No. 18-1563

In The

Supreme Court of the United States

RONALD BIAS,

Petitioner,

v.

TANGIPAHOA PARISH SCHOOL BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Fifth Circuit Court of Appeal's precedent that all Chapter 13 debtors have a continuing duty to disclose all post-confirmation claims offend the First and Fifth Amendments of the U.S. Constitution because it contravenes clear and unambiguous law and regulations granting some Chapter 13 debtors standing to pursue all post-confirmation claims without the court's permission?

If a debtor has standing to pursue a post-confirmation claim without court permission, does this standing overcome judicial estoppel issues?

If a debtor is in compliance with bankruptcy code and regulations, and if the confirmed plan to which he is bound does not require disclosure of post-confirmation claims, is it possible that he can be said to have taken an inconsistent position for his nondisclosure of a post-confirmation claim?

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The Fifth Circuit's order affirming the district court appears at App. 1-12. The Fifth Circuit's order denying Bias's petition for rehearing *en banc* appears at App. 32-33. The district court's order dismissing Bias's claim with prejudice appears at App. 13-18. The district court's order granting defendant's motion for judgment on the pleadings and dismissing Bias's claim without prejudice appears at App. 19-31.

STATEMENT OF JURISDICTION

The Fifth Circuit entered its order affirming the district court on March 22, 2019. App. 1-12. A timely petition for rehearing *en banc* was denied by the Fifth Circuit on March 22, 2019. App. 32-33. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment of the U.S. Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

11 U.S. Code § 101 provides in relative part:

In this title the following definitions shall apply:

(5) The term "claim" means—

(A)

right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;

11 U.S. Code § 103 provides in relative part:

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.

(i) Chapter 13 of this title applies only in a case under such chapter.

11 U.S. Code § 105 provides in relative part:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S. Code § 362 provides in relative part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

For any claims that arose before the commencement of the case under this title;

11 U.S. Code § 521 provides in relative part:

(a) The debtor shall—

(1) file—

(A) a list of creditors; and

(B) unless the court orders otherwise—

(i) a schedule of assets and liabilities;

11 U.S. Code § 541 provides in relative part:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such

estate is comprised of all the following property, wherever located and by whomever held:

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S. Code § 1141 provides in relative part:

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

11 U.S. Code § 1303 provides:

Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title.

11 U.S. Code § 1306 provides:

(a) Property of the estate includes, in addition to the property specified in section 541 of this title—

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

11 U.S. Code § 1322 provides in relative part:

(a) The plan—

(1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity;

(11) include any other appropriate provision not inconsistent with this title.

(b) Subject to subsections (a) and (c) of this section, the plan may—

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity;

(10) provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims; and

(11) include any other appropriate provision not inconsistent with this title.

11 U.S. Code § 1325 appears in relevant part at Appendix 35.

11 U.S. Code § 1327 provides in relative part:

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

11 U.S. Code § 1329 appears in relevant part at Appendix 36.

FED. R. BANKR. P. Rule 1007 addresses post-confirmation disclosure requirements:

(h) INTERESTS ACQUIRED OR ARISING AFTER PETITION. If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the

order confirming a chapter 11 plan or discharging the debtor in a chapter 12 or chapter 13 case.

FED. R. BANKR. P. Rule 1009 provides an optional right to amend voluntary petitions:

(a) GENERAL RIGHT TO AMEND. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed.

FED. R. BANKR. P. Rule 6009. Prosecution and Defense of Proceedings by Trustee or Debtor in Possession

With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.

STATEMENT OF THE CASE

This case involves a Chapter 13 debtor who was judicially estopped from pursuing a post-confirmation legal claim. The Fifth Circuit affirmed the district court's ruling that because Bias was under a continuing duty to disclose post-confirmation claims, judicial estoppel applied to bar his claim because he had taken a "clearly inconsistent" position by not disclosing the claim, his inconsistent position had been accepted by the bankruptcy court, and he had not acted

inadvertently. As a result of this ruling and its affirmation by the Fifth Circuit, Bias lost standing granted to him by law and regulation to pursue post-confirmation claims without the court's permission.

On May 22, 2008 Bias filed a voluntary petition for bankruptcy under Chapter 13 of Title 11 in the U.S. Bk Court, Eastern District of Virginia under case number 08-12901-RGM.

On July 1, 2008 his plan was confirmed, and he became a "debtor in possession" on this date when property of the estate vested in him upon plan confirmation. Amongst the provisions of the confirmation order was that post-confirmation he was to furnish information as the Trustee may require for determination of his "disposable income". He was not directed to report post-confirmation legal claims and was under no statutory or regulatory duty to disclose any post-confirmation claims.

During August 2008 Bias began working as a Junior Reserve Officer Training Corps (JROTC) instructor at a high school under the jurisdiction of the Tangipahoa Parish School System. Approximately one year later in August 2009 he was recalled to active duty because he was erroneously retired 15 months shy of the statutory requirement that a service member serve a total of at least 20 years of active duty to receive an active duty retirement under 10 U.S.C. 6323. A condition of his recall was that he was to remain in place as a JROTC instructor until retirement eligible, at which time he would have to either transfer to another duty

station or retire. During this 15-month period he was in the primary zone for promotion consideration to the rank of Colonel. The promotion board was to meet in Fall 2010.

Events giving rise to the legal claim arose during Sep 2009, roughly fourteen months post-confirmation of his Chapter 13 plan. Bias discovered and reported what he believed to be an attempt to misappropriate government funds appropriated to support the school's ROTC unit being used, instead, to support the school's cross-country team. The persons implicated in the report retaliated against Bias.

On Sep 5, 2012 Bias filed legal claims under the False Claims Act for qui tam and whistleblower retaliation in the Federal District Court for the Eastern District of Louisiana. Because the school had failed to comply with State and Federal laws mandating the posting of employee rights, Bias did not learn of his potential status as an agent of the school board for several months after events arose.

