No. 25-6

IN THE

Supreme Court of the United States

THOMAS KEATHLEY,

Petitioner,

v.

BUDDY AYERS CONSTRUCTION, INCORPORATED,

Respondent.

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

AMICI CURIAE BRIEF OF THE HONORABLE MELANIE CYGANOWSKI (RET.), JOAN FEENEY (RET.), JUDITH FITZGERALD (RET.), BRUCE MARKELL (RET.), EUGENE WEDOFF (RET.), AND PROFESSOR ROBERT M. LAWLESS IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are former U.S. Bankruptcy judges Melanie Cyganowski, Joan Feeney, Judith Fitzgerald, Bruce Markell and Eugene Wedoff. Amici have decades of judicial service and have presided over hundreds of bankruptcy cases involving both individual debtors, corporate debtors, and matters arising in Chapter 7, 11 and 13 of the U.S. Bankruptcy Code. Judges Wedoff and Markell were among the fifteen experts who formed the Commission on Consumer Bankruptcy Law, and ultimately published the FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY (2017-2019).[2]

Amici curiae include Professor Robert M. Lawless, the Max L. Rose Professor of Law at the University of Illinois College of Law, and a nationally recognized expert in bankruptcy law, consumer finance, and empirical studies. Professor Lawless served as the Reporter for the ABI Commission on Consumer Bankruptcy, and played a pivotal role in shaping its findings, including those on judicial estoppel. He has testified before Congress on consumer protection and bankruptcy reform. He is a co-author of the recently published DEBT'S GRIP.[3]

1. Pursuant to Sup. Ct. Rule 37, no counsel for a party authored the brief in whole or in part, and no such counsel made a monetary contribution intended to fund the preparation or submission of this brief.

2. ABI Announces Commission on Consumer Bankruptcy, March 13, 2017. https://www.abi.org/newsroom/press-releases/abi-announces-commission-on-consumer-bankruptcy.

3. Pamela Foohey, Robert M. Lawless, and Deborah Thorne, DEBT'S GRIP: RISK AND CONSUMER BANKRUPTCY (2025).

Amici support the petition for certiorari. Their interest arises from the belief that the ruling by the Fifth Circuit below concerning the application of judicial estoppel is harmful to the bankruptcy system, unfair to both debtors and creditors, inconsistent with the federal standard of judicial estoppel, and contrary to the Code provisions and customs that govern Chapter 13 bankruptcy cases.

Amici urge this Court to consider the Final Report of the ABI Commission on Consumer Bankruptcy.[4] The ABI Commission Report was a multi-year study by the leading judges and scholars in the bankruptcy community, including Professor Lawless and former Judges Wedoff and Markell. The Commission Report rejected a mechanical approach to judicial estoppel and recommended a standard consistent with the "totality of the circumstances" as set forth in *Slater v. United States Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017). The Commission Report stated that a "debtor's failure to disclose a cause of action is not alone grounds to apply judicial estoppel," and that a court should consider the "totality of the circumstances." ABI Comm. Rpt., 26. "The relevant inquiry should be about the debtor's intent toward other parties. . . ." *Id.* at 28.

The outcome of this case is important to a large number of people. "Over a million households filed bankruptcy every year through the early 2010s."[5] For the

4. Final Report of the abi commission on Consumer Bankruptcy (2017-2019). The report is available at https://consumercommission.abi.org/.

5. Pamela Foohey, Robert M. Lawless, Deborah Thorne, Debt's Grip: Risk and Consumer Bankruptcy, Univ. of Cal. 2025 p.9.

last decade filings were around 750,000 per year.[6] Amici submit that unless reversed by this Court, the Fifth Circuit's decision will create an unjustified forfeiture of assets for Chapter 13 debtors, and an unjustified windfall for defendants who may evade liability for wrongful acts. No valid purpose is served by such an outcome.

INTRODUCTION

The question presented in this appeal is whether the doctrine of judicial estoppel can be invoked to bar a plaintiff who fails to disclose a civil claim in a bankruptcy proceeding from later pursuing that claim based only on a showing of a *potential* motive for the nondisclosure, regardless of whether there is evidence that the debtor in fact acted in bad faith. Pet. i.

The answer is no. Judicial estoppel cannot be predicated on a *potential* showing of a motive for the non-disclosure. The correct legal standard for judicial estoppel is set forth by this Court in *New Hampshire v. Maine*, 532 U.S. 742 (2011) which recognizes that inadvertence or an honest mistake precludes the application of judicial estoppel. "We do not question that it may be appropriate to resist the application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.'" *Id*. at 752. "[J]udicial estopped forbids use of *intentional* self-contradiction … as a means of obtaining an unfair advantage." *Id*. at 751 (emphasis added).

The Respondent argues that "[t]he Fifth Circuit 'faithfully adhered to *New Hampshire's* equitable approach to the doctrine of judicial estoppel.'" (Opp. Br.

6. *Id*.

18). It did not. The Fifth Circuit's decision is inconsistent with this Court's ruling in *New Hampshire*.

New Hampshire held that judicial estoppel was *not appropriate* where there was a showing of inadvertence or mistake. The Fifth Circuit held to the contrary, stating that inadvertence could be assumed based on only a *potential* benefit to the debtor from the initial nondisclosure. "[T]he Fifth Circuit has made it clear that judicial estoppel 'almost always' applies when a plaintiff fails to disclose a tort claim," further characterizing this as a "strong presumption in favor of intent" and that "it will generally be impossible for any factfinder" to find lack of intent. Pet. App. 28a-30a. As the district court noted, "The Fifth Circuit's use of the 'almost always' language … suggests that something approaching *an absolute presumption of intent* exists" when the debtor does not disclose a lawsuit. Pet. App. 30a (emphasis added). Thus, once a nondisclosure occurs, the debtor "will not simply be allowed to plead an honest mistake and file an amended disclosure." Pet. App. 41a.

