No. 15-982

In the Supreme Court of the United States

CARL MCCAFFREE, ET AL., PETITIONERS

v.

BANCINSURE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether judicial estoppel can apply to preclude a party from asserting inconsistent positions on a question of law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 796 F.3d 1226. The opinion of the district court (Pet. App. 25a-47a) is reported at 3 F. Supp. 3d 904.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2015. A petition for rehearing was denied on November 6, 2015 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on February 1, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent BancInsure, Inc. (BancInsure) issued a directors and officers liability insurance policy to the Columbian Bank and Trust Company (Bank) for a policy period from May 11, 2007, to May 11, 2010.

Pet. App. 3a-4a. Petitioners, who were directors and officers of the Bank, were "Insured Persons" under the policy. *Id.* at 29a. Subject to certain exclusions, the policy covered any "Loss which the Insured Persons shall be legally obligated to pay." *Id.* at 4a.

On August 22, 2008, the Kansas Office of the State Bank Commissioner declared the Bank insolvent, closed its operations, and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. Pet. App. 5a. On September 2, 2008, the FDIC informed BancInsure that it intended to pursue potential claims against petitioners for mismanagement of the Bank's lending practices and other wrongful acts that could fall within the liability policy. *Id.* at 28a, 30a. Petitioners also notified BancInsure of the FDIC's potential claims. *Ibid.*

2. a. In anticipation of the FDIC's suit, and after BancInsure had denied coverage for another claim, petitioner Carl McCaffree and the Bank's holding company brought a declaratory-judgment action against BancInsure. *Columbian Fin. Corp.* v. *BancInsure, Inc.*, No. 08-2642-CM, 2009 WL 4508576 (D. Kan. Nov. 30, 2009) (*Columbian*), rev'd, 650 F.3d 1372 (10th Cir. 2011). McCaffree sought a declaration that the policy had not automatically terminated with the Bank's failure and that claims could continue to be reported until the policy's expiration date. *Id.* at *1. McCaffree argued that the policy provided coverage for claims brought by regulators, including a deposit insurance organization as receiver, and that this policy provision would be rendered meaningless if the appointment of the FDIC as receiver automatically terminated the policy. *Id.* at *5.

During discovery in the *Columbian* litigation, McCaffree served interrogatories on BancInsure concerning the scope of the policy's coverage for actions brought by a deposit insurance organization as receiver. Pet. App. 6a. One interrogatory asked whether coverage was "currently available under the Policy for any claims brought against Insured Persons by a deposit insurance organization acting as a receiver of Columbian Bank and Trust Company." *Id.* at 43a n.16. BancInsure responded, "Yes, provided notice of a potential claim was provided to BancInsure within thirty (30) days following the end of the Policy Period." *Ibid.*

b. The district court in *Columbian* granted summary judgment in favor of McCaffree on the issue of whether the policy remained in effect. 2009 WL 4508576, at *6. The court concluded that "the parties did not intend for the policy to terminate upon the appointment of a receiver" because the policy "provides coverage for actions brought by deposit insurance organizations as receivers." *Id.* at *5.

c. BancInsure appealed the declaratory-judgment ruling, and the court of appeals vacated the judgment, based on its *sua sponte* determination that there was no justiciable controversy. *Columbian Fin. Corp.* v. *BancInsure, Inc.*, 650 F.3d 1372, 1373 (10th Cir. 2011). The court observed that, during the course of the litigation, BancInsure had conceded coverage for one claim that it had previously denied. *Ibid.* The court also stated that there was no evidence "that a claim against the Insureds would arise in the future that would lead to a dispute between BancInsure and the Insureds regarding coverage." *Ibid.* In particular, the court found that, in light of BancInsure's inter-

rogatory answers, there was "no reason to believe that BancInsure would deny coverage" for anticipated claims by the FDIC as receiver. *Id.* at 1385. The court of appeals accordingly reversed and remanded to the district court with instructions to vacate its judgment. *Ibid.*

