No. 25-6

IN THE
# Supreme Court of the United States

THOMAS KEATHLEY,
*Petitioner*,
v.
BUDDY AYERS CONSTRUCTION, INC.,
*Respondent.*

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

## BRIEF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES AND THE AMERICAN COLLEGE OF BANKRUPTCY AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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The National Association of Bankruptcy Trustees (the "NABT") is an organization consisting of chapters 7, 11, and subchapter V trustees, their staff, employees of the Office of the United States Trustee, and associated professionals and businesses. The NABT is dedicated to assisting trustees in the performance of their statutory duties. Consistent with its mission, the NABT files *amicus curiae* briefs throughout the country on matters of national importance to bankruptcy trustees and the efficient administration of bankruptcy cases.

The American College of Bankruptcy (the "College") is an organization of lawyers, judges, academics, and other insolvency professionals, primarily from the United States, who are selected as fellows based on years of achievement in their chosen professions and service to the bar, the community, and their profession. As set forth in its Mission Statement, the College is "dedicated to the enhancement of professionalism, scholarship, and service in bankruptcy and insolvency law and practice." Recognizing and respecting the diversity of viewpoints and interests among its fellows, the College will only intervene in legal controversies to advocate for the effective functioning of the bankruptcy system, expressing views that reflect a general

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

consensus among bankruptcy professionals. The views expressed in this brief are those of the College and do not necessarily reflect the personal views of any fellow of the College or of any firm or organization with which any fellow is affiliated.

A fundamental duty of bankruptcy trustees is to collect the assets of the bankruptcy estates they administer for distribution to creditors. *See* 11 U.S.C. § 704(a)(1). Since 2003, chapter 7 trustees have distributed well over one billion dollars to creditors each year.[2] One common source of recovery for creditors is the non-exempt value in an individual debtor's pre-bankruptcy civil litigation claims, which causes of action become property of the bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1) upon the filing of a bankruptcy petition. Often, for a variety of reasons, including ineffective counsel, unsophisticated debtors, or the fact that the debtor has not filed suit at the time of the bankruptcy filing, individual debtors do not disclose the existence of their litigation assets in their initial bankruptcy schedules. Once discovered, these civil litigation claims can provide a valuable source of recovery for creditors. The NABT and the College therefore urge this Court to craft an opinion that—no matter the disposition of the controversy before it—preserves the ability of the trustee—the true party in interest in any such litigation—to continue to prosecute such claims

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[2] U.S. Trustee Program, U.S. Dep't of Just., *Chapter 7 Trustee Final Reports*, http:/www.justice.gov./ust/bankruptcy-data-statistics/chapter-7-trustee-final-reports (last updated Oct. 28, 2024).

and return value to creditors even in those circumstances where a debtor may be barred from a recovery based upon the doctrine of judicial estoppel.

## SUMMARY OF ARGUMENT

Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quotation marks omitted). It "is an equitable doctrine invoked by a court at its discretion" but its core purpose is "to protect the integrity of the judicial process." *Id.* at 749-50 (quotation marks omitted).

In the bankruptcy context, judicial estoppel is often raised as a defense when a debtor fails to schedule an existing or potential civil lawsuit as an asset of his estate, obtains a discharge, and then seeks to prosecute the cause of action post-discharge for his own benefit. When the defendant in the civil case discovers the bankruptcy, it will invoke judicial estoppel as a defense, arguing that the failure to schedule the cause of action should result in dismissal of the claim. When a court grants dismissal on this basis, a defendant receives a windfall but that windfall is justified on the grounds that the integrity of the court is protected by avoiding the appearance that the court has been misled. *See New Hampshire v. Maine*, 532 U.S. at 749-50.

But in those circumstances, the real party in interest in the lawsuit is not the individual debtor, it is the trustee. That is because the filing of a bankruptcy

petition creates an estate consisting of all of a debtor's "legal or equitable interests" "in property." 11 U.S.C. § 541(a)(1). A debtor's pre-bankruptcy claims are part of this estate, making the trustee who administers the estate, the real party in interest. 11 U.S.C. § 323(a). And an undisclosed cause of action remains estate property even after a bankruptcy case is closed, 11 U.S.C. § 554(d), and the Bankruptcy Code authorizes reopening the bankruptcy case to administer newly-found assets, 11 U.S.C. § 350(b).

