

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS KEATHLEY,)
 Petitioner,)
 v.) No. 25-6
BUDDY AYERS CONSTRUCTION,)
INCORPORATED,)
 Respondent.)
- - - - -

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

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7 vacatur.

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9 of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 25-6,
5 Keathley versus Buddy Ayers Construction.
6 Mr. Garre.

7 ORAL ARGUMENT OF GREGORY G. GARRE
8 ON BEHALF OF THE PETITIONER

9 MR. GARRE: Thank you, Mr. Chief
10 Justice, and may it please the Court:
11 Judicial estoppel present -- prevents
12 a party from deliberately adopting inconsistent
13 positions to gain an unfair advantage in
14 litigation. Because the doctrine targets
15 intentional inconsistencies, courts have
16 resisted its application when a party's prior
17 position is based on inadvertence or mistake.
18 The narrow but important question in
19 this case is how to determine when a party's
20 position was inadvertent or intentional in the
21 specific context where a debtor fails to update
22 a form to reflect a new cause of action outside
23 of bankruptcy.
24 The failure to update -- if the
25 failure to update the form was simply a

1 mistake, then there's no intentional
2 inconsistency and no basis to invoke judicial
3 estoppel. The Fifth Circuit applies what
4 amounts to a conclusive presumption that a
5 debtor's failure to disclose a cause of action
6 and update a -- through updating a form is
7 intentional as long as the debtor knew of the
8 facts underlying the claim and had a potential
9 financial motive to shield the asset, something
10 which exists almost by definition in the case
11 of any bank -- bankruptcy.

12 That rule flouts the flexibility that
13 equity ordinarily demands, it grants a windfall
14 to alleged wrongdoers have no -- who have no
15 connection to the bankruptcy, and it unfairly
16 penalizes honest debtors by denying them
17 redress for real wrongs.

18 This Court should reject the Fifth
19 Circuit's rule and hold instead that courts
20 must undertake a holistic analysis of all facts
21 bearing on a debtor's intent before concluding
22 that a debtor's failure to update a form
23 represents an intentional position that no
24 cause of action exists.

25 Erasing a debtor's claim seeking

1 redress for tortious or other illegal conduct,
2 like Petitioner's personal -- personal injury
3 action here, imposes an enormous cost on
4 individuals already facing hard times. There's
5 no basis for taking that extreme step based on
6 a conclusive presumption that may be entirely
7 unfounded.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Mr. Garre, what type
10 of evidence should be used in your holistic
11 approach?

12 MR. GARRE: So we would look to all
13 surrounding circumstances, Your Honor,
14 objective and subjective. It would include the
15 debtor's own testimony typically, but that
16 would just be one factor. You would look at
17 the sophistication of the debtor, when and --
18 and the manner in which the debtor updated the
19 form, whether the debtor told his attorney of
20 the cause of action, whether creditors objected
21 when a form was amended, the impact on
22 creditors or other in the bank -- others in the
23 bankruptcy, the bankruptcy court's own
24 findings. These are objective factors that
25 courts have looked to and can be applied in

1 determining a debtor's actual intent.

2 CHIEF JUSTICE ROBERTS: One factor you
3 haven't mentioned is, of course, the impact on
4 the judiciary, the judicial reputation, the
5 phrases that have traditionally been used here.
6 All that you've been talking about is between
7 the two parties to the -- the bankruptcy and
8 the accident.

9 Where does that factor in? I thought
10 that was the primary basis for the whole
11 doctrine of judicial estoppel. You don't want
12 to put the courts in the position of acting on
13 the basis of a counterfactual that's --
14 that's -- that's not true.

15 MR. GARRE: Absolutely, Your Honor.
16 That's the backbone of judicial estoppel. This
17 Court and others have talked about playing fast
18 and loose in the courts -- with the courts and
19 protecting the integrity of the courts.

20 And what -- what this Court recognized
21 in New Hampshire is that where the integrity is
22 impacted is where parties intentionally advance
23 inconsistent positions in order to gain
24 advantage in litigation. And to put the courts
25 in the position of potentially adopting those

1 inconsistent positions is what undermines the
2 integrity of the courts, so --

3 CHIEF JUSTICE ROBERTS: I thought it
4 was more that they proceeded on the basis of a
5 particular -- not assumption, but what was
6 shown, and you don't want to put them in a
7 position of having two different versions of
8 reality and then proceeding on the basis of one
9 or the other.

10 MR. GARRE: So I think what -- what
11 the courts have described it as is the cold
12 manipulation of the process, Your Honor, and
13 that happens when an individual intentionally
14 takes one position, secures an advantage by the
15 adoption of that position, turns around in a
16 different proceeding, adopts a different
17 position, and tries to get a different
18 advantage.

19 If the individual didn't intentionally
20 adopt that first position and -- and corrects
21 it, as happens in the scenario here, where a
22 debtor is simply unaware -- and, as the amici
23 former bankruptcy judges indicate, bankruptcy
24 forms are very confusing. Even with the aid of
25 counsel, many debtors simply just don't realize

1 that a cause of action is an asset and forms
2 have to be updated.

3 In that situation, the debtor has made
4 simply a mistake in failing to update the court
5 as to the existence of the cause of action.
6 And, there, the debtor is not actually taking
7 the position that there is no cause of action
8 before the bankruptcy court. He simply failed,
9 because of his mistake, to update a form. So
10 there is no intentional inconsistency. There's
11 no playing fast and loose with the courts.
12 There's no cold manipulation of the judicial
13 process. And there's no threat to the
14 integrity of the court.

15 And, conversely, I mean, judicial
16 estoppel is an extreme measure, and it's
17 appropriate where there is a threat to the
18 integrity of the court, but it involves wiping
19 out a cause of action. And, here, you have a
20 situation in which courts, without even
21 engaging in a holistic determination as to the
22 debtor's actual intent, whether the debtor
23 simply made a mistake in failing to update a
24 form, are wiping out a cause of action like
25 Mr. Keathley's personal injury action here.

1 Respondent's own driver admitted that
2 his brakes failed and that his truck hit
3 Mr. Keathley's, and that action has been wiped
4 out based on a conclusive presumption that the
5 Fifth Circuit applies that simply because a
6 debtor has a potential financial motive to
7 mislead, a debtor's failure to update the
8 bankruptcy court as to the existence of a cause
9 of action is an intentional representation.

10 JUSTICE BARRETT: Mr. Garre, can I
11 interrupt you and ask you a question? This is
12 an Erie question. This was a diversity suit,
13 so why does the federal law -- everyone's
14 assumed that the Fifth Circuit's law of
15 judicial estoppel applies. Is the Mississippi
16 law different? And, if not, why doesn't the
17 Mississippi law control in the diversity suit
18 under Erie?

19 MR. GARRE: So I -- I think, as I
20 understand this Court's decision in New
21 Hampshire versus Maine, I mean, the judicial
22 estoppel doctrine, as embraced by this Court,
23 is, you know, a federal common-law-type rule
24 inherent in the Court's own authority to
25 protect its proceedings. And so I think that

1 that would be a federal baseline.

2 I mean, state courts have applied it
3 as well. I -- I think, here, no one has
4 pointed to any difference in the proceedings.

5 JUSTICE BARRETT: I gather that it's a
6 matter of some dispute in -- in other circuits,
7 that -- that courts have struggled with that
8 question. And I don't want to resolve it here.
9 I don't think we have to resolve it here. But
10 I certainly wouldn't want anything we said here
11 to -- to resolve that question. I mean, I can
12 see arguments on either side.

13 I think what you're saying might be
14 kind of a Byrd versus Blue Ridge, the
15 overriding federal interest overcomes whatever
16 we might say about the outcome-determinative
17 prong of Erie. It just seems to me like that
18 might be something -- I just wanted to know
19 your reaction about it because it might be
20 something to avoid.

21 MR. GARRE: So I think the Court, you
22 know, can and absolutely should reserve that
23 question for a later day, Your Honor. I'm not
24 aware of any inconsistency in state or federal
25 courts in terms of recognizing that judicial

1 estoppel doctrine wouldn't apply in the case of
2 an honest mistake.

3 JUSTICE JACKSON: Can I -- can --

4 MR. GARRE: You know, I think courts
5 across the board have focused on, you know,
6 what they call the cold manipulation of the
7 courts and the judicial process.

8 JUSTICE BARRETT: Okay. Just one last
9 question then speaking of just questions to
10 avoid. Do you see your argument as really kind
11 of confined to how judicial estoppel plays out
12 in the bankruptcy context in particular?

13 MR. GARRE: Yes.

14 JUSTICE BARRETT: Or do you see it --
15 okay.

16 MR. GARRE: Yes.

17 JUSTICE BARRETT: Why?

18 MR. GARRE: Well, that's the
19 situation, and this has arisen. I mean,
20 it's -- it's unique in the important respect
21 is, typically, when judicial estoppel has
22 applied in other contexts, like New Hampshire
23 versus Maine, you have a party that's
24 affirmatively adopted two different positions,
25 and there's no question what the party, you

1 know, thinks its position is.