On July 18, 2013 Bias's bankruptcy was discharged, and the case closed on August 20, 2013. During the pendency of the bankruptcy, Bias did not modify or convert his confirmed plan, and his case was not dismissed and later refiled. Bias completed all plan payments under his original petition and original confirmed plan.

On August 8, 2017 the School System, an uninterested party to the bankruptcy, filed a motion for judgment on the pleadings under F.R.C.P. 12(c) alleging

Bias should be judicially estopped because he had failed to disclose his post-confirmation claim.

On September 13, 2017 the district court dismissed Bias's whistleblower retaliation claim under the doctrine of judicial estoppel. The dismissal was without prejudice to allow the Trustee an opportunity to decide whether Bias's case should be converted to a Chapter 7 case and the claim pursued by the Trustee. Bias moved to reopen his bankruptcy to amend his schedules and have the Trustee pursue the claim.

The Trustee first indicated he would pursue the claim, but during a hearing held in the U.S. Bankruptcy Court for the E.D. of VA, indicated he would not pursue the claim. Bias then moved to withdraw his motion to reopen. On Nov 30, 2017 the district court dismissed the claim with prejudice.

Bias timely appealed to the Fifth Circuit Court of Appeals. On December 5, 2018 the Fifth Circuit affirmed the dismissal by unpublished opinion. Bias timely petitioned for rehearing.

On March 22, 2019 the Fifth Circuit withdrew its prior opinion, issued a new opinion affirming the dismissal, and denied the petition for rehearing.

REASONS FOR GRANTING THE PETITION

This case presents critical constitutional issues regarding provisions of the bankruptcy code and regulation and offers this Court the opportunity to clarify the

law and promulgate a national standard for when judicial estoppel is proper in the context of Chapter 13 Bankruptcy, post-confirmation legal claims. "[The] relevant demands of *stare decisis* do not preclude considering, for the first time thoroughly and in the light of the best available evidence of congressional purpose, a statutory [*221] interpretation which started as an unexamined assumption on the basis of inapplicable [****89] citations and has the claim of a dogma solely through reiteration." *Monroe v. Pape*, 365 U.S. 167, 220-21 (1961) (Frankfurter, J., dissenting), *overruled on other grounds, Monell v. Dept. of Social Serv.*, 436 U.S. 658 (1978).

The Fifth's Circuit overly broad, strictly enforced, and legally unsupportable position that "Chapter 13 debtors have a continuing obligation to disclose post-petition causes of action", *Allen v. C & H Distribs., L.L.C.*, 813 F.3d 566, 572 (5th Cir. 2015) (quoting *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 129 (5th Cir. 2013), represents just such a precedent that is not based on rational consideration and deliberation of bankruptcy code or regulation, or the specific facts of this case. This requirement by the Fifth Circuit implies a free-standing and continuous duty to disclose post-confirmation legal claims, and failure to comply with this erroneous precedent represents grounds for judicial estoppel regardless of the evidence presented or the arguments made in opposition to judicial estoppel because intent may be inferred from the non-disclosure.

Judicial estoppel results in the loss of standing to pursue legal claims and the extinguishment of one's constitutional right to petition for redress of wrong under the First Amendment of the U.S. Constitution and denial of due process under the Fifth Amendment of the U.S. Constitution. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express*, 511 U.S. 298, 312-13, 114 S. Ct. 1510, 1519 (1994).

Sitting *en banc* the Fifth Circuit articulated its guidance for the imposition of judicial estoppel in the bankruptcy context in *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011). The Circuit determined that based on guidance from this Honorable Court in *New Hampshire v. Maine*, 532 U.S. 742 (2001), whether to invoke the sanction of judicial estoppel should consist of an analysis of whether: "1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; 2) a court accepted the prior position; and 3) the party did not act inadvertently." *Reed*, 650 F.3d at 574. The new standard announced in that Chapter 7 case was based on *Jethroe v. Omnova Sols., Inc*, 412 F.3d 598 (5th Cir. 2005) and *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330 (5th Cir. 2004)—two Chapter 13 cases. What the cases had in common was that all three involved pre-confirmation claims that were not disclosed to the bankruptcy court. None of the cases were on point with the law or facts in *Bias*.

I. FIFTH CIRCUIT ERRS ON BANKRUPTCY LAW AND REGULATION

a. No free-standing duty to disclose "purely" post-confirmation legal claims.

Perhaps, it is easier to understand the relationship between the law, regulations, and disclosure requirements if a new concept is introduced: a purely post-confirmation claim. This claim differs from the regular post-confirmation claim in that the debtor is a debtor in possession of this claim by operation of 11 U.S.C. 1306(b). All property of the estate, including this claim, has vested in him under 1327(b), and the court has not imposed a requirement that this claim be disclosed during the pendency of the Chapter 13 bankruptcy. Under Fed. R. Bankr. P. 1009, this claim *may* be disclosed if the debtor choses, but he is under no duty to disclose. This claim may be pursued without the court's permission. Fed. R. Bankr. P. 6009. And, the debtor has neither modified his plan under 11 U.S.C. 1329 or converted or dismissed his plan under 11 U.S.C. 1307 after the claim arose. This claim is purely a post-confirmation claim. The debtor has standing to pursue it.