2. In August 2011, the FDIC brought suit against petitioners, alleging that they had breached their fiduciary duties by failing to properly supervise Bank lending and by originating and approving loans in violation of the Bank's loan policy and prudent lending practices. Pet. App. 28a. The FDIC sought damages of $52 million. *Ibid.*

3. a. Shortly before the FDIC filed suit, BancInsure filed this action seeking a declaration that the policy did not provide coverage for the FDIC's claims. Pet. App. 28a. BancInsure argued that the claims fell within the "insured v. insured" policy exclusion, which bars "any Claim made against the Insured Persons" by "any other Insured Person, the Company, or any successor, trustee, assignee or receiver of the Company." *Id.* at 29a. The FDIC and petitioners argued that BancInsure's position was inconsistent with an endorsement to the policy and with BancInsure's concession in the *Columbian* litigation that the policy would cover claims brought by the FDIC as receiver. *Id.* at 36a, 38a, 43a-44a.

b. The district court granted summary judgment to BancInsure, finding that the policy unambiguously excluded coverage for claims against petitioners brought by the FDIC in its capacity as the Bank's receiver. Pet. App. 43a, 46a.

As relevant here, the district court declined to apply the judicial-estoppel doctrine to preclude BancIn-

sure from contesting coverage based on the representations it had made in the *Columbian* suit. Pet. App. 43a-46a. The court considered "three factors to determine whether judicial estoppel should apply." *Id.* at 44a. First, the court analyzed "whether [BancInsure's] later position was clearly inconsistent with its earlier position." *Ibid.* While acknowledging that "BancInsure's denial of liability in this case may appear superficially inconsistent with its interrogatory answer in the *Columbian* case," the court emphasized that the *Columbian* litigation had not focused on the same policy provisions and had instead concerned "when coverage ended" under the policy's terms. *Id.* at 44a, 45a.

Second, the district court stated that BancInsure had not "succeeded in persuading a court to accept [its] earlier position." Pet. App. 44a. In the court's view, "the interrogatory answer had no bearing on the resolution of the *Columbian* case" because "the district court in no way relied on the information in the interrogatory answer" and the court of appeals found no live case or controversy in *Columbian* for reasons unrelated to the interrogatory answer. *Id.* at 45a.

Third, the district court concluded that BancInsure would not "derive an unfair advantage or impose an unfair detriment on the opposing party" if it were permitted to deny coverage of the FDIC's claims. Pet. App. 44a. The court noted that the "FDIC was not a party to the *Columbian* case and could not have relied to its detriment on BancInsure's interrogatory answer." *Id.* at 45a. And BancInsure would not be unfairly advantaged, the court concluded, because "the *Columbian* case * * * had nothing to do with the FDIC claims." *Id.* at 45a-46a.

c. The court of appeals affirmed, agreeing with the district court that the policy unambiguously precluded coverage for the FDIC's claims and that BancInsure should not be estopped from denying coverage. Pet. App. 1a-24a.

With respect to estoppel, the court of appeals relied on prior Tenth Circuit decisions that had held "that judicial estoppel only applies when the position to be estopped is one of fact, not one of law." Pet. App. 22a. The court "acknowledge[d] that other courts have applied the doctrine of judicial estoppel to positions of law," but it found those decisions contrary to "the Tenth Circuit's approach." *Id.* at 23a n.9. Because the policy-coverage issue "is a question of law, not fact," the court held that "the doctrine of judicial estoppel is inapplicable." *Id.* at 24a. The court accordingly ruled that "the district court did not abuse its discretion in declining to apply" judicial estoppel, without addressing the district court's analysis of the relevant equitable factors. *Ibid.*

ARGUMENT

The court of appeals held, as a categorical matter, that judicial estoppel does not apply to inconsistent positions on questions of law. The FDIC agrees with petitioners that this holding is erroneous. The Tenth Circuit's decision is in tension with this Court's decision in *New Hampshire* v. *Maine*, 532 U.S. 742 (2001), which applied judicial estoppel to a party's assertion of inconsistent positions on a legal issue. As the Tenth Circuit recognized, the decision below also conflicts with decisions of other courts of appeals.