This "strong presumption" is essentially a "*per se*" rule that nondisclosure will result in forfeiture of a claim, even if corrected later and in time for creditors to seek any needed recourse. This harsh rule thus reads the requirement to show intentional nondisclosure out of the core holding of *New Hampshire*. In so doing, the Fifth Circuit decision contradicts *New Hampshire*, is inconsistent with the majority rule from other circuits, and is detrimental to bankruptcy practice and its foundational concepts.

Judge Haynes, who concurred in the judgment only, disagreed with the panel majority, stating, "I doubt that the goals of the doctrine have been advanced," (Pet. App. 21a) that preventing Mr. Keathley's assertion of his claims would "undermine the judicial system the doctrine claims to protect," (Pet. App. 21a) and that the summary judgment applying judicial estoppel failed to cite to any evidence of an actual financial benefit to the Petitioner, arguing instead it was "self-evident." Pet. App. 21a.

Amici agree with the Petitioner and respectfully ask this Court to reverse the decision of the Fifth Circuit.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. and Mrs. Keathley filed for relief under Chapter 13 of the U.S. Bankruptcy Code in December 2019. Pet. 6. The bankruptcy petition on official form 106E/F identified two priority unsecured creditors, the Arkansas Department of Finance and Administration ($15,500) and the Internal Revenue Service, ($8,554). ECF 1, pp. 20-21.[7] The Keathleys listed no other unsecured claims *Id.*[8]

The Chapter 13 trustee for the Eastern and Western District of Arkansas was Mark McCarty, appointed by the U.S. Trustee, who among other duties, advises and assists debtors in their performance under the plan. *See* 11 U.S.C. § 1302. Mr. McCarty appeared and made various

7. All references to "ECF" pertain to the Keathleys' bankruptcy case filed in the eastern district of Arkansas, Case no. 2:19-bk-16848, except when otherwise indicated.

8. Two smaller unsecured claims were later listed. *See* ECF 108, p. 2, showing Aaron's rental (no amount) and Southeastern Emergency Physicians for $104.

objections throughout the case. Mr. Keathley retained Mr. Bart Ziegenhorn, a lawyer in a two-person local Arkansas firm, who has a general practice including civil litigation, and bankruptcy.[9]

The Keathleys filed a Chapter 13 plan within 14 days of their filing. The plan provided for 100% payment to those creditors holding claims that arose pre-bankruptcy. Pet. 6, App 22a. The plan required the Keathleys to devote [all] of their disposable income to the payment of creditors over a five year period. The plan did not require payment of interest, in keeping with the general bankruptcy rule that claims for "unmatured interest" are not "allowed" claims. 11 U.S.C. § 502(b)(2). Priority creditors are entitled to the "full payment" of their claims, a phrase which does not include "interest." 11 U.S.C. § 1322(a)(2).

On August 23, 2021, Mr. Keathley suffered serious injuries when he was struck by a truck driven by David Fowler an employee of respondent, Buddy Ayers Construction, Inc. His injuries permanently reduced his earning capacity. Pet. 6. Mr. Keathley informed his bankruptcy counsel of the accident a few weeks later. Aff. of Thomas Keathley, ECF 154-2.

In December 2021 Mr. Keathley filed a personal injury claim in the United States District Court for the Northern District of Mississippi. Mr. Keathley's bankruptcy counsel did not initially inform the bankruptcy court of this claim, but stated later that even if the bankruptcy court had been aware of Mr. Keathley's personal injury claims at the time it confirmed the amended plan, the claim would have had no material effect on the Court's confirmation of the plan. Aff. of Bart Ziegenhorn, ECF 154-1.

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9. *See* https://www.szblaw.com/attorneys/bart-e-ziegenhorn/.

In March 2023, respondent moved for summary judgment in the district court, relying on judicial estoppel, and asked the court to bar Mr. Keathley from pursuing his claim, because it had not been listed on the bankruptcy schedules.

On April 4, 2023, the Keathleys filed amended schedules which listed the pending suit. Pet. App. 4a. ECF 66, p.6. Neither the Chapter 13 trustee, nor any creditor moved to modify the amount or nature of the plan's payment obligations. The bankruptcy court made no finding whatsoever to suggest that the amendment was improper or even untimely. ("[T]he sanction inquiry should belong to the bankruptcy court.") Pet. App. 23a (Haynes, J., concurring).

In August 2023, the district court granted respondent's summary judgment motion and dismissed the action, based on judicial estoppel. The district court cited with approval *Love v. Tyson Foods, Inc.*, 677 F.3d 258 (5th Cir. 2012), holding that "the motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court. Motivation in this context is self-evident because of *potential* financial benefit resulting from the nondisclosure." Pet. App. 44a. (emphasis added).

Mr. Keathley then moved under Rule 59(e) to amend the judgment. Mr. Keathley supported the motion with an affidavit from Ms. Kellie M. Emerson, a staff attorney for the Office of the Chapter 13 trustee. Pet. App. 58a. The affidavit stated that "[i]n the Eastern District of Arkansas it is not unusual for post-petition injury claims to be disclosed shortly before the settlement or resolution of the personal injury action." The district court viewed the affidavit as evidencing that there is "apparently a longstanding [practice] in the Eastern District of Arkansas." Pet. App. 25a.

