No. 25-6

In the Supreme Court of the United States

THOMAS KEATHLEY,

Petitioner,

v.

BUDDY AYERS CONSTRUCTION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

KRISTIN C. HOLLADAY
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020

ERIC J. LEWELLYN
ALDERS AND LEWELLYN PLLC
1331 Union Avenue
Suite 1000
Memphis, TN 38104

GREGORY G. GARRE
Counsel of Record
CHRISTINA R. GAY
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

INTRODUCTION

This petition presents an undeniably important and frequently recurring question: Whether the judicial-estoppel doctrine categorically bars a debtor who fails to disclose a civil claim in his bankruptcy filings from pursuing that claim based on the existence of a *potential* financial motive to mislead the bankruptcy court—which essentially always exists given the bankruptcy—without any consideration of whether the failure to disclose was an honest mistake. The circuits are openly divided on this question. It arises all the time. The minority rule epitomized by the Fifth Circuit decision below extinguishes potentially meritorious claims while giving an undeserved windfall to defendants wholly unrelated to the bankruptcy. And the issue was cleanly presented and outcome-determinative here. This is, in short, a textbook case for certiorari on an issue of great practical importance to everyday Americans.

Respondent does not dispute the importance of this question, and it has no serious response on the merits. Instead, respondent bases its opposition on two related propositions. First, that the Fifth Circuit actually employs a flexible approach to judicial estoppel that considers evidence of good faith before barring a debtor's claim. And second, that the circuits actually are aligned on the question presented. Both are patently false. As Judge Haynes explained below, the Fifth Circuit's "prior precedents" required barring Mr. Keathley from pursuing his personal injury claim against respondent, notwithstanding "evidence that Keathley's failure to disclose [his] claim on his bankruptcy schedules was an honest mistake." Pet.App.21a, 23a (concurring in the judgment). And,

as numerous courts and commentators have recognized, there is a direct circuit split on the issue.

Certiorari is warranted.

ARGUMENT

I. THE CONFLICT IS REAL

The conflict in this case is clear and widely acknowledged. In the Fifth and Tenth Circuits, the existence of a *hypothetical* motive to conceal a claim suffices to trigger judicial estoppel when a debtor fails to disclose the claim. Pet.17-20. His subjective intent—i.e., whether the nondisclosure was an honest mistake—is irrelevant. *Id.* at 17. In contrast, to ensure that judicial estoppel is not weaponized to penalize debtors for honest mistakes, the Eleventh, Ninth, Seventh, Sixth, and Fourth Circuits *require* courts to consider a debtor's subjective intent to mislead before barring his claim. *Id.* at 13-17.

In response, respondent evasively says (at 13, 18) there is no "fundamental" split. But the conflict is as clear as they come. Numerous courts of appeals have explicitly acknowledged—and taken sides on—the split.[1] Individual judges—including Judge Haynes

---

[1] *See, e.g.*, *Botelho v. Buscone (In re Buscone)*, 61 F.4th 10, 22 n.16 (1st Cir. 2023) (explaining that the Fifth and Tenth Circuits "consider[] an omission inadvertent only if the debtor neither knew about the claim nor had motive to conceal it," while others "call[] for the estoppel analysis to consider the circumstances of the omission and any explanations provided by the debtor"); *Martineau v. Wier*, 934 F.3d 385, 393-96 (4th Cir. 2019) (expressly declining to adopt the Fifth and Tenth Circuits' approach and agreeing with the Eleventh and Ninth Circuits' instead); *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1189 (11th Cir. 2017) (en banc) (noting that "a circuit split exists" on

below—have recognized the conflict.[2] And commentators have observed that whether a debtor-plaintiff's claim will be dismissed if the debtor fails to disclose it in bankruptcy filings "depend[s] on which jurisdiction she is in." William H. Burgess, *Dismissing Bankruptcy-Debtor Plaintiffs' Cases on Judicial Estoppel Grounds*, The Federal Lawyer 54 (May 2015), https://www.fedbar.org/wp-content/uploads/2015/05/feature7-may15-pdf-1.pdf.[3]

Respondent's arguments against a split are based on the premise (at 12-13) that every circuit—including the Fifth and Tenth—will "consider[] the totality of evidence bearing on intent" before barring an undisclosed claim. But that is demonstrably false. In the Fifth Circuit, a "motive to conceal" an undisclosed claim is enough to trigger judicial estoppel. Pet.App.13a-14a; *see* Pet.17-18 & n.1. And the Fifth Circuit "has made clear" that "'the motivation sub-element is almost always met,'" Pet.App.14a (citation omitted), because the court

---

the question presented); *Ah Quin v. County of Kauai Dep't of Transp.*, 733 F.3d 267, 277 (9th Cir. 2013) (consciously adopting a rule that "differ[s] from the test articulated by" other circuits).