The court of appeals' error, however, does not appear to warrant this Court's intervention in this case. Although the court of appeals' decision unduly nar-

rows protection for the integrity of the judicial process in the Tenth Circuit, this Court could conclude that different jurisdictions should be free to adopt varying approaches to the judicial-estoppel doctrine.

In addition, reversal of the Tenth Circuit's decision might not change the ultimate result in this case. The district court did not draw a law/fact distinction, but rather declined to apply judicial estoppel based on its analysis of the equitable factors described in *New Hampshire*. Even if this Court granted certiorari and held that judicial estoppel applies to questions of law, the court of appeals on remand could conclude that the district court did not abuse its discretion in declining to apply judicial estoppel under the circumstances of this case.

The government did not file a petition for a writ of certiorari in this case, and we do not believe that the court of appeals' decision warrants this Court's review. If the Court grants the petition, however, the FDIC will file a brief supporting petitioners.

1. a. The judicial-estoppel doctrine serves "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749-750 (citations and internal quotation marks omitted). Three factors "typically inform the decision whether to apply the doctrine in a particular case": (1) whether "a party's later position" is "clearly inconsistent with its earlier position"; (2) whether the party successfully persuaded "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) "whether the party

seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750, 751 (citations and internal quotation marks omitted).

Applying those factors in *New Hampshire*, this Court held that New Hampshire was estopped from changing its position on the meaning of the phrase "Middle of the River" in a 1740 decree establishing the lateral marine boundary between New Hampshire and Maine. 532 U.S. at 755. In an earlier proceeding, the States had agreed that the decree's reference to the "Middle of the River" meant "the middle of the Piscataqua River's main channel of navigation," and the Court had directed the entry of a consent decree memorializing that interpretation. *Id.* at 747. New Hampshire's position in the prior proceeding, the Court concluded, "estopped [it] from asserting" in a later suit "that the boundary runs along the Maine shore." *Id.* at 745. The Court observed that New Hampshire's new position was "clearly inconsistent" with its interpretation of the decree in the earlier suit. *Id.* at 751. Because New Hampshire had "convinced th[e] Court to accept one interpretation of 'Middle of the River,' and h[ad] benefited from that interpretation," the Court held that New Hampshire could not later press an "inconsistent interpretation" designed "to gain an additional advantage at Maine's expense." *Id.* at 755. The Court explained that it could not "interpret 'Middle of the River' in the 1740 decree to mean two different things along the same boundary line without undermining the integrity of the judicial process." *Ibid.*

b. In this case, the courts below erred in declining to apply judicial estoppel to preclude BancInsure from

changing its position on whether the policy covered claims brought by the FDIC as receiver.

BancInsure's contention below (Pet. App. 32a) that such claims are barred by the "insured v. insured" exclusion is clearly inconsistent with its concession in the *Columbian* litigation that coverage is "available under the Policy for * * * claims brought against Insured Persons by a deposit insurance organization acting as a receiver" of the Bank. *Id.* at 43a n.16. And the Tenth Circuit in *Columbian* expressly relied on that earlier representation to conclude that the prior case was non-justiciable. The court explained that there was "no reason to believe that BancInsure would deny coverage with respect to" potential claims brought by the FDIC as receiver because BancInsure had stated that those claims would be covered if timely notice was provided and had further stipulated "that it had received written notice of potential FDIC claims" within the requisite time period. *Columbian Fin. Corp.* v. *BancInsure, Inc.*, 650 F.3d 1372, 1385 (10th Cir. 2011).