The other claim, which is routinely confused as a post-confirmation claim, is really a pre-confirmation claim because the debtor has taken some act to modify, convert, or dismiss and refile the claim[1], or the court

[1] Because the facts of this case do not implicate the disclosure requirements for conversion or dismissal and refiling of a plan, those requirements are not addressed.

has not vested property in the debtor prior to the claim arising. Because under 1329(b)(2) the plan as modified becomes the plan—but only after undergoing the confirmation process under 11 U.S.C. 1325(a) in accordance with 11 U.S.C. 1329(b)(1)—any claim existing at the time of the action to modify or convert is under statutory duty to disclose in accordance with 11 U.S.C. 521. The debtor does not have standing to pursue this type of claim without court permission, Fed. R. Bankr. P. 6009, and if the claim is omitted from the schedule of assets, the debtor has a continuing duty to update his schedules to reflect the claim.

There is no free-standing duty in either law or code that mandates a Chapter 13 debtor disclose purely post-confirmation legal claims. "We do not hold that a debtor has a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty, *cf.* Fed. R. Bankr. P. 1007(h) (requiring a debtor to supplement his schedule regarding interests acquired after petition under section 541(a)(5) of the Code)". *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1246 (11th Cir. 2008). This apparent circuit split between Fifth Circuit and Eleventh Circuit is quickly laid to rest by examining the law.

If there were a statutory or regulatory duty to disclose Bias's post-confirmation legal claim, it would be easy enough to cite to that section of the law, yet no court has done this to date. Instead, courts rely on what they perceive to be the intent of the law instead

of the law as actually written. This Court has warned against such action: "If Congress [****30] enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue [***1039] Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." *Lamie v. United States Tr.*, 540 U.S. 526, 542, 124 S. Ct. 1023, 1034 (2004) quoting *United States v. Granderson*, 511 U.S. 39, 68, 114 S. Ct. 1259 (1994) (concurring opinion) (internal quotes omitted).

b. No continuing duty to modify schedules.

Chapter 13 debtors have an option—not a statutory or regulatory duty—to disclose purely post-confirmation legal claims because the regulation makes use of the word "may" instead of "shall" or "must" regarding amendments to schedules. Fed. R. Bankr. P. 1009. The Fifth Circuit references a "continuing duty to disclose" but that duty is based on pre-confirmation disclosure requirements. "The duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action". *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 208 (5th Cir. 1999). This is part of the unfortunate hodgepodge of pre-confirmation, post-confirmation, Chapter 7, Chapter 11, and Chapter 13 law that Fifth Circuit draws from in order to reach something of a one-size-fits-all standard for judicial estoppel in the bankruptcy context. To be clear, only chapters 1, 3, 5, and 13 apply to Chapter 13

bankruptcies. 11 U.S.C. 103(a) and (i). "The effect of the majority opinion is to make judicial estoppel virtually mandatory in all cases of non-disclosure where a party could be said to 'know the facts of' his claim, *In re Coastal*, 179 F.3d at 212, and essentially concludes that any debtor who fails to disclose a claim has a nefarious [**36] motive to do so. This reasoning, however, improperly presumes fraudulent intent from the outset." *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 271 (5th Cir. 2012) (Haynes, C., dissenting).

c. Standing is determined by classification of legal claim and vesting structure of the plan.

Another reason it is critical to distinguish between a post-confirmation legal claim (that becomes a pre-confirmation legal claim upon modification of a confirmed plan) and a purely post-confirmation legal claim (which does not undergo the modification process) is because this determines, along with the vesting structure of the confirmed plan, a debtor's standing to pursue legal claims as provided debtors by 11 U.S.C. 1303 and Fed. R. Bankr. P. 6009. Working in consonance, these provide a debtor the standing to pursue claims with or without court approval or to commence and prosecute any action or proceeding in behalf of the estate before any tribunal. "[I]n light of Bankruptcy Rule 6009's language that a debtor in possession may appear 'before any tribunal' 'with or without court approval,' Royal's lack of disclosure on his bankruptcy schedule does not appear to undermine his standing in

the instant suit. *Royal*, 2013 U.S. Dist. LEXIS 57416, 2013 WL 1736658 at *5 (quoting Fed. R.Bankr. P. 6009)." *In re Padula*, 542 B.R. 753, 759 (Bankr. E.D. Va. 2015). "A bankruptcy court has statutory authority to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code. 11 U.S.C. § 105(a). [*421] And it may also possess inherent power . . . to sanction abusive litigation practices. *Marrama v. Citizens Bank of Mass.*, 549 U. S. 365, 375-376, 127 S. Ct. 1105, [***153] 166 L. Ed. 2d 956 (2007). But in exercising those statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions." *Law v. Siegel*, 571 U.S. 415, 420-21, 134 S. Ct. 1188, 1194 (2014) (internal quotation marks omitted).

The Fourth Circuit, where Bias's bankruptcy was filed, administered, and discharged has held that Chapter 13 Debtors have standing to maintain non-bankruptcy causes of action. *See In re Padula*, 542 B.R. at 757. (explaining the difference between Chapter 7 and Chapter 13 debtors' rights to maintain non-bankruptcy legal claims). "Under *Wilson*, the Debtor in this case *always* had standing to file her lawsuit." *Id.* at 759 (emphasis in original).

Because Bias's confirmation order vested *all* property of the estate in him upon confirmation (App. p. 39), Bias always had standing to pursue his "purely" post-confirmation legal claim without the court's approval. Fifth Circuit's finding that "when the plan or order confirming the plan provides that the property of the estate revests in the debtor at confirmation, only those

property interests existing at confirmation revest in the debtor", *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, No. 12-2202, 2017 U.S. Dist. LEXIS 147933, at *9 (E.D. La. Sep. 13, 2017) (quoting *In re Wetzel*, 381 B.R. 247, 254 (Bankr. E.D. Wis. 2008)) is also misplaced because this logic is a holdover from 11 U.S.C. 1141, which is inapplicable to Chapter 13 bankruptcies.