2 Here, in the bankruptcy context, where
3 a debtor has failed to update a form, the --
4 the position is implied by the failure to
5 update the -- the form, but the debtor hasn't
6 actually affirmatively said, I have no cause of
7 action. Where judicial estoppel is invoked,
8 there's a presumption in the Fifth Circuit that
9 the debtor, in fact, made that representation.

10 So -- so the context is different in
11 important ways. In New Hampshire, this Court,
12 in -- in outlining general principles that
13 typically apply, recognized that additional
14 considerations would be appropriate in specific
15 factual contexts. So I think the context here
16 is important.

17 Also, in this context, you have
18 individuals who, you know, very often are not
19 particularly sophisticated. You have an
20 environment, bankruptcy, where forms are
21 complex. Again, amici, former bankruptcy
22 judges here, themselves have talked about the
23 complexity of the forms. They're confusing even
24 with the aid of counsel.

25 And so I think that's the situation in

1 particular in this context where one would be
2 wary about there was any position at all or
3 whether a -- a debtor simply made an honest
4 mistake in failing to update a form.

5 JUSTICE SOTOMAYOR: Mr. Garre, I --
6 I've been having trouble trying to fit in our
7 New Hampshire principle to the bankruptcy
8 context where the bankruptcy, it has not
9 terminated, meaning in a situation like this
10 one, where the bankruptcy is still ongoing
11 because, logically and otherwise, it should be
12 the bankruptcy court that decides whether to
13 impose a penalty because doing away with the
14 personal injury suit deprives the creditors of
15 a potential source of income for the
16 bankruptcy.

17 In an ongoing bankruptcy, that's a
18 draconian effect on the creditors that the
19 second court would be imposing. So I'm not
20 sure how equitable estoppel really can play out
21 on the principles set forth in New Hampshire.
22 New Hampshire said that the court -- the first
23 court had to be persuaded to accept that
24 party's earlier position. But, here, with the
25 amendment, there was no permanent acceptance of

1 a position by the bankruptcy court.

2 It also, New Hampshire said, a court
3 has to consider whether the party seeking to
4 assert an inconsistent position derived an
5 unfair advantage or imposed an unfair detriment
6 on the opposing party.

7 But the opposing party here, there's
8 no unfair -- unfair detriment to the man who
9 hit your client with a -- with a truck because
10 he wasn't involved in the bankruptcy, and the
11 unfair advantage was wiped away once the
12 disclosure was made in the bankruptcy court.

13 So I'm a little bit -- I've been
14 perplexed when I started with this how we deal
15 with that context --

16 MR. GARRE: So -- so --

17 JUSTICE SOTOMAYOR: -- in -- in --
18 in -- in -- in this special situation where the
19 bankruptcy has not terminated. There's been no
20 final determination that the bankruptcy court
21 was misled in a way that caused detriment to
22 the bankruptcy process, to its creditors, or to
23 anyone.

24 MR. GARRE: So I'm not going to
25 quarrel with anything that would lead to the

1 conclusion that judicial estoppel doesn't wipe
2 out my client's claim, Your Honor. I think
3 what I would say, though, is, in --

4 JUSTICE SOTOMAYOR: No, no, no, but --
5 but I'm trying to -- maybe this is a question
6 for your -- for the other side.

7 MR. GARRE: In --

8 JUSTICE SOTOMAYOR: But I'm have --
9 I've been having a -- a hard time understanding
10 how this theory works in a situation in which
11 it's different parties and not the same parties
12 being misled.

13 MR. GARRE: So, in New Hampshire, the
14 Court did reference a possibility that either
15 the first court or the second would be misled.
16 And I think that's probably the -- the theory
17 that courts have applied here.

18 I think what Your Honor's question
19 underscores, though, is that, here, the
20 bankruptcy court, you have a proceeding
21 ongoing. The bankruptcy court is well equipped
22 to take any action it determines is appropriate
23 to protect other creditors. Other creditors
24 can stand up as well to sanction conduct that
25 it believes is misleading or deceitful.

1 And so there's not the need for a sort
2 of overarching judicial estoppel check here.
3 And that makes it all the more egregious,
4 frankly, for the Fifth Circuit to simply
5 disregard all that and adopt this conclusive
6 presumption that a debtor is acting with an
7 intent to, you know, adopt a position that no
8 cause of action exists and to mislead the
9 courts.

10 JUSTICE JACKSON: Mr. Garre, can I ask
11 you, because I'm trying to ascertain your
12 position with respect to what suffices for
13 establishing inadvertence or mistake.

14 You've talked about intentional
15 omissions as they relate to misleading the
16 courts, but you can imagine a world, I think,
17 in which the debtor might have an intent to
18 omit, perhaps to mislead, someone else.

19 So, you know, a debtor who's, say,
20 contemplating a divorce, they leave off the
21 claim because they want to have less -- less
22 exposure in the case if they decide to go
23 through with the divorce. So it's intentional
24 but not with the point of misleading the court.

25 How would you say that should be taken

1 into account or should it in regard to figuring
2 out whether there was inadvertence or mistake?

3 MR. GARRE: So, Justice Jackson, I
4 think, first of all, that the key is that the
5 court has to determine that the debtor has made
6 an intentional -- adopted an intentional
7 position that no cause of action exists.

8 I -- I think that -- that the
9 heartland in which judicial estoppel is
10 invoked, the -- the understanding is that the
11 debtor is trying to mislead the court to gain
12 advantage. In your hypothetical, I -- I don't
13 think that that would invoke the -- the
14 heartland of judicial estoppel. Nevertheless,
15 I think judicial estoppel, being an equitable
16 doctrine, considering additional factors, that
17 could be part of the mix.

18 JUSTICE JACKSON: I'll take it into
19 account in terms of your holistic view. And so
20 your -- your argument here is that the Fifth
21 Circuit's test is too rigid because it doesn't
22 allow for full consideration of intent or other
23 factors that could bear on inadvertence or
24 mistake?

25 MR. GARRE: That's exactly right. I

1 mean, our position is that the inquiry into the
2 debtor's intent here as to whether they
3 intentionally adopted a position that no cause
4 of action exists should be undertaken --

5 JUSTICE JACKSON: But does it matter
6 that their motive is different? I mean, so, in
7 my hypothetical, they did intend, they intended
8 to omit. So it's not inadvertent or mistaken.
9 What -- what then? I mean, you --

10 MR. GARRE: So I think that -- I'm
11 sorry, Your Honor.

12 JUSTICE JACKSON: Yeah. No, I'm
13 just --

14 MR. GARRE: I think that's a good
15 example where, you know, really, the bankruptcy
16 judge is in charge of his or her proceedings
17 and can take appropriate action.

18 In that situation, no doubt the judge
19 would -- would think it's -- it's improper and
20 perhaps warrant sanction that the -- that
21 the -- that the debtor is attempting to hide
22 his assets from his spouse or others, and so
23 sanctions might be warranted.

24 I don't think that that's the -- the
25 typical fact pattern in which judicial estoppel

1 is warranted. But I think what distinguishes
2 this case is there's just no determination that
3 the debtor here actually intended to hide
4 anything from the court.

5 JUSTICE GORSUCH: Mr. Garre, on -- on
6 that, just to follow up on it, why -- why is
7 intent to mislead the court essential? I --
8 I -- you know, I -- I struggle to find that in
9 New Hampshire. There are gestures in that
10 direction, but couldn't sometimes a knowing --
11 knowing -- knowingly misleading the court plus
12 other factors in equity be enough?

13 MR. GARRE: Yes. And what the
14 intent --

15 JUSTICE GORSUCH: Well, if that's
16 true, if that's true, then intent isn't
17 essential, it -- it's just one factor in your
18 view, is that right?

19 MR. GARRE: So I agree it's one
20 factor, but the intent that matters, Your
21 Honor, is the intent to adopt inconsistent
22 positions.

23 JUSTICE GORSUCH: Inconsistent
24 positions. No, I get that.

25 MR. GARRE: Right.

1 JUSTICE GORSUCH: But -- but not
2 necessarily an intent to mislead the court?

3 MR. GARRE: Right. I mean, there's a
4 lot of language in the cases about cold
5 manipulation of the courts, playing fast and
6 loose.

7 JUSTICE GORSUCH: Yeah.

8 MR. GARRE: But, really, what -- what
9 I think that the court is driving at is
10 intentionally adopting inconsistent positions.
11 And what's different about this case is there's
12 no -- there's been no actual determination that
13 the debtor here intentionally adopted --

14 JUSTICE GORSUCH: Yeah, I got you.
15 Thank you.

16 MR. GARRE: -- the position that
17 there's no cause of action.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas?

21 Justice Alito?

22 JUSTICE ALITO: Well, I'm a, excuse
23 me, a little confused by those answers.

24 So what is required is knowledge of
25 the fact that inconsistent positions are being

1 taken?

2 MR. GARRE: So I think your -- your --
3 Justice Alito, it -- it's -- it's the fact that
4 the debtor has taken intentionally inconsistent
5 positions. So, in the bankruptcy context, by
6 failing to update the form, a determination
7 would be made that the debtor, in fact,
8 adopted -- intended to adopt the position that
9 no cause of action exists as opposed to simply
10 making a mistake in failing to update a form,
11 and, when -- when the debtor then goes to a
12 separate court and advances a cause of action,
13 he's taking the separate position that the
14 cause of action exists.

