

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

REPLY BRIEF FOR PETITIONER

ERIC J. LEWELLYN
ALDERS AND LEWELLYN
PLLC
1331 Union Avenue
Suite 1000
Memphis, TN 38104

THOMAS R. GREER
6256 Poplar Avenue
Memphis, TN 38119

GREGORY G. GARRE
Counsel of Record
CHRISTINA R. GAY
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

KRISTIN C. HOLLADAY
BAPU KOTAPATI
LATHAM & WATKINS LLP
1271 Avenue of the
Americas
New York, NY 10020

Counsel for Petitioner

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INTRODUCTION

The Fifth Circuit’s outlier judicial estoppel rule—which irrebuttably presumes an intent to manipulate the courts based merely on a *potential* financial motive to mislead the bankruptcy court—is so indefensible respondent does not even try to defend it. That is not surprising given the obvious flaws with that rule. But what respondent offers instead is—the even more extreme theory that judicial estoppel applies whenever a litigant would benefit from inconsistent positions, regardless of whether that inconsistency was the product of an “intent to deceive” the courts. Resp. Br. 27. That cannot be right. This Court and others have long recognized that judicial estoppel applies to those who deliberately manipulate the court to gain an unfair advantage. *See New Hampshire v. Maine*, 532 U.S. 742, 751 (2001); Pet. Br. 14-15. And an inconsistency that is the product of inadvertence or mistake is, by definition, not the result of a deliberate effort to manipulate the courts.

Once respondent’s sweeping premise is rejected, the case resolves itself. The proper inquiry into whether a change in positions was intentional or inadvertent must be holistic, as most circuits hold. And while the holistic test largely looks to objective factors, nothing justifies categorically excluding a litigant’s own explanation from the mix. As its name suggests, a holistic analysis considers all relevant evidence of intent. Respondent dismisses this approach as unruly and unworkable, but the totality approach reflects how courts resolve intent questions every day. Likewise, the flexibility to consider all relevant circumstances is a hallmark of equity.

The United States—in a forceful amicus brief that respondent essentially ignores—agrees. Not only is the United States “the Nation’s largest creditor,” but here it also represents the interests of United States Trustees, who “are charged with supervising the administration of bankruptcy cases and have a strong interest in ensuring transparency and deterring violations of disclosure requirements.” U.S. Br. 1. The United States agrees (at 24) that, in determining whether a debtor acted “inadvertently or intentionally” in failing to disclose a claim in bankruptcy, courts should consider “all relevant evidence” of intent. And it further explains that the Fifth Circuit “erred by limiting its analysis to a test that did not consider either the bankruptcy-specific context or relevant evidence of intent.” *Id.* at 14.

The Fifth Circuit’s decision cannot stand.

ARGUMENT

I. JUDICIAL ESTOPPEL DOES NOT APPLY TO INCONSISTENCIES ARISING FROM INADVERTENCE OR MISTAKE

Respondent’s core position is that judicial estoppel applies whenever a litigant would benefit from inconsistent positions—full stop, regardless of whether that inconsistency was part of a deliberate effort to manipulate the courts or instead an honest mistake. *See, e.g.*, Resp. Br. 3-5, 24-28, 30-32. That view ignores the doctrine’s reason for being, contradicts how courts have applied judicial estoppel for over a century, and rests on inapposite authority addressing a different doctrine altogether—equitable estoppel. Respondent’s position should be rejected.

A. Judicial Estoppel Targets Deliberate Efforts To Manipulate The Courts

Respondent’s argument hinges on the premise (at 24, 30) that judicial estoppel’s “purpose” is to prevent “the same litigant [from] win[ning] two cases by advancing positions clearly inconsistent with each other”—“period.” Whether the litigant intended to manipulate the courts is, in respondent’s telling, irrelevant. That vastly oversimplifies—and, at the same time, expands—the reach of the doctrine. And respondent’s own concessions betray this theory.

1. Judicial estoppel exists to prevent a specific and serious vice: “the cold manipulation of the courts.” *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995); see Pet. Br. 14-15. The doctrine’s purpose, as courts have long recognized, is to prevent parties from playing “fast and loose with the courts” through “intentional self-contradiction.” *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953); see, e.g., *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982) (judicial estoppel is designed “to prevent intentional inconsistency” and “perversion of judicial machinery”). As this Court put it in *New Hampshire v. Maine*, “courts have uniformly recognized that [judicial estoppel’s] purpose is ‘to protect the integrity of the judicial process’ by ‘prohibiting parties from deliberately changing positions according to the exigencies of the moment.’” 532 U.S. 742, 749-50 (2001). The doctrine is thus designed to prevent *manipulation*—not to punish or eliminate all inconsistencies, however innocent.