Comparing the effects of confirmation between a Chapter 11 and Chapter 13 bankruptcy, it is clear that the language is different. Chapter 11 bankruptcies speak to property dealt with at confirmation while Chapter 13 bankruptcies do not. *Cf.* 11 U.S.C. 1141(b) and (c) verses 11 U.S.C. 1327(b) and (c). Certainly, if Congress intended that only the property interests existing at confirmation would vest in a Chapter 13 debtor upon confirmation, it could have easily copied and pasted the language from 1141(c) into 1327(c); it did not.

The word "all" means all. Section 1306 defines property of the estate as "*all* property of the kind specified in [section 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted." 11 U.S.C. 1306(a)(1) (emphasis added). If a post-confirmation legal claim is property of the estate, then that property—by law—must vest in the debtor upon confirmation, unless ordered otherwise by the bankruptcy court. 11 U.S.C. 1327(b). Anything less would not give full effect to 11 U.S.C. 1327(b).

Unfortunately, the Courts have sewn confusion into the relationship between sections 1306 and 1327 when, arguably, none exist. "It may [**7] be uncertain whether a debtor must disclose assets post-*confirmation*. That uncertainty arises from two provisions in the Bankruptcy Code, one suggesting that post-confirmation causes of action are property of the estate and the other hinting that such property is vested in the debtor." *Flugence*, 738 F.3d at 129. Acting in consonance, these sections serve to give full effect to the stay implemented by 11 U.S.C. 362. Section 1306 defines property of the estate while section 1327 removes property of the estate from the reach of creditors for any claims that arose before the commencement of the case under Title 11. 11 U.S.C. 362(a)(3).

In and of themselves, these sections do not dictate post-confirmation disclosure requirements, but rather, depend on the vesting structure of the plan to determine post-confirmation disclosure requirements. The bankruptcy court determines when vesting of estate occurs. 11 U.S.C. 1322(a)(9). As discussed above, if all property of the estate vests in the debtor upon confirmation of the plan, a debtor may pursue purely post-confirmation legal claims without court permission. If confirmation of the plan dictates that vesting of the property of the estate is to occur at some point after confirmation of the plan, a debtor lacks standing and must obtain court permission to pursue any

post-confirmation legal claims that arise prior to the indicated point when property vests in the debtor[2].

Fifth Circuit's precedent offends the First Amendment of the U.S. Constitution by contravening specific statutory provisions of the bankruptcy code and regulation and by arbitrarily depriving honest debtors standing to petition for redress of wrongs. "[This] Court has recognized the right to petition as one of the most precious of the liberties safeguarded [***23] by the Bill of Rights." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954-55 (2018) [*1955] (quoting *BE&K Constr. Co. v. NLRB*, 536 U. S. 516, 524, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002)) (internal quotation marks omitted).

d. Fifth Circuit's logic for modification of a confirmed plan is unsupported by law.

Another of the many gravamens of the Fifth Circuit's precedence is that the Circuit justifies invoking judicial estoppel because it presumes a confirmed plan can be modified simply because a debtor informs the bankruptcy court that events giving rise to a legal claim have occurred. Fifth Circuit reasoned that "Had the bankruptcy court known of [Bias's] FCA claim, it may have modified his plan to require Bias to increase his payments, shorten the payoff period, or pay

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[2] See *United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 274 (5th Cir. 2015) (citing *Flugence* 738 F.3d at 129-30) (holding that when a plan specifies the vesting structure the apparent inconsistency is of no consequence).

interest." *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, No. 17-30982, 2019 U.S. App. LEXIS 8725, at *10 (5th Cir. Mar. 22, 2019). This is legal fallacy because the law simply does not allow such a modification to increase payments, shorten the payoff period, or pay interest.

The modification of a confirmed plan is governed by 11 U.S.C. 1329. As part of the modification process, the proposed plan must be confirmed by meeting the requirements for confirmation as set forth in 11 U.S.C. 1325(a). 11 U.S.C. 1329(b)(1). In order to be confirmed, a debtor must be able to "make all payments under the plan and to comply with the plan". 11 U.S.C. 1325(a)(6). The mere existence of a legal cause of action does not, in and of itself, result in an increase in disposable income required to accommodate any increase in plan payment. Only when a legal claim is settled or reaches a judgement that results in an increase in income can a confirmed plan be legally modified to increase payments. Disposable income as defined by 11 U.S.C. 1325(b)(2) is a factor considered in the modification process under 11 U.S.C. 1329(c). "Although the disposable income test does not explicitly apply, courts have recognized that the debtor's changed income and expenses are factored into the bankruptcy court's good judgment and discretion. This approach allows the Court to take into account the essential components of the disposable income test while upholding the plain language of § 1329 that omits the test." *In re Wetzel*, 381 B.R. 247, 252 (Bankr. E.D. Wis. 2008) (internal quotes and citations omitted).

Compliance with Fifth Circuit's precedent would result in an absurd situation where a debtor's plan is modified to increase payments only to have the debtor fail to comply with the plan because no additional disposable income resulted from the legal cause of action. Not only would a bankruptcy court have to expend time and resources to consider the modification, but also if approved as Fifth Circuit holds is possible, would have to expend more time and court resources to hold another hearing to modify the newly modified confirmed plan in order to return it to its original status (where the debtor could meet plan payments) or take some other measure to comply with Fifth Circuit's intent. One court has considered such an action: "The Chapter 13 Trustee though, under 11 U.S.C. § 1302, does not have the power under § 704(a)(1) to 'reduce to money the property of the estate,' does not 'stand in the shoes of the debtor,' and is specifically restricted from exercising control of property of the estate under 11 U.S.C. § 1303, particularly when § 1327(b) is applicable and the post-confirmation property of the estate vests in the debtor at confirmation. So, although this Court follows the clear ruling of the 5th Circuit in *Flugence*, its practical application presents a problem in that it requires that a Standing Chapter 13 Trustee to act outside of the sphere of authority granted under § 1302. Nevertheless, the possibility of conversion in this particular case, discussed *infra*, would moot the implications of this distinction." *Henley v. Malouf (In re Roberts)*, 556 B.R. 266, 277 (Bankr. S.D. Miss. 2016). The goal should be to shape the precedent to the law; not the law to the precedent.

e. Bias's Bankruptcy Court got it right.

