No. 25-6

IN THE

Supreme Court of the United States

THOMAS KEATHLEY,

Petitioner,

v.

BUDDY AYERS CONSTRUCTION, INC.,

Respondent.

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

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONER

BRUCE PLAXEN
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #300
Washington, DC 20001
(410) 730-7737
bruce.plaxen@justice.org

JEFFREY R. WHITE
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #300
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

December 19, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 79-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ addresses this Court regarding a judge-made rule that affects the fundamental rights of Americans but has received relatively little attention from this Court. AAJ is deeply concerned that the stringent application of judicial estoppel in this case threatens to deprive many plaintiffs of their right to pursue redress for wrongful injury and to their right to trial by jury.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Judicial estoppel, a judge-made rule that prevents a party from asserting a claim that is inconsistent

---

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

with an earlier claim, was long regarded as an obscure, ill-defined doctrine that was not followed by most jurisdictions. The doctrine is not deeply rooted in English or American common law, but was invented by the Tennessee Supreme Court in 1857 to protect the "sanctity of the oath."

For more than a century, courts seldom relied on the doctrine, because it conflicted with modern pleading rules and with the truth-seeking mission of the civil justice system. For these reasons, judicial estoppel deserves to be consigned to the history books.

At the very least, judicial estoppel should be unavailable to deprive plaintiffs of their cause of action in the bankruptcy nondisclosure context. Beginning in the 1990s, defendants in personal injury suits, civil rights and employment discrimination actions, and other disputes increasingly relied on judicial estoppel to obtain dismissal on the ground that the plaintiff had failed to report the potential claim as property in connection with a previous bankruptcy petition.

The Fifth Circuit applied its stringent formulation of the doctrine in this case. Judicial estoppel, though upheld by this Court in a far different setting, is particularly ill-suited for use in the bankruptcy nondisclosure context.

Bankruptcy nondisclosure cases simply do not meet three of the factors that this Court has listed as requirements for judicial estoppel. First, such cases do not meet the requirement that the party's later position be "clearly inconsistent" with its earlier statement. The plaintiff's earlier position in bankruptcy nondisclosure cases, like Mr. Keathley's, is silence,

which is very often ambiguous. There are many circumstances where the plaintiff's filing of an injury lawsuit is not clearly inconsistent with failure to list that lawsuit previously on a bankruptcy form.

Second, because a debtor's statements regarding potential causes of action that may result in legal claims are essentially conditional and may be revised, the court cannot be said to have "accepted" those statements.

Finally, the factor of whether the debtor would derive an unfair advantage is ill-suited to bankruptcy proceedings, which impact the interests of third parties. Estoppel of a plaintiff's cause of action bestows an unfair advantage on the defendant who evades accountability for wrongdoing in the damages lawsuit. But an unfair *dis*advantage is visited upon creditors when dismissal deprives them of a possible source to satisfy outstanding debts.

2a. Use of judicial estoppel to penalize plaintiffs for prior nondisclosure of potential claims in bankruptcy proceedings also threatens their constitutional rights to due process and trial by jury.

This Court's examination of judicial estoppel occurred in an original action between states, where the constitutional rights of individuals were not at stake. But the right to pursue legal remedies for wrongful injury is a fundamental right, protected by the due process clause. For that reason, courts rightly view dismissal of a plaintiff's cause of action as a drastic penalty of last resort, reserved for egregious misconduct.

This Court has made clear that a plaintiff may be judicially estopped from asserting a cause of action

only where the plaintiff deliberately failed to report the potential claim on a bankruptcy schedule with the bad faith intent to deceive the court and creditors. But the stringent version of judicial estoppel applied by the Fifth Circuit deprives the plaintiff of a property interest in his cause of action without an opportunity to show the absence of subjective bad faith intent. The court does so by narrowing the element of intent to include only "inadvertence." The court then irrefutably presumes bad-faith intent if the debtor had knowledge of the facts underlying the potential claim.

This presumption is arbitrary and lacks any reasonable basis. There are categories of cases in which bad-faith intent to deceive the court and creditors cannot reasonably be inferred from the debtor's mere knowledge of facts that will later form the basis of a claim. In some cases, for example, debtors misunderstood the instructions accompanying the bankruptcy forms or relied on the erroneous advice of their bankruptcy attorneys that reporting was not required. In other cases, plaintiffs disclosed their potential claims to the bankruptcy court or trustee in conference or by other means, but failed to enter the same information into their Schedule A/B form.

Most concerning are cases in which the debtor knew of the relevant facts but reasonably was not aware that he had a potential cause of action. The Fifth Circuit has even indicated that a debtor may be required to disclose a cause of action that has not yet accrued if "sufficiently rooted in" the debtor's prepetition past. The logical, but irrationally unfair, outcome would be that a plaintiff seeking damages caused by any of a wide variety of harmful chemicals or products

whose effects are delayed would be barred for life from recovery if a previous bankruptcy petition did not include a report of that exposure.

This Court should guard against such due process violations by declaring judicial estoppel unavailable in the bankruptcy nondisclosure context or, at the very least, rejecting the Fifth Circuit's rigid presumption of bad faith.

