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 FOR RESPONDENT

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January 27, 2026

QUESTION PRESENTED

Whether the doctrine of judicial estoppel can be invoked to bar a plaintiff who fails to disclose a civil claim in bankruptcy filings from pursuing that claim, regardless of whether there is evidence that the plaintiff in fact acted in bad faith.

CORPORATE DISCLOSURE STATEMENT

Respondent Buddy Ayers Construction, Inc. certifies that it does not have a parent company and no publicly held company owns ten percent or more of the stock of Buddy Ayers Construction, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Rules:

Other Authorities:

INTRODUCTION

If you win a dog-bite lawsuit by convincing the court you don't own the dog, you can't then expect to bring your own lawsuit seeking to recover the value of the dog from someone else. That is judicial estoppel: the principle that the same litigant cannot win two cases by taking clearly inconsistent positions.

Courts apply judicial estoppel because clearly inconsistent results, in cases asking the same question about the same litigant, threaten the integrity of the judicial system. That rule is objective, straightforward, and easy to apply. Petitioner's proposed rule would jettison that basic rationale and apply estoppel only when a litigant acts in bad faith—which seemingly means planning all along to switch positions. That would mean that a litigant could keep two clearly inconsistent victories—as long as the litigant cannot be shown to have personally planned to benefit from the inconsistency. Under petitioner's approach, just taking a hands-off approach with two separate litigation counsel could be enough to insulate the litigant from the type of scienter that petitioner says is necessary.

That is not consistent with either this Court's decisions or with the century-plus of estoppel caselaw that underlies them. It is inequitable to keep a benefit, or cause an adversary disadvantage, that depends on convincing the courts of two clearly inconsistent positions. And that is what petitioner seeks here. This Court's references to an exception for positions taken through "inadvertence or mistake" do not shift the analysis from an objective one, based on avoiding inconsistent results, to a subjective one, based only on punishing bad faith. And while petitioner appeals to

the notion that courts should consider all relevant evidence of intent, that skips over the question whether lack of bad faith defeats judicial estoppel at all.

Nor is there any reason to be more tolerant of clearly inconsistent adjudications just because one of the adjudications is in bankruptcy court. Although the Court does not need to formulate a special estoppel rule for the bankruptcy context, if anything bankruptcy-related considerations make it all the more important to apply the traditional, objective rule here. Because bankruptcy commonly creates economic incentives for debtors to conceal assets, the system depends on full and accurate disclosure of assets to the court, trustee, and creditors. Any bankruptcy-specific rule should incentivize candor, not reward concealment.

A cause of action is an asset. Representing to the bankruptcy court that an asset does not exist—and achieving a bankruptcy plan and a discharge of debts on that basis—can give rise to judicial estoppel because it is "clearly inconsistent" with later suing (and recovering) on the supposedly nonexistent cause of action. All parties and, indeed, all courts of appeals agree on that point. The only question is whether to formulate an exception for "inadvertence or mistake" so broad that judicial estoppel becomes essentially unavailable in the bankruptcy context. Because that view is unfaithful to the established, objective test for judicial estoppel and would create perverse incentives in the bankruptcy context, this Court should reject it.

STATEMENT OF THE CASE

I. Judicial estoppel protects judicial integrity by prohibiting the same party from winning two clearly inconsistent victories.

A. Judicial estoppel prevents inconsistent adjudication and has never turned on bad faith.

Like many other estoppel doctrines, judicial estoppel prevents inconsistent adjudication. In short, once a litigant has succeeded in convincing a court to accept its position, the litigant cannot deny the correctness of that position in other cases. By preventing litigants from taking clearly inconsistent positions—and winning on both—the doctrine "protect[s] the integrity of the judicial process" and bolsters the "orderly administration of the judicial system." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted); Walter S. Beck, *Estoppel Against Inconsistent Positions in Judicial Proceedings*, 9 Brook. L. Rev. 245, 248 (1940). Given the systemic considerations that underlie it, judicial estoppel has never turned on proof of an individual litigant's bad faith.

1. Without adopting any "inflexible" or "general formulation," this Court has identified three factors that typically justify judicial estoppel. *New Hampshire*, 532 U.S. at 750, 751 (citation omitted). First, the "party's later position must be 'clearly inconsistent' with its earlier position." *Id.* at 750 (citation omitted). Second, the party generally must "ha[ve] succeeded in persuading a court to accept that party's earlier position." *Id.* Third, courts consider whether "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair

detriment on the opposing party if not estopped." *Id.* at 751.

Thus, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). A party who "helped to induce [a] ruling when the result was to his advantage" cannot later ask courts to "change it … when the result is to his detriment." *Assets Realization Co. v. Roth*, 123 N.E. 743, 744 (N.Y. 1919) (Cardozo, J.).

Significantly, judicial estoppel is not restricted to cases in which all the parties are identical. *E.g.*, *Ryan Operations GP v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir. 1996) (collecting cases). The winner of the first case cannot adopt a clearly inconsistent position in a second case—whether against the same party or (as is more common) someone else. For that reason, judicial estoppel does not require a showing of reliance. *Phila., Wilmington & Balt. R.R. Co. v. Howard*, 54 U.S. (13 How.) 307, 333 (1851); Beck 247.

2. As the name suggests, judicial estoppel derives its origins from estoppel more generally. Beck 245-247. Thus, "like many estoppel rules," it "reflects a demand for consistency in dealing with others." *Minerva Surgical, Inc. v. Hologic, Inc.*, 594 U.S. 559, 575 (2021). In each branch of the doctrine, a person is estopped "when he has done some act which the policy of the law will not permit him to gainsay or deny." Henry M. Herman, *Commentaries on the Law of Estoppel and Res Judicata* 2 (1886).

In both law and equity,[1] estoppel's foundational institutional concern was the functioning and administration of the courts of justice. Herman 17-18. The earliest form of estoppel—estoppel by record—sought to bring credit and finality to the court system by prohibiting litigants from controverting the record of proceedings in the courts of common law and chancery (courts of record). *Id.* at 18, 21. Similar concerns underly the related doctrines of claim preclusion (res judicata) and issue preclusion (collateral estoppel), which both involve questions in dispute that were submitted to a court to decide. Melville M. Bigelow, *Treatise on the Law of Estoppel and its Application in Practice* 8-9, 330 (5th ed. 1890).

Estoppel has particular force where it rests on a person's own knowing decision, in light of "the general doctrine that a man shall not defeat his own act or deny its validity to the prejudice of another." Herman 711. Thus, for example, under the doctrine of election, if a person chooses "between several inconsistent courses of action, he will be confined to that which he first adopts." Bigelow 673. Or in estoppel by deed (for land) or assignor estoppel (for patents), if a person chooses to sell ownership of a piece of real or intellectual property, she is estopped from attacking the validity of her own grant. *Minerva*, 594 U.S. at 567-570. Judicial estoppel addresses these same institutional, practical, and fairness concerns. *See* Bigelow 717, 722; Beck 245-247 (noting that judicial estoppel developed from other types of estoppel); *see also* Note, *The Doctrine of Preclusion Against Inconsistent Positions*

[1] Estoppel developed in both courts of law and equity. Herman 864-865; John Norton Pomeroy & John Norton Pomeroy, Jr., *Treatise on Equity Jurisprudence* 1633 (4th ed. 1918).

in Judicial Proceedings, 59 Harv. L. Rev. 1122 (1946); Mark J. Plumer, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409, 410 n.8 (1987).

B. "Inadvertence or mistake" may justify an exception to judicial estoppel, but the mere absence of bad faith does not.

This Court noted in *New Hampshire* that "it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.'" 532 U.S. at 753 (citation omitted). The Court historically was suspicious of litigants' efforts to get out of their own former solemn representations by claiming mistake. *See Phila., Wilmington & Balt. R.R. Co.*, 54 U.S. (13 How.) at 337 ("[T]he defendant cannot be heard to say, that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it."). Thus, the courts of appeals have treated this as (at most) a narrow exception and have required the party changing positions to establish that its previous position resulted from inadvertence or mistake. *See Fornesa v. Fifth Third Mortg. Co.*, 897 F.3d 624, 628 (5th Cir. 2018); *Davis v. District of Columbia*, 925 F.3d 1240, 1256 (D.C. Cir. 2019).

Mistake generally means a mistake of fact arising from a reasonable lack of knowledge. Throughout estoppel doctrine more broadly, for a party to be estopped based on his own representations, "truth concerning the[] material facts represented or concealed

must be *known* to the party at the time when his conduct … takes place." Pomeroy 1660 (emphasis added). That does not require mind-reading: A party's knowledge can be established through objective evidence, as where "the circumstances must be such that a *knowledge* of the truth is necessarily imputed to" that party. *Id.* (emphasis added).