"We have long held that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421, 134 S. Ct. 1188, 1194-95 (2014) (quoting *Norwest Bank Worthington v. Ahlers*, 485 U.S. at 206). Presumably, the bankruptcy court recognizing that some debtors might not take the initiative to disclose income resulting from purely post-confirmation claim settlements or judgments, Bias's bankruptcy court took steps in advance to protect the estate by requiring Bias report increases in disposable income throughout the pendency of his bankruptcy. Fifth Circuit's finding that by the bankruptcy court's order " . . . further incentivized [Bias] to conceal his claim and prolong this litigation to avoid having to include it in his bankruptcy estate.", *Bias*, No. 17-30982, 2019 U.S. App. LEXIS 8725, at *10, is without merit unless one is to believe that the entirety of the bankruptcy law serves to incentivize debtors to conceal claims.

Under 11 U.S.C. 1329, a modified confirmed plan cannot extent payments beyond five years from the date of the initial payment under the original confirmed plan. 11 U.S.C. 1329(c). "(The modification section) does not give courts discretion to modify confirmed plans based on whatever considerations they deem appropriate. Rather, the statute exhaustively specifies the criteria that must be met in order that a confirmed plan be modified. The court takes a

legal action, labels it illegal, and then uses the illegal label to sanction debtors." *Law*, 571 U.S. at 423-24.

f. Fifth Circuit's precedent is based on inapplicable citations for this case.

Coastal Plains, cited as one of the foundational cases for establishing Fifth Circuit's precedent on judicial estoppel, involved a Chapter 13 debtor whose legal claim existed prior to plan confirmation—a pre-confirmation legal claim—but the claim was never disclosed to the bankruptcy court. "Essentially, *Superior Crewboats* holds that debtors cannot recover pre-petition personal injury claims if the debtors failed to disclose the cause(s) of action to their creditors during bankruptcy proceedings. *In re Superior Crewboats, Inc.*, 374 F.3d at 335 (applying judicial estoppel because 'omission of the personal injury claim from their mandatory bankruptcy filings is tantamount to a representation that no such claim existed.'") *Wells Fargo Bank, N.A. v. Jones*, 391 B.R. 577, 589 n.30 (E.D. La. 2008). Bias's claims arose more than a year after plan confirmation—a purely post-confirmation legal claim—and was not governed by the decision in *Coastal Plains*. Likewise, the post-confirmation legal claims in *Flugence* and *Allen* were rendered pre-confirmation legal claims when their confirmed plans were modified and had to undergo the confirmation process. *See Flugence*, 738 F.3d at 128 (original plan amended after claim arose but claim not disclosed and property of the estate did not revest in debtor upon confirmation) and *Allen*, 813 F.3d at 570 (original plan amended after claim arose

but claim not disclosed to bankruptcy court). Flugence and Allen were under a continuing statutory duty to disclose their pre-confirmation claims as a result of the confirmation process required for the modification of a confirmed plan. Bias was under no such duty.

While most of the cases cited by the Fifth Circuit were not on point with the facts of *Bias*[3] the only case with similar facts, *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1245 (11th Cir. 2008), was quoted out of context by the Fifth Circuit. In that case, the trustee was sued by the Waldrons because they did not believe their post-confirmation lawsuit was property of the estate and that the trustee could not, therefore, require them to amend their schedules to disclose any settlement from their lawsuit. *Waldron* did not, as the Fifth

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[3] *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011), *Spicer v. Westbrook*, 751 F.3d 354 (5th Cir. 2014), and *Kamont v. West*, 83 App'x 1 (5th Cir. 2003) were Chapter 7 cases where claims existed pre-confirmation but not disclosed. *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197 (5th Cir. 1999) and *Youngblood Grp. v. Lufkin Fed. Sav. & Loan Ass'n*, 931 F.Supp 859 (E.D. Tex. 1996) were Chapter 11 cases where claims existed pre-confirmation but were not disclosed. *United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265 (5th Cir. 2015) involved pre-confirmation claims and property of the estate did not revest in debtor upon confirmation. Chapter 13 cases Cited by Fifth Circuit involving undisclosed pre-confirmation claims include: *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598 (5th Cir. 2005); *Love v. Tyson Foods, Inc.*, 677 F.3d 258 (5th Cir. 2012); *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)* 374 F.3d 330 (5th Cir. 2004); and *In re Aycock*, No. 10-80516, 2014 Bankr. LEXIS 1051 (Bankr. W.D. La. Mar. 18, 2014).

Circuit suggests, stand for the proposition that Chapter 13 debtors are under a statutory free-standing duty to disclose post-confirmation claims because "The bankruptcy court is entitled to learn about a substantial asset that the court had not considered when it confirmed the debtors' plan." *Bias*, No. 17-30982, 2019 U.S. App. LEXIS 8725, at *8 (quoting *Waldron*, 536 F.3d at 1245). Rather, *Waldron* found that "the bankruptcy court has the discretion, under Rule 1009, to require a debtor to amend his schedule of assets to disclose a new property interest acquired after the confirmation of the debtor's plan." *Id.* at 1246. Importantly, this is precisely the requirement Bias's bankruptcy court imposed upon him when it properly used its discretion to require Bias to report changes to his disposable income. Bias was a victim of Fifth Circuit's statutory interpretation which started as an unexamined assumption on the basis of inapplicable citations and the claim of a dogma solely through reiteration.

g. Fifth Circuit affirmed the weighing of evidence in light most favorable to movant.