The district court denied the motion to amend the judgment. *Keathley v. Buddy Ayers Construction, Inc.*, 706 F. Supp. 3d 628 (N.D. Miss., 2023). Pet. App. 24a. "In so stating, this court notes that a crucial factor in deciding judicial estoppel issues in the Fifth Circuit is whether a debtor can be *inferred* to have acted *intentionally* in failing to list a tort claim as an asset of the bankruptcy case. . . . [T]he Fifth Circuit's *stringent* judicial estoppel jurisprudence means that a debtor who fails to disclose a tort claim is '*almost always*' inferred to have acted with intent." Pet. App. 25a. (emphasis in original except for "inferred"). The phrase "almost always" was repeated (Pet. App. 29a) and characterized by the district court as a "strong presumption" of intent. Pet. App. 30a.

The Fifth Circuit affirmed the decision of the district court. 2025 WL 673434 (2025). Pet. App. 1a. "Thus, we agree with the district court that Keathley stood to potentially benefit by concealing his personal injury case from the bankruptcy court. "[T]he motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court." (citing *Love*, 677 F.3d at 262.) Pet. App. 14a.

Judge Haynes concurred in the result, but criticized the application of the doctrine in this context. Pet. App. 20a. "Here there was evidence that Keathley's failure to disclose the personal injury was an *honest mistake*." *Id.* (emphasis added). "Without citing to any evidence of an actual financial benefit that Keathley experienced, the defendant argued that his motive for concealment was 'self-evident' under Fifth Circuit precedent.'" *Id.* "This *hypothetical motive* was enough; the district court granted the motion, citing this circuit's 'stringent application of the judicial estoppel rules.'" Pet. App. 21a.

This Court granted certiorari on October 20, 2025.

SUMMARY OF ARGUMENT

First, the Fifth Circuit's ruling is inconsistent with this Court's ruling in *New Hampshire v. Maine* and is contradicted by other authorities. Contrary to *New Hampshire*, the Fifth Circuit held that judicial estoppel may be applied to bar a claim not disclosed in a prior bankruptcy case based solely on the debtor's knowledge of the claim and the *potential* possibility of a benefit from the omission. The rationale of this decision has been squarely rejected in other circuits. *See*, *e.g.*, *Slater v. United States Steel Corp.*, 871 F.3d 1174 (11th Cir). The decision amounts to a "mechanical" application, an inference of lack of inadvertence, and is contrary to the recommendations of the ABI Commission Report on the correct standard for judicial estoppel—consideration of the "totality of the circumstances" and the debtor's intent: "the relevant inquiry should be about the debtor's intent toward other parties." ABI Comm. Rpt. 28.

Second, the Fifth Circuit decision is in contravention of the nature and practices of a Chapter 13 bankruptcy case, as well as the relevant factors that should be considered as set forth in the ABI Commission Report. These include whether the debtor informed counsel, whether the omission was corrected, and whether the bankruptcy court took any action after the omission was discovered. Tellingly, the standing Chapter 13 trustee and his staff attorney, who worked closely with the Keathleys perceived no wrongful intent and sought no change in the Keathleys' plan after the omission was corrected.

Third, because the Fifth Circuit decision results in forfeiture by Chapter 13 debtors of civil claims, it diminishes the value of the "fresh start" goal of bankruptcy, by depriving debtors of the ability to recover for torts, contract claims and other wrongs, based on an inadvertent failure to schedule such claims initially. The defendants in the civil action were not parties to the bankruptcy and now seek to benefit, having suffered no prejudice from a filing that had only contestable relevance to the bankruptcy estate. The decision harms the bankruptcy estate, diminishes returns to creditors, encourages gamesmanship and gives an inequitable windfall to a wrongdoer.

LEGAL ARGUMENT

I. The Fifth Circuit's decision is inconsistent with the federal standard for invoking judicial estoppel that this Court set out in *New Hampshire v. Maine*, and it fails to follow both the majority of circuit court decisions and the recommendation of a significant report on consumer bankruptcy law.

A. The Fifth Circuit's decision contravenes this Court's holding in *New Hampshire v. Maine.*

The standard for judicial estoppel was set forth by this Court in *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895): "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter … assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

The purpose of the doctrine is to "protect the integrity of the judicial process," and "to prevent the perversions of the judicial process." *New Hampshire,* 532 U.S. at 743. At the core of the rule is the notion that the nondisclosure must be done "deliberately." *Id.* at 750, quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993). There must be "intentional self-contradiction … as a means of obtaining unfair advantage." *Id*. at 751. The Court acknowledged that judicial estoppel should not be applied "when a party's prior position was based on inadvertence or mistake." *Id.* at 753.

The decision of the Fifth Circuit is at odds with *New Hampshire* and the ABI Commission Report. The Fifth Circuit, instead, relied upon an inference of lack of inadvertence based only upon a showing of "potential" financial gain, even if such gain is "hypothetical" or utterly speculative. "[I]n considering judicial estoppel *for bankruptcy cases*, the debtor's failure to satisfy its statutory disclosure duty is *inadvertent only* when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." Pet. App. 13a (emphasis added) (citing *In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999)).

Further, the Fifth Circuit gives short shrift to the "motive" element, declaring "the *controlling inquiry*, with respect to inadvertence, is the knowing of facts giving rise to inconsistent positions." Pet. App. 13a (citing *In re Flugence*, 738 F.3d 126. 130-31, (5th Cir. 2013) (emphasis added). "[T]he motivation sub-element is *almost always* met if a debtor fails to disclose a claim or possible claim to the bankruptcy court." Pet. App. 14a.

In applying this strict test, the Fifth Circuit held that Mr. Keathley "stood to *potentially benefit* by concealing his personal injury case from the bankruptcy court." Pet. App. 14a. The Fifth Circuit concluded "Keathley *cannot* show that his failure to disclose his personal injury lawsuit was inadvertent." *Id*.