But requiring knowledge does not equate to requiring proof of scienter. Applying estoppel requires only *objective knowledge* of the facts concerning inconsistent positions—not *bad faith* with respect to the inconsistency or a *subjective intent* to mislead. Pomeroy 1640-1641 (Equitable estoppel does not require "that the conduct itself—the acts, words, or silence of the party—constituting the estoppel is an actual fraud, done with the actual intention of deceiving."); *Cont'l Nat'l Bank v. Nat'l Bank of Commonwealth*, 50 N.Y. 575, 583 (1872) ("[W]e hold that there need not be, upon the part of the person making a declaration or doing an act, an intention to mislead the one who is induced to rely upon it."). In that sense, "a perfectly innocent misrepresentation ... may be quite sufficient for estoppel." John S. Ewart, *Exposition of the Principles of Estoppel by Misrepresentation* 85 (22d ed. 1900); *see also, e.g.*, 28 Am. Jur. 2d Estoppel and Waiver § 46 (similar); Restatement (First) of Torts § 894 (1939); Restatement (Second) of Torts § 894 (1979).

C. A debtor who denies the existence of a cause of action to the bankruptcy court may be judicially estopped from later asserting that same cause of action.

Judicial estoppel arises with some frequency as a result of bankruptcy. A cause of action is an asset,

and debtors must disclose even an unasserted cause of action to the bankruptcy court along with their other assets. When a debtor omits a cause of action from his list of assets, secures bankruptcy relief based on that incomplete disclosure, and then asserts the undisclosed claim in another court, judicial estoppel may result, as the courts of appeals unanimously agree and petitioner does not dispute. In such circumstances, the basic elements of judicial estoppel are all present: a legal position clearly inconsistent with a prior one; judicial acceptance of the earlier position; and an unfair advantage to the litigant.

1. When a debtor files for bankruptcy, all the debtor's "legal or equitable interests" "in property" are made part of the bankruptcy estate, with few exceptions. 11 U.S.C. § 541(a); *City of Chi. v. Fulton*, 592 U.S. 154, 156 (2021). Debtors must disclose these assets in their bankruptcy schedules. *See* 11 U.S.C. § 521(a)(1)(B)(i); Fed. R. Bankr. P. 1007(b)(1)(A).

Because "[t]hese disclosure requirements are crucial to the effective functioning of the federal bankruptcy system," "the importance of full and honest disclosure cannot be overstated." *Ryan Operations*, 81 F.3d at 362; *accord Harrington v. Purdue Pharma L. P.*, 603 U.S. 204, 209 (2024); *Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2d Cir. 2008) (per curiam) ("[F]ull disclosure by debtors is essential to the proper functioning of the bankruptcy system...."). Depending on when it accrues, a cause of action belonging to the debtor may be among the assets that belong to the bankruptcy estate and thus subject to the disclosure requirements. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995). The potential

value of the claim to creditors—the claim's significance to the bankruptcy estate and the value of its prompt disclosure—may also vary depending on the type of bankruptcy proceeding. Differences between two forms of bankruptcy, Chapter 7 and Chapter 13, are illustrative here.[2]

2. "Chapter 7 allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor's assets." *Harris v. Viegelahn*, 575 U.S. 510, 513 (2015). Generally, all of the debtor's assets, including legal claims that exist at the time the Chapter 7 petition is filed, are part of the bankruptcy estate. *See* 11 U.S.C. § 541. "Crucially, however, a Chapter 7 estate does not include the wages a debtor earns or the assets he acquires *after* the bankruptcy filing." *Harris*, 575 U.S. at 513-14 (citing 11 U.S.C. § 541(a)(1)). "Thus, while a Chapter 7 debtor must forfeit virtually all his *prepetition* property, he is able to make a 'fresh start' by shielding from creditors his *postpetition* earnings and acquisitions." *Id*. (emphasis added).

Because all prepetition claims in a Chapter 7 bankruptcy are subject to liquidation to satisfy the petitioner's outstanding debts, the bankruptcy trustee becomes the real party in interest for the claims, "vested with the authority and duty to pursue" them "as an asset of the bankruptcy estate." *Reed v. City of Arlington*, 650 F.3d 571, 574-76 (5th Cir. 2011) (en banc) (citing 11 U.S.C. §§ 323(a)-(b), 704(a)(1)). This

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[2] The same principles apply fully to other bankruptcy contexts such as Chapter 11. That chapter allows a bankruptcy plan to specify what happens to claims belonging to the bankruptcy estate, *see* 11 U.S.C. § 1123(b)(3), including enforcement by a "representative," which can introduce complexities not relevant here.

has important consequences for the application of judicial estoppel. As the *amicus* brief of the National Association of Bankruptcy Trustees and the American College of Bankruptcy explains at length (at 5-11), courts (including the Fifth Circuit) generally *do not* apply judicial estoppel when a trustee discovers an undisclosed cause of action and then prosecutes the claim. That makes good sense: Exempting "blameless bankruptcy trustee[s]" from application of the estoppel "preserv[es] the assets of the bankruptcy estate for equitable distribution to the estate's innocent creditors." *Reed*, 650 F.3d at 572.

All parties appear to agree the Court should endorse (or at least leave undisturbed) this rule exempting blameless trustees from application of judicial estoppel. Thus, in the Chapter 7 liquidation context, the role of judicial estoppel is especially narrow. It applies *only* to undisclosed *prepetition* causes of action, and *only* when the bankruptcy trustee declines to assume the claim. Application of the estoppel in that scenario poses no risk to creditors—the trustee has already "abandoned" the cause of action, so the creditors do not stand to recover. *Cannon-Stokes v. Potter,* 453 F.3d 446, 448 (7th Cir. 2006); *In re Wilton Armetale, Inc.*, 968 F.3d 273, 283-84 (3d Cir. 2020) (same). And causes of action that the trustee abandons generally revert back to the debtor, 3 Norton Bankr. L. & Prac. 3d § 74:2—the party against whom the estoppel can properly be applied.

3. "Chapter 13," the type of bankruptcy at issue in this case, "works differently." *Harris*, 575 U.S. at 514. This form of bankruptcy "allows a debtor to retain his property if he proposes, and gains court confirmation of, a plan to repay his debts over a three- to five-year

period." *Id.* (citing 11 U.S.C. §§ 1306(b), 1322, 1327(b)). Three distinctions between Chapter 13 and Chapter 7 are especially relevant for judicial estoppel and this case.

a. First, because Chapter 13 debts are satisfied through gradual repayment from income or earnings, the bankruptcy estate is not liquidated and distributed directly to creditors. "Rather, the court and creditors may examine the Chapter 13 estate, consider the debtor's expected income, and voice their support or objections as to whether a proposed payment plan should be 'confirmed.'" *Hughes v. Canadian Nat'l Ry. Co.*, 105 F.4th 1060, 1066 (8th Cir. 2024). "A court may [then] confirm a debtor's proposed Chapter 13 plan if creditors holding allowed claims will receive value equal to, or in excess of, what they would receive from an immediate liquidation." *Id.* (citing 11 U.S.C. § 1325(a)(4)).

The purpose of the bankruptcy estate in Chapter 13 is therefore "informational." *Hughes*, 105 F.4th at 1067. It allow creditors to determine up-front whether the proposed terms of the payment plan—*e.g.*, how long payment should be spread over the three-to-five-year window, or whether the repayment amount should include interest—are reasonable and provide creditors adequate protections. And because the estate plays an informational role for creditors in Chapter 13, prompt and accurate disclosure of assets is especially critical. Assets uncovered later may be of little use to creditors—they will not get such assets through liquidation, and learning about them late in repayment may render them all but valueless from an informational perspective.

b. Second, the disclosures in Chapter 13 differ not just in purpose, but also in scope. Because repayment is generally made out of a debtor's "future earnings or other future income," 11 U.S.C. § 1322(a), the Chapter 13 bankruptcy estate (unlike the Chapter 7 estate) includes assets, like litigation claims, that the debtor acquires *after* the petition is filed, *id.* § 1306(a). So the Chapter 13 bankruptcy estate includes both pre- and post- petition causes of action. It is therefore unsurprising that a number of courts, including the Fifth Circuit, have held that Chapter 13 debtors "have a continuing obligation to disclose post-petition causes of action." *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 129 (5th Cir. 2013). Petitioner did not seek certiorari on that question and, in this Court, does not dispute that he was bound by this continuing disclosure obligation. *See* Pet.Br.6.

c. Third, because the estate's role in a Chapter 13 bankruptcy is "informational," a creditor's interest in knowing about a debtor's cause of action—both pre-*and* post-petition—varies depending on when the cause of action arises and is disclosed. For example, the repayment plan may not provide for full repayment to creditors. *See* U.S. Courts, *Chapter 13 – Bankruptcy Basics*, https://perma.cc/R4XC-RUSW; 11 U.S.C. § 1325. In that case, if a claim is timely disclosed early in the repayment process, creditors may have a full opportunity and incentive to move for modification of the plan to account for the claim. *See* 11 U.S.C. § 1329. This in turn impacts the application of judicial estoppel. In the subset of cases where a debtor attempted to conceal a cause of action but was discovered early enough to bring value to creditors, a blameless trustee may be able to pursue the cause of action. *See Reed*, 650 F.3d at 574 (A "blameless bankruptcy

trustee" is not estopped "from pursuing a judgment that the debtor—having concealed the judgment during bankruptcy—is himself estopped from pursuing"); *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1155 n.3 (10th Cir. 2007); *Anderson v. Seven Falls Co.*, 696 F. App'x 341, 344 (10th Cir. 2017) ("[J]udicial estoppel does not apply to a compliant bankruptcy trustee.").