This focus on manipulation does more than explain the doctrine’s purpose; it defines its limits. As the Court explained in *Minerva Surgical, Inc. v.*

Hologic, Inc., an estoppel doctrine’s boundaries must remain “true to the doctrine’s reason for being.” 594 U.S. 559, 576 (2021); *see* U.S. Br. 17-18. In *Minerva*, the Court declined to extend assignor estoppel beyond situations “when its underlying principle of fair dealing comes into play.” 594 U.S. at 576. The same goes here: Where no manipulation has occurred, judicial estoppel has no purchase. *See* U.S. Br. 29.

Respondent’s contrary position relies almost exclusively on treatises and other authorities addressing the separate doctrine of *equitable* estoppel.¹ But equitable estoppel is different. It is concerned with “fairness in the relationship” between two parties, and so applies when one party reasonably relied on another’s prior representation and would be prejudiced by a change in position. *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980). Because reliance by an adversary—not the integrity of the judicial system—is the touchstone, equitable estoppel is “not limited to precluding bad faith inter-trial inconsistencies.” Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409, 416 (1987).

By contrast, judicial estoppel serves a “widely divergent” goal: protecting courts themselves from manipulation. Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial*

¹ *See, e.g.*, Resp. Br. 5 & n.1, 6-7, 32 (citing *Continental Nat’l Bank v. National Bank of Commonwealth*, 50 N.Y. 575, 583 (1872); John Norton Pomeroy & John Norton Pomeroy, Jr., *Treatise on Equity Jurisprudence* 1640-41, 1660 (4th ed. 1918); John S. Ewart, *Exposition of the Principles of Estoppel by Misrepresentation* 85 (22d ed. 1900); 28 Am. Jur. 2d *Estoppel and Waiver* § 46; Restatement (First) of Torts § 894 (1939); Restatement (Second) of Torts § 894 (1979)).

Estoppel, 80 Nw. U. L. Rev. 1244, 1248 (1986). Its concern is “culpable behavior vis-à-vis the court,” *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 780-81, 785 (3d Cir. 2001)—namely, “intentionally misle[ading] the court to gain unfair advantage,” *Tenneco Chems., Inc. v. William T. Burnett & Co.*, 691 F.2d 658, 665 (4th Cir. 1982).

Respondent’s own authorities prove the point. For example, respondent invokes (at 7) a section of American Jurisprudence addressing *equitable* estoppel to argue that a party’s intentions are irrelevant—while conspicuously omitting sections of that same treatise concerning *judicial* estoppel. Those sections make clear that judicial estoppel turns on “intentional contradictions, not simple error or inadvertence,” 28 Am. Jur. 2d *Estoppel and Waiver* § 67 (2026 update, Westlaw); that judicial estoppel “is intended to protect the courts from being manipulated by chameleonic litigants,” *id.*; and that most courts require that inconsistencies “be part of an intentional effort to mislead the court,” *id.* § 69. The treatise further explains that “[e]quitable estoppel is distinct from judicial estoppel,” and that judicial estoppel targets only those inconsistencies amounting to “deliberate manipulation of the courts.” *Id.* § 33.

This focus on intent squarely refutes respondent’s conception of the doctrine. It also yields an obvious corollary: Where the relevant inconsistency resulted from inadvertence or honest mistake, judicial estoppel should not apply because there is no “cold manipulation” to remedy. *John S. Clark Co.*, 65 F.3d at 29; *see, e.g., Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973) (Texas law) (Judicial estoppel does not apply when inconsistency stems from “inadvertence[] or mistake” because the

doctrine “looks towards cold manipulation and not an unthinking or confused blunder.”).

This limitation is as old as the doctrine itself. *Hamilton v. Zimmerman*—widely credited as the origin of judicial estoppel—recognized that when a party’s prior statements “were made inconsiderately or by mistake,” the doctrine does not apply. 37 Tenn. 39, 48 (1857). Leading commentary calls this “[p]erhaps the most important caveat to the entire doctrine of judicial estoppel.” Boyers, *supra*, at 1264. Indeed, as the United States explains (at 29), policing “honest mistakes is generally not necessary to ‘protect the integrity of the judicial process.’”

2. For all its bluster, respondent does not actually deny that inadvertence or mistake defeats judicial estoppel. *See* Resp. Br. 6-7, 21-23, 25-28, 33, 38, 42, 49 (assuming an “inadvertence” limitation of some kind exists). Instead, it tries a different tack: accepting the “inadvertence” limitation in name only, then defining it out of existence.