When a trustee elects to prosecute a previously undisclosed cause of action for the benefit of creditors, judicial estoppel should not bar the trustee from doing so. The trustee in that circumstance will not have failed to disclose the cause of action and also will not have obtained any relief on behalf of the bankruptcy estate as a result of the nondisclosure. Applying the doctrine of judicial estoppel against an innocent trustee does nothing to protect the integrity of the judicial process and instead only results in a windfall for the defendant and compounds the harm to creditors caused by the initial nondisclosure. *Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 413 (7th Cir. 2006). The NABT and the College, therefore, urge this Court to recognize that there is a distinction between a debtor pursing an undisclosed claim for his own benefit, and that of a trustee pursuing the same claim for the benefit of creditors and not to create a rule that will have the effect of "vaporizing assets that could be used for the creditors' benefit." *Id.*

In addition, the NABT and the College also urge the Court not to impose any artificial cap on damages when

a trustee elects to pursue an undisclosed cause of action. Reducing the potential recovery may make prosecution of the suit by a trustee economically unfeasible. Instead, consistent with the exclusive jurisdiction granted to district courts, and by reference bankruptcy courts hearing the bankruptcy case, the Court should allow a trustee to pursue and recover the full value of the claim. *See* 28 U.S.C. § 1334(e). If there is an excess in recovery beyond the amount necessary to pay creditors' claims, the bankruptcy court is best positioned to decide if the debtor acted fraudulently in its court—under whatever standard this Court establishes here—and to direct the proceeds to either pay interest to creditors, or to pay the excess recovery to the debtor if judicial estoppel does not apply, or to return those funds to the defendant.

## ARGUMENT

### I. Judicial Estoppel Should Not Bar A Trustee From Prosecuting Undisclosed Causes Of Action.

In ruling on the present case, the Court should take care not to draw into question the ability of the bankruptcy estate to recover on account of a debtor's undisclosed civil litigation claims. Distinguishing between the ability of a debtor to pursue an undisclosed claim for his own benefit and the estate's ability to do so is justified based upon the Bankruptcy Code provisions that transfer all pre-petition assets to the estate and place the trustee in control of those assets. Recognizing this distinction between a debtor and a trustee also

is fully consistent with the equitable principles that underlie the judicial estoppel doctrine.

When a bankruptcy petition is filed, an estate is created consisting of all of a debtor's "legal or equitable interests" "in property." 11 U.S.C. § 541(a); *City of Chicago v. Fulton*, 592 U.S. 154, 156 (2021). A cause of action based upon a harm that a debtor suffered pre-bankruptcy falls within the definition of estate property. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995).

Section 323(a) makes the trustee the "representative" of the estate. 11 U.S.C. § 323(a). Thus, the trustee is the "real party in interest" in any cause of action that is estate property and is "vested with the authority and duty [pursuant to § 704(a)(1)] to pursue the judgment … as an asset of the bankruptcy estate." *Reed v. City of Arlington*, 650 F.3d 571, 575 (5th Cir. 2011) (en banc); *accord Metrou v. M.A. Mortenson Co.*, 781 F.3d 357, 360 (7th Cir. 2015); *Stephenson v. Malloy*, 700 F.3d 265, 272 (6th Cir. 2012); *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004). The duty to prosecute and reduce to cash an estate cause of action also is not extinguished by the closing of the bankruptcy case because "[e]ven after the case is closed, the estate continues to retain its interest in unscheduled property." 5 Collier on Bankruptcy ¶554.03 (Richard Levin & Henry J. Sommer eds., 16th ed. 2025). When unscheduled property is found, a trustee may reopen the case to administer the asset. 11 U.S.C. § 350(b). Taken together, these Code provisions reflect "Congress's clear preference for the preservation of the

bankruptcy estate and for its equitable distribution to creditors through the bankruptcy process." *Reed*, 650 F.3d at 575. Applying judicial estoppel to block a trustee from collecting an estate asset and distributing its proceeds to creditors would be contrary to these Code provisions.[3]

Moreover, the general rule that a trustee does not have any more rights than a debtor does in estate property and thus, assumes the debtor's causes of action subject to all defenses that might be asserted against the debtor but for the filing of the bankruptcy petition, does not apply to the defense of judicial estoppel. *See Bank of Marin v. England*, 385 U.S. 99, 101 (1966). Unlike a defense that exists pre-petition and continues post-petition unaffected by the bankruptcy filing, the defense of judicial estoppel only comes into existence *after* the bankruptcy case is filed. Before the defense is available to a defendant, the debtor must first file for bankruptcy and thereafter fail to disclose his cause of action against the defendant in his bankruptcy schedules, representing to the bankruptcy court by omission

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[3]Chapter 7 and chapter 13, of course, differ in many details. None of these details are relevant to the issue presented. There is one important similarity for purposes of this case. In both chapters, a trustee is appointed to act as the representative of the bankruptcy estate. 11 U.S.C. § 323(a). As the estate representative, the trustee has a duty to creditors. The acts of the debtor should not judicially estop the trustee as the fiduciary for parties who are innocent of any wrongdoing.