In *Tolan v. Cotton*, 572 U.S. 650, 134 S. Ct. 1861 (2014), this Court reversed the Fifth Circuit's affirmation of a summary judgment order issued by a lower court where the lower court failed to weigh evidence in light most favorable to the non-movant. This Court reminded the Fifth Circuit that "a judge's function at summary judgment is not to weigh the evidence and

determine the truth of the matter but to determine whether there is a genuine issue for trial. Summary judgment is appropriate only if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to [*657] judgment as a matter of law. [****11] Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence in the light most favorable to the opposing party." *Id.* at 656-57. It is questionable whether this occurred in this case. In fact, Fifth Circuit not only weighed evidence against Bias, but also considered evidence not in the record when it reasoned had the bankruptcy court known of the FCA claim it "may have modified his plan to require Bias to increase his payments, shorten the payoff period, or pay interest." *Bias*, No. 17-30982, 2019 U.S. App. LEXIS 8725, at *10. The defendant presented no evidence indicating it offered to settle Bias's claim, and Bias was estopped from pursuing the claim before it could reach judgment.

Bias presented the Fifth Circuit with a copy of his Order Confirming Plan (App. p. 39) as evidence that the bankruptcy court required him to report changes to his disposable income vice a requirement to report post-confirmation legal claims. Bias also argued he was under no statutory or regulatory mandate to disclose his post-confirmation claim. Bias informed the court he was aware that had his lawsuit resulted in income during the pendency of his bankruptcy, that increase in income was required to be reported to the bankruptcy court. Rather than weigh this evidence in favor of Bias as the non-movant, the Fifth Circuit not only affirmed the lower court's weighing of that

evidence in light most favorable to the movant, but also went on to mock the bankruptcy court by stating the bankruptcy court's order only served to further incentivize Bias to delay settlement of his retaliation lawsuit. *Id.* at *10. Whether a motion for summary judgment under Fed. Rule Civ. Proc. 56(a) or a motion for judgment on the pleadings under Fed. Rule Civ. Proc. 12(c), evidence must be weighed in light most favorable to the non-movant. In this case, the non-movant was Bias.

Finally, the Fifth Circuit conflates two distinct arguments—lack of knowledge of a duty to disclose and knowledge of no duty to disclose. Bias argued he had no duty to disclose his claim under Code, Regulation, or his confirmation order. Fifth Circuit read this to mean Bias was alleging he was confused about his disclosure requirements. See *Bias*, No. 17-30982, 2019 U.S. App. LEXIS 8725, at *9. The arguments are not the same. The former can be dismissed by precedent while the latter requires further analysis.

II. FIFTH CIRCUIT STANDARD FOR JUDICIAL ESTOPPEL CONTRAVENES BANKRUPTCY CODE AND REGULATION AND OFFENDS THE U.S. CONSTITUTION

a. Fifth Circuit precedent is overly broad and does not account for differences in Chapter 13 debtor rights in the purely post-confirmation context.

The standard announced by Fifth Circuit legally applies only to pre-confirmation, undisclosed claims

and post-confirmation undisclosed claims when a confirmed plan is modified, or the asset falls within the ambit of 541(a)(5), or property of the estate has not vested in the debtor when the claim arises. The standard's application is overly broad when applied to Chapter 13, purely post-confirmation claims.

During the confirmation process, all claims are treated the same and must be disclosed to the bankruptcy court in accordance with 11 U.S.C. 521. This duty is continuing and debtors are statutorily required to update any errors/omissions in their schedules. When a debtor modifies a confirmed plan or if property of the estate does not vest in the debtor, that debtor has no standing to pursue legal claims without court permission. A Chapter 13 debtor who does not modify his plan after property of the estate vests in him has standing to pursue legal claims without court permission. Fed. R. Bankr. P. 6009. "'Standing is a jurisdictional requirement, and [the court is] obliged to ensure it is satisfied. . . .' *Dynasty Oil & Gas, LLC v. Citizens Bank (In re United Operating, LLC)*, 540 F.3d 351, 354 (5th Cir. 2008) (addressing standing before *res judicata* and collateral estoppel on summary judgment motion in post-confirmation action by reorganized debtor)". *ASARCO, LLC v. Mont. Res., Inc.*, 514 B.R. 168, 179 (S.D. Tex. 2013). "Further, a plaintiff's standing, or lack thereof, can dispose of the res judicata and judicial estoppel issues raised by Defendants. *See Spicer v. Laguna Madre Oil & Gas II, LLC (In re Tex. Wyo. Drilling, Inc.)*, 647 F.3d 547, 553 (5th Cir. 2011) (no judicial estoppel because plaintiff had standing); *id.* (res judicata

does not apply where plaintiff has standing)." *ASARCO*, 514 B.R. at 179. Fifth Circuit's holding that "We have recognized that Chapter 13 debtors have a continuing obligation to disclose post-petition causes of action." (*Bias*, No. 17-30982, 2019 U.S. App. LEXIS 8725, at *6. (internal quotes omitted) is overly broad because it erroneously presumes all Chapter 13 debtors lack standing to pursue their post-confirmation claims without court permission. Fed. R. Bankr. P. 1009. Debtors standing to pursue post-confirmation claims is not by accident:

> There are practical reasons why the debtor alone should control, and be responsible for, litigation. If the standing [*11] chapter 13 trustee were the representative of the estate for litigation purposes it would impose a huge, additional administrative burden. After all, one cannot be a party to litigation without assuming responsibility for its prosecution. The trustee would have to investigate the existence of potential litigation, assess its merits, and make a cost benefit analysis of pursuing the claim. See *Gardner*, 218 B.R. at 342. If litigation was determined to be prudent, the trustee would have to select and retain counsel and might need expert witnesses and investigators. The trustee would incur expenses for filing fees, transcripts and other costs of litigation and would need to be involved in formulating litigation strategy, discovery and negotiating settlement. Eventually the trustee would be involved in trial and possibly appeal. Inevitably disputes

would arise between the trustee and the debtor concerning decisions made, and actions taken or not taken by the trustee. In this district each standing chapter 13 trustee has tens of thousands of active chapter 13 cases at any one time. Among those cases are dozens, if not hundreds, of causes of action. To require that the trustee be a party to all litigation on behalf [*12] of the chapter 13 estates would subject the trustee to an impossible responsibility.