According to respondent, an inconsistency qualifies as “inadvertent” or “mistaken” only when the plaintiff lacked “knowledge of the facts concerning inconsistent positions.” *Id.* at 7 (emphasis omitted). In bankruptcy, that means a debtor must lack knowledge of the underlying facts giving rise to an undisclosed claim. *See id.* at 24, 32. Yet respondent never explains how its test is tethered to any coherent account of the doctrine’s purpose. It does not fit respondent’s own theory of judicial estoppel: If the doctrine exists simply to prevent litigants from successfully adopting contrary positions—“period”—why should lack of knowledge of facts matter? *See id.* at 30. An “inadvertent” inconsistency—however defined—is still an inconsistency. Under

respondent's stated rationale, it should trigger judicial estoppel just the same.

Nor does respondent's test make sense on any other terms. It has no grounding in ordinary meaning. Respondent asserts (at 6-7) that "mistake" "generally means a mistake of fact"—but the sole authority respondent cites for this is a section of Pomeroy titled "Concerning *Equitable Estoppel*." John Norton Pomeroy & John Norton Pomeroy, Jr., *Treatise on Equity Jurisprudence* 1632 (4th ed. 1918) (capitalization normalized) (emphasis added); see Resp. Br. 7 (citing Pomeroy, *supra*, at 1640-41, 1660). And respondent offers no account of "inadvertence," which by ordinary usage refers to "unintentional" conduct. See, e.g., Inadvertent, *Webster's Third New International Dictionary*, <https://www.merriam-webster.com/dictionary/inadvertent> (last updated Feb. 12, 2026) (defining "inadvertent" as "unintentional"; "not focusing the mind on a matter; inattentive"). There is no reason to deviate from "the ordinary understanding of 'mistake' and 'inadvertence'" here. *Ah Quin v. County of Kauai Dep't of Transp.*, 733 F.3d 267, 277 (9th Cir. 2013).

Respondent's cramped definition of "inadvertence or mistake" also ignores the many ways a litigant who has taken inconsistent positions may know the "facts" underlying a potential claim yet still lack an intent to manipulate the courts. For instance, a litigant may not realize that his earlier conduct communicated any particular position at all, such as a debtor who knows he was injured in an accident but does not understand that failing to amend an asset schedule that was accurate when filed communicates the position that

no personal injury claim exists.² Or consider “a litigant who is not represented by counsel or who speaks English as a second language and fails to include a claim on her bankruptcy schedule because she does not understand that she was required to do so.” *Ah Quin*, 733 F.3d at 272 n.3. In each case, the litigant knew the “facts” but did not engage in a deliberate manipulation in changing positions later.

Respondent’s definition would also exclude cases where a litigant lacked any meaningful “opportunity or incentive” to assert a different position in the first proceeding, *New Hampshire*, 532 U.S. at 754, or reasonably understood his first position to be narrower than it is later characterized. These are ordinary, “commonly understood” applications of “inadvertence or mistake,” *Ah Quin*, 733 F.3d at 276. But respondent’s rule accounts for none of them.

Ultimately, even respondent cannot stick to its own rule. Throughout its brief, respondent assumes that facts bearing on a party’s intent to manipulate the courts—beyond mere knowledge of the facts underlying a claim—sometimes *do* matter. For example, respondent seems to accept that courts can ask whether a litigant’s positions reflect a “conscious” or “knowing decision,” Resp. Br. 5, 38; whether they were “knowingly inconsistent,” *id.* at 30 (emphasis omitted); and whether a position resulted from “scrivener’s error,” *id.* at 21. But none of that should matter if mere-inconsistency-plus-knowledge-of-the-facts-of-the-claim alone triggered judicial estoppel.

² This would be particularly understandable in jurisdictions that do not impose any continuing disclosure obligation on Chapter 13 debtors. *See infra* at 21-22.

3. Respondent’s appeal to *New Hampshire* is no more persuasive. Respondent claims (at 21, 26-27, 34) that “this Court did not look at New Hampshire’s intent at all” before applying judicial estoppel, then leaps to the conclusion that *New Hampshire* forecloses an inquiry into a debtor’s intent in this context. This argument is wrong in multiple respects.

To begin, *New Hampshire* made unmistakably clear that judicial estoppel exists to protect “the integrity of the judicial process” by “prohibiting parties from deliberately changing positions according to the exigencies of the moment.” 532 U.S. at 749-50; *see id.* at 751 (citing cases holding that the doctrine “forbids use of ‘intentional self-contradiction . . . as a means of obtaining unfair advantage’” (alteration in original)). In *New Hampshire*, there was no need to probe that requisite intent because it was obvious. New Hampshire had deliberately switched positions across two proceedings to secure incompatible advantages in each. *See id.* at 746-48, 751-55.

