tangible or intangible. In bailments of intangible resources, the bailee's right to exclude third parties is the security for the bailor's right to what lawyers now call "privacy." This fundamental right of privacy—a property right in intangible resources—is neither relinquished nor extinguished when one entrusts one's personal correspondence or data to another person in bailment. Only an act of general publication, either performed or authorized by the owner of the private data, can extinguish the common law right. Gómez-Arostegui, *supra*, at 11, 21; Melville B. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185, 200–01

(1956). Because the bailee has a right to prevent third persons from accessing or using the personal data, the creation of the bailment is not an act of general publication that could extinguish the common-law copyright.

Therefore, a bailment does not convert private property into public property. The bailment transfers some rights, especially the right of exclusive possession, from the bailor to the bailee. Far from being an act of devotion to the public use, this transfer of exclusive right also transfers to the bailee the responsibility to exclude third parties from accessing or using the entrusted *res*.

Nearly a century ago, Congress employed the bailment to solve several practical problems arising out of telephone communications. Then a new technology, land-based telephones and the infrastructure which made them operable carried valuable, private, intangible information—conversations between two persons. To codify the rules governing telecommunications in interstate commerce, Congress employed the common law concept of carriage and identified telephone companies as carriers. 47 U.S.C. §153(11). Carriage is a special type of bailment, and a carrier is a special type of bailee. RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY 399–504 (2d ed. 1955). At the root of the Communications Act of 1934, therefore, is the recognition that the information passed through telephone communications is a type of property.

A carrier is any person, whether natural (*i.e.*, a human being) or artificial (*e.g.*, a corporation), who "undertakes the transportation of persons or

property or one employed in or engaged in the business of carrying goods for others for a fee." George L. Blum et al., *Who Is a Carrier, Generally*, 13 AM. JUR. 2D CARRIERS § 1 (2024). Carriage is a type of bailment because the carrier takes custody, possession, or control of another person or another person's property while undertaking to deliver the person or property or to keep them safe. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *396. The carrier has a duty to deliver the person or property, or to make such property available for use, upon the demand of the person who entrusted possession to the carrier. The status of carrier is deeply rooted in our fundamental, common law. Congress recognized that telephone companies naturally fit into this established legal category.

Thus, from the beginning, the doctrines of bailment and common carriage have shaped the law governing shared access to intangible communications. *See* TYLER BERRY, COMMUNICATIONS BY WIRE AND RADIO: A TREATISE 32–102 (1937); Mark A. Hall, *Common Carriers Under the Communications Act*, 48 U. CHI. L. REV. 409 (1981). Consistent with this tradition, the California Supreme Court reasonably interpreted a California statute governing common carriers to include carriers of intangible, telephone communications. *Goldin* v. *Pub. Utilities Comm'n*, 592 P.2d 289, 304 (Cal. 1979).

There is no reason in law or general jurisprudence why bailments should be limited to tangible goods. As Congress and the California courts recognize, the rights of custody and control of property need not be transferred by a transfer of *physical* possession, if the

thing transferred is intangible. As the leading treatise on the subject teaches, carriage by bailment "may be by any instrumentality." *Law of Personal Property*, *supra*, at 419. The bailment generates and determines the carrier's duties to the bailor and the carrier's rights toward third persons. Bailees such as telephone companies, Internet service providers, and cryptocurrency exchanges take possession of intangible resources, such as information and intellectual creations. But the rights and duties governing their bailments are the same as those governing bailments of tangible goods, such as food and furniture.

C. Bailments of Personal Information Preserve Private Property Rights.

A telephone communication is a private sharing of information, not an act of publication to the public at large. And the bailment entrusted to the telephone company is a private right. For the same reason, a bailment of personal information in digital form is a private right, not a public right. Both the bailor and the bailee have the right to exclude all persons who are not intended to access the information. Indeed, the bailee has legal remedies against third persons who interfere with the bailment by taking, destroying, or injuring the *res*. *The W.C. Block*, 71 F.2d 682, 683 (2d Cir. 1934), cert. denied 293 U.S. 579 (1934); *Howard* v. *United States*, 101 Ct. Cl. 823, 829–30 (1944); *American Sur. Co. of N.Y.* v. *Baker*, 172 F.2d 689, 690–91 (4th Cir. 1949); *George Bohannon Transp., Inc.* v. *Davis*, 323 F.2d 755, 757 (10th Cir. 1963). From the perspective of third parties, both the bailor and the

bailee have all the rights of full ownership, including the right to exclude third persons.

When applied to intangible information, the doctrine of bailment defines rights with clarity. The information entrusted by the bailor to the bailee remains private property. Entrusting personal information to a bailee, such as a telephone company, Internet service provider, or cryptocurrency exchange, does not confer on any third parties any legal rights to access the information. To the contrary, both the bailor and the bailee have the right to exclude third persons from it, including public officials, and rights to recover for any wrongful appropriation of it.

III. The First Circuit's Decision Failed to Acknowledge That Longstanding Right

In the decision below, the First Circuit rejected an argument by Petitioner that Coinbase served as a bailee of his private property, and that the IRS's inspection of them therefore served as an intrusion on his property rights, which the Fourth Amendment prohibits. Pet. App. 20a. It rejected that argument on the ground that the petitioner "failed to explain the legal source of the interest he asserts." Pet. App. 20a; *see also* Pet. App. 21a–24a. But, as discussed above, there is a longstanding recognition in the common law of just the kind of property interest that petitioner asserted here. The First Circuit's failure to recognize that interest merits correction by this Court.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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