By contrast, a newly-arisen or previously undisclosed claim will be of little use to Chapter 13 creditors if it is discovered far into the process. For example, the claim may only be uncovered at the end of a plan that already provides for full repayment to creditors. In that case, the informational benefit to creditors is too little, too late—they may have proposed different or modified repayment terms *if* the claim had been promptly disclosed, but now the costs of modifying the plan outweigh the benefits. So any value of the claim has already been lost to creditors, and there is no harm to them or to the estate from estopping the debtor from pursuing the claim—and the system benefits generally from deterring other debtors from similarly hiding their causes of action.

That is what happened here.

II. Petitioner's actions lead to judicial estoppel.

A. Despite immediately recognizing his cause of action, petitioner fails to disclose it for nearly two years.

1. On December 27, 2019, petitioner Thomas Keathley filed for Chapter 13 bankruptcy in the United States Bankruptcy Court for the Eastern District of Arkansas. JA.255. His initial disclosures identified $180,054 in liabilities. JA.82.

It was not petitioner's first run through the bankruptcy system. He had petitioned for bankruptcy relief at least three times before. First, in 2001, he filed a Chapter 7 case, for which he received a full discharge of his debts. JA.242-243. Next in 2003, he filed a Chapter 13 bankruptcy case, under which a plan was confirmed allowing petitioner to repay his debts over several years; petitioner received a discharge from that bankruptcy in 2009. JA.244. Finally, in 2015, he filed another Chapter 13 case, which was ultimately converted to a Chapter 7 case. JA.244-245. The Chapter 13 proceedings at issue here followed all those.

The repayment plan ultimately approved by the bankruptcy court offered petitioner generous terms for a fresh start. He was to pay back his debts over the span of five years, entirely interest-free. Pet.App.51a.

2. While his Chapter 13 repayment plan was ongoing, on August 23, 2021, petitioner was involved in a car accident with David Fowler, a driver for respondent Buddy Ayers Construction. JA.1.

Petitioner immediately understood that he had potential legal claims as a result. That same day, he spoke with a personal-injury attorney about the possibility of filing suit. JA.223-224. Three days later, the attorney informed Buddy Ayers's insurer he had been retained by petitioner. JA.1-2. And within a few weeks of the accident, petitioner had told his bankruptcy attorney about it. JA.184. Petitioner did not, however, tell the bankruptcy court or any of his creditors about the accident or the claims he was already preparing to assert—even though he concedes he was

under an ongoing obligation to disclose post-petition claims, *see* p. 12, *supra*.

Petitioner then began pursuing his claims. On December 29, 2021, he filed this personal-injury suit against Buddy Ayers and Fowler in the Northern District of Mississippi. ROA.17-25. And before this, in September 2021, petitioner filed a separate workers' compensation claim based on the accident. JA.206.

Petitioner did not inform the bankruptcy court about either action—even as he filed multiple requests for post-confirmation amendments to his Chapter 13 plan, in March 2022 and May 2022. JA.3-23, 45-65. The relevant forms asked about "changes of circumstance," JA.3, but petitioner disclosed neither the personal-injury claim nor his separate workers' compensation claim. On the basis of these filings, the bankruptcy court approved petitioner's amended Chapter 13 plan on July 20, 2022. JA.66-67.

Meanwhile, petitioner continued to press the undisclosed claims. He filed the operative First Amended Complaint in this action, asserting a new demand for punitive damages. ROA.512. A week later, he entered into an agreement settling his workers' compensation suit for $18,000, JA.294-301—a sum amounting to about 9% of his total debts and 75% of his unsecured debts. The Tennessee Court of Workers' Compensation Claims approved the settlement the same day. JA.302-303. Petitioner disclosed none of these developments to the bankruptcy court as they unfolded.

B. The courts below apply judicial estoppel.

1. a. Buddy Ayers filed for summary judgment against petitioner on the basis of judicial estoppel.

The motion explained how all the standard elements of judicial estoppel were readily satisfied on undisputed facts: Petitioner had taken clearly inconsistent positions regarding the existence of the personal-injury claim, implicitly representing to the bankruptcy court that no such claim existed even as he pressed the claim in the district court; he had convinced the bankruptcy court to accept his position regarding the non-existence of the claim by confirming a plan that did not account for the claim; and he had secured an unfair benefit from his inconsistency, by maintaining the personal-injury claim without alerting his creditors. ROA.976-977. Most relevant here, the motion further showed that petitioner's actions were "by no means[] inadvertent." ROA.977. For one thing, petitioner had knowledge of the personal-injury claim from its inception: He realized almost immediately that he had a claim from the accident, but he stayed silent about it in the bankruptcy proceedings—repeatedly omitting it from his filings even as he litigated the personal-injury claim in federal court. For another, petitioner had an obvious motive for concealing the claim: Had it known of this additional asset, the bankruptcy court could have amended his repayment plan to account for it. ROA.977.

b. A few days later, his hand forced by Buddy Ayers's motion for summary judgment based on judicial estoppel, petitioner finally filed an amended schedule in the bankruptcy court disclosing the personal-injury claim. JA.186, 202-203; Pet.App.4a. The disclosure came nearly two years after the accident occurred and about sixteen months after petitioner filed suit. Unsurprisingly, at this point (three years into petitioner's repayment plan), no creditor attempted to modify the plan.

About a week after that, petitioner made his first disclosure of the workers' compensation suit, by filing a motion asking the bankruptcy court to approve the December 2022 settlement of that suit. JA.308-309. In this filing, petitioner revealed that he had already spent $14,000 of the net settlement funds, leaving only $4,000 left for the bankruptcy estate by the time it was disclosed. JA.308.

c. Petitioner then opposed the judicial-estoppel motion. Among other things, he argued that his inconsistent representations concerning the personal-injury claim were inadvertent. He "d[id] not contest [Buddy Ayers's] position that he had knowledge of the undisclosed claims." ROA.1208. Nonetheless, he averred that he had no motive for concealment, because he was "paying his creditors 100%" and "could not possibly pay more pursuant to his plan." ROA.1208. Ultimately, he blamed the non-disclosure on his bankruptcy attorney, to whom he "disclosed his personal injury claims" and upon whom he "relied ... to perform whatever additional steps were necessary." ROA.1209.

2. The district court granted Buddy Ayers's summary judgment motion. The court concluded that all the elements of judicial estoppel were met and rejected petitioner's claim of inadvertence. Petitioner had conceded knowledge of the claim. His contentions about a mistake of law or reliance on counsel were not cognizable "inadvertence." Pet.App.52a-53a. And the court further concluded that he had a clear financial incentive not to disclose his claim. Prompt disclosure could have led petitioner's creditors to demand more stringent terms for his Chapter 13 plan—payment with interest, for example. Pet.App.50a-52a.

While petitioner protested he had never intended to deceive the courts, the court concluded that there was "no" realistic "way of ascertaining his subjective intent in this regard," for the obvious reason that "courts are not mind readers." Pet.App.40a, 48a. The court was also unpersuaded that petitioner's belated disclosure demonstrated good faith. Accepting that logic "would provide perverse incentives for debtors to keep their potential tort actions to themselves and 'wait and see' if they were caught in the act." Pet.App.47a. It would also be "unfair" to opposing parties "if the only consequence of 'catching the plaintiff in the act' were that he simply filed an amended bankruptcy plan." Pet.App.47a.