15 And that would be intentionally
16 inconsistent. But that intentional
17 inconsistency doesn't arise where a debtor
18 simply makes a mistake in failing to update a
19 form. And in that -- in that situation, the
20 debtor isn't adopting any position that he has
21 no cause of action. He's simply making an
22 honest mistake. And -- and that's -- so
23 that's --

24 JUSTICE ALITO: I'm not sure I
25 understand that, the distinction in this

1 context, but I'll leave it at that.

2 Does the record show why the
3 bankruptcy attorney did not list this as an
4 asset?

5 MR. GARRE: It doesn't, Your Honor.
6 The bankruptcy attorney did, in a sworn
7 declaration in -- in the record here, say that
8 my client informed him of it, but he -- it
9 doesn't explain why he didn't advise the court.
10 I mean, that's something that potentially could
11 come out in a holistic inquiry.

12 But I think, here, what matters is --
13 is the debtor's intent in terms of whether or
14 not the debtor was attempting to hide it.

15 JUSTICE ALITO: Well, do you think
16 that -- that the client in a judicial estoppel
17 situation has -- is to any degree responsible
18 for the actions of the attorney?

19 MR. GARRE: I don't -- not --
20 certainly, not in the normal sense that the
21 court ordinarily would apply the client
22 responsibility, Your Honor, because the key
23 here is the -- the debtor's own intent in terms
24 of whether the debtor was trying to hide
25 anything because it's the debtor who's going to

1 a different court and asserting his cause of
2 action.

3 And so I think that that's a factor,
4 and I think, frankly, the fact that the debtor
5 here told his attorney promptly after the
6 accident is a factor that cuts in his favor,
7 that he wasn't trying to hide anything from the
8 bankruptcy court. And there are many other
9 factors that go to that.

10 But what we really want is an
11 opportunity for a holistic analysis that, under
12 the Fifth Circuit's rule, we never -- we never
13 got.

14 JUSTICE ALITO: Would you disagree
15 with the proposition that where there is a duty
16 to disclose and a potential financial interest
17 and the person who has that duty has a
18 financial interest in not disclosing, that
19 creates a pretty strong presumption of the --
20 the requisite intent or knowledge?

21 MR. GARRE: Not in this context, Your
22 Honor.

23 JUSTICE ALITO: No?

24 MR. GARRE: Because, here, I mean,
25 again, the -- the brief by the amici, former

1 bankruptcy judges themselves, piggybacking --
2 piggybacking on the American Bankruptcy
3 Institute's own findings, emphasized that these
4 forms are confusing, hard to follow, even with
5 the aid of attorneys.

6 So I think, in this context, where
7 you're dealing with, you know, by and large,
8 relatively unsophisticated people who lack
9 legal training or the like, all of that factors
10 into the judicial estoppel analysis here.

11 JUSTICE ALITO: There are factors here
12 that seem perhaps confined to the bankruptcy
13 situation and to the way in which proceedings
14 are often conducted in bankruptcy court, which
15 I think are not always -- it -- it's not always
16 a forum in which scrupulous compliance -- very
17 meticulous compliance with all the rules apply.

18 But I don't quite understand why the
19 bankruptcy attorney didn't disclose. I don't
20 quite understand why the creditors here had no
21 interest apparently in having this as an asset
22 of the estate.

23 MR. GARRE: Well, the creditors were
24 being --

25 JUSTICE ALITO: Can you explain what's

1 going on? Is it just because this is Chapter
2 13 and it's not -- it's just handled in a -- in
3 a -- in a rather informal way?

4 MR. GARRE: So, Your Honor, I mean,
5 that's part of -- part of it. I mean, here,
6 the creditors were paid 100 percent on -- on
7 the plan and ultimately were paid off.

8 If any creditor had any concern about
9 the payments on the plan or how this asset
10 would have affected the estate, they could have
11 taken action in the nearly one year between the
12 time when Mr. Keathley advised the court of the
13 cause of action and before his -- his -- his
14 bankruptcy was completed. And all of that
15 would be part of the mix here, the fact that no
16 creditors even complained.

17 There's a debate as -- in -- in the
18 law as to whether or not there was any interest
19 available here. I mean, again, as the amici,
20 former bankruptcy judges, explained, we don't
21 think interest was available here. So the
22 creditors were getting and did get everything
23 they were entitled to --

24 JUSTICE ALITO: All right. Thank you.

25 MR. GARRE: -- in the bankruptcy.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: I don't know how
4 much this law -- personal injury lawsuit would
5 garner, but the choice for the creditors was an
6 unknown sum of recovery, some of which would
7 have been paid to medical injuries and to
8 supplement lost income versus the security of
9 having full payment, correct?

10 MR. GARRE: That's -- that's correct,
11 Your Honor.

12 JUSTICE SOTOMAYOR: And having the
13 bankruptcy last forever without full payment?

14 MR. GARRE: That's correct. And, you
15 know, creditors are uniquely situated to
16 protect their own interests. If they thought
17 anything wrong had happened or there was a --
18 they had a stake in the cause of action, they
19 would have acted here. No creditor objected.

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: Mr. Garre, your --
23 your brief speaks often of bad faith, of
24 whether the debtor had bad faith in making
25 these inconsistent representations. Are you

1 equating that -- you haven't spoken of it very
2 much today. Are you equating it with the kind
3 of intent that you have been talking about?

4 MR. GARRE: Yes. I mean, the courts
5 refer to bad faith here in cases from here and
6 there. I mean, we're not suggesting that this
7 is an inquiry into whether there was an -- an
8 intent to -- to defraud the court or anything
9 like that. I think what the -- the doctrine
10 looks to is the intentional inconsistency.

11 And where a litigant makes an
12 intentional inconsistency to gain an unfair
13 advantage through the courts, this Court
14 recognized in New Hampshire that that
15 undermines the integrity of the court and that
16 that -- that is sort of, you know, consistent
17 with an intent to mislead the court often.

18 But we're not suggesting that a
19 finding of, you know, actual bad faith is -- is
20 necessary or part of the -- part of the
21 analysis.

22 JUSTICE KAGAN: But are you suggesting
23 that this finding of intentional
24 misrepresentation is necessary? This goes to
25 Justice Gorsuch's question again --

1 MR. GARRE: Yeah.

2 JUSTICE KAGAN: -- and also to the
3 Chief Justice's when he opened when he said,
4 you know, in the end, judicial estoppel is
5 about the integrity of the courts.

6 And aren't there circumstances in
7 which, even though you couldn't find that kind
8 of intentionality on the part of the debtor or
9 the part of somebody else making the
10 representations, still, the integrity of the
11 courts is on the line?

12 MR. GARRE: So I don't think the Court
13 has to rule that out. I mean, I think the --
14 the courts, you know, just as frequently talk
15 about how judicial estoppel doesn't apply in
16 the case of inadvertence or mistake. And we
17 think, in that situation, where a party,
18 because of a mistake, hasn't intentionally
19 adopted a particular position, that there is
20 not the same kind of threat to the judiciary.

21 But this Court doesn't need to say
22 here that judicial estoppel is never
23 appropriate in any situation in which a party
24 makes a mistake. I mean, we think it's an
25 important factor. The Court recognized it in

1 New Hampshire, other courts have universally
2 recognized it, and it's particularly important
3 and applicable in this unique context.

4 JUSTICE KAGAN: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch?

7 JUSTICE GORSUCH: Very briefly,
8 Mr. Garre. I -- I -- I take your point that
9 you don't need to have an intention to mislead
10 the court. You say, though, an intention to
11 pursue inconsistent positions is required.

12 I just don't see that in New Hampshire
13 either. I see you have to take inconsistent
14 positions, but I'm not sure I see that you have
15 to intentionally do so.

16 Am I missing something there?

17 MR. GARRE: So I think, in New
18 Hampshire, on page 750, it talked about
19 prohibiting parties from deliberately changing
20 positions according to the exigencies. I mean,
21 the Court cited lower court cases like Scarano,
22 which talked about --

23 JUSTICE GORSUCH: It -- it does cite
24 lower court cases, but when it -- when it
25 actually lists the factors, it just says

1 inconsistent positions and deriving an unfair
2 advantage from them on page 750.

3 MR. GARRE: But then I think the --
4 I'm sorry, Your Honor.

5 JUSTICE GORSUCH: No, go ahead,
6 please.

7 MR. GARRE: But then I think, when the
8 Court later, in applying the factors, says
9 that -- that courts have resisted application
10 in the instance of mistake or --

11 JUSTICE GORSUCH: Yes, inadvertence
12 and mistake. That we know to be true. That
13 New Hampshire definitely does say.

14 MR. GARRE: Right.

15 JUSTICE GORSUCH: And I guess that
16 leads me to this. Judicial estoppel is kind of
17 an off-branch of equitable estoppel and is a
18 relatively new invention dating to -- well,
19 new -- date -- dates to the mid-19th century.
20 For law, I guess that's new sometimes.

21 And we have exactly one opinion on the
22 subject, New Hampshire. That's it. We haven't
23 developed the law very much yet. And I wonder
24 whether you would be content with the following
25 ruling and, if not, why not.