2b. Dismissal of plaintiff's cause of action based on judicial estoppel also violates plaintiff's right to trial by jury. This Court has repeatedly emphasized the importance of this right.

The Seventh Amendment preserves the jury right as it existed in 1791, when the amendment came into force. A personal injury action seeking damages, like the suit in this case, is the prototypical example of a case where the parties are entitled to a jury trial. There were, of course, judicial restraints on common-law juries in 1791, including devices that authorized judges to take a case away from the jury entirely. Devices that can be traced to the common law of that era fall within the scope that the Seventh Amendment preserves, even if not all their particular details have persisted unchanged. But new rules that permit courts to deny litigants a trial by jury on grounds that did not exist in 1791 are prohibited by the Seventh Amendment. Judicial estoppel, invented in 1857, should be outlawed.

3. The integrity of the judicial process will not be left unprotected if this Court eliminates judicial estoppel. Unlike the situation in the mid-Nineteenth Century,

courts have a variety of tools available to them to address abuse by debtors who intentionally fail to disclose potential claims for the purpose of hiding assets that belong to the estate for the benefit of creditors.

As Official Form 106A/B and its accompanying instructions make clear, Schedule A/B submissions that conceal property may subject the debtor to criminal prosecution and substantial fines and imprisonment.

Either the trustee or bankruptcy court itself has statutory authority to reopen a case if it uncovers deception. The court can appoint a new trustee, if necessary, to determine how best to deal with the cause of action for the benefit of the estate. The court or trustee can impose sanctions, including denial of a discharge, if the court finds that the debtor withheld property with the intent to conceal or defraud a creditor or the estate.

The most sensible approach is to eliminate the irrational presumptions that courts have used to avoid inquiring into the subjective intent of the plaintiff or determining the truth of either statement. Those questions belong in the hands of the jury.

Under the Federal Rules of Evidence, submissions to the bankruptcy court may be admitted in the damages trial as prior statements of a party or prior inconsistent statements of a witness. The jury can proceed with its appropriate task of assigning weight and credibility to the evidence and determining the truth of the facts in dispute.

ARGUMENT

I. JUDICIAL ESTOPPEL IS AN OBSCURE AND OUTMODED DOCTRINE THAT IS UNSUITED TO ADDRESS BANKRUPTCY NONDISCLOSURE.

A. Judicial Estoppel Is Ill-Defined and Unnecessary.

Judicial estoppel has been described as an "obscure doctrine," *U.S. v. Kattar*, 840 F.2d 118, 129 n.7 (1st Cir. 1988), whose "rather vague" requirements "vary from state to state and from circuit to circuit." *Patriot Cinemas, Inc. v. Gen. Cinemas Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) (citation omitted). Until relatively recently, federal courts had declined to adopt "this confused area of the law." *Konstantinidis v. Chen*, 626 F.2d 933, 936 n.6 (D.C. Cir. 1980). *See also United States v. 49.01 Acres of Land, More or Less*, 802 F.2d 387, 390 (10th Cir. 1986). The Fifth Circuit previously described it as "obscure," "amorphous," "lacking defined principles," and—at that time—not "followed by anything approaching a majority of jurisdictions." *Nichols v. Scott*, 69 F.3d 1255, 1272 (5th Cir. 1995) (internal quotes omitted).

The doctrine of judicial estoppel "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."18 Moore's Federal Practice § 134.30 at 134–62 (3d ed. 2000). It has no roots in English common law, nor in American law, prior to its invention in 1857 in a case the Supreme Court of Tennessee pronounced "extraordinary." *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39, 43 (1857). As Hamilton told it, he

was the co-owner of a store in Nashville that came on hard times. To mislead creditors, the owners sold the store to Zimmerman. By secret agreement, Hamilton continued to work at the store as a clerk ostensibly but, in reality, as a silent partner. *Id.* at 41–42. When Zimmerman sold the store, Hamilton demanded half the profits. Zimmerman answered that Hamilton was, in fact, no more than his store's clerk and that, in a pleading in an earlier lawsuit between Zimmerman and the store, Hamilton admitted that fact. *Id.* at 47. The Tennessee court held that it would presume Hamilton's admission under oath was true, "without enquiring whether, as a matter of fact, it be so," and that "proper reverence for the sanctity of an oath" prohibited him from contradicting that admission. *Id.* at 47–48.

For more than a century, the doctrine of judicial estoppel essentially gathered dust. Prior to 1960, only thirty-four federal court opinions contained the term. During the 1970s and 1980s, courts often used the term in connection with "res judicata" or simply held it inapplicable. *See generally* Lawrence B. Solum, *Caution! Estoppel Ahead: Cleveland v. Policy Management Systems Corporation*, 32 Loy. L.A. L. Rev. 461, 475 (1999). Even in the 1990s, judicial estoppel could be called "a seldom-invoked doctrine." *Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210, 1212 (8th Cir. 1998). *See also Carnero v. Deitert*, 10 F. Supp. 2d 440, 441 (D.N.J. 1996) ("Rarely is a judge confronted with a paradigmatic case for the application of the doctrine of judicial estoppel."). Most importantly, "[a]lmost none of the reported decisions address a crucial question: What function does the doctrine of judicial estoppel serve in the context of a modern procedural system

that has adopted the Federal Rules of Civil Procedure and the Federal Rules of Evidence and that has adopted the contemporary doctrines of issue and claim preclusion?" Solum, *supra*, at 483.