[2] *See, e.g.*, Pet.App.22a (concurring in the judgment) ("Other circuits take a more holistic approach than [the Fifth Circuit]."); *Ah Quin*, 733 F.3d at 279-80 (9th Cir. 2013) (Bybee, J., dissenting) ("The majority's holding . . . is . . . contrary to the law of our sister circuits, as the majority admits.").

[3] *See also, e.g.,* Pet.20 (citing commentary); W. Homer Drake, Jr. et al., *Chapter 13: Practice and Procedure* § 16:7 (June 2025 update) (noting circuit split); Rebecca Rhym, Note, *Overcoming the Presumption of the Deceitful Debtor*, 39 Ga. St. U. L. Rev. 521, 532 (2023) (same); Mary Frances McKenna, Comment, *Stop Right There: Limiting Judicial Estoppel in the Bankruptcy Context*, 31 Emory Bankr. Dev. J. 465, 472-74 & n.64 (2015) (same).

considers "[a] motive to conceal" to be "'self-evident'" in the bankruptcy context, *Fornesa v. Fifth Third Mortg. Co.*, 897 F.3d 624, 628 (5th Cir. 2018) (citation omitted), *cert. denied*, 587 U.S. 1064 (2019); BIO.7 (conceding that a potential "[m]otivation in this context is 'self-evident'" (citation omitted)). Thus, as the decision below illustrates, if the debtor knew the facts underlying his claim and stood even "to *potentially* benefit by concealing [it]," dismissal follows. Pet.App.14a (emphasis added); *see id.* at 21a (Haynes, J., concurring in the judgment) (explaining that a "hypothetical motive was enough" to require dismissal under the Fifth Circuit's stringent rule).

Respondent recognized and embraced this very rule when he was urging the Fifth Circuit to follow its entrenched precedent on this issue and affirm the dismissal of Mr. Keathley's claim. Below, respondent argued that evidence of subjective intent "sheds no light" on the judicial-estoppel inquiry under Fifth Circuit precedent because "the test under [that] precedent focuses on whether Keathley had motive to conceal, not whether he actually concealed." Resp.CA5.Br.44; *see id.* at 36 n.7 ("The Fifth Circuit has consistently held that motive to conceal can be established by evidence of a *potential* financial benefit that *could* result from nondisclosure.").

Respondent now sings a different tune. But respondent was right below: "An 'unintentional' and/or 'in good faith' failure to disclose is not an 'inadvertent' failure to disclose under Fifth Circuit precedent." *Id.* at 18. Thus, the Fifth Circuit has deemed "irrelevant" evidence that a debtor "did not know that bankruptcy law required disclosure," *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 131 (5th Cir. 2013), and that a debtor "relied

on the advice of her attorney," *id.* at 130. If the Fifth Circuit truly "consider[ed] the totality of evidence bearing on intent," BIO.13, it would not reject that kind of probative evidence out of hand. By contrast, the circuits on the *other* side of the split routinely weigh this very evidence before barring a claim.[4]

Respondent essentially admits (at 3) that this case would warrant review if the Fifth Circuit "regarded the mere omission of an asset in a pending bankruptcy proceeding as conclusive on the issue of intent." But that is exactly how the Fifth Circuit's rule operates. The proof is in the pudding. Respondent fails to identify a *single* Fifth Circuit decision declining to apply judicial estoppel after a debtor failed to disclose a claim. *See* Pet.21 & n.3 (documenting the frequency with which the Fifth Circuit has considered judicial estoppel in the bankruptcy context). Nor did the decisions below. *See* Pet.28a-29a (district court noting that "plaintiff would have this court do something which, judging by his briefing, the Fifth Circuit itself has never actually done"—decline to apply judicial estoppel in this

---

[4] *See, e.g.*, *Slater*, 871 F.3d at 1185-86 (courts should consider whether a plaintiff "did not understand the disclosure obligations" and "told his bankruptcy attorney about the civil claims"); *Martineau*, 934 F.3d at 395 (judicial estoppel should not bar a claim if debtor "failed to disclose not deliberately but 'because [she] did not understand the disclosure obligations'" (alteration in original) (citation omitted)). Applying this precedent, courts have declined to invoke judicial estoppel even when debtors have failed to disclose claims. *See, e.g.*, *Ryder v. Lifestance Health Grp., Inc.*, No. 22-cv-2050, 2024 WL 1119821, at *4 (M.D. Fla. Feb. 12, 2024); *Brown v. Keystone Foods LLC*, No. 20-cv-01619, 2022 WL 2346376, at *3-4 (N.D. Ala. June 29, 2022); *Watson v. HomeBridge Fin. Servs., Inc.*, No. 20-2578, 2022 WL 125278, at *6 (D. Md. Jan. 12, 2022).