1 We've said inadvertence and mistake is
2 not a basis for judicial estoppel. The Fifth
3 Circuit glossed that rule with one of its own,
4 a bright-line rule that it's never inadvertence
5 and mistake when there's a knowing omission and
6 there's a motive.

7 Would it be enough to simply say we
8 don't need a further gloss on inadvertence and
9 mistake, this is an equitable doctrine, go back
10 and do it again, looking to what we've said?

11 MR. GARRE: So that would be an
12 improvement, Your Honor, but I think that what
13 the court need -- what the -- the Fifth Circuit
14 needs guidance on is that you really have to
15 take this holistic analysis in terms of whether
16 or not there was a mistake, and I, you know --

17 JUSTICE GORSUCH: Yes. No, I'm giving
18 you that.

19 MR. GARRE: Right.

20 JUSTICE GORSUCH: I'm just simply
21 saying their bright-line rule on what does and
22 does not qualify as inadvertence and mistake
23 is -- is not what we said in New Hampshire, go
24 back and try again. Maybe -- maybe applying
25 state law, maybe taking cognizance of the

1 bankruptcy context, all of these kinds of
2 additional concerns, but -- but a very short
3 and succinct opinion saying look at New
4 Hampshire.

5 MR. GARRE: So I think that that would
6 be fine. Obviously, the devil's in the
7 details, Your Honor, but I think what -- what's
8 critical there is that --

9 JUSTICE GORSUCH: I don't think there
10 would be many details in what I've outlined.

11 MR. GARRE: -- the -- that the upshot
12 would be is that in this instance, if the
13 courts conclude that a debtor's failure to
14 update a form was simply an honest mistake that
15 it generally -- it would be inappropriate to
16 apply judicial estoppel, and that's -- that's
17 the baseline.

18 JUSTICE GORSUCH: If it's inadvertent
19 or mistaken?

20 MR. GARRE: Yes.

21 JUSTICE GORSUCH: Okay. Honest
22 mistake. Okay. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh?

25 JUSTICE KAVANAUGH: Is there any

1 difference between a knowing inconsistency and
2 an intentional inconsistency? I'm not sure
3 about your answer to that.

4 MR. GARRE: I don't think so, Your
5 Honor. But the -- the point that's critical
6 here is that a court has to determine that when
7 the debtor failed to update his form, he was
8 knowingly or intentionally adopting the
9 position that no cause of action exists, and --
10 and instead of --

11 JUSTICE KAVANAUGH: So no daylight?
12 I'm just making sure.

13 MR. GARRE: Well, I mean, I -- look,
14 in the law, there -- there probably is a
15 difference between knowing, willingness --

16 JUSTICE KAVANAUGH: Well, in this. I
17 know in the law.

18 MR. GARRE: -- intentional.

19 JUSTICE KAVANAUGH: In this context,
20 is there any daylight between a knowing
21 inconsistency and an intentional inconsistency
22 as you see it?

23 MR. GARRE: As a practical matter, I
24 don't think there is. I will say that the
25 courts have talked about intentional

1 inconsistency. I mean, that's the language
2 this Court piggybacked on for the lower court
3 cases.

4 JUSTICE KAVANAUGH: Well, I think that
5 creates confusion, as Justice Gorsuch was
6 talking about.

7 MR. GARRE: Yeah. So, I -- I mean,
8 I -- I think the intent -- the intent language
9 is well taken. I mean, if this Court believes
10 that -- that the knowing language is -- is more
11 suited to the doctrine, I mean, I think that
12 would lead to the same conclusion here, and
13 that's -- that's what we're up here fighting
14 for.

15 JUSTICE KAVANAUGH: Thank you.

16 MR. GARRE: Thank you, Your Honor.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 Justice Jackson?

20 JUSTICE JACKSON: So I'm noting that
21 New Hampshire wasn't a bankruptcy case, and I'm
22 thinking that maybe judicial estoppel is sort
23 of a poor fit for this context because, even if
24 there is an intentional omission, however we
25 define that, that the bankruptcy court has

1 many, many tools, I think -- this is sort of
2 what Justice Sotomayor was alluding to -- to
3 solve that problem when it comes to its
4 attention, and to prevent the estate from
5 getting this additional asset seems to harm the
6 creditors in ways that I don't think are
7 consistent with the way we understand
8 bankruptcy.

9 So, I mean, in addition to Justice
10 Gorsuch's solution, I suppose one thing could
11 be to think about whether judicial estoppel is
12 really the right remedy here.

13 MR. GARRE: So I -- I -- again, I'm
14 not going to quarrel with anything that results
15 in a conclusion that judicial estoppel doesn't
16 apply. What -- what I think is important here
17 is what the bankruptcy -- the bankruptcy court
18 has control of these proceedings, and its
19 actions or inactions should be an important
20 factor in determining whether or not judicial
21 estoppel is appropriate.

22 JUSTICE JACKSON: Do you know if
23 there's ever a world in which -- is -- is it
24 after the bankruptcy closes that this
25 information comes to the bankruptcy court's

1 attention? Is there nothing that could be done
2 at that point, or --

3 MR. GARRE: So it can be reopened.

4 JUSTICE JACKSON: It can be?

5 MR. GARRE: It can be reopened.

6 JUSTICE JACKSON: So there's always an
7 opportunity to take advantage?

8 MR. GARRE: Right. And I'm not going
9 to -- I'm not going to make my friend's
10 argument. What I would say, though, is I think
11 that -- that courts have assumed judicial
12 estoppel is applied here because, on the theory
13 that the second court is being duped, so to
14 speak, in -- in the sense that there's
15 inconsistent positions, and so it's -- it's a
16 threat to the second court, but -- but I think
17 Your Honor's point is exactly right that the
18 bankruptcy context is unique and that there's
19 an important role for the bankruptcy courts --

20 JUSTICE JACKSON: And the second
21 court's proceed --

22 MR. GARRE: -- and a lot of this can
23 be resolved.

24 JUSTICE JACKSON: The second court's
25 proceedings are sort of completely independent,

1 right?

2 MR. GARRE: Yes.

3 JUSTICE JACKSON: I mean, they're
4 arising out of facts that have nothing to do
5 with the bankruptcy.

6 MR. GARRE: Exactly.

7 JUSTICE JACKSON: Right.

8 MR. GARRE: And that -- that
9 underscores the windfall that the defendant is
10 getting. The defendant in the second
11 proceeding has no connection to the bankruptcy,
12 and yet the defendant walks away scot-free.

13 JUSTICE JACKSON: Thank you.

14 MR. GARRE: And that's not equitable
15 in any sense.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 MR. GARRE: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Mr. Liu.

20 ORAL ARGUMENT OF FREDERICK LIU
21 FOR THE UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING VACATUR

23 MR. LIU: Thank you, Mr. Chief
24 Justice, and may it please the Court:
25 Whoops, I spilled the water. That's a

1 first.

2 Judicial estoppel should apply only if
3 the balance of equities supports it. In New
4 Hampshire versus Maine, this Court described
5 factors relevant to that balance.

6 Those factors include whether a party
7 derived an unfair advantage from the prior
8 position, whether that position was the product
9 of inadvertence, and whether judicial estoppel
10 is consistent with broader public interests.

11 Here, the Fifth Circuit made two
12 errors. One is the error Petitioner has
13 focused on this morning. The Fifth Circuit
14 reduced inadvertence to just two
15 considerations, thereby failing to consider the
16 totality of the relevant evidence, including
17 evidence that Petitioner reasonably believed
18 that he had no duty to disclose his tort claim
19 while a damages award was still a long ways
20 off.

21 But the other error is, in our view,
22 even more fundamental. The Fifth Circuit
23 effectively reduced the entire balance of
24 equities to a single factor, inadvertence,
25 thereby ignoring the interests of innocent

1 creditors and the bankruptcy court's ability to
2 undo any unfair advantage. Therefore, the
3 decision below should be vacated and the case
4 remanded.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Mr. Liu, I'd like you
7 to take a step back to New Hampshire. New
8 Hampshire was quite a different case from this.
9 New Hampshire involved litigation between Maine
10 and New Hampshire over the boundaries.

11 In two earlier cases, New Hampshire
12 had accepted that the middle of the river was
13 the boundary, and in the subsequent litigation,
14 it changed and argued that the boundary was to
15 the Maine shore.

16 And what the Court said in Justice
17 Ginsburg's opinion was that you could not, to
18 your advantage, change positions like that and,
19 hence, judicial estoppel.

20 How does that fact pattern allow us to
21 decide this case based on New Hampshire?

22 MR. LIU: Well, I -- I -- you're right
23 that the specific context of New Hampshire is
24 far different from a bankruptcy case, where, as
25 some justices have already mentioned, the --

1 the two proceedings, the bankruptcy case --

2 JUSTICE THOMAS: Well, I'm not as
3 interested in the bankruptcy case. I'm
4 interested in the fact that the litigation was
5 between the same parties, between New Hampshire
6 and Maine. Here, that you do not have that
7 mutuality.