3. In a motion for reconsideration, petitioner submitted an affidavit as "newly discovered evidence" relevant to inadvertence. ROA.1880. The affiant was a staff attorney for the Chapter 13 Trustee for the district where petitioner had filed his bankruptcy case. JA.252. The affidavit averred that, "[i]n the Eastern District of Arkansas, it is not uncommon for debtors to amend their bankruptcy filings to disclose post-petition claims for personal injury actions prior to the settlement or resolution of the personal injury action." JA.253.

The district court held that the evidence was not properly filed on reconsideration, but also observed that the new "affidavit actually *hurt[]* [petitioner's] position." Pet.App.25a. Rather than showing petitioner's actions were inadvertent, it "strongly suggest[ed] that [petitioner's] non-disclosure was intentional, albeit based upon a misunderstanding of the applicable law," and "a conscious decision based upon

a misunderstanding of the law remains a conscious one." Pet.App.33a-34a.

4. The court of appeals affirmed.

Relevant here, the Fifth Circuit found that petitioner had not shown that judicial estoppel should not apply on the ground that his failure to disclose his personal-injury claim was inadvertent. The court observed that, under an objective test, a "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 (citation omitted). Petitioner admitted he had knowledge of the claims, and his argument "that he had no motive to conceal his claims from the bankruptcy court because he did not realize he had a duty to disclose them" was "meritless." Pet.App.13a. A mistake of law was no defense, and "[petitioner] conceded in his deposition testimony[] [that] this [was] his fourth time to file for bankruptcy," making it difficult "to accept his representation that he was unaware" of his disclosure duties. Pet.App.13a.

Indeed, much like the district court, the Fifth Circuit found that the affidavit petitioner had submitted from the bankruptcy staff attorney merely "cut[] against [his] argument": "Pointing out that 'non-disclosure was not unusual and is, in fact, routine in the Eastern District of Arkansas,' suggest[ed] that [petitioner's] nondisclosure was actually intentional—not inadvertent as he claim[ed]." Pet.App.13a-14a. Nor was the court persuaded by the affidavit's contentions that petitioner's non-disclosure was immaterial and could not have been to his benefit. He "ha[d] an interest-free repayment plan which [was] spread over five

years," and "ha[d] filed multiple times to have his interest-fee repayment plan extended." Pet.App.14a. "If he had disclosed his personal injury claims to the bankruptcy court, his creditors would have had an opportunity to object to his interest-free plan on grounds that his personal injury suit, if successful, would have generated enough revenue to cover the interest he owed on his debts." Pet.App.14a. Thus, petitioner had a clear motive to conceal the claim, and the district court acted within its discretion in applying judicial estoppel. Pet.App.14a-15a.

Judge Haynes concurred in the judgment. She agreed the district court's application of judicial estoppel was a proper exercise of discretion under Fifth Circuit precedent, but expressed reservations about that precedent. Pet.App.20a-23a.

SUMMARY OF ARGUMENT

I. Judicial estoppel does not require proof of bad faith. The doctrine forbids clearly inconsistent results not to punish the litigant, but to protect the integrity of the judicial system from the skepticism that inconsistent decisionmaking produces. It is inequitable to keep a benefit, or cause an adversary disadvantage, that depends on convincing the courts of two clearly inconsistent positions. A mere lack of bad faith, or lack of *proof* of bad faith, does not justify departing from that established principle. This Court should not stretch an "inadvertence or mistake" exception so far as to allow litigants to undo their past positions—while keeping the benefit of their past victories—for essentially any non-malicious reason.

This Court has always judged judicial estoppel by an objective standard. Thus, in assessing the inadvertence-or-mistake exception in *New Hampshire*, this Court did not look at New Hampshire's intent at all. New Hampshire contended that it should be allowed to shed its prior position because it had recently found new historical evidence. This Court did not question New Hampshire's sincerity, but recognized that just because a party now sees advantage in changing positions does not mean that its original position rested on a "mistake."

The rule should be no different in bankruptcy. Denying the existence of a known cause of action as an asset; obtaining a discharge, plan confirmation, or other relief; and then seeking to sue on the undisclosed cause of action meets all the elements of judicial estoppel. A claim of bad legal advice, strategic misjudgment, or general good faith does not establish that the non-disclosure was a "mistake" in the sense that a true scrivener's error would be. And the administration of the bankruptcy system depends on full, timely disclosure of all the debtor's asserts. Adopting a rule in which the only consequence of getting caught is belatedly *making the disclosure that was required anyway* does not create an incentive to disclose fully.

II. Petitioner's amorphous, multi-factor test finds no support in the history of judicial estoppel, in this Court or elsewhere.

To begin, petitioner acknowledges that his rule would open the door to litigants citing mistakes of law, or contending that their legal arguments were selected by counsel and not by them, as reasons to let them keep their clearly inconsistent wins. But reasons like those have never been valid ways of escaping

estoppel. To the contrary, estoppel has always recognized that a litigant may be bound by the representations and strategic judgments of its counsel.

Petitioner's rule, with its 17-plus factors, is also too amorphous to produce predictable results. Petitioner appeals to the notion that courts should be able to look at every possible factor in exercising their discretion, but he overlooks that a lack of bad faith has never been a legitimate part of the "inadvertence or mistake" analysis. His test would *require* courts to entertain a search for such evidence despite the significant difficulty in finding it and weighing its credibility years after the schedules were filed.

At bottom, petitioner argues that debtors should be able to avoid judicial estoppel from an undisclosed cause of action by claiming a pure heart and making belated disclosure once caught—even if the debtor unquestionably both knew of the cause of action and had a financial motive for concealment. Petitioner's rule will do nothing to incentivize the full, timely disclosure of assets that creditors, trustees, and bankruptcy courts need—it will do the opposite.

Judicial estoppel is appropriate where a debtor knew of a cause of action, did not disclose it, secured bankruptcy relief, and obtained a benefit by undervaluing his assets or keeping the cause of action for himself. The exception for inadvertence or mistake does not extend to a simple change of heart.

ARGUMENT

The question on which this Court granted certiorari is whether "judicial estoppel can be invoked" in a case like this one "regardless of whether there is evidence that the plaintiff in fact acted in bad faith." Pet.

i. The answer is yes: Judicial estoppel can be invoked without proof of bad faith. Petitioner no longer disputes that he took "clearly inconsistent" positions in the bankruptcy and in this action, that the bankruptcy court accepted his position, and that he would benefit from the change of position. The lower courts ruled against him on all of those elements, and petitioner did not seek certiorari on any of them. When all those considerations are present, judicial estoppel is appropriate. *New Hampshire*, 532 U.S. at 750-51.

None of those three prongs contains a bad-faith requirement, so petitioner attempts to smuggle one in through the inadvertence-or-mistake exception to judicial estoppel. But no precedent, historical principle, or policy consideration supports allowing a litigant to escape judicial estoppel—*i.e.*, to prevail simultaneously on two clearly inconsistent positions—unless his adversary can prove his subjective bad faith.

Much of petitioner's brief styles this case as a dispute about what "evidence" a court should consider in deciding whether a debtor-turned-plaintiff made "an intentional effort to mislead the courts." Pet.Br.2. But that framing skips past the core question: whether proof of an "intentional effort to mislead" is a prerequisite to applying judicial estoppel. It is not. This Court has previously declined to create "inflexible prerequisites" to the application of judicial estoppel. *New Hampshire*, 532 U.S. at 751. It should not now adopt petitioner's position that bad faith is such a prerequisite.

I. Judicial estoppel rests on objective considerations.

Judicial estoppel requires no showing of bad faith. That is apparent from this Court's decisions over nearly two centuries, which base judicial estoppel on the clear inconsistency of the litigant's positions—not on the litigant's reasons for switching positions. And the historical roots of estoppel doctrine more broadly confirm that no bad-faith requirement exists.

To the contrary, judicial estoppel rests on objective considerations: whether the litigant previously took a position clearly inconsistent with its current one; whether a court accepted the litigant's previous position; and whether allowing the litigant to switch positions (while retaining its past victory) would either benefit the switching litigant or disadvantage its adversary. Any exception for "inadvertence or mistake" likewise entails an objective inquiry into ascertainable historical facts about the litigant's representations to the *first* tribunal.

For the same litigant to win two cases by advancing positions clearly inconsistent with each other is a problem not just for the litigants but for the judiciary: It creates an obvious unfairness that would make reasonable observers question the outcome. Judicial estoppel heads off that problem and safeguards the courts' integrity. But that safeguard would be undone if a lack of bad faith—more accurately, a lack of *proof* of bad faith—were sufficient to let the litigant pocket its two clearly inconsistent victories. Petitioner's position thus runs contrary to the basic purpose of judicial estoppel. And the fact that this case deals with the estoppel effect of a bankruptcy adjudication is, if anything, more reason to apply the ordinary rule.