The Fifth Circuit has characterized this test as an "inference" and acknowledged that the result is that it "almost always" results in a finding of lack of inadvertence, based on a "potential" or speculative benefit. The district court referred to this rule as "establishing such a strong presumption in favor of intent," Pet. App. 30a, and in so doing effectively eliminates "mistake or inadvertence" as reasons not to apply judicial estoppel and is contrary to the basic principle that the burden of showing the elements of judicial estoppel is on the proponent. *See, e.g.*, *Gibson Found, Inc., v. Norris*, No. 24-1763, 2025 WL 3240367, at * 4 (1st Cir. Nov. 20, 2025).

B. The Fifth Circuit's decision conflicts with the majority rule followed in other circuits, including the Eleventh Circuit's decision in *Slater v. United States Steel.*

Slater v. United States Steel, 871 F.3d 1174 (11th Cir. 2017)—a decision on rehearing by the full circuit court—illustrates the correct analysis applying judicial estoppel in the context of a Chapter 13 case nearly identical to the Keathley's.

As in the present case, the question presented in *Slater* was how a court should apply the doctrine of judicial estoppel when a debtor has failed to include a civil law suit in the debtor's bankruptcy schedules. The Eleventh Circuit held that there must be a showing that "the party took an inconsistent position under oath in a separate proceeding and (2) these inconsistent positions were intended to make a mockery of the judicial system." "Judicial estoppel should not be applied when the inconsistent positions were of "inadvertence[] or mistake." *Id*. at 1181, quoting *New Hampshire,* 532 U.S. at 753.

Prior to the rehearing decision, the standard in the Eleventh Circuit mostly mirrored the rule by the Fifth Circuit—namely, that "the mere fact of the plaintiff's nondisclosure is sufficient, even if the plaintiff corrected his bankruptcy disclosures after the omission was called to his attention and the bankruptcy court allowed the correction without penalty." 871 F.3d at 1176.

On rehearing, the Eleventh Circuit, *en banc,* rejected the approach used by the Fifth Circuit. The court held that even if the plaintiff acted voluntarily, in the sense that he knew of his civil claim when completing the disclosure forms, "voluntariness alone does not establish a calculated attempt to undermine the judicial process." *Id*. at 1177.

Instead of a *per se* rule, much like the Fifth Circuit used, it held that a district court could not *infer intent* to misuse the courts "without considering the individual plaintiff and the circumstances surrounding the nondisclosure." *Id*. at 1177 (emphasis added).

> 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. When the plaintiff's inconsistent statement comes in the form of an omission in bankruptcy disclosures, the court may consider such factors as the plaintiff's level of sophistication, whether and under what circumstance the plaintiff corrected the disclosures, whether the plaintiff told his bankruptcy attorney about the civil claims before filing the bankruptcy disclosures, whether the trustees or creditors were aware of the civil lawsuit or claims before the plaintiff amended the disclosure . . . *and any action by the bankruptcy court* after the omissions was discovered.

Id. at 1185 (emphasis added).

Slater focused on the inequitable result of a windfall from applying the doctrine. Focusing on the facts and circumstances, "reduces the likelihood that an otherwise liable civil defendant will receive an unjustified windfall or that innocent creditors will be harmed." 871 F.3d at 1187. Otherwise, when a district court applies the doctrine, "the civil defendant avoids liability on an otherwise potentially meritorious civil claim while providing no benefit to the court system. As an equitable doctrine, judicial estoppel should apply only when the plaintiff's conduct is egregious enough that the situation 'demands equitable intervention.'" *Id.* at 1187. "If a court applies judicial estoppel to bar the plaintiff's claim absent such intent, it awards the civil defendant an unjustified windfall." *Id.* at 1187. "[E]quity cannot condone a defendant's avoidance of liability through a doctrine premised upon intentional misconduct without establishing such misconduct." *Id.* at 1188.

In addition to the windfall concern is the harm to other creditors. "The application of judicial estoppel poses a potential risk of harm to innocent creditors. When a civil claim is dismissed on the basis of judicial estoppel, the asset becomes worthless—losing any potential to increase the value of the bankruptcy estate, which in turn harms creditors." *Id*. at 1188.

"Because the application of judicial estoppel may harm innocent creditors, equitable principles dictate that courts proceed with care and consider all the relevant circumstances." *Id*. at 1188. "[The inference that] a plaintiff who omitted a civil claim as an asset in bankruptcy filings necessarily intended to make a mockery of the judicial system . . . 'guarantees the very mockery of justice the doctrine of judicial estoppel was designed to avoid.'" *Id.* at 1178–79 (citation omitted).

C. The Fifth Circuit decision fails to consider the recommendations of the Final Report of the ABI Commission on Consumer Bankruptcy.

In 2019, the American Bankruptcy Institute published the results of a multi-year study on consumer bankruptcy law. Final Report of the abi commission on Consumer Bankruptcy (2017-2019). Professors Lawless, Wedoff and Markell, your amici, among others, served on the Commission. The Fifth Circuit's decision is inconsistent with the recommendations of the Commission.

To launch the project, the ABI convened an exploratory committee composed of bankruptcy professionals representing all major constituencies affected by bankruptcy, who would work toward consensus rather than seeing their roles primarily as advocates for an interest group. *See generally*, ABI Comm. Rpt. vii-viii. The Commission was composed of all constituencies in the bankruptcy community, debtor's lawyers, creditor's lawyers, trustees, retired judges. Ultimately, the goal of the Commission was to recommend improvements to the bankruptcy law. The judicial estoppel recommendation came out of that conversation.