8 MR. LIU: That's right. And I -- I --
9 I -- I -- I think what this points up is that,
10 for judicial estoppel to apply, the balance of
11 equities has to support it. And in New
12 Hampshire versus Maine, I think it was
13 important to the balance of equities that you
14 had two co-equal sovereigns that had been
15 involved in the same litigation many years
16 prior. That's part of the balance of equities.

17 Our submission here is a court
18 shouldn't blind itself to the balance of
19 equities in this context either. I think what
20 New Hampshire versus Maine teaches is there are
21 two kind of essential elements of judicial
22 estoppel. Those are the first two factors.
23 You've got to have inconsistent statements, and
24 you've got to have the first statement relied
25 upon by the court.

1 But, beyond that -- and this is on
2 pages 750 to 756 of the Court's opinion -- it's
3 a balance-of-equities analysis. You look to
4 see if one party derived an unfair advantage.
5 You look to see if the prior position was the
6 product of inadvertence. You look at the
7 broader public interest, including the fact
8 that these were two coequal sovereigns that
9 were involved in the same case earlier, and you
10 ask, after considering the entire balance of
11 equities, whether judicial estoppel is
12 appropriate.

13 I think what's really wrong about the
14 Fifth Circuit's decision in this case is, if
15 you look at Pet. App. 9a, it reduced that
16 entire balance to just one factor, which is
17 inadvertence.

18 And then, beyond that, compounding
19 that error, it turned inadvertence into just
20 two considerations, knowledge of the facts and
21 potential motive, which -- which is not a --
22 a -- a totality analysis of even the one factor
23 the Fifth Circuit thought it should consider.

24 JUSTICE KAGAN: Mr. Liu, I guess I'm
25 not sure I understand how what you're saying

1 right now fits with this footnote that you
2 wrote. This is page 24 in your brief, Footnote
3 2, where you say we shouldn't talk about
4 whether inadvertence always precludes judicial
5 estoppel.

6 And I hear you saying now we should
7 talk about that. We should say inadvertence is
8 just one factor. It doesn't always preclude
9 judicial estoppel. Am -- am I wrong about that
10 there's a shift here?

11 MR. LIU: I -- I -- I wouldn't say
12 it's a shift in this sense, and -- and I -- I
13 think there are two -- two analytical things at
14 issue. One question is, what goes on the
15 balance? And we think that is an important
16 question. The Court should address what goes
17 on the balance is not just inadvertence but
18 also unfair advantage, other interests, et
19 cetera. That's all what goes on the balance.

20 I think there is a separate analytical
21 question about how those various factors relate
22 to each other. And what we mean by Footnote 2
23 is this Court doesn't need to decide whether
24 one factor, if it exists, is necessarily going
25 to trump the other factors. We think it's

1 enough for this Court to basically reiterate
2 what it said in New Hampshire versus Maine,
3 which is the balance of equities isn't just one
4 factor, it's all these factors. The Court said
5 it was non-exhaustive in the end.

6 JUSTICE KAGAN: But do you agree with
7 this, that in -- even if you had all the intent
8 in the world, it doesn't necessarily get you
9 judicial estoppel, and, conversely, even if
10 there was complete inadvertence, it doesn't
11 necessarily preclude judicial estoppel?

12 MR. LIU: That is the government's
13 position. I think that's that second bucket of
14 analysis. The Court doesn't need to go that
15 far. I think the Court can just say, look, if
16 you're a lower court, you should be looking at
17 all the factors.

18 It may well be that one factor turns
19 out to be dispositive. After you've -- you've
20 seen a bunch of cases, maybe you can reach that
21 conclusion. But, at this -- at this part of
22 the analysis, you should at least have in full
23 view all the relevant factors.

24 JUSTICE KAGAN: And is the idea behind
25 this that everything needs to be filtered

1 through the principal purpose of judicial
2 estoppel, which is protecting the integrity of
3 the courts, and that this question of
4 intentionality may coincide with that principal
5 purpose but in certain cases may not?

6 MR. LIU: Correct. We -- we -- we
7 think, certainly, when a party has deliberately
8 taken a prior position, as opposed to having
9 taken it by inadvertence, it certainly
10 heightens the impression that I think judicial
11 estoppel is trying to avoid, and that
12 impression is the impression that courts are
13 just arbitrarily giving a party whatever it
14 says it wants.

15 But, conversely, there may be cases
16 where the first party gets a tremendous
17 advantage even though it took that position
18 inadvertently, and it doesn't make sense, it
19 just wouldn't be fair, to allow that party to
20 obtain a further advantage in the second
21 proceeding.

22 JUSTICE GORSUCH: Mr. Liu, I -- I take
23 your point that inadvertence and mistake may
24 not automatically defeat judicial estoppel.
25 But I'm also not sure we need to get into what

1 all the factors are or even talk about a
2 holistic analysis given, as Justice Thomas
3 pointed out, New Hampshire was -- really could
4 have been an equitable estoppel case. Forget
5 about judicial estoppel. And the bankruptcy
6 context is different. And we have an Erie
7 problem and all these -- why not just simply
8 say the factor of -- of inadvertence and
9 mistake, whatever it means, doesn't mean what
10 the Fifth Circuit said it meant, good-bye?

11 MR. LIU: That is a sufficient ground
12 for vacating and remanding. We --

13 JUSTICE GORSUCH: And you have no
14 problem with that?

15 MR. LIU: We have no problem with
16 that. We just wanted the Court to be aware,
17 when it's considering the scope of
18 inadvertence, that it may not be the be all/end
19 all of the analysis, that you can't -- you
20 might not necessarily hang everything in the
21 case on whether it's inadvertent or not.

22 JUSTICE GORSUCH: We don't even need
23 to take a view on that, it seems to me. Maybe
24 some future case, there would be a reason to
25 make it a bright-line rule. Maybe not, as you

1 say. We don't have to take a position in this
2 case on that, do we?

3 MR. LIU: That's -- that's right.

4 And, really, our submission is you -- you don't
5 need to move the lines you drew in New
6 Hampshire versus Maine an inch. New Hampshire
7 versus Maine said inadvertence -- it may be
8 appropriate to resist -- resist the application
9 of judicial estoppel if the party's prior
10 position was the product of inadvertence.

11 We -- we're happy with -- with -- with
12 that statement of what the law is.

13 JUSTICE GORSUCH: Thank you.

14 MR. LIU: We dispute the way
15 inadvertence was defined here.

16 CHIEF JUSTICE ROBERTS: Well, I mean,
17 New Hampshire against Maine, it's featured
18 prominently because it's the only thing. I --
19 I wonder if saying anything about it -- I mean,
20 it's two sovereign states against each other
21 and the boundaries, you know, I'm not sure that
22 we should try to bring it into play any more
23 than is necessary.

24 MR. LIU: I don't -- I don't really
25 quibble with that at all. I -- I -- I read New

1 Hampshire versus Maine as setting forth pretty
2 high-level principles. I mean, the principles
3 I understand that decision to set forth are the
4 balance of equities matters and the list of
5 equities is kind of non-exhaustive and
6 inadvertence may be one of those factors.

7 I think, at that level, there's
8 nothing wrong with taking those principles and
9 articulating them here. I agree, once you get
10 into how those principles cash out, you may not
11 be in a -- in a situation where New Hampshire
12 versus Maine really speaks to that.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 Justice Alito?

17 JUSTICE ALITO: No.

18 JUSTICE SOTOMAYOR: I -- I know I'll
19 have a chance to speak to Justice Gorsuch
20 later, but --

21 (Laughter.)

22 JUSTICE SOTOMAYOR: -- but you
23 answered him --

24 JUSTICE GORSUCH: I look forward to
25 it.

1 JUSTICE SOTOMAYOR: I -- always.

2 (Laughter.)

3 JUSTICE SOTOMAYOR: I don't know what
4 you think simply saying they were wrong about
5 inadvertence would get us, because you came up
6 here and said there were two fundamental errors
7 and that -- and I thought, in describing the
8 errors, both times, you -- you said the court
9 failed to take into account totality of the
10 circumstances.

11 So it wasn't just merely their failure
12 to address inadvertence properly. They failed
13 to do the holistic evaluation of what was the
14 prejudice to the parties from that
15 inadvertence. Even if it was deliberate, it
16 could still -- you -- you've said all these
17 other things. So I -- I'm not sure --

18 MR. LIU: I -- well, we -- we would
19 certainly be more satisfied with an opinion
20 that went further and said inadvertence is not
21 the only factor. We think that just follows
22 pretty directly from New Hampshire versus
23 Maine.

24 To give one stark example, I mean, New
25 Hampshire versus Maine --

1 JUSTICE SOTOMAYOR: No, I -- I -- I --
2 but why did you say yes --

3 MR. LIU: Oh. Well --

4 JUSTICE SOTOMAYOR: -- to an opinion
5 that basically brings us back here? Because I
6 can see the Fifth Circuit saying exactly what
7 it said below. If you know you didn't say it,
8 it's intentional; it's not inadvertence. So
9 they've already answered that question.

10 MR. LIU: Yeah. No. So --

11 JUSTICE SOTOMAYOR: And so I'm not
12 sure --

13 MR. LIU: I don't think they -- so
14 this is getting to the error, I think, that
15 this Court should really -- needs to correct
16 because it is core to the dispute between the
17 parties, which is this is what -- this is the
18 real definition -- this is the correct
19 definition in our view of -- of -- of
20 inadvertence versus non-inadvertence.