B. Judicial Estoppel Is Inconsistent with Modern Pleading Rules and with the Truth-Seeking Purpose of the Justice System.

Judicial estoppel "was developed to meet the perceived needs of protecting the judicial system at a time when rules of pleading were strict and unforgiving." Douglas W. Henkin, *Judicial Estoppel—Beating Shields into Swords and Back Again*, 139 U. Pa. L. Rev. 1711, 1755 (1991). But the civil justice system no longer focuses on whether litigants' skillful filings avoid the subtle traps of code pleading.

Modern notice pleading tolerates inconsistencies in pleading legal theories. For example, the Federal Rules of Civil Procedure allow a party to make inconsistent assertions in a single proceeding:

> A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

Fed. R. Civ. P. 8(d)(2). *See also Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir. 1956) (rejecting judicial estoppel as not "in keeping with the spirit of [the rule] and would discourage the determination of cases

on the basis of the true facts as they might be established ultimately").

More fundamentally, an essential feature of judicial estoppel, as the *Hamilton* court noted, is that a court can avoid inquiring whether either inconsistent statement is true. *See* 37 Tenn. (5 Sneed) at 47–48. But in the modern era, "[c]ourt proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial." *Estes v. Texas*, 381 U.S. 532, 540 (1965). *See also Nix v. Williams*, 467 U.S. 431, 445, 447–50 (1984) (noting that the American legal system exalts "the search for truth in the administration of justice"). In this case, Mr. Keathley's claim that he was wrongfully injured by the careless driving of defendant's truck driver was dismissed without any determination of, or even inquiry into, whether those allegations are true. Nor was dismissal based on any misconduct by Mr. Keathley in the district court.

A quarter of a century ago, the Sixth Circuit aptly warned that, "[j]udicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement." *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990). But it is time to stop simply advising courts to apply judicial estoppel with caution. There are other, better tools to address a party's inconsistent positions. *See infra* Part III. This Court should declare that "judicial estoppel is a policy whose time has come and gone, and it, like common law and code pleading, should be consigned to the history books." Henkin, *supra*, at 1755. At the very least, this

Court should make clear that the doctrine is inappropriate as punishment for bankruptcy nondisclosure in the absence of a finding of subjective intent to deceive the court.

C. Judicial Estoppel Is Inappropriate Punishment for a Plaintiff's Nondisclosure in Prior Bankruptcy Proceedings.

Beginning in the 1990s, the doctrine of judicial estoppel gained popularity as a ground for motions to dismiss by defendants in personal injury suits, civil rights and employment discrimination actions, and other disputes. Like the defendant in the case before this Court, defendants in these damages lawsuits seek to evade accountability for their alleged wrongdoing by pointing to a plaintiff's failure to list the lawsuit as "property" on schedules submitted in connection with his Chapter 7 or 13 bankruptcy petition, often many years earlier. This is judicial estoppel in the bankruptcy nondisclosure context.

The Fifth Circuit's application of the doctrine is regarded as "the most stringent in regard to the application of judicial estoppel in the bankruptcy context." Elizabeth E. Stephens, *The Slip-and-Fall Slip-Up*, Am. Bankr. Inst. J., July 2017, at 22, 22. The court has also asserted that the doctrine "is particularly appropriate where . . . a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset." *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 600 (5th Cir. 2005). Nothing could be further from the truth.

This Court undertook its only detailed examination of judicial estoppel in a far different context. *New*

Hampshire v. Maine, 532 U.S. 742 (2001), was an original action brought by New Hampshire to adjudicate a longstanding border dispute with its sister state. This Court concluded that judicial estoppel was the "best fit[]" for the "unusual circumstances" of that controversy. *Id.* at 749.

The Court dismissed New Hampshire's complaint, ruling that the state was judicially estopped from asserting that the river between the states belonged entirely to New Hampshire, contradicting its previous position in a consent decree involving lobster fishing rights that the boundary was located in the middle of the river. *Id.* at 748–49.

The Court outlined the factors that "tip the balance of equities in favor of barring New Hampshire's present complaint." *Id.* at 751. Judicial estoppel should be applied if: (1) "a party's later position" is "clearly inconsistent" with its earlier position; (2) "the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and (3) "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 750–51.[2]

---

[2] The Court also underscored the importance of the element of intent, instructing that judicial estoppel should not apply when inconsistent positions were "based on inadvertence or mistake." *Id.* at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995)).

The Fifth Circuit has strained mightily to shoehorn bankruptcy nondisclosure cases into this paradigm. *See, e.g.*, *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012). They clearly do not fit.

First, a party's later position must be "clearly inconsistent" with its earlier position. *Maine*, 532 U.S. at 751. This element of judicial estoppel is not suited to the bankruptcy nondisclosure context because the prior inconsistent "statement" in such cases is silence. "In most circumstances," this Court has noted, "silence is so ambiguous that it is of little probative force." *United States v. Hale*, 422 U.S. 171, 176 (1975). The Fifth Circuit, however, has dictated that "[b]y omitting the claims from its schedules and stipulation, [the Debtor] represented that none existed." *In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999).