Bankruptcy depends on a full and candid disclosure of assets; the financial incentives to conceal assets are real, and unasserted causes of action are particularly easy assets to hide. This Court should not create a special rule relying on subjective intent in the bankruptcy context alone.

A. An objective standard comports with the history and purpose of judicial estoppel.

An objective standard for judicial estoppel best comports with this Court's precedent and judicial estoppel's doctrinal history. This Court has never looked to subjective bad faith, and in fact has rejected the notion that there is an exception to estoppel for prior mistakes of law—even though a good-faith legal misunderstanding might well be thought to show a lack of malign intent.

1. *New Hampshire*, this Court's primary modern precedent on judicial estoppel, shows that the test for applying the doctrine is objective, not subjective. *See also* pp. 6, 21, *supra*. In that decision, this Court did not consider New Hampshire's possible subjective intent to mislead in taking its position in prior litigation. To the contrary, it dismissed New Hampshire's complaint on the pleadings, without any suggestion that fact development on good faith was warranted. The Court extensively considered whether New Hampshire's change of position could be said to be the result of "inadvertence or mistake," but its inquiry looked nothing like what petitioner proposes.

To begin, the Court did not even need to decide definitively whether to recognize an exception for "inadvertence or mistake." What it said was this: "We do

not question that it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.'" 532 U.S. at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995), and citing two other circuit decisions). In other words, this Court has never recognized such an exception itself, much less held that it is enough to defeat judicial estoppel standing alone.

When this Court proceeded to analyze whether New Hampshire's previous position "fairly may be regarded as a product of inadvertence or mistake," 532 U.S. at 753, it said not a word about whether New Hampshire had acted in bad faith in the prior litigation. Indeed, the notion that the Court would attribute such malign intent to a sovereign State or its counsel—including then-Deputy Attorney General David H. Souter—is farfetched. To the contrary, the Court took at face value New Hampshire's representations that its changed position resulted from a reinterpretation of the historical evidence about a 1740 decree of King George II, *see id.* at 753, 756, presumably a matter on which reasonable minds could plausibly differ. But New Hampshire's evident good faith did not save it.

Instead of treating "inadvertence or mistake" as turning on subjective intent or bad faith, this Court engaged in a limited—and, critically, objective—inquiry into whether New Hampshire could have made a mistake in taking its previous position. 532 U.S. at 753. It found no possible cognizable mistake. All the relevant materials "were no less available 25 years ago," and New Hampshire "had every reason to consult [them]." *Id.* at 754. The Court did not need to

delve deeper than that, or to ask *why* New Hampshire or its lawyers decided to take the position it took in the first case.

And it is the first case that matters, as this Court made very clear. 532 U.S. at 753 (asking whether "New Hampshire's position in 1977" came from "inadvertence or mistake"). That shows that "inadvertence or mistake" cannot mean "lack of intent to game the system." Judicial estoppel precludes opportunistic switches of position only after the first case is won. It would not make sense to ask whether New Hampshire intended to game the judicial system when it filed its papers *in the first case*, because the opportunity to benefit from switching position may not arise until after judgment in the first case.

Thus, it is inconsistent with *New Hampshire*'s explanation of judicial estoppel to say (as the Ninth Circuit does) that "[t]he relevant inquiry is, more broadly, the plaintiff's subjective intent when filling out and signing the relevant bankruptcy schedules." *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 276-77 (9th Cir. 2013). Again, the requirement for estoppel has always been that the litigant took the original position with *objective knowledge*, not a bad-faith intent to deceive. *See* p. 7, *supra*. A debtor who knows about a cause of action but does not list it on her bankruptcy schedules because she plans never to assert it, and who changes her mind several years later when she learns how much money a jury could award, should not be excused from estoppel based on the purity of her heart at the time of the bankruptcy.

Petitioner discusses none of this in his sparse treatment of *New Hampshire*. Rather, he contends

that *New Hampshire* "acknowledged" "that judicial estoppel applies when 'the party who is alleged to be estopped 'intentionally misled the court to gain unfair advantage.'" Pet.Br.14-15. But the quote is not from *New Hampshire*—it is from a Fourth Circuit decision, *John S. Clark*, 65 F.3d at 29. And while this Court cited *John S. Clark* once (for the proposition that there "may" be an inadvertence-or-mistake exception), p. 26, *supra*, that does not mean it endorsed the reasoning petitioner quotes.

Petitioner's primary use of *New Hampshire* is his repeated quotation of the word "deliberately," but that word does not signal that this Court has endorsed a bad-faith standard. The word comes from a passing quote from dictum in a decision by the Fifth Circuit, 532 U.S. at 751—and petitioner's entire submission to this Court is that the Fifth Circuit does *not* ask about bad faith. To the extent "deliberately" tracks this Court's holding, petitioner is misreading it: New Hampshire was estopped, without the Court ever stating that it acted "deliberately" in the way petitioner uses the word.

At bottom, the reason New Hampshire was estopped was that it had previously advanced—and the Court had adopted—a legal position "clearly inconsistent" with its new one. As the Court recognized, if it let New Hampshire switch positions, "'the risk of inconsistent court determinations' would become a reality." 532 U.S. at 755 (citation omitted). So would the consequent "threat to judicial integrity." *Id.* at 751.

2. Earlier precedents also teach that an inquiry into a party's subjective intent to mislead is not required for the application of judicial estoppel.

A subjective inquiry would, for example, naturally encompass a mistake-of-law defense. But this Court long ago rejected that possibility. In *Davis v. Wakelee*, the Court considered the effect of plaintiff Davis's position in a prior proceeding—a bankruptcy. 156 U.S. at 685. Davis had moved to dismiss Wakelee's opposition to his bankruptcy discharge. *Id.* Davis argued that Wakelee's claim had been reduced to a judgment since the commencement of bankruptcy proceedings and so it would be unaffected by his discharge. *Id.* In a later proceeding after discharge, Davis asserted that Wakelee's claim was invalid. This Court held that Davis was estopped from so asserting. Davis resisted the estoppel on the basis that he had made a mistake of law. But this Court held that mistake of law was no defense. Although "Davis may possibly have been m[i]staken in his conclusion that the judgment was valid, … he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it." *Id.* at 691. Davis had "obtained an order which he could only have obtained upon the theory that the judgment was valid," and this Court held that, despite his mistake-of-law defense, his prior representation amounted to "consent that the judgment should be treated as binding for the purposes of the motion, and he is now estopped to take a different position." *Id.* As in *New Hampshire*, the analysis in *Davis* is incompatible with inquiry into the litigant's subjective intent.

Similarly, in *Philadelphia, Wilmington & Baltimore R.R. Co. v. Howard*, this Court applied estoppel without regard to intent. The plaintiff railroad had, in a prior action, successfully asserted that a contract bore its seal and was thus the deed of the corporation, but it then took the opposite position in a later action.

54 U.S. (13 How.) at 334. This Court was "clearly of opinion, that the defendant cannot be heard to say, that what was asserted on the former trial was false, even if the assertion was made by mistake." *Id.* at 337. The Court explained that if "it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it." *Id.* The Court rejected the railroad's excuse that its change of position in the prior action would not "have been a fraud upon the administration of justice." *Id.* at 327. It did not matter that the railroad's position was *not fraudulent*—that it was *knowingly inconsistent* was enough to warrant estoppel.

Thus, this Court's precedents already establish that judicial estoppel does not require a subjective intent to mislead the court.

B. An objective standard serves estoppel's essential purpose of preserving consistency across the judicial system.

Clearly inconsistent adjudications of like issues create a problem not just for the losing litigants, but for the judicial system as a whole. That is why estoppel exists: not to punish litigants for intentionally working to produce inconsistent results, but to avoid the inconsistency, period. *See* pp. 3-4, *supra*. Judicial estoppel protects "the integrity of the judicial process," *New Hampshire*, 532 U.S. at 755; indeed, that is a core purpose of estoppel more generally. *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 213 (5th Cir. 1999) ("[T]he purpose of judicial estoppel is to protect the integrity of courts, not to punish adversaries or to protect litigants"); *Ryan Operations*, 81 F.3d at 360 (similar). The objective-intent

standard is the only standard that accords with the history and purposes behind estoppel more broadly.

The reputation of judicial proceedings suffers if a litigant prevails in separate proceedings on two clearly inconsistent arguments (just as it suffers if a litigant prevails on an issue that litigant previously lost, the rationale for collateral estoppel). "[J]udicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" *New Hampshire*, 532 U.S. at 750 (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)). That is why one of the core elements of judicial estoppel is acceptance of the prior position by a court.