The situation here is completely different. The alleged misrepresentation arose from inaction—the failure to update a form in bankruptcy. A court must determine whether that inaction was intentional or inadvertent—because only a *deliberate* nondisclosure, followed by assertion of the claim concealed, reflects the kind of conscious decision to manipulate the courts that is the touchstone for invoking judicial estoppel. *See supra* at 3-6; *see also, e.g., Martineau v. Wier*, 934 F.3d 385, 393-97 (4th Cir. 2019) (reaffirming, after *New Hampshire*, that omission must be intentional and in “bad faith”). Furthermore, *New Hampshire* made clear that it was not establishing “an exhaustive formula for determining

the applicability of judicial estoppel”—no matter the context. 532 U.S. at 751. That is reason enough to reject respondent’s argument (at 26-27) that *New Hampshire* somehow forecloses an inquiry into a debtor’s intent in the nondisclosure context here.

Respondent’s reliance on *Davis v. Wakelee*, 156 U.S. 680 (1895)—and the maxim that “ignorance of the law” is no excuse—is also unavailing. *See* Resp. Br. 29, 36. Respondent claims (at 29) that *Davis* forecloses any “inquiry into [a] litigant’s subjective intent” because it “rejected” a “mistake-of-law defense” to estoppel. But respondent conflates two distinct questions. A mistake-of-law defense presupposes intentional conduct—in the judicial estoppel context, that the litigant knowingly adopted incompatible positions to gain dual advantages but misunderstood the legal correctness of the first position when he took it. *See Davis*, 156 U.S. at 689-91. The inadvertence inquiry simply asks whether there was deliberate self-contradiction to secure an additional benefit in the first place.³

B. Adopting Respondent’s Contrary Rule Would Work A Sea Change In How Lower Courts Assess Judicial Estoppel

Respondent suggests (at 3, 23, 35) that lower-court practice supports its intent-free rule. Not true.

³ Respondent also overreads (at 29-30) *Philadelphia, Wilmington & Baltimore Railroad Co. v. Howard*, 54 U.S. (13 How.) 307 (1852). The Court’s aside that the railroad could not retreat from its prior position “even if . . . made by mistake”—“of which there [wa]s no evidence”—came in a case of blatant litigation gamesmanship: The railroad had deliberately flipped positions to win twice in different courts. *Id.* at 335-37.

Respondent's position would overturn decades of precedent in the courts of appeals.

Courts have—repeatedly and expressly—held that judicial estoppel does not apply when the plaintiff did not intend to manipulate the courts. As the Fourth Circuit put it: “Without bad faith, there can be no judicial estoppel.” *Zinkand v. Brown*, 478 F.3d 634, 638 (4th Cir. 2007). The Third Circuit agrees: Judicial estoppel “does not apply ‘when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court.’” *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996); see *Mesabi Metallics Co. v. Cleveland-Cliffs, Inc. (In re ESML Holdings Inc.)*, 135 F.4th 80, 92 (3d Cir. 2025) (similar). So too the Sixth and Eighth Circuits, which require “bad faith,” *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 477-78 (6th Cir. 2010), or “deliberate manipulation,” *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1049 (8th Cir. 2006), before judicial estoppel attaches. The same goes for bankruptcy cases in particular, where courts have likewise required proof that the debtor “intended to make a mockery of the judicial system,” *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017), or otherwise engaged in “deceit,” *Spaine v. Community Contacts, Inc.*, 756 F.3d 542, 547-48 (7th Cir. 2014), before invoking judicial estoppel. Respondent acknowledges none of this.

Nor can respondent find refuge in the circuits it ostensibly defends. Even the Fifth Circuit's two-factor “inadvertence” test from the bankruptcy context rests on the premise that judicial estoppel applies only to “intentional self-contradiction.” *Superior Crewboats Inc. v. Primary P&I Underwriters*

(*In re Superior Crewboats, Inc.*), 374 F.3d 330, 334-35 (5th Cir. 2004); see *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1157 (10th Cir. 2007) (analyzing same factors to assess “deliberate manipulation”). That is precisely why the Fifth Circuit inquires into a party’s “*motive* for concealment”—motive is relevant only to a rule concerned with intent. *Fornesa v. Fifth Third Mortg. Co.*, 897 F.3d 624, 628 (5th Cir. 2018) (emphasis added); Pet.App.12a-13a. The Fifth Circuit’s error is not in rejecting an intent requirement (as respondent advocates), but in assuming intent based simply on the existence of a *possible* motive to mislead. Pet. Br. 10.