There are many circumstances in which the filing of a damages lawsuit might not be "clearly inconsistent" with not listing the cause of action as property on Official Form 106A/B.[3] For instance, the debtor

---

[3] A petition establishes a bankruptcy estate which will be transferred to the trustee for liquidation in the case of a Chapter 7 bankruptcy, or made part of a plan for repayment to creditors under Chapter 13. Section 521 of the Bankruptcy Code requires all debtors to file a Schedule A/B of assets and liabilities (Official Form 106A/B) and a Statement of Financial Affairs (Official Form 107). Question 33 of Form 106A/B asks the debtor to list: "Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment. *Examples*: Accidents, employment disputes, insurance claims, or rights to sue." Official Form 106A/B at 8, https://www.uscourts.gov/file/18729/download.

may have misunderstood the form's instructions. *E.g.*, *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 277–78 (9th Cir. 2013) (plaintiff credibly stated that she found the instructions "vague," and mistakenly believed she was not required to list her lawsuit); *In re Arana*, 456 B.R. 161, 176–77 (Bankr. E.D.N.Y. 2011) (debtors who had limited command of English and were unrepresented "testified credibly that they did not understand the questions about pending lawsuits and claims in their bankruptcy filings.").

Or the debtor may have consulted legal counsel who erroneously advised that there was no viable cause of action or that the debtor was not required to report the potential claim. *E.g.*, *Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006); *Barger v. City of Cartersville*, 348 F.3d 1289, 1291, 1295 (11th Cir. 2003). Furthermore, a plaintiff's damages cause of action may have become viable solely due to advances in science or changes in the law occurring after the bankruptcy disclosures were submitted. *E.g.*, *In re Ross*, 548 B.R. 632, 634 (Bankr. E.D.N.Y. 2016) (holding that settlement funds in connection with faulty transvaginal surgical mesh, which the medical community was unaware could cause injury until the FDA published a report seven years after plaintiff filed her petition, were not property of the bankruptcy estate); *In re Carroll*, 586 B.R. 775, 783 (Bankr. E.D. Cal. 2018) (similar).

Second, the party must have "succeeded in persuading a court to accept that party's earlier position." *Maine*, 532 U.S. at 750. In *Maine*, where the prior statement was reflected in a consent decree, this element served the ultimate purpose of judicial estoppel.

"Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, . . . and thus poses little threat to judicial integrity." *Id.* at 750–51 (citation omitted). By accepting the debtor's filings, the court has not given unqualified "acceptance" to all the implications of the debtor's disclosures or nondisclosures therein. *Cf. Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010) (declining to apply judicial estoppel where the district court's approval of a settlement did not necessarily accept the party's statements therein).

Moreover, bankruptcy proceedings are different in that the prior statement contained in the bankruptcy schedule is neither fixed nor final. The bankruptcy court's acceptance of the debtor's Schedule A/B assets, submitted with the Petition, is essentially conditional. The court does not grant the petition and discharge the debts at that time; it may be months or years before the debtor obtains a fresh start. During that time, a Chapter 7 estate or Chapter 13 plan may be reopened or modified to take account of developments regarding the debtor's potential claims. In fact, the Fifth Circuit has held that the debtor is under a continuing obligation to report such changes. *In re Coastal Plains, Inc.*, 179 F.3d at 208. The fluid and contingent nature of the disclosures makes judicial estoppel particularly ill-suited in this context.

Third, because bankruptcy nondisclosure necessarily involves the interest of third parties in the outcome of the damages action, it often confounds the third factor, 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." *Maine*, 532 U.S. at 751.

In the bankruptcy nondisclosure context, the tort defendant can suffer no unfair detriment by denying estoppel: The parties' trial on the merits would proceed unaffected. Estoppel bestows a windfall on the defendant, allowing him to evade accountability on grounds completely unrelated to the merits of the case, turning equity's "clean hands" principle on its head. Estoppel inflicts an unfair detriment on the creditors, depriving them of a potential source of repayment.

Fourth, the Fifth Circuit's stringent application of judicial estoppel in the bankruptcy nondisclosure context ignores this Court's additional limitation on the doctrine: A plaintiff must not be deprived of their cause of action if the prior inconsistent statement was due to inadvertence or mistake. Imposing judicial estoppel without inquiry into subjective intent undermines plaintiffs' due process and jury trial rights.

II. JUDICIAL ESTOPPEL SHOULD BE UNAVAILABLE AS A PENALTY FOR NONDISCLOSURE IN BANKRUPTCY PROCEEDINGS TO AVOID VIOLATION OF PLAINTIFFS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TRIAL BY JURY.

A. In the Absence of Bad-Faith Intent, Dismissal of a Plaintiff's Wrongful Injury Cause of Action as Punishment for Nondisclosure Violates Due Process.

1. Dismissal of a plaintiff's cause of action is a drastic step reserved as a sanction for egregious intentional misconduct.