And once the court accepts the party's first position, estoppel treats a first adjudication as settling the matter. Conversely, asserting that the court got it wrong the first time is not a valid way of refuting the estoppel effect of that first decision—whether under judicial estoppel, collateral estoppel, direct estoppel, or any other estoppel that rests on a judicial judgment. *See, e.g.*, *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 1308-09 (2015); *see also Minerva*, 594 U.S. at 575 (recognizing that assignor estoppel may bar an assignor from challenging a patent even if a court would agree with that challenge).[3]

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[3] That point is also the response to petitioner's insistence (at, *e.g.*, 24-25) that judicial estoppel confers a "windfall" on parties that assert it successfully. It would only be a "windfall" if the first court's decision (accepting the party's original position) were wrong and the "clearly inconsistent" new position were right. But the whole point of estoppel (whether judicial estoppel or col-

In this context especially, then, the good faith of the estoppel-denier is naturally subordinated to a more important equitable goal of guarding against the "threat to judicial integrity" from two clearly inconsistent victories. *New Hampshire*, 532 U.S. at 751. That threat is not dispelled just because the twice-victorious litigant subjectively lacked bad faith.

Indeed, adding a bad-faith requirement to those estoppel doctrines would convert those doctrines into fraud by another name. Ewart 83-85; Pomeroy 1638-1640. Similarly here, it would undermine and contradict the equitable principle behind judicial estoppel to narrow the doctrine to instances of fraud—*i.e.* where the estoppel-denier had a subjective intent to mislead.

Judicial estoppel would not serve its function of preventing public distrust in the integrity of the judicial system if it applied only where a party in the first proceeding had a subjective intent to mislead the court. *In re Buscone*, 61 F.4th 10, 23 (1st Cir. 2023) ("[W]e have never recognized such an exception and have noted that deliberate dishonesty is not a prerequisite to application of judicial estoppel." (citation omitted)). That concern is amplified given the practical reality that only a subset of cases lend themselves to proof of subjective bad faith. Requiring such proof means tolerating inconsistent adjudications involving the same party—and allowing that party to keep the benefit of the inconsistency, even when it had full knowledge of the relevant facts and so cannot claim

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lateral estoppel) is that, once the first decision reaches final judgment and is not going to be re-examined, no other court will re-examine it either. Estoppel "prevents relitigation of wrong decisions just as much as right ones." *B & B*, 575 U.S. at 1308 (citation and brackets omitted).

true "inadvertence." Accepting such inconsistency can only harm the reliability and reputation of the judicial process. An objective test is crucial to addressing the system-wide value that judicial estoppel provides.

C. An objective standard is the best fit for the bankruptcy context.

The foregoing principles apply with full force in the bankruptcy context, and bankruptcy does not need its own atypical judicial estoppel rule. *Contra* U.S. Br. 18. There is no reason why bankruptcy should be the only area of the law in which judicial estoppel requires proof of bad faith. If anything, bankruptcy-specific considerations support the application of an objective standard even more strongly.

An objective test incentivizes the full and timely disclosure required to maximize the value to creditors, facilitates a speedy resolution of the bankruptcy, and discourages a race to the courthouse by creditors by ensuring a fair and orderly distribution of the bankruptcy estate—all core goals of bankruptcy. And while bankruptcy seeks to provide a debtor a fresh start, that fresh start is contingent on his fair and full disclosure of his assets—bankruptcy simply does not function without that disclosure. *See* p. 8, *supra*.

In the Chapter 7 context, the bankruptcy estate includes pre-petition assets which are then liquidated to repay creditors. Concealed pre-petition assets thus directly impact the amount available to creditors in the bankruptcy. In Chapter 13, a full and fair view of the bankruptcy estate, which includes pre- and post-petition assets, directly informs the repayment plan to creditors. *See* pp. 12-13, *supra*. A debtor's assets

are peculiarly within his knowledge, so it is imperative that the debtor disclose the assets he knows about, rather than conceal what he can.

Not only does bankruptcy's practical functioning rely on full and fair disclosure, but the equity of bankruptcy also relies on it. The early history of bankruptcy treated debtors harshly—bankruptcy was seen as relief *from* debtors, not relief *for* debtors. Charles Jordan Tabb, *The History of Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 8 (1995). Over time, creditors slowly began to accept the proposition that debtors who cooperated in bankruptcy proceedings should be discharged from their debts, based on the idea that such cooperation would improve recoveries for creditors. *Id.* at 10-11. The success of bankruptcy law relies on fairly balancing the interests of creditors and debtors. *Id.* at 27-38; *see Taggart v. Lorenzen*, 587 U.S. 554, 565 (2019) (noting "that the Bankruptcy Code often seeks to achieve" a "careful balance between the interests of creditors and debtors" (citation omitted)).

That balance is upset without requiring full and fair disclosure of all assets within the debtor's knowledge. And a rule that permits knowing omissions, without consequence, will result in incomplete disclosure. A debtor must be incentivized to come forward with all of the assets *of which he has knowledge*. A debtor *will* be excused for lack of knowledge, but not for a supposed purity of heart in concealing assets. For example, a debtor could demonstrate that he failed to disclose a trespass cause of action because he did not know the source of water flooding onto his property—but not because he sincerely but incorrectly

believed that the value of the claim would not affect the court's decision.

II. Petitioner's subjective standard is legally unsound and unworkable.

Against the traditional and administrable objective standard, petitioner proposes (at 31, 34-37) a 17-plus-factor standard "bearing on a debtor's intent to mislead." This multi-factor subjective standard is contrary to settled law, grossly inefficient, and insensitive to the goals of bankruptcy. This Court should reject it.

A. Petitioner's subjective standard is legally flawed.

In addition to proceeding from a flawed premise—that what matters to judicial estoppel is whether the debtor had the "intent to mislead," a point refuted above, pp. 25-30, *supra*—key elements of petitioner's subjective standard flout other established legal principles.

1. Petitioner would have courts consider whether there is evidence the debtor understood the "rules governing disclosure" in bankruptcy. Pet.Br.35. The implication is that a well-intentioned misunderstanding of the disclosure obligations can demonstrate that non-disclosure was inadvertent. But courts—including courts that petitioner says (at 31-32) embrace his subjective standard—have rejected arguments that a debtor's "not know[ing] that [he] ought to have disclosed" a claim shows inadvertence. *Stanley v. FCA US, LLC*, 51 F.4th 215, 221 (6th Cir. 2022) (citation omitted); *see also Flugence*, 738 F.3d at 130; *In re Superior Crewboats, Inc.*, 374 F.3d 330, 335 (5th Cir. 2004).

For good reason. After all, this Court has "long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010) (citation omitted). "Our law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law." *Id.* at 582-83; *Stanley*, 51 F.4th at 221 ("[I]gnorance of the law is generally not an excuse."). Thus, statutes excusing "bona fide error" routinely do not excuse legal error. *Jerman*, 559 U.S. at 593 (federal statutes), 601 (state statutes). Likewise, the historical record shows that mistake of law is not a defense to estoppel generally. *See* pp. 6-7, 29-30, *supra.* Petitioner has not even attempted to demonstrate why that settled law does not apply here.

2. Equally mistaken is petitioner's assertion (at 35) that "[w]hether the debtor told his bankruptcy attorney about the civil claim" is relevant—with the suggestion that if the bankruptcy attorney was told about the claim and it still goes undisclosed, the fault should lie with the attorney and not the debtor. But the attorney is the debtor's agent, with the actual and apparent authority to make representations to courts that bind the client. That happens every time a lawyer files an answer to a complaint, serves a response to a Request for Admission, or makes a judicial admission in a signed pleading. *See* Fed. R. Civ. P. 8(b), 36(a)(3), 11(b). Having "voluntarily ch[osen] [an] attorney as his representative in [an] action," a party "cannot [then] avoid the consequences of the acts or omissions of this freely selected agent." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962). "Any other

notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Id.* (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).

For exactly that reason, courts across the country, including a number of the circuits petitioner invokes in support of his standard, have held that "bad legal advice does not relieve the client of the consequences of her own" non-disclosure. *Cannon-Stokes*, 453 F.3d at 449; *see, e.g.*, *Putnam v. Day*, 89 U.S. 60, 64 (1874) (applying estoppel because "[i]f his counsel failed to make as good a defence for him as they might have done, it was his misfortune and cannot be rectified after the passing of the decree"); *Stanley*, 51 F.4th at 221 (refusing to "depart from the general rule ... that litigants are bound by the actions of their attorneys" (citation and quotation marks omitted)); *Queen v. TA Operating, LLC*, 734 F.3d 1081, 1094 (10th Cir. 2013) (litigants "cannot escape their responsibility by blaming their bankruptcy attorney"); *Eastman*, 493 F.3d at 1159 ("Gardner's assertion that he simply did not know better and his attorney 'blew it' is insufficient to withstand application of the doctrine."); *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 601 (5th Cir. 2005) (similar).