21 We think, in all cases, the relevant
22 question is, did the party deliberately take
23 the prior position? In other words, did the
24 party deliberately choose Position X --

25 JUSTICE SOTOMAYOR: So does it come

1 down to the Fifth Circuit now coming back to us
2 and saying he told his attorney, but the
3 attorney didn't tell the court, and you're
4 responsible for your attorney's errors?

5 MR. LIU: So we do --

6 JUSTICE SOTOMAYOR: Which is what we
7 usually say.

8 MR. LIU: We do think the attorney is
9 responsible. The attorney's conduct does bind
10 the client. And --

11 JUSTICE SOTOMAYOR: And so that's what
12 the Fifth Circuit basically said here, that the
13 attorney knew. The attorney didn't say it. So
14 you -- we're -- we're back to the circle.

15 MR. LIU: Well, here -- here's --
16 here's -- here are two errors, I think, that
17 the Fifth Circuit made just as to inadvertence.
18 One is it deemed irrelevant -- and this is on
19 Pet. App. 13a -- any evidence regarding the
20 attorney's knowledge of whether the duty to
21 disclose applied in this case. That is a
22 bucket of relevant evidence that -- relevant
23 and -- and mainly objective evidence, in our
24 view, that the Fifth Circuit didn't consider.

25 And the second error is, even with

1 respect to its analysis of the potential motive
2 that Justice Alito brought up, the Fifth
3 Circuit's analysis was incomplete. I mean, the
4 record suggests many reasons why there was no
5 modification of the plan when this -- when this
6 tort claim was ultimately disclosed. The fact
7 is, no matter when you disclosed it, it would
8 have been years before this claim would have
9 become an award of damages.

10 JUSTICE SOTOMAYOR: So, in one word,
11 I'd do a simple opinion that says you have to
12 look at the totality of the circumstances and
13 you can't reduce it to the three factors that
14 you mention alone.

15 MR. LIU: That's right.

16 JUSTICE SOTOMAYOR: That would be my
17 opinion.

18 MR. LIU: That -- that -- that's
19 right. And -- and -- and the Fifth Circuit
20 ignored evidence relevant to the knowledge of
21 the duty and ignored evidence pertaining to the
22 potential motive prong --

23 JUSTICE SOTOMAYOR: All right. Thank
24 you, counsel.

25 MR. LIU: -- that the Fifth Circuit

1 did consider.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

5 Justice Barrett?

6 Justice Jackson?

7 Thank you, counsel.

8 Mr. Jay.

9 ORAL ARGUMENT OF WILLIAM M. JAY

10 ON BEHALF OF THE RESPONDENT

11 MR. JAY: Mr. Chief Justice, and may
12 it please the Court:

13 The question the Court agreed to
14 decide in this case is not about whether there
15 was a clear inconsistency between the
16 representations but about whether proof of bad
17 faith is required before judicial estoppel can
18 apply. And the answer should be no.

19 Where the same litigant seeks to win a
20 second victory on grounds that are clearly
21 inconsistent with the grounds on which he won
22 the first victory, that undermines the
23 integrity of the judicial process, and it is
24 not necessary to also prove that -- as Mr. Liu
25 just said, that the -- that litigant intended

1 to switch positions all along.

2 I'd like to make basically three basic
3 points, one about precedent, one about
4 practicalities, and one about bankruptcy.

5 The first is that there are multiple
6 cases, not just New Hampshire, also the 19th
7 century cases that New Hampshire addressed. I
8 don't think Petitioner's rule can explain any
9 of them. One key thing that New Hampshire says
10 is that mistake or inadvertence looks at Time
11 1, not Time 2. And I -- I think there's been a
12 lot of inconsistency with the other side's
13 presentation this morning about whether they
14 look at Time 1 or Time 2.

15 Second, in practice, as the district
16 court noted, basically, every litigant facing
17 judicial estoppel who claims his original
18 position was a mistake, under the other side's
19 rule, would just -- just a declaration claiming
20 a lack of legal understanding or that the
21 attorney gave bad advice would be enough for a
22 trial.

23 And, third, although we are not urging
24 a special rule for bankruptcy cases, as the
25 other side is, we think that our rule better

1 fits the bankruptcy context anyway.

2 Petitioner's rule would undermine the full
3 disclosure of assets on which the bankruptcy
4 bargain depends.

5 A doctrine, as Judge Easterbrook puts
6 it, that encourages debtors to be truthful in
7 their bankruptcy filings will assist creditors
8 in the long run. That is why our rule does not
9 deprive creditors of recoveries that they would
10 otherwise be able to get.

11 District courts might well exercise
12 their discretion at the margin in favor of less
13 culpable litigants, but there's no reason to
14 make bad faith a prerequisite.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Is there any
17 difference between your rule and the Fifth
18 Circuit's rule?

19 MR. JAY: Not in practice and
20 certainly -- certainly not in this case.
21 The -- the one -- if -- if -- if I were writing
22 the rule for all circumstances, I would say
23 that the question of benefit, which the Fifth
24 Circuit describes as part of the inadvertence-
25 or-mistake inquiry, I think New Hampshire would

1 put that earlier in the analysis.

2 And the core -- New Hampshire's core
3 three factors are clear inconsistency, accepted
4 by the tribunal, and getting some benefit that
5 would be inequitable for you to keep.

6 And I think that we -- we would put
7 the -- sort of the financial aspect of the
8 benefit that the litigant gains from the
9 bankruptcy in that bucket instead. I don't
10 think that's a -- that's an analytical point.
11 I don't think it makes any difference in this
12 case.

13 So we certainly agree with the Fifth
14 Circuit that the question is not whether the --
15 the litigant himself got bad legal advice or
16 was subjectively aware of the legal duty as
17 opposed to the facts.

18 JUSTICE THOMAS: New Hampshire also
19 considered the detriment to the party before
20 the court in the subsequent litigation. What
21 is the detriment to your client?

22 MR. JAY: So, in New Hampshire, the
23 Court said or, in other words, that it said
24 either benefit to the party that took the
25 position or a detriment to the adversary. And

1 I think New Hampshire is unusual, and your
2 question to my friend earlier about mutuality
3 gets to this.

4 It is actually unusual for judicial
5 estoppel to be -- to come up in a second piece
6 of litigation before the same -- involving the
7 same parties precisely because the second -- if
8 it's the same party, they're well positioned to
9 call the person out for switching positions.

10 In the Philadelphia, Wilmington
11 Railroad case that New Hampshire discussed, you
12 know, it's been -- it's been settled since the
13 1850s that this is primarily a doctrine about
14 defending the courts' integrity, and for that
15 reason, mutuality is not required.

16 JUSTICE THOMAS: What's -- how would
17 you respond to Petitioner's argument that this
18 is a windfall for your client?

19 MR. JAY: I think it -- it's just the
20 same point, that the -- the way in which a
21 court's integrity is preserved through the use
22 of this doctrine is that the litigant against
23 whom the inconsistent representation is being
24 made points it out to the court and so, in --
25 in that sense, because mutuality isn't

1 required, it is that litigant's standing in for
2 the court and pointing out that the court is
3 about to be misled by the common litigant who
4 took the -- the clearly inconsistent position
5 in the prior action.

6 So I understand the windfall point,
7 but I think that's just -- you might say the
8 same thing about res judicata, collateral
9 estoppel, that the -- the system cares more
10 about locking down the first determination and
11 preventing it from being relitigated rather
12 than saying, well, the correct answer would be
13 to side against the second litigant rather than
14 the first.

15 CHIEF JUSTICE ROBERTS: Well, but it's
16 not really just relitigation. It's a new
17 person jumping on to the scene. It does
18 seem -- in terms of the courts' integrity, it
19 does seem a little much that the one person
20 who's getting off is the one who -- whose truck
21 hit the other guy, right?

22 I mean, it's a lot easier to explain
23 why that's a bad result than simply the idea
24 that, oh, there was something else that went on
25 that the court didn't know about and now you're

1 going to change the -- the natural sense of the
2 propriety of the result by saying the one
3 person who we know inflicted harm, according to
4 the allegations, of course, gets off scot-free.

5 MR. JAY: So I think that's a
6 consequence, Your Honor, of the fact that, if
7 this comes up, it comes up at a time when it's
8 too late to reopen the first proceeding. This
9 goes to a question that Justice Sotomayor
10 asked, that one of the elements of judicial
11 estoppel is that the first proceeding has
12 already resulted in some benefit to the -- to
13 the common litigant.

14 And so every court of appeals that has
15 applied New Hampshire to the bankruptcy context
16 has agreed with the basic proposition in this
17 case, although I think it's one that Mr. Garre
18 seems to be disagreeing with, that a
19 representation to the bankruptcy court that
20 there is no cause of action is inconsistent
21 with asserting in a subsequent action that
22 there is a cause of action, just like asserting
23 ownership of a piece of property or a -- a
24 different legal interest, asserting that you
25 don't own that property in one action is

1 inconsistent with assert -- with trying to
2 invoke the ownership right in a second action.