From the debtor's point of view, it makes sense to leave the chapter 13 debtor in charge of litigation. Chapter 13 is a completely voluntary proceeding. A debtor cannot be forced into chapter 13, §§ 303(a) and 706(c), and has the right to forego a discharge and dismiss a case if he or she sees fit. § 1307(b). . . . Judge Lundin, citing *Wirmel*, stated that "[i]f the Chapter 13 debtor has the exclusive right to 'use' the lawsuit under §§ 1303 and 363, then the debtor should control all aspects of the litigation, including settlement." 1 Lundin, *Chapter 13 Bankruptcy* § 3.45, at 3-39. "The reality of a filing under Chapter 13 is that the debtors are the true representatives of the estate and should be given the broad latitude essential to control the progress of their case." *Freeman*, 72 B.R. at 854 (citations omitted). Thus, from the perspective of either the debtor or the trustee it makes sense to have the debtor be responsible for litigating causes of action that are property of the estate.

In re Leahey, No. 11-11906-ABA, 2017 Bankr. LEXIS 3274, at *10-12 (Bankr. D.N.J. Sep. 26, 2017) (quoting In re Bowker, 245 B.R. 192, 200 (Bankr. D.N.J. 2000). The intent of the bankruptcy laws was accomplished by having Bias disclose any income that might result from the post-confirmation claim.

b. Requiring all Chapter 13 debtors to disclose post-confirmation causes of action and/or ignoring the vesting structure of a plan changes the law.

Congress clearly intended that Chapter 13 debtors have standing to pursue post-confirmation legal claims as evidenced by 11 U.S.C. 1303 and Fed. R. Bankr. P. 6009. If property of the estate has not vested in the debtor, the debtor has no standing to pursue the claim until the bankruptcy court authorizes him to pursue the claim. If property of the estate has vested in the debtor, and the court has not ordered the debtor to disclose post-confirmation causes of action, the debtor has standing to pursue the claims without the court's permission. While the decision to invoke judicial estoppel is left to the court, that discretion does not include the authority to ignore the provisions of the law that do not fit the precedent. Courts must operate within the confines of the Bankruptcy Code. *Law*, 571 U.S. at 421. Allowing Fifth Circuit's standard to remain in effect deprives some debtors of statutorily provided standing to pursue post-confirmation legal claims and, and ultimately, their constitutional right to petition for redress; thereby, denying them their constitutional right

to due process before relieving them of their property interests in a legal claim.

c. The judicial estoppel inquiry should begin with standing analysis.

The trustee and debtor have very different rights in a Chapter 13 post-confirmation environment than they do in a pre-confirmation or Chapter 7 scenario. The Fifth Circuit's precedent, however, treats every post-confirmation claim as if it were a pre-confirmation claim or a Chapter 7 case, where a debtor lacks standing to pursue post-confirmation claims without the court's permission. The law is quite clear that this is not proper or intended, and forcing it upon the courts has led to conflicts in its practical application:

> The Chapter 13 Trustee though, under 11 U.S.C. § 1302, does not have the power under § 704(a)(1) to "reduce to money the property of the estate," does not "stand in the shoes of the debtor," and is specifically restricted from exercising control of property of the estate under 11 U.S.C. § 1303, particularly when § 1327(b) is applicable and the post-confirmation property of the estate vests in the debtor at confirmation. So, although this Court follows the clear ruling of the 5th Circuit in Flugence, its practical application presents a problem in that it requires that a Standing Chapter 13 Trustee to act outside of the sphere of authority granted under § 1302. Nevertheless, the possibility of conversion in this particular

> case, discussed infra, would moot the implications of this distinction.

Henley, *id.* at 277.

A "clearly inconsistent" position remains undefined in the bankruptcy context and there is no indication of what evidence might refute it. In *New Hampshire* this Court indicated that a litigant must take a "clearly inconsistent" position to justify the application of judicial estoppel but neither defined what that meant nor indicated what evidence might refute the conclusion that the position was clearly inconsistent. *Id.* at 750. If, in a bankruptcy context, a debtor complying with the laws, regulations, and court orders governing his specific disclosure requirements for post-confirmation legal claims is not enough to shift the scales of equity into his favor, what evidence would clear the hurdle should be clearly and easily identifiable since constitutional rights lay in the balance.

Because of Fifth Circuit's precedent that Chapter 13 debtors must report all post-confirmation claims, the judicial estoppel inquiry continues on to the nearly impossible to overcome inquiry of whether the debtor acted inadvertently because the Circuit considers the grant of a discharge to be the same as accepting that a debtor affirmatively indicated he had no such claim. The problem here is that the Fifth Circuit's definition of "inadvertence" does not give regard to a debtor's rights in the purely post-confirmation claim context.

In *New Hampshire* this Court indicated that judicial estoppel may not be appropriate when an inconsistent position is the result of inadvertence or mistake. *Id.* at 753. Of course, this presumes an inconsistent position was taken in the first place. Given the context of the words when taken together it appears that inadvertence carries its plain meaning—not focusing the mind on a matter; inattentive; unintentional. Merriam-Webster Dictionary. "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Caminetti v. United States*, 242 U.S. 470, 490, 37 S. Ct. 192, 196 (1917).