Indeed, it would make little sense not to apply in the estoppel context a basic concept—an agent's authority to bind the principal—that derived from estoppel in the first place. It is the law of estoppel that "underlies the doctrine of the implied authority of an agent in most of its applications, and which prevents the principal from denying the authority which, by his

conduct, he has held the agent out to the world as possessing." Pomeroy 1634; *see, e.g.*, *Bronson's Ex'r v. Chappell*, 79 U.S. 681, 683 (1870) (principal "is estopped to take refuge" in denying his agent's authority "[i]f he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done"). If a client is estopped from disavowing the actions of the "lawyer-agent," *Link*, 370 U.S. at 634, it follows that those actions can estop the client in subsequent litigation as well.

Conceivably the fact that a debtor disclosed a cause of action to the attorney might be relevant to establishing true inadvertence—such as a paralegal e-filing the wrong schedule of assets. *Cf. Carson v. Hyatt*, 118 U.S. 279, 285-88 (1886) (no estoppel from mistaken averment of domicile promptly corrected). But there is no suggestion that any scrivener's error caused the omission here: The record shows that, if anything, the decision not to disclose petitioner's cause of action was a conscious one, perhaps based on local practice (a dubious one if so).

Rather than rewrite the applicable law, where a party's representation to a tribunal rests on bad legal advice, "[t]he remedy for bad legal advice lies in malpractice litigation against the offending lawyer." *Cannon-Stokes*, 453 F.3d at 449. The remedy is not allowing the party to walk away from the consequences of its (successful) position as long as it can blame the lawyer. In so arguing, petitioner "might as well say that []he is free to ignore any contract that a lawyer advised h[im] to sign with h[is] fingers crossed behind h[is] back." *Id.*

B. Petitioner's subjective standard is amorphous and unmanageable.

Even setting aside the obvious legal flaws, petitioner's subjective standard has nothing to recommend it as a practical matter. On his view, every single motion for judicial estoppel in a bankruptcy-related case would compel district courts to engage in an unbounded, multi-factored balancing test entailing exhaustive fact discovery and requiring certification of legal and factual questions to the bankruptcy court. Pragmatic good sense does not support this approach any more than precedent.

1. To recite petitioner's multi-factor test is practically to discredit it. The standard requires courts to march through *at least* 17 different considerations—petitioner (at 35) makes clear the analysis merely "include[s]" but is by no means limited to his catalogue of factors—all to decide a backstop exception to a doctrine that *already* requires a multi-step analysis. *See* Pet.Br.35-37.

As this Court and its Members have repeatedly observed, "experience has shown that" such "open-ended balancing tests[] can yield unpredictable and at times arbitrary results." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014) (statutory standing); *see also, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 898, 901 (2008) (non-party claim preclusion) (rejecting a similarly "amorphous," "all-things-considered balancing approach"); *Wooden v. United States*, 595 U.S. 360, 385 (2022) (Gorsuch, J., concurring, joined by Sotomayor, J.) (Armed Career Criminal Act's "[o]ccasions [c]lause") ("Multi-factor balancing tests of this sort, too, have supplied notoriously little guidance in many other contexts, and there is little

reason to think one might fare any better here."). The reason why is obvious: "[I]t is no more possible to demonstrate the inconsistency of two opinions based upon a 'totality of the circumstances' test than it is to demonstrate the inconsistency of two jury verdicts." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989).

Petitioner counters (at 16-17) that his nebulous consider-anything-at-all standard is required by the equitable nature of judicial estoppel, which historically prizes "case-by-case" "flexibility." To be sure, equity must avoid rigidity and respond to context (though estoppel is not purely an equitable doctrine). But even in equity, flexibility should not mean formlessness. "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike"—a principle that underlies judicial estoppel as well. *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005); Scalia 1180 ("Only by announcing rules do [judges] hedge [themselves] in."). Even discretionary equitable doctrines require limiting principles and outer bounds. Petitioner's test has none.

2. The only thing certain about petitioner's subjective standard is that it will mire litigants and the lower courts in laborious and prolonged factfinding.

Again, his approach mandates that courts examine the subjective intent of the debtor, the debtor's understanding of the law, and the debtor's communications with bankruptcy counsel. There is scant chance those issues can be decided on the papers. Rather, they will almost inevitably require extensive fact discovery—at a minimum, depositions and wide-ranging document requests aimed at reconstructing the debtor's state of

mind at the time he made incomplete disclosures to the bankruptcy court, and perhaps ultimately a trial on the debtor's subjective intent. And difficult questions of privilege and waiver will compound the endeavor's cost and complexity whenever communication between the debtor and his bankruptcy attorney is placed at issue.

In short, this "all-things-considered balancing approach [will] spark wide-ranging, time-consuming, and expensive discovery" into elusive and knotty questions around state of mind and attorney-client confidences. *Taylor*, 553 U.S. at 901. "And after the relevant facts are established, district judges would be called upon to evaluate them under a standard that provides no firm guidance." *Id.* To make matters worse, the "facts" would concern issues of subjective intent that are notoriously difficult to establish no matter how rigorous the discovery process—particularly given the obvious reality that *every* debtor will testify that his failure to disclose a claim was not a product of bad faith.

It is therefore unsurprising that the government recoils from petitioner's emphasis on the debtor's own self-serving testimony on state of mind, and rightly urges that "objective evidence" should win out. U.S. Br. 26. To the extent the Court holds that the inadvertence analysis should be broader than the one conducted by the courts below, then, it should at least place limits on the kind of factfinding that should be typically expected—limits that privilege readily discernible objective evidence over *post hoc* assertions of good faith, or the absence of evidence of bad faith.

3. On top of all this, petitioner's subjective standard would require district courts to effectively certify

aspects of the judicial-estoppel analysis to the bankruptcy courts, asking them to detail their "own findings or actions as to any omissions or delayed disclosures." Pet.Br.37-38. Such an approach would introduce unnecessary inefficiencies and jurisdictional complexities into the doctrine. Judicial estoppel does not ordinarily call for going back to the first court (nor, for that matter, does collateral estoppel or equitable estoppel). There is no reason to adopt that practice here.

Petitioner's standard presents significant challenges for the bankruptcy courts. They would often have to reopen a closed docket to issue findings and conclusions on years-old matters. Resurrecting and analyzing these stale proceedings could well involve another set of full briefing in the original bankruptcy court, on top of the motion practice on judicial estoppel in the court where the claim is being litigated. So the parties would face additional burdens as well, from having to hire a separate set of counsel with local credentials and bankruptcy experience to litigate the parallel proceedings—and that is assuming that the bankruptcy court would allow an unrelated party like respondent to participate in a re-opened proceedings.

Petitioner's insistence on the need to return to bankruptcy court to fully resolve the judicial estoppel inquiry highlights a fundamental flaw with the suggestion that the inadvertence-or-mistake exceptions should be broadened because the bankruptcy court has "other tools" that could replace judicial estoppel. *See* U.S.Br.3; *cf.* Pet.Br.29-30. First, a number of those bankruptcy-court tools are either too blunt (*e.g.*, the possibility of criminal sanctions for fraudulent concealment, 18 U.S.C. § 152) or too confined to the

bankruptcy proceeding (*e.g.*, the power to dismiss a pending bankruptcy case, which may be useless if the bankruptcy case is already over by the time the concealed asset is asserted in another court). More fundamentally, this argument ignores that judicial estoppel is a backstop to allow the *second* court to prevent the inequity of allowing parties to take inconsistent positions in separate judicial proceedings and to prevent the harm that inconsistent positions inflicts on the judiciary. It thus serves an important role that cannot be replaced by tools available to the *first* court.

The district courts would confront difficulties as well. Those courts would have to take into account the unfamiliar practices of bankruptcy courts operating in jurisdictions governed by different law. This is not a theoretical concern. Petitioner himself argued below that the district court should reconsider its decision on judicial estoppel based on representations about the disclosure practices of a bankruptcy court in a different regional circuit—practices that were at odds with the precedent of the circuit in which the district court sits. *See* p. 12, *supra*.