The ABI Commission expressed concern that some circuits have adopted rules of judicial estoppel which are inconsistent with *New Hampshire*. ABI Comm. Rpt. 28. ("The Commission is concerned that the doctrine has been applied mechanically in a way that is not faithful to the Supreme Court's directive in *Maine v. New Hampshire,* as well as the doctrine's roots.") The Commission Report cited the Fifth Circuit's decision in *In re Coastal Plains, Inc.,* 179 F.3d 197, 210 (5th Cir. 1999) as evidencing the mechanical and disfavored "bright line" approach—a case which was followed by *Love v. Tyson Foods, Inc.* 677 F.3d 258 (5th Cir. 2012), which in turn was a principal case for the decisions below.

The Commission Report contained a section focused specifically on judicial estoppel. *Id.* at 26. The Commission concluded that in "deciding whether to apply judicial estoppel, courts should consider the totality of the circumstances. In this respect, the Commission's recommendation is consistent with the Eleventh Circuit's approach in *Slater*." *Id.* at 28-29.

It recommended that the courts should use a "restrained" use of the doctrine which examines the "totality of the circumstances." While *Slater* focused on whether the debtor's action made a "mockery of justice," the Commission's "preferred formulation" is that "judicial estoppel should apply when the debtor would gain an unfair advantage." *Id*. at 28. "The relevant inquiry should be about the debtor's intent toward other parties, not the judicial system." *Id*.

The Commission stated that a "debtor's failure to disclose a cause of action is not alone grounds to apply judicial estoppel" and that a court should consider whether the debtor's failure led to an unfair advantage using a totality of the circumstances approach, that includes consideration of eleven factors.

The Fifth Circuit doctrine embraces neither "intent" nor "unfair advantage" nor "impugning judicial integrity." It is a mechanical, if not rigid rule, that employs a "strong presumption" of intent disregarding the "totality of the circumstances" and is out of step with the goals and purpose of judicial estoppel.

II. The Fifth Circuit's application of judicial estoppel is inconsistent with governing provisions for a Chapter 13 bankruptcy case, as well as the standards and responsibilities assigned by Congress to the Chapter 13 trustee.

A. The Keathleys neither obtained an unfair advantage nor impugned the integrity of the judicial system.

The ABI Commission Report noted that "some of the problems with judicial estoppel have arisen through mechanical applications of the doctrine that do not appreciate the *context* of a consumer bankruptcy filing." ABI Comm. Rpt. 29 (emphasis added). Likewise, *New Hampshire* recognized that specific factual contexts may inform the applicability of the doctrine. 532 U.S. at 751. A determination that judicial estoppel is appropriate, or not, must be attentive to the legal and factual context of a Chapter 13 case. "We apply judicial estoppel against the backdrop of the bankruptcy system and the ends it seeks to achieve." Pet. App. 20a (Haynes, J., concurring) (citations omitted).

These judicial statements direct the courts to consider the specific context of a Chapter 13 case, as part of the "totality of the circumstances" test set forth in the ABI Commission Report (*see supra* at 26). Relevant factors include the complexity of the schedules, the significant role of the standing Chapter 13 trustee, the nature of the bankruptcy estate, the lack of any statutory duty to amend schedules, whether the debtor's lawyer was informed of the lawsuit, whether the omission was corrected, and whether the bankruptcy court took any action after the omission was discovered. The failure of the Fifth Circuit to apply or even consider these factors was reversible error.

A Chapter 13 bankruptcy is a "wage earner" case, that is designed to enable individuals with regular, often modest incomes, to pay all or part of their debts and in return, retain most of their property. *See Hamilton v. Lanning*, 560 U.S. 505 (2010) describing the general legal framework for a Chapter 13 case, noting that a Chapter 13 case "provides bankruptcy protection to individuals with regular income, whose debts fall within statutory limits . . . ." *See also Bullard v. Blue Hills Bank*, 575 U.S. 496, 498 (2015) ("Chapter 13 of the Bankruptcy Code affords individuals with regular income an opportunity to obtain some relief from their debts while retaining their property.").

A Chapter 13 case is commenced by the filing of a voluntary petition for individuals (Official Form 101), which includes Official Form 106E/F ("creditors who have unsecured claims"). These standardized forms consist of 46 highly detailed pages, including calculation of income and expense and the calculation of the "commitment period" during which the debtors are required to make payments to creditors. *See* Official Form 122C-1, ECF 1, p. 36. The Keathleys timely and properly filed their petition and the required Official forms on December 27, 2019. ECF 1.

These forms and schedules are complex and even with counsel, are frequently misunderstood. The ABI Commission Report "reflects the reality that a consumer faces before a bankruptcy filing. . . . Even with the aid of an attorney, a consumer has a huge task to assemble the information to complete these forms. Moreover, a consumer might not appreciate that a potential lawsuit is an asset in the same way as a house or bank account." *Id*. at 29.

Congress has enacted a statutory scheme providing for Chapter 13 trustees to deal with the complexity of the Chapter 13 process, and to assist the debtor. In *Siegel v. Fitzgerald*, 596 U.S. 464, 468 (2022) this Court described the historical development of the trustee program, and noted that Congress has relocated many of the former judicial responsibilities to the newly created trustees:

> Bankruptcy cases involve both traditional judicial responsibilities and extensive

> administrative ones. . . . Concerned that these dual roles were overloading bankruptcy judges and creating an appearance of bias, particularly because judges were responsible for supervising trustees that they themselves had appointed, Congress in 1978 piloted the United States Trustee Program (Trustee Program) in 18 of the 94 federal judicial districts. *See id.*, at 17–18; Bankruptcy Reform Act of 1978, 92 Stat. 2549. To "rende[r] the separation of administrative and judicial functions complete," the pilot program transferred the administrative functions previously handled by the bankruptcy courts to newly created U.S. Trustees, housed within the Department of Justice rather than the Administrative Office of the U.S. Courts. H. R. Rep. No. 95–595, p. 115 (1977).