context). That silence confirms what other courts have explicitly recognized: In the Fifth Circuit, a debtor-plaintiff's chances of "escap[ing] estoppel" are all but "illusory." *Botelho v. Buscone (In re Buscone)*, 61 F.4th 10, 22 n.16 (1st Cir. 2023); *see Slater v. United States Steel Corp.*, 871 F.3d 1174, 1189 & n.18 (11th Cir. 2017) (en banc) (the Fifth and Tenth Circuits "have endorsed the inference that a plaintiff who omitted a claim *necessarily* intended to manipulate the judicial system" (emphasis added) (citing cases)).[5]

The decisions below confirm the Fifth Circuit's inflexible approach. The district court stressed that the Fifth Circuit's precedents are "inhospitable" to claims of "honest mistake." Pet.App.43a; *see id.* at 55a-56a. And the Fifth Circuit panel deemed Mr. Keathley's arguments that he did not intend to mislead the bankruptcy court "not relevant" under Fifth Circuit precedent. *Id.* at 13a (quoting *In re Flugence*, 738 F.3d at 130-31); *see* BIO.11 (acknowledging that Mr. Keathley's good-faith arguments were "not relevant to the inquiry"). All that mattered to the panel was that Mr. Keathley—

---

[5] Respondent points (at 6, 14) to *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 766 F. App'x 38 (5th Cir.), *cert. denied*, 140 S. Ct. 75 (2019). But an unpublished decision cannot change entrenched circuit precedent—sharply affirmed, again, in the decision below. And, in any event, *Tangipahoa* followed the same script as the Fifth Circuit's other precedential decisions: It approved barring a debtor-plaintiff from pursuing an undisclosed claim. *Id.* at 43-44. And it held that the debtor's arguments that he "was confused about the law and did not know that bankruptcy law required disclosure [were], according to [Fifth Circuit] precedents, irrelevant." *Id.* at 43 (citation omitted). A footnote in an unpublished opinion labeling that rigid approach "fact-specific," *id.* at 43 n.3, does not make it so.

like every other debtor—"stood to *potentially* benefit by concealing" his personal injury claim, an element the panel admitted is "'almost always met.'" Pet.App.14a. (emphasis added) (citation omitted). So, as Judge Haynes explained, the Fifth Circuit's "prior precedents" compelled dismissing Mr. Keathley's personal injury claim even though there was "evidence that Keathley's failure to disclose [it] on his bankruptcy schedules was an honest mistake." Pet.App.21a, 23a. In the Fifth Circuit, the existence of a *potential* motive to conceal is ball game.

Nor do debtor-plaintiffs fare any better in the Tenth Circuit. Pet.18-19. Contrary to respondent's suggestion (*see* BIO.12-13), the Tenth Circuit has held that "knowledge of [undisclosed] claims and a motive to conceal them" is enough to "infer deliberate manipulation" and bar relief, *Queen v. TA Operating, LLC*, 734 F.3d 1081, 1093 (10th Cir. 2013) (citation omitted). Indeed, the very Tenth Circuit case respondent cites (at 17-18) exposes the split here: It "decline[d]" to follow the Ninth Circuit's approach to the question presented and refused to "requir[e] courts to consider a debtor-plaintiff's subjective beliefs" before barring his claim. *Anderson v. Seven Falls Co.*, 696 F. App'x 341, 348 (10th Cir. 2017) (emphasis omitted). That rule cannot be squared with other circuits' holdings that "[w]ithout bad faith, there can be no judicial estoppel." *Martineau v. Wier*, 934 F.3d 385, 394 (4th Cir. 2019) (alteration in original) (citation omitted); *see also, e.g.*, *Slater*, 871 F.3d at 1187 ("When a plaintiff intended no deception, judicial estoppel may not be applied.").

In short, the conflict is clear—and fundamental.

II. REVIEW IS NEEDED

Respondent does not dispute the exceptional importance of the question presented. The question presented arises up to "several times each week in the federal and state courts." Pet.21 (citation omitted). And its consequences are anything but academic: As the district court in this case explained, the Fifth Circuit's "stringent approach" "no doubt[] result[s] in many debtors who did, in fact, make an honest mistake being barred from pursuing potentially meritorious tort claims." Pet.App.55a-56a.

Under the Fifth Circuit's rule, innocent debtor-plaintiffs like Mr. Keathley are permanently barred from pursuing claims that have nothing to do with their bankruptcy—no matter how meritorious the claims, and no matter how innocent their mistake in failing to disclose them to the bankruptcy court. The Fifth Circuit's rule thus has led to the permanent dismissal of a broad range of claims, including:

- Claims for personal injury
- Claims for sex discrimination
- Claims for pregnancy discrimination
- Claims for race discrimination
- Claims for violations of the Americans with Disabilities Act
- Claims for retaliation under the Family Medical Leave Act; and
- Claims for wrongful foreclosure

See Pet.22-23 (citing cases). The Fifth Circuit's rule sweeps in *any* type of undisclosed civil claim, and denies debtors redress for those claims even when the failure to disclose them was an honest mistake.