The right to a legal remedy for wrongful injury is a fundamental right in America's civil justice system. Chief Justice John Marshall, echoing Sir William Blackstone, declared:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Multiple provisions of the Constitution, including the Due Process Clause, guarantee the right of access to the courts to pursue legal remedies. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

This Court has repeatedly cautioned that, even when a litigant is guilty of misconduct, dismissal of their cause of action is a "drastic" consequence. *Hamer v. Neighborhood Hous. Servs.*, 583 U.S. 17, 20 (2017); *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). For that reason, federal courts widely recognize that dismissal is the "sanction of last resort." *Shields v. Wiegand*, No. 24-3050, 2025 WL 3043377, at *2 (3d Cir. Oct. 31, 2025) (citation omitted). *See, e.g.*, *Velazquez–Rivera v. Sea–Land Serv., Inc.*, 920 F.2d 1072, 1075–76 (1st Cir. 1990) (describing dismissal as "the most severe sanction"); *Benitez-Garcia v. Gonzalez-Vega*, 468 F.3d 1, 4–5 (1st Cir. 2006) (stating that dismissal

is the "harshest sanction," reserved for when "a plaintiff's misconduct is particularly egregious or extreme"). In particular, the use of judicial estoppel to dismiss a claim "is an extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 364 (3d Cir. 1996) (citation omitted).

However, the Fifth Circuit's rigid application of judicial estoppel to address bankruptcy nondisclosure, exemplified by its decision in this case, looks to dismissal of plaintiff's suit as a first resort.[4] The Fifth Circuit refuses to inquire into the debtor's subjective intent to deceive the court, asserting instead that a debtor's "lack of awareness of the statutory disclosure duty is simply not relevant to the question of judicial estoppel." *Kamont v. West*, 83 F. App'x 1, 3 (5th Cir. 2003). *See also In re Flugence*, 738 F.3d 126, 130 (5th Cir. 2013); *In re Coastal Plains*, 179 F.3d at 212.

---

[4] "Stringent" judicial estoppel stands in sharp contrast with a more flexible approach, which instructs the district court to "look to all the facts and circumstances" to ascertain whether the debtor subjectively "actually intended to manipulate the judicial system to his advantage." *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1186 (11th Cir. 2017). To the extent the Court assumes or holds that judicial estoppel applies in this context, AAJ agrees with petitioner that the Court should repudiate the Fifth Circuit's test in favor of the totality-of-the-circumstances test exemplified by *Slater*.

2. Judicial estoppel requires proof of a litigant's subjective bad-faith intent to deceive the court to gain unfair advantage.

In *Maine*, this Court concluded that judicial estoppel was the "best fit[]" for an original action between two states where the individual's right to due process was not at stake. 532 U.S. at 749. At the same time, the Court emphasized that proof of intent is an important element of judicial estoppel. Because judicial estoppel is directed at a litigant's "*deliberately* changing positions according to the exigencies of the moment," *id.* at 750, and "*intentional* self-contradiction . . . as a means of obtaining unfair advantage," *id.* at 751, courts may not impose it "*when a party's prior position was based on inadvertence or mistake*." *Id.* at 753 (emphasis added) (citation omitted). Bad faith on the part of the debtor is an essential prerequisite for imposition of judicial estoppel.

A cause of action is "a species of property" protected by the due process guarantee. *Logan v. Zimmerman Brush, Co.*, 455 U.S. 422, 428 (1982). In that case, this Court held that dismissal of Logan's employment discrimination case for failure to comply with an administrative time limit that was beyond his control violated his due process right to access the state's adjudicatory procedures "to present his case and have its merits fairly judged." *Id.* at 433.

The Fifth Circuit's stringent application of judicial estoppel does precisely that. It punishes a debtor's failure to disclose a property interest in a potential damages cause of action by depriving the debtor of that property, for reasons unrelated to the merits of the

damages suit, and without affording him the opportunity to be heard on whether he had the requisite bad-faith intent.

In place of any inquiry into a debtor's subjective intent, the Fifth Circuit essentially presumes the element of bad faith intent out of existence. First, the court has substituted the *Maine* Court's "inadvertence" caution, 532 U.S. at 751, for the whole of the element of bad-faith intent. *See Tyson Foods*, 677 F.3d at 262 (listing "the party did not act inadvertently" as the third essential prerequisite for judicial estoppel).

The Fifth Circuit then establishes an irrebuttable presumption of bad faith based solely on knowledge and motive. The court explains, "in considering judicial estoppel *for bankruptcy cases*, the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims[5] *or* has no motive for their concealment."[6] *In re Coastal Plains*, 179 F.3d at 21. "This combination [gives] rise to an inference of

---

[5] To prove that she "did not know of the inconsistent position," she "must show not that she was unaware that she had a duty to disclose her claims but that . . . she was unaware of the facts giving rise to them." *In re Flugence*, 738 F.3d at 130 (quoting *Jethroe*, 412 F.3d at 601).