Respondent’s authorities do nothing to bridge the gap. Most, as discussed, concern equitable estoppel and thus are inapposite. See *supra* at 4-5. But the handful of judicial estoppel authorities respondent does cite (at 4, 6) only make matters worse. These authorities recognize—correctly—that the doctrine turns on “intent to mislead or deceive.” *Ryan*, 81 F.3d at 364; see *Davis v. District of Columbia*, 925 F.3d 1240, 1256 (D.C. Cir. 2019) (judicial estoppel “looks toward cold manipulation and not unthinking or confused blunder”); Plumer, *supra*, at 424 & n.100 (distinguishing a “good-faith mistake” from a “willful attempt to use the judicial system to obtain a double recovery”). Respondent never explains how its intent-free conception of “inadvertence” could be squared with cases requiring an intent to deceive.⁴

⁴ Respondent quotes (at 32) the First Circuit’s statement in *Botelho v. Buscone* (*In re Buscone*) that it has never formally adopted an inadvertence exception. 61 F.4th 10, 23 (2023). But respondent neglects to mention that decision affirmed the denial

Adopting respondent's extreme conception of judicial estoppel would revolutionize the doctrine.

II. COURTS MUST LOOK TO THE TOTALITY OF THE CIRCUMSTANCES IN DETERMINING WHETHER A FAILURE TO DISCLOSE WAS INADVERTENT

Because intent has always mattered to judicial estoppel, the core question here is not whether to assess it, but how. And on *that* score, respondent's brief is most remarkable for what it does not say: Respondent does not defend the Fifth Circuit's rule finding an intent to mislead based only on knowledge of facts and a *possible* financial motive to mislead. Nor does respondent claim that its "knowledge of facts" test measures intent at all. Lacking a test of its own, respondent resorts to taking shots at the holistic approach followed in most circuits. Its sundry attempts to discredit the inquiry fail.

1. As explained, a totality test best advances both judicial estoppel's purpose and the bankruptcy system's goals, while honoring the flexibility equity demands. Pet. Br. 16-30. On the judicial estoppel side, a holistic inquiry ensures that only intentional inconsistencies—the kind that threaten judicial integrity—trigger the doctrine's severe remedy, while giving courts the flexibility to weigh all relevant circumstances in deciding whether an inconsistency is intentional or inadvertent. *Id.* at 16-24. And on the bankruptcy side, the totality approach honors the system's promise of a "fresh start" for honest debtors while reflecting the bankruptcy system's own

of judicial estoppel because, among other reasons, the defendant offered insufficient evidence that the plaintiff had "engaged in intentional conduct" to manipulate the courts. *Id.* at 23-28.

distinction between honest errors (which warrant leniency) and intentional concealment (which justify severe sanctions). *Id.* at 27-30.

Respondent does not dispute that, in cases like this, judicial estoppel must be applied “against the backdrop of the bankruptcy system and the ends it seeks to achieve.” *Id.* at 27-28 (quoting *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc)). But respondent protests (at 44) that a totality test would “disserve the goals of bankruptcy” by failing to “deter dishonest debtors” and “protect[] innocent creditors.” Wrong on both counts.

As for deterrence, petitioner’s rule protects only honest mistakes; it offers no refuge to those who intentionally conceal their claims. Pet. Br. 27 n.7. As the United States explains (at 29), judicial estoppel still would apply to intentional concealment, preserving whatever deterrent force the doctrine properly carries. And respondent never explains how harsh consequences would deter mistakes that, by definition, the debtor did not realize he was making.

Nor can respondent reconcile its harsh view of bankruptcy with how the bankruptcy system itself treats disclosure errors. That system permits liberal amendment of schedules precisely because Congress recognized that mistaken omissions happen—and made a policy judgment that debtors should be able to correct them freely. Pet. Br. 28-29.

Rather than engage with any of this, respondent simply invokes (at 34) the “early history of bankruptcy,” which “treated debtors harshly.” That is a strange place to seek refuge. The punitive era is long gone—modern bankruptcy law now promises honest debtors a “fresh start.” *Marrama v. Citizens*

Bank of Mass., 549 U.S. 365, 367 (2007). A totality test ensures that this promise is not illusory when an honest debtor makes an honest mistake.

As for the impact on creditors, the United States—the “Nation’s largest creditor”—has explained that the totality test best “accounts for the interests of innocent creditors who may be harmed if [a] tort claim cannot go forward.” U.S. Br. 1, 3; *see id.* at 13, 19-21, 24, 28. A rigid rule like the Fifth Circuit’s harms creditors by destroying claims that would otherwise augment a bankruptcy estate. *Id.* at 19-21; *see* Pet. Br. 26. Respondent has no response.