Siegel v. Fitzgerald, 596 U.S. 464, 468 (2022).

The Second Circuit recently described the broad duties of the Chapter 13 trustee in *Soussis v. Macco (In re Soussis)*, 136 F. 4th 415, 420 (2d Cir. 2025). In short, Chapter 13 trustees have taken over many of the tasks formerly performed by bankruptcy judges: "Until 1978, bankruptcy judges handled both the judicial and administrative tasks … arising from a given case. . . . Under the current system, which was piloted in 1978 … a trustee is appointed to administer a Chapter 13 case."[10]

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10. "U.S. Trustees are appointed by the U.S. Attorney General to five-year terms. 28 U.S.C. § 581(b). Each U.S. Trustee is charged with administering the federal bankruptcy system in

> Chapter 13 trustees (whether standing, ad hoc, or a U.S. Trustee) perform many duties in Chapter 13 cases, including accounting for all property received from the debtor under the plan; investigating the debtor's financial affairs; examining proofs of claims filed by creditors; and objecting to those proofs on behalf of the debtor, if necessary. 11 U.S.C. § 704(a)(2), (a)(4)–(a)(5); *id.* § 1302(b)(1). The trustee must also oppose the debtor's discharge, if he deems opposition advisable, and must appear and be heard at any hearing that concerns confirmation or modification of a plan. *Id.* §§ 704(a)(6), 1302(b)(2). He assists the debtor with performing the plan; coordinates and disposes of the funds received or to be received in the case; and files a final report and accounting of the administration of the bankruptcy estate when it is ready to be closed. *Id.* §§ 704(a)(9), 1302(b)(3)–(4).

Soussis, 136 F.4th at 422. In sum, a bankruptcy trustee "is the principal administrator in a chapter 13 case." Senate Report No. 95-989, 95th Cong. 2d Sess. 139 (1978).

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one of twenty-one defined regions in the United States and its territories. *Id.* § 581(a). When the number of Chapter 13 cases in a region so warrants, the cognizant U.S. Trustee may appoint and will supervise one or more "standing trustees" to handle those cases. 28 U.S.C. § 586(b); *see* 1 Collier ¶ 6.01[2][c]. If the volume of cases does not warrant appointing a standing trustee, the U.S. Trustee may instead appoint a qualified individual to serve as trustee in each particular Chapter 13 matter (an "ad hoc" Chapter 13 trustee). 11 U.S.C. § 1302(a)." *Soussis*, 136 F.4th at 422.

In this case, the standing trustee for the Eastern and Western District of Arkansas, Mark McCarty, entered his appearance and was actively involved throughout the case. *See generally,* official docket for bankruptcy case 2:19-bk-16848. In addition, Mr. McCarty's office assigned a staff attorney from his office, Kellie Emerson to work with the Keathleys: "[Emerson] and Keathley have been in contact both directly and indirectly throughout the duration of the [Keathleys'] bankruptcy." Pet. App. 16a. The standing trustee was thus in a good position to evaluate, assist and monitor the Keathleys' compliance with their statutory duties. Their lack of any objection to the Keathleys' filing of their amended schedules is a reliable indicator that they perceived no improper intent or conduct.

The creditors.

The Keathleys' schedules listed two key creditors. The Arkansas Department of Finance filed a proof of claim stating its claim of $15,500 was a secured claim by virtue of having docketed its claim in state court. *See* ECF Claim 1-1, p. 2 and 8 dated January 7, 2020.[11]

The IRS filed a proof of claim on February 21, 2020, stating it had an unsecured priority claim of $1,823.82 for income taxes in 2014, and a general unsecured claim for income taxes for 2012 and 2013 in the amount of $6,732.99. *See* ECF Claim 3-1, p. 4.

After these two proofs of claim were filed, the Keathleys filed an amended plan on March 11, 2020. ECF

11. A holder of an allowed secured claim is only entitled to postpetition interest to the extent of the value of its collateral. The filing of the tort suit had no impact on collateral value.

27. On June 27, 2022 they filed an amended plan, ECF 61 as well as a "modified plan." ECF 62. The modified plan provided that allowed nonpriority unsecured claims "shall be paid in full (100%) and that they shall be paid "at least as much as they would receive if the debtor filed a chapter 7 case." ECF 62, p. 6. The modified plan was confirmed on July 20, 2022. ECF 64.

The Keathleys' plan properly provided for payment of unsecured claims without interest. In Chapter 13 cases, the general rule is that unsecured pre-petition creditors do not accrue interest during the course of the case. Section 502(b)(2)—dealing with the allowance of claims, states that "a claim or interest, proof which is filed … is deemed allowed . . . . except to the extent that such claim is for unmatured interest." 11 U.S.C. § 502(b)(2). "An allowed unsecured claim does not include unmatured post-petition interest, and the chapter 13 plan may not provide for payments outside of the allowed claim." *In re Monahan*, 497 B.R. 642, 648 (B.A.P. 1st Cir. 2013) (citations omitted).

The treatment of priority claims is set forth in § 1322(a)(2) which requires "full payment, in deferred cash payments." The term "full payment" is not defined in the Code with specific reference to § 1322. The notion of "full payment" does not by itself include "interest." When Congress requires "deferred cash payments" it generally signifies when interest is due by adding a "value" or "present value" component to the payment obligation in a plan. *See, e.g.*, 11 U.S.C. § 1129(a)(9)(B)(i) requiring "deferred cash payments of a value as of the effective date."[12] *See In re Herr*, 80 B.R. 135 (Bankr.