[6] The court has made clear that a debtor almost always has a motive to conceal a potential cause of action from the bankruptcy court; that is, the desire to keep the proceeds from any subsequent lawsuit from creditors. *Tyson Foods*, 677 F.3d at 262. The only way to show lack of intent is to prove the negative (i.e., lack of knowledge of the facts giving rise to the cause of action).

intent sufficient to satisfy the [bad faith] requirements of judicial estoppel." *Tyson Foods*, 677 F.3d at 210. This two-factor presumption of intent effectively disqualifies other possible indicators of the lack of bad faith, such as reliance on advice of counsel, misunderstanding of the instructions, or recent developments in the law or science.

This presumption, when applied in the bankruptcy nondisclosure context, borders on arbitrary and capricious. One might postulate that an otherwise healthy former smoker seeking bankruptcy protection would be obligated to list claims against all cigarette companies on a Schedule A/B. Failure to do so would preclude that individual from filing an injury action against any cigarette company for the remainder of the individual's life. Dismissing a plaintiff's personal injury cause of action on the basis of a presumption so lacking in rational basis plainly violates due process.

3. In many circumstances, a debtor's nondisclosure of a potential future cause of action is not indicative of intent to deceive the court or hide assets from creditors.

To illustrate this point, AAJ calls the Court's attention to several categories of actual cases where plaintiffs failed to disclose their potential causes of action on bankruptcy schedules, and defendants sought automatic dismissal on the basis of judicial estoppel. Inquiry into the specific facts of each case would show that the debtor's knowledge of the underlying facts of the claim, plus the debtor's economic motive to conceal the cause of action from creditors, provided no rational

basis for the presumption that the debtor acted with bad-faith intent to deceive the court and creditors.

In one category of cases, debtors were fully aware of their claims but reasonably believed that disclosing the cause of action on the bankruptcy schedules was not required. For example, in *In re Flugence*, Cheryl Flugence filed for Chapter 13 bankruptcy protection, and a plan was confirmed in 2004. 738 F.3d at 128. In March 2007, she was injured in a car crash and filed a personal injury suit one year later. *Id.* The court of appeals held that the district court abused its discretion in denying the defendants' motion to judicially estop plaintiff from pursuing her claim. The court rejected Flugence's explanation that she did not know she had to disclose a potential cause of action that arose after her Chapter 13 plan was confirmed and that she relied on her attorney's advice that disclosure was not required. The court acknowledged that, due to an apparent conflict between two Bankruptcy Code provisions, whether Flugence was required to report a post-confirmation claim was "unclear," but that fact was ultimately "not relevant." *Id.* at 130–31. Moreover, she "knew of the facts underlying her personal-injury claim" which gave rise to the presumption nondisclosure was in bad faith. *Id*. *See also In re Coastal Plains*, 179 F.3d at 212 (finding abuse of discretion in denying judicial estoppel where an equipment distributor's CEO relied on its attorneys, who failed to disclose a potential claim in its Chapter 11 petition, and holding that "Coastal's claimed 'inadvertence' is not the type that precludes judicial estoppel because Coastal knew of the facts" giving rise to its claim.).

In another group of cases, debtors attempted to disclose their potential claims but were not successful. In *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003), the court upheld the dismissal of Donna Barger's employment discrimination suit for money damages because she failed to disclose it on the Statement of Financial Affairs in connection with her Chapter 7 petition. Barger had reopened her bankruptcy case to add the claim as an asset and specifically announced the suit to the bankruptcy trustee at a creditors' meeting. But through an oversight, her bankruptcy attorney failed to disclose the lawsuit on Barger's bankruptcy schedule. *Id.* at 1292. The unfairness of this outcome led the Eleventh Circuit to overrule the decision, rejecting the notion that a court can infer bad faith from nondisclosure "without considering the individual plaintiff and the circumstances surrounding the nondisclosure." *Slater*, 871 F.3d at 1177). *See also Spaine v. Community Contacts, Inc.*, 756 F.3d 542 (7th Cir. 2014) (holding judicial estoppel inappropriate where the debtor disclosed her employment discrimination lawsuit at her meeting of creditors but omitted the suit from her bankruptcy schedules because oral disclosure was sufficient to show absence of bad faith).

Perhaps the most concerning use of judicial estoppel in this context arises in cases where the debtor could not have known that a potential cause of action even existed. A debtor is obligated by the Bankruptcy Code "to disclose all assets, *including contingent and unliquidated claims*." *In re Coastal Plains*, 179 F.3d at 208. But in the Fifth Circuit's view, that obligation exists without regard to whether the debtor has knowledge of "all of the underlying facts or even the

legal basis of the claim." *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 362 (5th Cir. 2014) (citation omitted).

The Fifth Circuit's stringent version of judicial estoppel insists that the debtor's obligation to disclose a potential damages action not only includes claims that have not been filed, but also extends to causes of action that have not yet accrued. The court has stated that "a cause of action not fully accrued under state law at the date of filing could be sufficiently rooted in the pre-bankruptcy past to be includable in the debtor's estate." *In re Burgess*, 438 F.3d 493, 513 (5th Cir. 2006). The court offered as an example the case of a debtor who was exposed to asbestos before he filed bankruptcy but was not diagnosed with asbestosis until seven months post petition. *In re Richards*, 249 B.R. 859 (Bankr. E.D. Mich. 2000). In that case, even though under Michigan law, the debtor's cause of action did not accrue until his harm was diagnosed, the claim was "sufficiently rooted in the pre-bankruptcy past" for the reporting obligation to attach. *Id.* at 861.