At bottom, the practical effect of the Fifth Circuit’s rule is not to deter dishonesty or protect creditors, but to reward alleged bad actors with no connection to the first proceeding. Pet. Br. 24-26. As the United States notes (at 30-31), a windfall to the civil defendant is warranted only when there is some corresponding benefit to the integrity of the judicial system—which neither the Fifth Circuit’s rule nor respondent’s more extreme position ensures. Respondent, which walks away scot-free under the Fifth Circuit’s rule after its employee negligently struck and injured petitioner, offers no real answer, except to fall back (at 31 n.3) on its position that an inconsistency—alone—triggers the severe remedy of dismissal. That extreme version of judicial estoppel would have draconian consequences, depriving individuals of their day in court for wrongs of all types even where there is no evidence the litigant intended to manipulate the courts. Pet. Br. 24.

2. Respondent next argues (at 35-45) that the totality test’s focus on intent renders it impermissibly “subjective” and therefore unworkable. But respondent’s concerns are vastly overstated.

To begin, any intent inquiry is “necessarily subjective”—it asks *why* the particular party actually did (or did not do) something. Dan B. Dobbs et al., *The Law of Torts* § 29 (2d ed. Apr. 2025 update, Westlaw); see *Ah Quin*, 733 F.3d at 276-77 (“The relevant inquiry is . . . the plaintiff’s subjective intent when filling out and signing the bankruptcy schedules.”). But the subjective nature of intent does not mean there is no manageable way to assess it. Courts routinely infer subjective intent from objective circumstances in a host of contexts. The holistic test follows the same approach—considering “*all* evidence relevant to determining whether the debtor’s nondisclosure was inadvertent [or intentional].” U.S. Br. 26 (emphasis added); see *id.* at 13-14.

As is often the case in assessing intent, *objective* evidence is critical. Pet. Br. 35-37. For example, the totality test considers the debtor’s level of sophistication; whether the undisclosed claim arose after the debtor’s initial bankruptcy filings; whether the debtor identified other lawsuits to which he was a party; and whether the bankruptcy court made any adverse findings after the omission was discovered. See *id.*; see also U.S. Br. 14 (enumerating some of the “[m]any objective factors” that “may assist in assessing inadvertence”); *Slater*, 871 F.3d at 1185 (listing factors). As the United States explains, “[f]ocusing on objective indicia of intent is consistent with the way courts commonly identify subjective intent.” U.S. Br. 26-27 (citing cases); cf., e.g., *Intel Corp. Inv. Pol’y Comm. v. Sulyma*, 589 U.S. 178, 189 (2020) (“inference from circumstantial evidence” is a “usual way[]” of proving actual knowledge).

Such objective indicia of intent can outweigh (or discredit) a debtor’s own testimony. U.S. Br. 26-27;

see *Slater*, 871 F.3d at 1186 n.12. But that is no reason to exclude subjective evidence from the holistic analysis altogether. Courts consider relevant actors’ own accounts in virtually every context where intent is at issue. See, e.g., *Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. 1, 13, 19-24 (2024) (considering testimony of state senate’s map drawer and colleagues in determining whether electoral map had racial target); *Johnson v. California*, 545 U.S. 162, 170 (2005) (*Batson* framework “assume[s]” “that the trial judge [will] have the benefit of all relevant circumstances, including the prosecutor’s explanation, before deciding whether it was more likely than not that the [peremptory] challenge was improperly motivated”); *Morissette v. United States*, 342 U.S. 246, 276 (1952) (intent to steal must be determined “no[t] only from the act of taking, but from that together with defendant’s testimony and all of the surrounding circumstances”). The totality inquiry reasonably considers *all* relevant evidence—objective and subjective alike—before deciding whether the omission was deliberate or mistaken.⁵

Nor is there any reason to bar consideration of whether a debtor told his bankruptcy attorney about the undisclosed claim. *Contra* Resp. Br. 35-38. The question for judicial estoppel is not whether the nondisclosure was legally excusable—it is whether it was *inadvertent*. And even respondent concedes

⁵ While a proper holistic analysis considers all relevant evidence of intent, the Fifth Circuit’s rule cannot stand even if the analysis were limited to objective evidence. Indeed, for all its complaints about subjective evidence, respondent never really tries to explain why possible objective indicia of intent—beyond mere knowledge of facts—should be disregarded.