12. This has been recognized as requiring interest in order to satisfy the "value" or "present value" test. "The present value

S.D. Iowa 1987) stating the absence of the "traditional 'present value' language" signified that "Congress did not intend deferred cash payments made under section 1222(a)(2) to include interest in every case." *Id*. at 137.

The filing of the civil lawsuit.

Mr. Keathley was injured by respondent in August 2021, and filed suit to recover damages in December 2021. His bankruptcy lawyer was advised of the accident. Pet. App. 42a, Pet.7. Mr. Keathley believed that this was everything he needed to do. *Keathley v. Buddy Ayers*, *supra*., ECF 154-2 ¶ 7.

A Chapter 13 debtor is permitted to commence and prosecute civil actions "on the estate's behalf" with or *without court approval*, signifying that notice of such filing is not required:

> Bankruptcy Rule 6009, which applies to Chapters 7, 11 and 13, directs that "[w]ith 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 by or against the debtor … in behalf of the estate before any tribunal." Fed. R. Bankr. P. 6009 (emphasis added).

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requirement means that the amount of the claim, the principal, must be paid with interest to make up for the delay in payment. 11 U.S.C.A. § 1129(a)(9)(C) (West Supp.1991)." *In re Sanders Coal & Trucking, Inc*., 129 B.R. 516, 519 (Bankr. E.D. Tenn. 1991).

Cable v. Ivy Tech State Coll., 200 F.3d 467, 472 (7th Cir. 1999), overruled on other grounds, by *Hill v. Tangherlini*, 724 F.3d 965 (7th Cir. 2013).

Just as there is no requirement to seek prior court approval before filing, the bankruptcy rules do not require immediate notice to creditors. Bankruptcy Rule 1007(h) specifies that after the petition is filed, if a debtor becomes entitled to acquire an interest "in property described in § 541(a)(5)" it must amend its schedules. But § 541(a)(5) is limited to property acquired by devise, inheritance or settlement agreement with a spouse, or under life insurance.

In re Boyd, 618 B.R. 133, 147-57 (Bankr. D. S. C. 2020) stated that "neither Rule 1007(h), [n]or any other bankruptcy rule indicates that a chapter 13 debtor must file a supplemental or amended schedule for other types of property acquired post-petition that becomes part of the estate as a result of § 1306(a)." Noting the sheer impracticality of a different rule, and the five year period of plan performance, "it would be problematic to specify what level of assets would require reporting and when. Would every new refrigerator, every traded car, every dollar change in income, every new expense be required? Such an approach would virtually inundate the court with filings. . . ." *Id.* at 150–151. *See also* 9 *Collier on Bankruptcy* ¶ 1007.08 (16th ed. 2025) (noting that Bankruptcy Rule 1007(h) does not require scheduling all postpetition property and opining that such a requirement "would be completely impracticable."

Amendment to debtors' schedules-April 2023.

The Keathleys amended their schedules to list the tort claim on April 4, 2023. ECF 66, p. 6, § 33. Respondent repeatedly argued that the Keathley's failed to amend their plan to reflect the lawsuit. Their argument confuses what is included in schedules and what goes in the form plan for Chapter 13. The required form for a Chapter 13 plan does not require a listing of assets, including lawsuits.

At the time of the amendment identifying the pending lawsuit, the plan commitment period still had almost 18 months left. The Keathleys were not granted a discharge until September 16, 2024 (ECF 106), and the standing trustee's Final Report was not submitted until October 25, 2024. ECF 108. Accordingly, any party had ample time to seek plan modification or demand interest. *See Germeraad v. Powers*, 826 F.3d 962 (7th Cir. 2016) approving modification of a Chapter 13 plan to reflect a postpetition increase in debtor's income. Neither the IRS, the court, the trustee, nor any other party either objected, or sought to modify the plan or otherwise change the Keathleys' payment obligations. The Chapter 13 trustee had ample time to investigate fully the underlying claim. The fairest inference to be drawn is that the Chapter 13 trustee, Mark McCarty, did not object or seek plan modification because he felt there was no legal basis to do so.[13]

13. The trustee had ample grounds for not seeking any plan modification based on the newly disclosed tort claim. One example is that the district court's finding that the Keathleys might be obligated to contribute any recovery to pay creditors more than 100% of their claims was based on a legally erroneous view that the potential recovery for creditors "would be higher" under the

The Fifth Circuit itself acknowledged that the inclusion of assets is "often a contested issued," and that the resolution is best left to the "orderly bankruptcy process," (Pet. App. 12a); that is, to the creditors, trustee and the court. That orderly process worked as intended, with all parties being given ample time to seek any modification. None did so reflecting that none perceived any "unfair advantage" from the scheduling of the tort claim nor an intent to mislead. This should have laid to rest the question of whether there was some hypothetical or potential value to which creditors were entitled. The imposition of a draconian sanction against the Keathleys is unwarranted when there was a straightforward time and place to address any issues without resorting to hypotheticals and potentials.

B. The standard for judicial estoppel followed by the Fifth Circuit impugns the role of the bankruptcy court and the duties assigned by Congress to the Chapter 13 trustee.