The logical outcome of this rigid application is that any debtor seeking bankruptcy protection would be required to describe on Official Form 106A/B whether they have smoked or were exposed to second-hand smoke, whether they were exposed to asbestos, certain pesticides or chemicals, or whether they had been subjected to discrimination at work, or a nearly limitless number of experiences that could give rise to a lawsuit in the future. Failure to do so would allow the defendant to evade accountability for the remainder of the plaintiff's lifetime.

Such irrational deprivations of a personal injury cause of action would clearly deprive the plaintiff of due process. And they are only possible because courts have pressed judicial estoppel into tasks that the doctrine is not suited to accomplish.

This Court should protect litigants and creditors by declaring that the doctrine is not available to deal with bankruptcy nondisclosures. To the extent this Court holds that judicial estoppel is appropriate in the bankruptcy nondisclosure context, however, AAJ agrees with petitioner that the Fifth Circuit's rigid presumption of bad faith should be rejected in favor of a full, totality-of-the-circumstances inquiry into whether the debtor had a bad-faith intent to mislead. *See* Pet. Br. 14–38.

B. Dismissing Plaintiff's Tort Cause of Action for Damages Based on Prior Nondisclosure Violates the Seventh Amendment Right to Trial by Jury.

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Indeed, the federal rules mandate that the jury right be "preserved to the parties inviolate." Fed. R. Civ. P. 38(a).

This Court recently reaffirmed that "[t]he right to trial by jury is 'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.'" *Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109, 121 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

Today, as throughout our history, this Court regards any encroachment upon this prized and sacred right "with great jealousy." *Jarkesy*, 603 U.S. at 122 (quoting *Parsons v. Bedford*, 28 U.S. 433, 434 (1830)).

"[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791." *Pernell v. Southall Realty*, 416 U.S. 363, 374 (1974) (quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974)). The Seventh Amendment "preserve[s]" the right to a jury in causes of action cognizable in English common law courts as of 1791, when the Seventh Amendment came into force. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989).

A personal injury action, such as Petitioner's suit, is "a prototypical example of an action at law, to which the Seventh Amendment applies." *Wooddell v. Int'l Bhd. of Elec. Workers, Loc. 71*, 502 U.S. 93, 98 (1991). And money damages are "the prototypical common law remedy." *Jarkesy*, 603 U.S. at 123.

There were, of course, judicial restraints on juries at common law, including common-law devices allowing judges to take a case away from the jury entirely. Thus, "to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Dimick*, 293 U.S. at 476–77. In *Dimick*, this Court approved the reduction of a jury's verdict through the device of remittitur. However, because "careful examination of the English reports prior to [1791] fails to disclose any authoritative decision sustaining the power of an English court to *increase* . . . the amount fixed by the verdict of a jury in an action at law," additurs are

prohibited by the Seventh Amendment. *Id*. at 486–87. *See also Galloway v. United States*, 319 U.S. 372, 394–95 (1943) (upholding two "classical modes" of taking a case away from the jury, demurrer to the evidence or directed verdict, which do not "amount to a departure from 'the rules of the common law' which the Amendment requires to be followed").

As Chief Justice Rehnquist explained, the procedures affecting the jury right are not frozen in their 1791 specifics, but no new restrictions may be imposed. To allow "creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 346 (1979) (Rehnquist, dissenting).

Yet that is precisely what judicial estoppel accomplishes in cases like this one. Mr. Keathley was deprived of his right to try his personal injury case to a jury. Dismissal was not based on the law or the facts pertaining to his case, nor on any rule known to the common law in 1791. Rather, it was invented in 1857 by judges who intended to protect the integrity of the judicial system, even at the expense of the constitutional rights that contribute mightily to the system's integrity. The Founders enshrined the jury right in the Constitution specifically to check "the otherwise autocratic power and authority of the judge" to undermine that right, even for worthy reasons. *Granfinanciera*, 492 U.S. at 83 (White, J., dissenting).

This Court should declare that the outmoded and unneeded doctrine of judicial estoppel is unavailable, at least in the bankruptcy nondisclosure context, to

protect the jury rights of the litigants. The Court can call a halt to the "gradual process of judicial erosion'" which threatens "the essential guarantee of the Seventh Amendment." *Parklane Hosiery*, 439 U.S. at 339 (Rehnquist, J., dissenting) (quoting *Galloway*, 319 U.S. at 407 (1943) (Black, J., dissenting).

III. COURTS ARE WELL-EQUIPPED TO PROTECT THE INTEGITY OF THE JUDICIARY AND DISPENSE WITH INTENTIONALLY INCONSISTENT PLEADINGS.