that he does not own any litigation claims. The bankruptcy court must next accept that representation and discharge the debtor. Even then, the defense does not arise until the debtor thereafter seeks to pursue the cause of action post-petition for his own benefit, thereby taking an inconsistent position that he actually does own the cause of action, after succeeding on the contrary position. All of these events necessarily occur post-petition. By that time, however, the estate is the real party in interest and the trustee, not the debtor, controls the cause of action. The fact that the debtor may have failed to disclose the cause of action and may be subject to a defense that arose post-petition should not deprive the true party in interest—the trustee—from pursuing the claim, as both the Fifth and the Eleventh Circuits have held. *See, e.g.*, *Reed*, 650 F.3d at 575-76; *Parker*, 365 F.3d at 1272 & n.3.

This result also is fully consistent with the fact that, as this Court has held, "judicial estoppel 'is an equitable doctrine.'" *New Hampshire v. Maine*, 532 U.S. at 750 (citation omitted). A debtor's nondisclosure of a cause of action harms his creditors. To use that nondisclosure to altogether eliminate the cause of action when the trustee and the creditors have not contradicted themselves in court or prevailed on an inconsistent position is not an equitable application of what is an equitable defense. *See Biesek*, 440 F.3d at 413 ("using [judicial estoppel] to land another blow on the victims of bankruptcy fraud is not an equitable application").

A defendant who cannot raise the defense against a

trustee also is not harmed because "[c]ourts do not apply judicial estoppel for the benefit of the defendant"; the defense exists "to protect courts and creditors from deception and manipulation." *Spaine v. Cmty. Contacts, Inc.*, 756 F.3d 542, 547 (7th Cir. 2014) (rejecting the defendant's argument that it was harmed when the court rejected the defense); *accord Reed*, 650 F.3d at 577 (rejecting the defendant's argument that it will be harmed if judicial estoppel is not applied to bar the trustee from pursuing an estate cause of action); *see also Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 213 (5th Cir. 1999) ("the purpose of judicial estoppel is to protect the integrity of courts, not to punish adversaries or to protect litigants").

Recognizing that a trustee is in a far different position from a debtor when prosecuting a cause of action that the debtor did not disclose, the federal appellate courts have generally held that judicial estoppel will not bar a trustee from pursuing a cause of action that a debtor failed to disclose. *See Metrou*, 781 F.3d at 360 ("[w]hether or not [the debtor] should have disclosed the claim in bankruptcy does not matter to a suit maintained by the Trustee, who is not even arguably culpable for any misconduct"); *Stephenson*, 700 F.3d at 272 ("[t]he trustee's pursuit of this action is therefore not contrary to a position he previously asserted under oath"); *Reed*, 650 F.3d at 574-76 (refusing to apply judicial estoppel against a trustee "[f]ollows from Bankruptcy Law" and "from [e]quity" (emphasis omitted)); *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1155 n.3 (10th Cir. 2007) (the "district court's application of

judicial estoppel" was "[q]uite likely … inappropriate, at least to the extent [the debtor]'s personal injury claims were necessary to satisfy his debts" because "the trustee as the real-party-in-interest had not engaged in contradictory litigation tactics"); *Parker*, 365 F.3d at 1272 (judicial estoppel not applied to a trustee because he "never took an inconsistent position under oath with regard to th[e] claim").

State supreme courts generally conclude the same. *Saddlebrook Invs., LLC v. Krohne Fund, L.P.*, 546 P.3d 195, 206 (Mont. 2024) ("[T]here is a difference between a debtor attempting to pursue an action for his own benefit, and a trustee pursuing an action for the benefit of creditors" (quotation marks omitted) (bracket in original)); *Alward v. Johnston*, 199 A.3d 1190, 1203 (N.H. 2018) (refusing to apply judicial estoppel to bar a trustee's lawsuit because "doing so would undermine, rather than protect, the integrity of the judicial process"); *Hamm v. Norfolk S. Ry. Co.*, 52 So. 3d 484, 497 (Ala. 2010) ("[i]mposing the doctrine of judicial estoppel on an innocent bankruptcy trustee, which, in turn, punishes innocent creditors for the mistakes of a debtor, does not further the purpose of protecting the integrity of the judicial process"); *Arkison v. Ethan Allen, Inc.*, 160 P.3d 13, 16 (Wash. 2007) (en banc) ("a trial court may not generally apply the doctrine of judicial estoppel to bar a bankruptcy trustee standing as the real party from pursuing a debtor's legal claim not listed as an asset during bankruptcy proceedings"); *Dupwe v. Wallace*, 140 S.W.3d 464, 474 (Ark. 2004) ("[j]ustice would neither be preserved nor protected

by estopping trustee Dupwe from pursuing this action").