(at 38) that “the fact that a debtor disclosed a cause of action to the attorney might be relevant to establishing true inadvertence.” *See Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1961) (while advice of counsel is not “a separate and distinct defense” to liability, it is “a circumstance indicating good faith which the trier of fact is entitled to consider” in assessing debtor’s intent); *Robinson v. Worley*, 849 F.3d 577, 586 (4th Cir. 2017) (“reliance on counsel” can “absolve[] a debtor of fraudulent intent”). As such, it should be included in the mix of factors. The same goes for a debtor’s understanding of his disclosure obligations, which likewise bears on whether a failure to update a form was intentional or inadvertent. *Contra* Resp. Br. 35-36.

3. Respondent’s various administrability objections to the totality test fare no better.

Respondent first warns (at 39-44) that a holistic inquiry would be “amorphous” and “unmanageable.” But this Court has prescribed many totality tests—for reasonable suspicion, *see, e.g., Navarette v. California*, 572 U.S. 393, 396-97 (2014); probable cause, *see, e.g., District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018); whether a case is “exceptional,” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014), and so on, *see, e.g., Monasky v. Taglieri*, 589 U.S. 68, 71, 84 (2020) (whether a child is “at home” in a particular country). And the Court has specifically approved totality tests for assessing mental states. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (whether consent to search was voluntary); *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (whether waiver of *Miranda* rights was voluntary, knowing, and intelligent). Courts across the country apply these tests daily without any apparent difficulty.

Balancing tests may well have shortcomings in other contexts. Resp. Br. 39-40. But judicial estoppel is an equitable doctrine—and this Court has long held that equity resists the kind of rigid, categorical rule respondent proposes. Pet. Br. 16-17; U.S. Br. 17-18. Indeed, respondent itself acknowledges (at 40) that “equity must avoid rigidity and respond to context.” That principle cannot be reconciled with respondent’s inflexible “knowledge of facts” test. But it fits perfectly with a totality approach, which the American Bankruptcy Institute’s Commission on Consumer Bankruptcy has endorsed, and which most courts of appeals already embrace. Pet. Br. 31-34. Nor has respondent identified any administrability problems in the circuits that have already adopted the totality test, *see id.* at 31-32, or in the bankruptcy courts that similarly use a totality test to assess debtors’ intent across various contexts, *see id.* at 34.

Respondent caricatures (at 22, 39) petitioner’s position as proposing a “17-plus factor” test. But petitioner simply identified potentially relevant factors that courts have already considered in applying the totality test. *Id.* at 35-37 (observing that the “relevant facts and circumstances” “*may* include [various factors]” (emphasis added)). The relevant and available factors in each case will vary. That is the essence of applying the kind of “flexible, case-by-case analysis” that equity demands. U.S. Br. 15.

Respondent’s parade of horrors ultimately is just that. Respondent warns (at 40-41) of complex and “wide-ranging” discovery “aimed at reconstructing the debtor’s state of mind at the time he made incomplete disclosures.” But courts assess intent through holistic tests all the time—in fraud cases, discrimination cases, and countless others—and

respondent offers no reason why the inquiry would somehow become uniquely unmanageable in the judicial estoppel context. *See supra* at 17-18. As the United States observes (at 30), “[i]ntent-based standards are prevalent throughout the law,” and “there is no basis to suggest that courts are incapable of applying [a similar] standard here.”

Respondent claims (at 41-42) that the totality test is unworkable because it permits courts to consider what happened in the bankruptcy court after the debtor disclosed his claim—suggesting this would require “certify[ing]” questions to the bankruptcy court. That is another strawman. The point is not that district courts must affirmatively seek out bankruptcy courts’ guidance; it is that they should not ignore it when it already exists. Pet. Br. 37-38.

Here, after Mr. Keathley disclosed the claim in an amended schedule, no creditor moved to modify the plan, the Chapter 13 trustee took no action, and the bankruptcy court imposed no sanction—even though the Keathleys had more than a year of payments remaining. *Id.* at 7-8. That is strong evidence that those closest to the bankruptcy did not view the omission as intentional concealment. There is no reason to require a district court to “blind itself” to such proceedings, including the bankruptcy court’s own assessment (if any) of the nondisclosure or steps to correct it. *Slater*, 871 F.3d at 1187; *see* U.S. Br. 26.

Respondent complains (at 42-43) that bankruptcy courts’ remedial tools are “too blunt” or “too confined to the bankruptcy proceeding” to address nondisclosure. But it is the Fifth Circuit’s rule that is too “blunt”—punishing honest mistakes just as harshly as knowing fraud, harming innocent creditors, and handing undeserved windfalls to

strangers to the bankruptcy. Pet. Br. 24-30. Congress, meanwhile, provided bankruptcy courts with a number of tools “more precisely calibrated to address nondisclosure in this context” than judicial estoppel. U.S. Br. 20-23; *see* Pet. Br. 28-30. Of course, judicial estoppel remains available—if otherwise warranted—when those remedies fall short. But that is reason to treat judicial estoppel as a backstop, not a blunt instrument to be deployed without regard to what the bankruptcy court considered and rejected.