3 JUSTICE JACKSON: Yes, it's
4 inconsistent, but what is the advantage that is
5 gained from that in this situation?

6 MR. JAY: So the advantage in a -- in
7 a bankruptcy in which the debtor has an
8 incentive to minimize assets is the ability to
9 convince the bankruptcy court that -- so this
10 is a Chapter 13 case, taking this as an
11 example, that a Chapter 13 would be just as
12 much in the creditors' interest as a Chapter 7,
13 which is always the --

14 JUSTICE JACKSON: I understand. But
15 the bankruptcy court could convert the
16 proceeding if that information is brought to
17 their attention. The creditors apparently in
18 this case, for whatever reason, said we don't
19 care.

20 I don't understand what the advantage
21 is that is being apparently at the heart of
22 your concern that judicial integrity is
23 threatened or something in this situation.

24 MR. JAY: The advantage that a
25 litigant gets is getting -- is convincing the

1 bankruptcy court to confirm the Chapter 13
2 plan --

3 JUSTICE JACKSON: Not a litigant, this
4 litigant. In other words, in these
5 circumstances --

6 MR. JAY: Oh, sure.

7 JUSTICE JACKSON: -- because, as
8 others have pointed out, we're talking about a
9 totality of the circumstances, you know,
10 equitable assessment of whether judicial
11 estoppel should be applied.

12 MR. JAY: Right. And the facts -- I
13 mean, if you want me to talk about the facts of
14 this case, so, in this case, at the time that
15 the debtor had the cause of action, the debtor
16 also fell behind on payments and had to -- had
17 to submit additional amendments to the -- or
18 modifications to the Chapter 13 plan.

19 And the trustee initially objected to
20 the first of those amendments and said this
21 amended plan doesn't leave unsecured creditors
22 as well off as a Chapter 7.

23 JUSTICE JACKSON: And once the
24 information was brought to their attention, no
25 one sought interest, no one thought the plan

1 should change in any way?

2 MR. JAY: So, respectfully, Your
3 Honor, like, that's a -- that's a distinct
4 point, and I'm happy to address that because
5 the -- this was brought to the bankruptcy
6 court's attention such as it was.

7 And if you -- if you look at page 203,
8 you'll see that the -- the debtors didn't
9 actually disclose any valuation for this claim.
10 They didn't change the sum total of their
11 assets at all.

12 They just listed -- they mentioned the
13 claim and said unknown. This, of course, was
14 well into the payment plan. It's after the --
15 the new confirmation had been granted. And at
16 that point, I think it's not surprising that
17 creditors who were receiving this stream of
18 payments and weren't really told anything about
19 this cause of action didn't affirmatively seek
20 reopening of the -- the bankruptcy.

21 JUSTICE JACKSON: I guess my question
22 is, is it fair to just assume or presume that
23 by not having this information, an advantage
24 has been obtained such that it makes sense and
25 is equitable to preclude the debtor from

1 accessing or having this asset, which could, in
2 some situations, actually go into the estate
3 and be a part of the entire bankruptcy? It
4 just seems very harsh.

5 MR. JAY: So I'm happy to --

6 JUSTICE JACKSON: Yes.

7 MR. JAY: -- I'm happy to answer
8 the -- the question. Just let me note by my
9 preface that the -- whether there has been an
10 advantage gained, I think, as -- as -- this
11 goes to much of my colloquy with Justice Thomas
12 earlier -- I think that that's a different
13 question than the one on which the Court
14 granted cert. I mean, at the -- the --

15 JUSTICE JACKSON: Well, we certainly
16 didn't grant cert on the bad faith. You said
17 that at your original statement, and I took
18 issue with it. The question the Court granted
19 cert on, you said, was whether proof of bad
20 faith is required.

21 MR. JAY: Right.

22 JUSTICE JACKSON: If you look at the
23 actual question presented, it's whether the
24 Fifth Circuit's formulation, which is requiring
25 potential motive for disclosure, was correct.

1 MR. JAY: Right. But, if you --
2 right. If you look at the last sentence of the
3 question presented, right, it says that the
4 reason that the -- that the Fifth Circuit is
5 wrong is that it doesn't require proof of bad
6 faith. And that is the -- that is the
7 fundamental submission that we're making to the
8 Court, that inadvertence or mistake, as an
9 exception to the judicial estoppel doctrine,
10 does not connote proof of bad faith.

11 I mean, it may --

12 JUSTICE BARRETT: Well, Mr. Jay, if
13 we're talking about protecting the integrity of
14 the courts, I just want to clarify a factual
15 point. Am I correct that the bankruptcy court
16 declined to sanction?

17 MR. JAY: No party asked for
18 sanctions, Your Honor, so -- so that --

19 JUSTICE BARRETT: The bankruptcy court
20 knew because this was brought, you know,
21 your -- the -- let's see. It's my
22 understanding the bankruptcy court knew about
23 this because he ultimately did go back to the
24 bankruptcy court and make the court aware. Am
25 I right about that?

1 MR. JAY: There's an amended schedule
2 that, as I was saying to Justice Jackson,
3 doesn't disclose the amounts but states that
4 there is a claim -- for the first time that
5 there is a claim under -- in the answer to
6 Question 33 on the schedule.

7 JUSTICE BARRETT: Maybe this --

8 MR. JAY: That's after the
9 confirmation.

10 JUSTICE BARRETT: And maybe this goes
11 to Justice Sotomayor's point and Justice
12 Jackson's point to your friend on the other
13 side. Why isn't the bankruptcy -- in this
14 context, why wouldn't we expect the bankruptcy
15 court to be the one to police this?

16 MR. JAY: I think that no one asked
17 the bankruptcy court to take any action. And
18 it -- I -- it may well be that -- you know, as
19 I was saying to Justice Jackson, that the
20 creditors concluded that this late in the
21 payment plan, it wasn't worth the candle to do
22 so.

23 And the bankruptcy court -- and this
24 is to the point that Justice Jackson asked my
25 friend about. The bankruptcy court may have

1 tools that it can use in bankruptcy in the
2 sense of denying a discharge or denying access
3 to Chapter 13 and forcing the case to be
4 converted -- converted to Chapter 7 or even
5 referring to criminal prosecution.

6 But all of those things go to the
7 bankruptcy itself rather than to the
8 consistency of the representations between the
9 bankruptcy and the -- and a subsequent
10 proceeding.

11 JUSTICE GORSUCH: Mr. Jay, if we might
12 zoom out just for a second, judicial estoppel
13 is an off-branch of equitable estoppel.
14 Equitable estoppel requires mutuality. Our
15 judicial estoppel, one case, had mutuality,
16 where a benefit gained by one party did cause a
17 detriment to the other, could have been an
18 equitable estoppel case.

19 This is where we don't have mutuality.
20 And if -- if judicial estoppel is about
21 protecting the integrity of the courts, I get
22 the concern on the one side that there's
23 perhaps a misrepresentation to the bankruptcy
24 court subject to all the caveats we've
25 discussed.

1 But the courts also have a duty and
2 they're open to claims of personal injury. And
3 to give your client a windfall would also seem
4 to have some impact, again, zooming out, on
5 the -- on the integrity of the judicial process
6 and its accessibility. No?

7 MR. JAY: I don't think so, Your
8 Honor, any more than -- than issue preclusion
9 does, which, as the Court's --

10 JUSTICE GORSUCH: No, I understand we
11 have non-mutual issue preclusion.

12 MR. JAY: Right.

13 JUSTICE GORSUCH: And -- and you --
14 you alluded to those. But those -- those
15 doctrines are, again, new and riddled with
16 exceptions when it comes to non-mutual
17 collateral estoppel and -- and the like.

18 And -- and -- and it does seem to me
19 like what one -- often we don't do it when it's
20 just not fair.

21 MR. JAY: So --

22 JUSTICE GORSUCH: And -- and, here,
23 how about, again, if we're concerned about the
24 integrity of the judicial process, why isn't
25 one consideration that your client would just

1 get a plain old windfall?

2 MR. JAY: So the non-mutuality goes at
3 least back to the Philadelphia, Wilmington
4 Railroad case in the 1850s, which --

5 JUSTICE GORSUCH: No, I give you --

6 MR. JAY: -- discussed in New
7 Hampshire, right? So I resist the premise
8 that -- that it is as new as, for example,
9 non-mutual issue preclusion. And --

10 JUSTICE GORSUCH: Okay. I take the
11 point.

12 MR. JAY: Right. And the -- the
13 significance that we take from the fact that,
14 as you said, issue -- sorry, judicial estoppel
15 grows out of equitable estoppel is that
16 equitable estoppel likewise doesn't have this
17 type of state-of-mind requirement. It focuses
18 on the -- on the effect --

19 JUSTICE GORSUCH: Not just -- put
20 aside the state-of-mind requirement. Put that
21 aside.

22 MR. JAY: Right.

23 JUSTICE GORSUCH: That's not relevant
24 to my question.

25 MR. JAY: But I think that the reason

1 that there is no state-of-mind requirement for
2 equitable estoppel or judicial estoppel is --
3 is that both doctrines focus on the effect.
4 Equitable estoppel focuses on the effect to one
5 litigant. Judicial estoppel focuses on the
6 effects on the judicial system.