For these reasons, the NABT and the College encourage this Court—however it rules in this case—to make clear in its decision that its ruling does not extend to trustees who discover undisclosed causes of action and elect to pursue those causes of action for the benefit of creditors.

## II. The Court Should Not Impose A Damages Cap And Instead Should Allow The Bankruptcy Court To Decide What Disposition To Make Of The Litigation Proceeds After Creditors Are Paid, Including Whether The Debtor Should Receive Any Recovery.

The NABT and the College also urge the Court to follow the approach that the Seventh Circuit adopted in *Metrou*, which is to allow a trustee to pursue an undisclosed claim without imposing any cap on the potential recovery, leaving the bankruptcy court to decide how to distribute the proceeds of a successful suit, including whether a debtor's nondisclosure prevents a distribution to that debtor. *Metrou*, 781 F.3d at 360. This approach is consistent with the jurisdiction of the bankruptcy court over estate property and recognizes the practical consideration that imposing a damages cap equal to creditor claims may hamper the ability of a trustee to successfully pursue estate causes of action.

Section 1334(e) grants the district court in which the bankruptcy case "is commenced," and by reference the bankruptcy court, "exclusive jurisdiction" over the

"property of the estate." 28 U.S.C. § 1334(e). When an estate cause of action is reduced to money, those funds are estate property within the jurisdiction of the bankruptcy court to distribute as required by the Bankruptcy Code and applicable law. 11 U.S.C. § 541(a)(6). Because the money recovered on account of the prosecution of a cause of action is part of the estate's *res*, the "bankruptcy court's *in rem* jurisdiction permits it to 'determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.'" *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004) (citation omitted); *see also Williams v. Sears, Roebuck & Co. (In re Williams)*, 244 B.R. 858, 866 (S.D. Ga. 2000) ("[t]he function of § 1334(e) is clear—to insure that only one court administers the bankruptcy estate of a debtor"), *aff'd*, 34 F. App'x 967 (11th Cir. 2002).

Leaving it to the bankruptcy court to address whether a debtor should be estopped under the standard this Court decides here allows the court where the alleged nondisclosure occurred to determine whether in fact the debtor acted in violation of that standard. It also acknowledges the bankruptcy court's exclusive jurisdiction over the litigation proceeds and affords the bankruptcy court the ability to decide who should receive those monies.

The Seventh Circuit recognized that allowing a trustee to pursue a claim without a damages cap also has the practical effect of furthering the successful prosecution of such claims. Often, the undisclosed asset

is discovered in a case where there are no other non-exempt assets available to pay litigation costs including attorney's fees. When that is the case, a trustee will be required to hire counsel willing to take the case on a contingent fee basis. And even where there are some assets, it may be prudent to hire contingent fee counsel to conserve those other assets for distribution to creditors.

But if any potential recovery from the suit is capped at the amount owed to creditors, that cap may even make a cause of action with a high likelihood of success unattractive to skilled counsel. As the Seventh Circuit stated, "[r]educing the stakes in the tort suit could [therefore] injure the creditors along with the debtor." *Metrou*, 781 F.3d at 360.

Allowing the bankruptcy court to decide whether judicial estoppel applies also has the added benefit of encouraging debtors whose omissions were not made with fraudulent intent to assist the trustee as needed in prosecuting the cause of action, thereby increasing the likelihood of recovery on the claim.

Given these practical considerations, the Seventh Circuit imposes no cap on the value of the undisclosed claim. Instead under *Metrou*, if the suit is successful, the bankruptcy court decides who will receive the funds, including whether a debtor should be barred from any recovery, and whether creditors should receive interest on their claims or on any excess funds returned to the defendant. *Id.* "Either way, the creditors will escape injury at [the debtor]'s hands because

it will remain economically feasible to prosecute the tort suit." *Id.*

The NABT and the College request that the Court adopt that procedure here.

## CONCLUSION

The National Association of Bankruptcy Trustees and the American College of Bankruptcy respectfully recommend that in ruling on this case, the Court take care not to categorically bar the pursuit of causes of action a debtor fails to disclose and that it recognize that a trustee should be able to pursue such claims for the benefit of the debtor's creditors. And to avoid a diminution in value of the cause of action, the NABT and the College ask the Court not to place a cap on any recovery and to recognize the jurisdiction of the bankruptcy court to decide who will receive the litigation proceeds, including whether a debtor should be judicially estopped from sharing in any recovery that exceeds the amount of the creditors' claims.

Respectfully submitted,

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