In the Fifth Circuit inadvertence exists "only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment." *United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 272 (5th Cir. 2015) (quoting *In re Coastal Plains*, 179 F.3d at 210). To show inadvertence in The Fifth Circuit a debtor "must show not that she was unaware that she had a duty to disclose her claims but that . . . she was unaware of the facts giving rise to them." *Jethroe*, 412 F.3d at 601. The Fifth Circuit requires a debtor to show no financial motive to conceal a claim, but the very nature of a bankruptcy renders this a near impossibility for most debtors, given the Fifth Circuit's erroneous understanding of the law and regulations. "No plaintiff who omitted civil claims from bankruptcy disclosures will be able to show that he acted inadvertently because, as we

explained above, the plaintiff always will have knowledge of his pending civil claim and a potential motive to conceal it due to the very nature of bankruptcy." *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1189 (11th Cir. 2017). Here again an honest debtor is caught in a catch-22. On the one hand he is not acting inadvertently because he is in compliance with the law, regulations, and court orders governing his disclosure requirements while on the other hand he risks losing his property interest in his legal claim because the Fifth Circuit requires that he acts inadvertently to avoid judicial estoppel.

This definition of inadvertent appears quite different from the plain meaning of the word "inadvertent". And, for some reason, the Fifth Circuit left out all consideration for mistakes. While this definition might work in a Chapter 7 case or a Chapter 13 case where the confirmed plan is modified, it does not fit in the "purely" post-confirmation claim context. The Eleventh Circuit recently remarked, "The Supreme Court has told us that judicial estoppel must not be applied to an inadvertent inconsistency, *New Hampshire*, 532 U.S. at 753, yet under our precedent inadvertence places no meaningful limit on the doctrine's application." *Slater*, 871 F.3d at 1189. Fifth Circuit overlooks the additional considerations which may inform the doctrine's application in the specific factual contexts of "purely" post-confirmation legal claims. Given the confusion between the law, regulation, and Fifth Circuit's standard it is quite difficult to see how an honest debtor could ever overcome the extraordinary burden arbitrarily

placed on him by the Fifth Circuit, or hope to find equity in what is supposed to be an equitable doctrine.

d. Fifth Circuit's precedent is strictly enforced and intent to deceive can be inferred from nondisclosure.

This Honorable Court advised that " . . . we do not establish inflexible [****19] prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts." *New Hampshire*, 532 U.S. at 751. However, courts in the Fifth Circuit have interpreted the Fifth Circuit's precedent as requiring strict enforcement. *See Long*, 798 F.3d at 270 (noting the Fifth Circuit's strict stance on judicial estoppel in the context of bankruptcy filings); *Elliott v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 889 F. Supp. 2d 857, 861 (E.D. La. 2012) (noting the Fifth Circuit reaffirmed its strict stance on judicial estoppel in the context of bankruptcy filings in *Love*, 677 F.3d 258); and *In re Watts*, No. 09-35864, 2012 Bankr. LEXIS 3694, at *24-25, (stating the Court is mindful of the strict standard that the Fifth Circuit has promulgated). If the Fifth Circuit does not employ a strict standard for judicial estoppel, its lower courts have not received that message.

The same can be said of intent to make a mockery of the legal system. Courts have held that judicial estoppel can be properly applied because Fifth Circuit's standard allows them to draw the inference of

intent to make a mockery of the judicial system unless the debtor can prove lack of knowledge of the facts leading to the claim and no motivation for the non-disclosure of a post-confirmation claim. The problem with this approach is that the Fifth Circuit has, perhaps by luck, reached the right decision in the case of pre-confirmation situations (including those Chapter 13, post-confirmation claims that become pre-confirmation claims upon modification of a confirmed plan) regardless of the Chapter bankruptcy. See *Casey v. Peco Foods, Inc.*, 297 B.R. 73, 78 (S.D. Miss. 2003) (finding because Chapter 7 debtor had knowledge of her claim and possessed motive to conceal it, the court could properly infer her intent to deceive, and "make a mockery of the judicial system); *In re Coastal Plains, Inc.*, 179 F.3d at 211 (finding that it was the combination of [**31] knowledge of the claim and motive for concealment in the face of an affirmative duty to disclose [that] gave rise to an inference of intent sufficient to satisfy the [bad faith] requirements of judicial estoppel). The logic does not withstand scrutiny in "purely" post-confirmation cases where there was no inconsistent position in the first instance because there was no "affirmative duty to disclose"; yet judicial estoppel is still applied to bar purely post-confirmation claims.

In reversing its precedent regarding the inference of intent in the judicial estoppel analysis, the Eleventh Circuit commented, "We hold that to determine whether a plaintiff's inconsistent statements were calculated to make a mockery of the judicial system, a court should look to all the facts and circumstances of

the particular case." *Slater*, 871 F.3d at 1185[4]. Judicial estoppel is supposed to be "an equitable doctrine invoked by a court at its discretion" for the purpose of "protect[ing] the integrity of the judicial process." *New Hampshire*, 532 U.S. 742, 749-50 (internal quotation marks omitted). Determining a debtor's standing to pursue claims as determined by law and regulation instead of precedent, should be the first step in the judicial estoppel analysis when post-confirmation claims are involved. And, judicial estoppel should not serve to bar claims when the debtor has complied with law, regulations, and his court order confirming his plan. To estop in these scenarios is to award an undue windfall to a defendant.

[4] It is important to note that even *Slater* frames its precedent for reversing inference of intent in the context of "when the plaintiff's inconsistent statement comes in the form of an omission in bankruptcy disclosures." *Id.* at 1185. This implies the entire analysis is irrelevant if no inconsistent position was taken because there was no requirement to disclose in the first instance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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