Which version of the law is the district court supposed to credit? Must a district court defer to the bankruptcy court's view of the legal significance and intentionality of a non-disclosure—even if the conclusion is plainly contrary to the law binding the district court? Reviewing courts, too, would have to grapple with difficult questions around whether a district court has discretion to discount the bankruptcy court's findings, or to credit legal conclusions from an out-of-circuit court at odds with the reviewing court's own precedent. Straightforward motion practice on a common defense would thus devolve into a procedural

quagmire. Nothing in the history of judicial estoppel, this Court's cases, or sound policy requires that result.

C. Petitioner's subjective standard would disserve the goals of bankruptcy.

Petitioner's subjective standard also would not advance the purposes of judicial estoppel in the bankruptcy context: to deter dishonest debtors while protecting innocent creditors.

At bottom, petitioner argues that debtors should be able to avoid judicial estoppel through protestations of a pure heart and with belated disclosure—even if the debtor unquestionably knew of the cause of action before the bankruptcy filing and did not disclose it, and even when there is undisputed evidence of a motive for concealment. That sends a clear message to debtors: First, take a shot at "[c]onceal[ing] your claims; get[ting] rid of your creditors on the cheap, and start[ing] over with a bundle of rights." *Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570, 571 (1st Cir. 1993). Then, if things go wrong, simply "back-up, re-open the bankruptcy case, and amend [your] bankruptcy filings," but "only after [your] omission has been challenged by an adversary." *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1288 (11th Cir. 2002), *overruled by Slater v. U.S. Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017) (en banc). Under such an approach, a debtor plainly "[w]ould consider disclosing potential assets only if he [were] caught concealing them." *Id.*

The systemic disadvantages of this regime are easy to foresee. Disclosures will be less complete and timely, and creditors will lose out on valuable assets

and crucial information they need to evaluate bankruptcy plans before they are approved. The more creditors fear they are being "scam[med]" by lax disclosures from at least a minority of debtors who go unpunished, the more that will "drive up interest rates and injure the more numerous honest borrowers." *Cannon-Stokes*, 453 F.3d at 448. In the meanwhile, courts would be saddled with a burdensome, discovery-intensive estoppel standard that rewards gamesmanship and last-minute disclosure. So all constituents of the bankruptcy process—debtors, creditors, and the courts that administer the proceedings—will lose out.

The better course is to endorse "[a] doctrine that induces debtors to be truthful in their bankruptcy filings." *Cannon-Stokes*, 453 F.3d at 448. A "strict[er] estoppel rule" that ensures "better up-front disclosure" will benefit creditors and debtors in the long run, *Ah Quin*, 733 F.3d at 281 (Bybee, J., dissenting), and it promises more efficient proceedings in both the bankruptcy and the district courts. Equity will win out, too: "Ultimately, when a lie is punished, and future lies are deterred—especially in the context of a bankruptcy system so dependent on full and accurate disclosure—equity will usually have been done." *Id.* at 294 (Bybee, J., dissenting).

D. Petitioner's concerns are best addressed by the core requirements for judicial estoppel.

Petitioner's concerns about unfairness and rigid application of estoppel are not best addressed by his multi-factor, consider-any-circumstance test for the inadvertence exception. Rather, those issues are already adequately accounted for in the three primary

judicial-estoppel factors, and by the discretionary nature of the doctrine's application.

1. The first judicial estoppel factor requires that the supposed inconsistency must be "clear." *See* p. 3, *supra*; *Zedner v. United States*, 547 U.S. 489, 505 (2006). Offhand statements are not likely to qualify. That is so even in the bankruptcy context, where courts regularly hold that ambiguity cuts against application of judicial estoppel—and that the omission of a cause of action from the schedules may still be ambiguous.

For example, the Second Circuit found no clear inconsistency where a *pro se* debtor listed his whistleblower suit in his Statement of Financial Affairs, even though he did not list it in his Schedule B list of assets. *Ashmore v. CGI Grp., Inc.*, 923 F.3d 260, 271-81 (2d Cir. 2019). The debtor therefore was not estopped from maintaining his whistleblower suit. *Id.* at 283*; see also, e.g.*, *Vehicle Mkt. Rsch., Inc. v. Mitchell Int'l, Inc.*, 767 F.3d 987, 994-96 (10th Cir. 2014) (debtor was not judicially estopped from seeking to recover damages for the misappropriation of assets he had previously listed as worthless in his bankruptcy, because "a plausible inference the other way was possible about each piece of evidence relied upon"). Thus, inconsistencies in the listed *value* of a cause of action in bankruptcy and the amount of damages sought in the subsequent litigation would not qualify as a sufficiently clear inconsistency under the first prong, since those two estimates are driven by different considerations. *Id.*

2. The second prong requires success in convincing the first court of the party's earlier position. *See* p. 3, *supra*. If the party changes its position before

pocketing a victory based on it, it need not worry about judicial estoppel. Conceivably, even after final judgment, Rule 60(b) or its analogues might provide a way to unwind a victory and avoid judicial estoppel.

To be clear, however, in the bankruptcy context, "[t]he bankruptcy court may 'accept' the debtor's assertions by relying on the debtor's nondisclosure of potential claims in many … ways" besides granting a discharge, so vacating the discharge may not be enough to defeat judicial estoppel. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001). In the Chapter 13 context, for example, judicial acceptance occurs no later than the first confirmation of the plan, and not at the discharge.

As the government aptly points out, the "judicial-estoppel analysis should not be applied in such a way that debtors can decline to disclose claims until they are caught, and then avoid any consequences by claiming inadvertence or mistake." U.S. Br. 28. Thus, "last minute candor" after being caught often will not be enough. *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030, 1032-33 (8th Cir. 2016). If it were, that would "suggest[] that a debtor should consider disclosing personal assets only if he is caught concealing them." *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 265-66 (5th Cir. 2012) (citation omitted); *see Stanley*, 51 F.4th at 221 ("[M]erely allowing a bankruptcy petitioner to avoid judicial estoppel by correcting omissions after an opposing party notifies them of the same 'would encourage gamesmanship' and defeat the purpose of the doctrine.") (citation omitted).

3. As to the third prong, the party asserting judicial estoppel must establish that the party who took inconsistent positions gained an advantage. *See* pp.

3-4, *supra*. Therefore, in scenarios where the debtor truly gains no benefit from the non-disclosure, judicial estoppel does not apply.

For example, a court could conclude that there is no unfair advantage where a Chapter 13 bankruptcy debtor was already required to pay the debtors in full, with interest, and the cause of action arose only a few weeks before the final payment. *E.g.*, *Clark v. AII Acquisition, LLC*, 886 F.3d 261, 264 (2d Cir. 2018). Likewise, there is no unfair advantage if the debtor will "receive no windfall as a result of its failure to disclose its claims, because only [its] creditors will receive the distribution of any recovery." *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2022). And, as already described, courts may not find any unfair advantage to the debtor (or clear inconsistency of position) when a blameless trustee pursues the cause of action. *See Reed,* 650 F.3d at 574-75; *see* also pp. 12-13, *supra.*

That said, in most Chapter 13 bankruptcy cases, debtors "stand[] to benefit from omitting claims during their Chapter 13 bankruptcy proceedings—even if they don't have their debts discharged." *Stanley*, 51 F.4th at 220. That is why, in this case, it initially sufficed for Buddy Ayers to show that petitioner "could have enjoyed personal gains from concealing his claims had they remained undisclosed," after which "the burden [] shift[ed] to [petitioner] to provide some explanation for his failure to meet his disclosure obligations." *Love*, 677 F.3d at 263 n.2. Petitioner failed to meet that burden.

4. Lastly, judicial estoppel is "invoked by a court at its discretion." *New Hampshire*, 532 U.S. at 750 (citation omitted). The court below has repeatedly acknowledged as much: "Because judicial estoppel is

equitable in nature, trial courts are not *required* to apply it in every instance that they determine its elements have been met." *U.S. ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 271 (5th Cir. 2015); *accord Matter of Parker,* 789 F. App'x 462, 464 (5th Cir. 2020). And indeed, other courts have recognized that the "courts of appeals that have followed the" approach petitioner attacks "have not been 'as rigid as one would expect' in practice." *Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 932 (D.C. Cir. 2016) (quoting *Ah Quin*, 733 F.3d at 277).

Thus, despite petitioner's insistence (at, *e.g.*, 16-18) that the Fifth Circuit's precedent is not "flexible," courts retain discretion to decline to apply the doctrine given the specific circumstances of a particular case. The fact that petitioner could not persuade the courts below to treat his case as an exceptional one hardly supports radically rewriting the inadvertence exception for all future judicial-estoppel cases, bankruptcy and nonbankruptcy alike.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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