Among the factors that the ABI Commission Report lists for assessing the appropriateness of judicial estoppel

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"projected disposable income" requirement for plan confirmation found in § 1325(b)(1)(A). Pet. App. 50a-51a, citing *In re Watts,* 2012 WL 3400820 (Bankr. S.D. Tex. Aug 9, 2012). This statement by the district court was wrong. Because the plan obligated the Keathleys to pay unsecured creditors 100% of their allowed claims, it satisfied the full payment provisions of § 1325(b)(1)(A) and thus the debtors were not obligated to satisfy the projected disposable income test found in § 1325(b)(1)(B). *See* 2014 Collier Bankruptcy Case Update 11 U.S.C. § 1325(b)(1) (2025). Nor is postpetition interest an allowed claim under § 502(a)(2). The Fifth Circuit's affirmance of the district court carried forward this incorrect understanding of Chapter 13, also citing *Watts.* Pet. App. 14a.

is this one: “Did the bankruptcy court take any action after the omission was discovered.” ABI Comm. Rpt. 26. Similarly, Judge Haynes in her concurrence noted, “I believe it best to defer to the bankruptcy court’s evaluation regarding whether the plaintiff should be allowed to proceed.” Pet. App. 20a (citing *Flugence v. Axis Surplus, Ins. (In re Flugence)*, 738 F.3d 126, 132 (5th Cir. 2013) for the view that the bankruptcy court, *which is closest to the facts*, should be given discretion to craft the “appropriate remedy.”)

Both the standing trustee, and his staff attorney were well situated to discharge their duties and assess the Keathleys’ actual intent. Ms. Emerson, from the office of the standing trustee, was in direct contact with the Keathleys “throughout the duration” of their case. Pet. App. 16a. Ms. Emerson provided her full assessment to the district court, which she did after contacting her “supervisors” [including Mr. McCarty] and seeking their approval. Pet. App. 16a.

Thus, the affidavit of Ms. Emerson was a reliable source of the operation of Chapter 13, and given the role assigned by Congress to the Chapter 13 trustee, should have been credited. Her views reflect what the “orderly bankruptcy process” actually involved. Among other things, her affidavit stated as follows:

> [T]here is nothing unusual or misleading about Mr. and Mrs. Keathley not disclosing the personal injury action while the personal injury action is ongoing.

> In the Eastern District of Arkansas, it is not uncommon for debtors to amend their bankruptcy filings to disclose postpetition claims for personal injury actions prior to the settlement or resolution of the personal injury action.
>
> Even if Mr. and Mrs. Keathley had notified the bankruptcy court of the personal injury claim immediately after the wreck of August 23, 2021, it would not have had any effect on the administration of the bankruptcy as the bankruptcy case will pay 100% to creditors.
>
> Even if Mr. and Mrs. Keathley had notified the bankruptcy court of the personal injury claim immediately after the wreck of August 23, 2021, it would not have had any impact on the amount the Keathleys would have had to pay or the time they would have to pay it.

Pet. App. 58a-60a.

The Fifth Circuit gave little consideration to the sworn affidavit from the office of the Chapter 13 trustee. Yet, it is the trustee, who as the "primary administrator," has the duty and responsibility to identify if and when a debtor engages in improper or misleading conduct. Likewise, the bankruptcy judge had ample opportunity to assess any improper intent. These two reliable and unbiased sources are the proper measure of how the test for judicial estoppel—the "totality of the circumstances"—should have been applied below, and the absence of any wrongful intent.

III. The Fifth Circuit's Decision impairs the foundational concept of the bankruptcy "fresh start."

The decision of the Fifth Circuit will result in a windfall to those who have allegedly caused harm to the debtor, and a forfeiture of a debtor's potentially valuable claims. Such an outcome is inconsistent with this Court's repeated statement of the overarching goals of bankruptcy—to give "honest but unfortunate debtor[s]" the opportunity to "reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Grogan v. Garner*, 498 U.S. 279, 288 (1991).

This Court stated in *Local Loan Co v Hunt,* 292 U.S. 234, 244 (1934) that one of the primary purposes of the bankruptcy law is to give the "honest but unfortunate debtor … a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." In *Stellwagen v. Clum,* 245 U.S. 605 (1918) the Court noted that the fresh start provided by the discharge was one of the two overriding policies of the bankruptcy system and of "great public interest." *See also*, John C. McCoid II, *Discharge: The Most Important Development in Bankruptcy History,* in Charles Tabb, Bankruptcy Anthology, (Anderson, 2022), 524. Professor McCoid noted that the discharge "ranks ahead in importance of all other [provisions] in Anglo-American bankruptcy history." *Id*. at 525.

The discharge has been held to be the "greatest power" granted to Congress concerning bankruptcy, and discharge issues properly reside at the very core of bankruptcy jurisdiction. "One of the most enduring definitions of Congress's power under the Bankruptcy Clause is that the power extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest [power] is a discharge of the debtor from his contracts." *In re Deitz,* 760 F.3d 1038, 1053 (2014) at n. 1 (Markell, J., concurring) (quoting *In re Klein*, 42 U.S. (1 How.) 277, 281 (1843)) (Catron, J., sitting as circuit justice).

Judicial estoppel is an equitable concept. *New Hampshire*, 532 U.S. 742, 750. The burden is on the proponent to establish the elements. *Gibson Found., Inc. v. Norris*, No. 24-1763, 2025 WL 3240367, at *4 (1st Cir. Nov. 20, 2025). The Fifth Circuit's "harsh" rule is more punitive than equitable, and the "strong presumption" and "absolute presumption of intent" (Pet. App. 30a) disregards the proper burden allocation as well. This harsh burden-shifting concept impairs the fresh start and bears little resemblance to the doctrine as announced by this Court or elsewhere.

CONCLUSION

Accordingly, amici respectfully submit that the Fifth Circuit's ruling be reversed.

Respectfully submitted,

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