7 JUSTICE GORSUCH: Yes, and -- and my
8 question is one of the effects on the judicial
9 system here is we're closing the courthouse
10 doors to a good claim and allowing one party
11 who has engaged in tortious conduct to walk
12 away scot-free.

13 MR. JAY: We only -- the premise of
14 your question, Your Honor, that it is a good
15 claim is --

16 JUSTICE GORSUCH: Let's assume -- I --
17 I know you resist that, but let's just assume
18 that for one --

19 MR. JAY: I'm not resisting it for the
20 usual "I don't" -- you know, lawyers don't
21 concede anything reasons.

22 JUSTICE GORSUCH: They never do.

23 (Laughter.)

24 MR. JAY: I'm resisting it because
25 it's the very premise of judicial estoppel that

1 we don't look past -- once the first case is
2 over, we don't look past the accuracy of the
3 representation in the first case.

4 That's the point, right? The -- the
5 whole point of the -- of the representation in
6 the first case, whether it's New Hampshire
7 or -- or this bankruptcy case or any of the
8 other judicial estoppel cases, is the
9 representation that, in this case, I don't have
10 an asset of this nature.

11 JUSTICE GORSUCH: Thank you.

12 MR. JAY: Right. So I think that --
13 that Mr. Garre, in his presentation, brought
14 this, you know, back to sort of the mantra of a
15 failure to update a form, and I do want to
16 resist that -- that characterization because, I
17 mean, again, first, the Court didn't grant cert
18 on the clear inconsistency point.

19 You know, there's no -- no
20 disagreement in the courts of appeals that
21 where there's a representation that a cause of
22 action doesn't exist, that's inconsistent with
23 asserting it. And in this case, there's no
24 fact -- no assertion of a factual lack of
25 knowledge. In fact, the facts show that the --

1 that all the facts were known.

2 There's also no dispute about the
3 obligation to disclose, and this -- this
4 goes -- this gets to a question, I think, that
5 Justice Alito asked my friend earlier, that
6 where there is a duty to disclose, that failing
7 to make a disclosure is a representation to the
8 courts that there is nothing to disclose.

9 So, because those aren't the questions
10 before the Court, all I think that the other
11 side is left with is saying that they resist
12 the idea that either the attorney knew of the
13 legal obligation, which in that bankruptcy
14 court is well established, it's been
15 established for at least a decade, or that the
16 attorney failed to give advice on that to the
17 debtor.

18 And on -- tying together all the
19 questions about what you might say in an
20 opinion, we would urge you to say in an opinion
21 that the bankruptcy -- that attorneys'
22 representations matter, that a litigant can't
23 escape judicial estoppel by saying, although my
24 attorney made this representation to the court
25 in the first action, that's a mistake because I

1 didn't understand the consequences of the
2 choice that my attorney was making.

3 That's fundamentally inconsistent with
4 the notion of mistake as this Court has used it
5 for well over a century. I think this is well
6 fleshed out in the Jerman versus Carlisle
7 McNellie decision that we cite in our papers.
8 But that cites precedent going well back to
9 Justice Story construing a statute involving
10 mistake or error.

11 Legal mistakes aren't that kind of
12 mistake, and that -- that type of error is not
13 what the judicial estoppel doctrine or the
14 inadvertence-or-mistake exception to it are
15 getting at.

16 And I think Justice Jackson had the
17 hypothetical in the top half of the argument
18 about the -- the asset being concealed from the
19 divorce. And I think that the point that I
20 wanted to make from that is that how is that
21 example going to come to light and how are --
22 how are these causes of action that are not
23 disclosed in bankruptcy and that -- that, if
24 disclosed, the bankruptcy court could make its
25 determination about whether they should have

1 been disclosed sooner and what the consequences
2 should be, how are they going to come to light
3 if there is no incentive to litigate the fact
4 that they didn't come to light sooner?

5 So, as the lower courts have
6 recognized that -- that apply our rule, not
7 just the Fifth Circuit but -- but also
8 others --

9 JUSTICE JACKSON: But why does the
10 incentive have to come from the threat of not
11 allowing you to pursue the claim? I mean, this
12 is the point that -- that many have pointed to
13 or made with respect to all the tools the
14 bankruptcy court has to sanction an intentional
15 omission of that nature.

16 MR. JAY: But the -- the tools to
17 sanction all presuppose that someone's going to
18 find out about the concealed claim, and the
19 tools are not useful if the assets don't come
20 to light. And I think that --

21 JUSTICE JACKSON: Yeah, but you need
22 to find out about the concealed claim in order
23 for the claim to be extinguished. I mean,
24 that's -- that's a necessary condition for
25 anything to happen.

1 The question is, why, once we find out
2 about it, the remedy is to say you cannot
3 pursue that claim as opposed to some other
4 solution?

5 MR. JAY: I mean, I think the -- the
6 reason is the clear inconsistency and that, you
7 know, this isn't -- this doesn't just come up
8 in the context of, you know, the -- the good
9 claim that -- that we're talking about. I
10 mean, this comes up in all types of bankruptcy
11 actions in which a party makes a solemn
12 representation to the bankruptcy court about
13 the amount of property that they have, and they
14 subsequently turn around and make
15 representations to another court that are
16 flatly inconsistent with that such that --

17 JUSTICE JACKSON: I understand, but
18 the equivalent would be that once that happens,
19 somehow the bankruptcy court could divest the
20 person of that property, which is not the
21 answer, right? The answer is they adjust the
22 bankruptcy proceeding to sanction them
23 appropriately.

24 MR. JAY: But that -- that's just --
25 that's just it, Justice Jackson. I think that

1 once the plan is confirmed and the debtor gets
2 the discharge, I don't think that the -- that
3 my friend on the other side is correct to say
4 that the bankruptcy court always has the option
5 to say, oh, I'm going to take some further
6 action.

7 In a Chapter 13 plan, if the creditors
8 have been paid off, then the creditors have
9 been paid off. And I -- and a Chapter 13 plan
10 is time-limited. The bankruptcy court, I
11 think, doesn't have the -- the free hand that
12 your question is positing.

13 JUSTICE JACKSON: And should that
14 factor in then to whether or not judicial
15 estoppel is appropriate? Why couldn't -- in
16 the totality of the circumstances, maybe in
17 that situation, you would have judicial
18 estoppel?

19 MR. JAY: So, I -- I mean, I think
20 our -- I resist giving a bankruptcy-specific
21 answer, but I'll -- but I'm happy to give --
22 give an answer for that question. In every
23 bankruptcy -- in every judicial estoppel case,
24 rather, the question is what is the benefit
25 that the -- that the common litigant, you know,

1 between the two actions has gotten from the
2 first action?

3 And if it's raised early enough that
4 the -- that the litigant can surrender the
5 benefit, then there isn't going to be judicial
6 estoppel. I think that's just baked right into
7 the doctrine. You don't need a bankruptcy --
8 bankruptcy-specific rule to say that because I
9 think that's part of judicial estoppel, just
10 like the clarity, like the -- clearness -- how
11 clear the inconsistency between the
12 representations is, also baked into the
13 judicial estoppel doctrine.

14 And when -- when there's doubt about
15 whether a, you know, pro se litigant or
16 something like that has made such a
17 representation, then the -- the existing
18 judicial estoppel doctrine can deal with that.

19 JUSTICE JACKSON: Thank you.

20 MR. JAY: Unless the Court has any
21 further questions?

22 CHIEF JUSTICE ROBERTS: Justice
23 Thomas?

24 Justice Alito?

25 Thank you, counsel.

1 MR. JAY: Thank you, Your Honors.

2 CHIEF JUSTICE ROBERTS: Rebuttal,
3 Mr. Garre?

4 REBUTTAL ARGUMENT OF GREGORY G. GARRE
5 ON BEHALF OF THE PETITIONER

6 MR. GARRE: Thank you, Mr. Chief
7 Justice.

8 We would welcome any ruling setting
9 aside the Fifth Circuit rule in this case.

10 (Laughter.)

11 MR. GARRE: But we do think it's
12 important for the Court to say that a holistic
13 analysis should be undertaken into intent
14 because I do think that it's likely this case
15 will end up right back before this Court, as
16 Justice Sotomayor indicated.

17 And then we would urge the Court to
18 let the lower courts sort out the particular
19 facts and circumstances in this case under the
20 holistic analysis.

21 As to the question presented, the
22 question presented and the whole petition is
23 directed right at the Fifth Circuit's rule
24 here. There's absolutely nothing that prevents
25 this Court from considering that question,

1 resolving the circuit split, and the Court
2 should do so.

3 Petitioner disclosed his claim with
4 more than a year left on the bankruptcy plan in
5 this case. The bankruptcy court could have
6 objected if it thought anything was awry. And
7 any creditor could have come forward and
8 objected if it thought it was entitled to
9 anything more, but no one did.

10 And, last, I would just say on the
11 windfall point, no doctrine of equity would
12 allow the tortfeasor in this case to walk away
13 scot-free if the debtor here simply made an
14 honest mistake in failing to update the form.
15 The Fifth Circuit's decision should be reversed
16 and the case remanded.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 The case is submitted.

21 (Whereupon, at 11:11 a.m., the case
22 was submitted.)

23
24
25

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