There are no obstacles to resolving this important question presented here. Respondent—which has no stake in the bankruptcy and which is simply trying to evade responsibility for the fact that its employee negligently struck Mr. Keathley's vehicle and injured him—tries (at 1, 15) to paint Mr. Keathley as a bad actor because he has undergone multiple bankruptcies. But the fact that Mr. Keathley has fallen on hard times does not make him a bad actor or serial manipulator of the courts. Millions of Americans have faced repeated financial hardship, and many have to file for bankruptcy more than once. There is nothing nefarious about that.

Indeed, Mr. Keathley promptly told his bankruptcy attorney about the accident and his potential claim; relied in good faith on his attorney to handle any necessary disclosures; and amended his bankruptcy filings soon after the omission was brought to his attention. Pet.7; *see* ROA.1217. A staff attorney for the bankruptcy trustee assigned to the case further confirmed that even if Mr. Keathley had notified the bankruptcy court of his personal injury claim "immediately after the wreck," "it would not have had any effect on the administration of the bankruptcy" or "the amount the Keathleys would have had to pay or the time they would have had to pay it." Pet.App.58a-60a. And once Mr. Keathley disclosed his personal injury claim to the bankruptcy court, no creditor moved to modify the Keathleys' repayment plan in light of that disclosure. Pet.7.

Put simply, this is not a case of gamesmanship or concealment; it is a case of an honest debtor facing difficult circumstances who did everything right—except trust his bankruptcy attorney to handle any necessary disclosures. Yet the Fifth Circuit's outlier

rule makes no room for that kind of good-faith mistake; the existence of a *potential* motive to mislead kills the claim. That rule handed an undeserved windfall to respondent—freeing it of any responsibility for the fact that its employee inflicted serious, long-term harms on Mr. Keathley. Pet.6. That is a decidedly *in*equitable result.

Having leaned heavily on the Fifth Circuit's extreme rule to secure dismissal of Mr. Keathley's claim below, respondent now surmises (at 15) that the outcome of this case would be the same under the rule in other circuits. That is nonsense. Indeed, Judge Haynes concurred separately to say that she "disagree[d] with the outcome [in this case] and would have dissented if we did not have prior precedents" requiring the harsh result. Pet.App.23a. In other words, the split *is* outcome-determinative here.

In arguing otherwise, respondent disregards the evidence that would be considered under the holistic approach applied in other circuits. BIO.14-15. For instance, respondent never addresses that "[Mr. Keathley] told his bankruptcy attorney about the civil claim[]," that the bankruptcy court took no action against him "after [his failure to disclose] was discovered," *Slater*, 871 F.3d at 1185, and so on. None of that matters under the Fifth Circuit's rigid rule.

In any event, respondent's unpersuasive attempt to show that it would win under the majority rule is beside the point. How this case would come out under the proper standard is a question for remand, not an obstacle to this Court's review of the question presented. If this Court were to hold that courts must evaluate evidence of actual intent—and find subjective bad faith—before invoking judicial estoppel to bar a claim, the normal course would be

for this Court to remand for the lower courts to apply the correct standard in the first instance. This Court does that all the time. *See, e.g.*, *Cantero v. Bank of Am., N.A.*, 602 U.S. 205, 221 (2024). This practice by no means presents a barrier to certiorari on the purely legal, threshold question presented.

Finally, it is notable that respondent offers no serious defense of the Fifth Circuit's extreme position on the merits. The Fifth Circuit's outlier rule contorts principles of judicial estoppel and bankruptcy law, and unjustifiably grants a windfall to wrongdoers with no stake in the bankruptcy. Pet.26-29. Honest individuals like Mr. Keathley should not be denied their day in court on civil claims—whether for personal injuries, a violation of civil rights, or some other harm—based on good-faith mistakes.

* * *

The Fifth Circuit's outlier rule is extinguishing potentially valid claims held by everyday Americans who are battling financial hardship and handing a windfall to wrongdoers. This Court's intervention is warranted to resolve the conflict on this important and frequently recurring question and to eliminate the Fifth Circuit's patently inequitable rule.

CONCLUSION

The petition should be granted.

Respectfully submitted,

KRISTIN C. HOLLADAY
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020

ERIC J. LEWELLYN
ALDERS AND LEWELLYN PLLC
1331 Union Avenue
Suite 1000
Memphis, TN 38104

GREGORY G. GARRE
Counsel of Record
CHRISTINA R. GAY
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

September 16, 2025