Certainly, it is important for courts "to protect the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Maine*, 532 U.S. at 749–50. Understandably, courts take that responsibility seriously. *See, e.g.*, *Payless Wholesale Distributors., Inc. v. Alberto Culver, Inc.*, 989 F.2d 570, 571 (1st Cir. 1993) (holding that intentional omission of claims from bankruptcy schedules "is a palpable fraud that the court will not tolerate . . . [and] an unacceptable abuse of judicial proceedings"). But judicial estoppel is poorly suited to this task. And to deprive a plaintiff of the right to pursue her remedy—a penalty that may be wildly disproportionate to the harm while bestowing a windfall on the alleged wrongdoer and penalizing creditors who had no part in misleading the court—is not equity.

As the D.C. Circuit pointed out when it joined the Tenth Circuit in rejecting judicial estoppel in this context, "[e]ven in the case of false statements in pleadings, public policy can be vindicated otherwise and more practicably and fairly in most instances than

through suppression of truth in the future." *Konstantinidis*, 626 F.2d at 938 (quoting *Parkinson*, 233 F.2d at 438).[7]

Bankruptcy petitioners must disclose property, including potential causes of action, under penalty of perjury The instructions accompanying the Official Form 106A/B make clear:

> You must verify under penalty of perjury that the information you provide is complete and accurate. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $250,000, or imprisonment for up to 20 years, or both.

Instructions: Bankruptcy Forms for Individuals at 16 (Feb. 2025), https://www.uscourts.gov/sites/default/files/2025-04/instructions-individuals-2025-04v2-instructions.pdf.

The bankruptcy court itself is the most appropriate agent to vindicate those policies, being familiar with the circumstances surrounding the debtor's incomplete filing and having "plenty of protections" to preclude abuse. *Ah Quin*, 733 F.3d at 275. For instance,

---

[7] The D.C. and Tenth Circuits subsequently applied judicial estoppel in *Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 931 (D.C. Cir. 2016), at *Eastman v. Union Pac. R. Co.*, 493 F.3d 1151, 1160 (10th Cir. 2007), respectively.

> [t]he bankruptcy court or trustee may reopen a case if it uncovers deception . . . even if it has long been closed. 11 U.S.C. § 350(b); Fed. R. Bankr.P. 5010. A bankruptcy court or trustee can impose sanctions, including denial of a discharge. Fed. R. Bankr.P. 9011. And, of course, a case may be referred to the United States Attorney's office for criminal prosecution. *See* 18 U.S.C. § 152 (criminalizing the concealment of assets, false oaths, and claims).

Id.

Because nondisclosure in the bankruptcy context imposes economic consequences on third-party creditors, the "correct solution is often to reopen the bankruptcy case and order the appointment of a trustee who, as owner of the cause of action, can determine whether to deal with the cause of action for the benefit of the estate." *In re An-Tze Cheng*, 308 B.R. 448, 460 (B.A.P. 9th Cir. 2004). The bankruptcy court or trustee is also in the best position to take account of the debtor's good or bad faith. *See* Caryn Wang, *The Last Estop: Why Judicial Estoppel Should Be a Court's Last Resort for Undisclosed Lawsuits from Bankruptcy*, 66 Emory L.J. 1209, 1238–39 (2017).

The bankruptcy court can deny the discharge of a petitioner's debts if the court finds that the debtor withheld property with the intent to conceal or defraud a creditor or officer of the estate. 11 U.S.C. § 727(a)(2). The trustee, a creditor, or the United States trustee may request revocation of a discharge.

Id. § 727(d). Additionally, the Bankruptcy Code provides strict punishment in certain cases where a debtor fails to meet the disclosure obligations. For example, where "an individual debtor . . . fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed." 11 U.S.C. § 521(i).

The court presiding over the damages action is also equipped to address the plaintiff's intentional change in position. Although Rule 8 permits a party to adopt inconsistent positions in pleadings, those pleadings remain "subject to the obligations set forth in Rule 11." Fed. R. Civ. P. 8(d)(2).

The preferred approach in many circumstances may be to admit the plaintiff's previous silence regarding the existence of the potential claim for the jury's consideration. Prior statements of a party are admissible non-hearsay under Fed. R. Evid. 801(d)(2). *See Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428, 1432 (10th Cir. 1990) (noting that "prior inconsistent pleadings [are admissible] as substantive evidence") (collecting cases). If the plaintiff takes the stand in his damages suit, as is most often the case, the inconsistent bankruptcy filing will be admissible as a non-hearsay impeachment by prior inconsistent statement under Rules 801(d)(1) and 613.

Rejecting judicial estoppel in favor of admitting the prior inconsistent statement for the jury's consid-

eration "avoid[s] impinging on the truth-seeking function of the court." *Teledyne Indus.*, 911 F.2d at 1218.[8] By rejecting the use of judicial estoppel in bankruptcy nondisclosure situations, this Court will return the focus of the damages court to the truth of the factual allegations, rather than their consistency with the plaintiff's prior statements.

CONCLUSION

For these reasons, AAJ urges this Court to reverse the decision of the Fifth Circuit Court of Appeals.

December 19, 2025

Respectfully submitted,

Jeffrey R. White
Counsel of Record
Bruce Plaxen
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th St. NW, #300
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae

---

[8] This is an option that was not available to the Tennessee Supreme Court credited with invented judicial estoppel, in part, because prior inconsistent statements were inadmissible in Tennessee courts. *See Hamilton*, 37 Tenn. (5 Sneed) at 48.