Nor is respondent right to suggest (at 43) that only “the *second* court” can “prevent the harm that inconsistent positions inflict[] on the judiciary.” Judicial estoppel guards against “the perception that *either* the first or the second court was misled” in a way that “threat[ens]” “judicial integrity.” *New Hampshire*, 532 U.S. at 750-51 (emphasis added). And particularly where a debtor stands accused of intentionally concealing an asset to game the bankruptcy system, there is no basis to ignore the bankruptcy court’s own actions, or decision not to act, in response to that alleged deceit.

Respondent frets (at 43) that the totality test might require a district court to account for differences in governing law when the bankruptcy court sat in another jurisdiction. But such differences are plainly relevant to a debtor’s intent. Under respondent’s rule, for example, judicial estoppel would apply even when a debtor’s schedules were accurate when filed, and even when the bankruptcy jurisdiction imposed no continuing duty to amend—so long as the governing law in the *later* forum would have required ongoing disclosure. *See* Resp. Br. 43; *see also* National Consumer Bankruptcy Rights Center et al. Amici Br. (discussing differing disclosure

regimes in Chapter 13 context). That is not a rule against manipulation; it is a trap for the unwary.

4. Finally, respondent says (at 2, 21-22, 44) that a holistic analysis would render judicial estoppel “essentially unavailable.” But the track record in the courts applying the totality test tells a different story. Applying the test, courts have not hesitated to bar claims when the facts show an intent to manipulate. *See, e.g., Weakley v. Eagle Logistics*, 894 F.3d 1244, 1247 (11th Cir. 2018) (per curiam); *Leighton v. Homesite Ins. Co. of the Midwest*, No. 21-cv-490, 2022 WL 5585907, at *6-7 (E.D. Va. Aug. 5, 2022), *report and recommendation adopted*, 2022 WL 19075650 (E.D. Va. Oct. 18, 2022); *Cagle v. C&S Wholesale Grocers, Inc.*, 505 B.R. 534, 539 (E.D. Cal. 2014).

On the flip side, respondent’s severe rule would have justified applying the blunt force of judicial estoppel in cases with powerful innocent explanations for any inconsistency, including where:

- A debtor was diagnosed with mesothelioma just weeks before completing his Chapter 13 bankruptcy plan, alerted his bankruptcy counsel to this information, “trusted him to do what was required under the law,” and “disclosure ‘would not have altered the outcome’” of the bankruptcy;⁶
- A debtor was “seriously dyslexic,” “totally unsophisticated in finances,” “never graduated

⁶ *Clark v. AII Acquisition, LLC*, 886 F.3d 261, 264-68 (2d Cir. 2018).

from high school,” and relied on her attorney for bankruptcy filings;⁷ and

- A Title VII plaintiff was told by her employment lawyers “to refrain from speaking to anyone about” her claim, her employment and bankruptcy counsel did not coordinate, and she lacked “sophistication and experience with bankruptcy proceedings.”⁸

The holistic approach avoids such *inequitable* results and “ensures that judicial estoppel is applied only when a party acted with a sufficiently culpable mental state.” *Slater*, 871 F.3d at 1185-86.

III. THE COURT SHOULD VACATE AND REMAND FOR RECONSIDERATION UNDER A PROPER HOLISTIC ANALYSIS

Respondent does not dispute that if the Fifth Circuit applied the wrong standard for determining whether to invoke judicial estoppel, this case should be remanded for further factual development and application of the proper holistic test. Pet. Br. 38-40; *see* U.S. Br. 31-32. Remand is therefore warranted.

⁷ *Julie Kagan & Saborax, Ltd. v. Bercu (In re Bercu)*, 293 B.R. 806, 810-11 (Bankr. M.D. Fla. 2003).

⁸ *Brown v. Keystone Foods LLC*, No. 20-cv-1619, 2022 WL 2346376, at *4 (N.D. Ala. June 29, 2022).

CONCLUSION

The judgment below should be vacated and the case remanded for further proceedings.

ERIC J. LEWELLYN
ALDERS AND LEWELLYN
PLLC
1331 Union Avenue
Suite 1000
Memphis, TN 38104

THOMAS R. GREER
6256 Poplar Avenue
Memphis, TN 38119

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
CHRISTINA R. GAY
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

KRISTIN C. HOLLADAY
BAPU KOTAPATI
LATHAM & WATKINS LLP
1271 Avenue of the
Americas
New York, NY 10020

Counsel for Petitioner

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