The court of appeals in *Columbian* accordingly "h[eld] that there was no actual controversy between the parties when judgment was entered." 650 F.3d at 1385. BancInsure benefitted from that ruling, moreover, because the court of appeals vacated the district court's judgment granting partial summary judgment in McCaffree's favor. *Ibid.* BancInsure's effort to contest coverage in this suit therefore should have been barred by judicial estoppel.

c. In declining to apply judicial estoppel in this case, the court of appeals relied solely on its view that "judicial estoppel only applies when the position to be estopped is one of fact, not one of law." Pet. App. 22a.

That limitation on the judicial-estoppel doctrine lacks merit.[1]

The court of appeals' categorical prohibition on applying judicial estoppel to legal positions is at odds with this Court's decision in *New Hampshire*. The proper interpretation of the phrase "Middle of the River" in the 1740 boundary decree was a question of law, yet this Court applied judicial estoppel to preclude New Hampshire from changing its position on that question. 532 U.S. at 756. The Court's analysis demonstrates that judicial estoppel may apply to a party's inconsistent legal positions to ensure that "the risk of inconsistent court determinations" does not "become a reality." *Id.* at 755 (citation omitted).[2]

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[1] The court of appeals cited prior circuit precedent to support the distinction it drew between factual and legal questions, but the decisions on which it relied do not explain the rationale for that distinction. The first Tenth Circuit decision to apply judicial estoppel stated without analysis that "the position to be estopped must generally be one of fact rather than of law or legal theory." *Johnson* v. *Lindon City Corp.*, 405 F.3d 1065, 1069 (2005). Other Tenth Circuit decisions have simply quoted that statement without further discussion. See *Kaiser* v. *Bowlen*, 455 F.3d 1197, 1204 (2006); *United States* v. *Villagrana-Flores*, 467 F.3d 1269, 1278 (2006), cert. denied, 549 U.S. 1149 (2007).

[2] In *Sturm* v. *Boker*, 150 U.S. 312 (1893), this Court declined to apply the doctrine of equitable estoppel to a statement of opinion on a question of law. See *id.* at 334-337. Equitable estoppel, however, generally focuses on the reliance interests of an opposing party rather than on the integrity of the courts. See *id.* at 335-336 (emphasizing that the statement had not "misl[ed] or induce[d]" other interested parties "to alter or change their position in any respect whatever, nor influence[d] their conduct in any way"); see also *Heckler* v. *Community Health Serv. of Crawford Cnty., Inc.*, 467 U.S. 51, 58-59 (1984) (describing reasonable reliance on an adversary's conduct as essential for equitable estoppel). Because

The Tenth Circuit's limitation on judicial estoppel also conflicts with the purposes underlying that doctrine. Judicial estoppel exists "to protect the integrity of the judicial process." *New Hampshire*, 532 U.S. at 749 (citation omitted). "From the standpoint of equity, as most federal courts recognize, a change of legal position can be just as abusive of court processes and an opposing party as deliberate factual flip-flopping." *Republic of Ecuador* v. *Connor*, 708 F.3d 651, 657 (5th Cir. 2013); see *In re Cassidy*, 892 F.2d 637, 642 (7th Cir.) (observing that a "change of position on [a] legal question [can be] every bit as harmful to the administration of justice as a change on an issue of fact"), cert. denied, 498 U.S. 812 (1990). When a party's change in legal position threatens to produce inconsistent decisions by the same court, the application of judicial estoppel would serve the doctrine's core goal of protecting the integrity of the judicial proceedings. And a party is equally likely to derive an unfair benefit when it alters its stance on a legal issue after it has convinced a court to accept its prior position. There is accordingly no sound basis to confine judicial estoppel to inconsistent factual positions.

2. As the court of appeals acknowledged, the federal circuits disagree on whether judicial estoppel may apply to questions of law. Pet. App. 23a n.9. A majority of the courts of appeals that have addressed the issue have held that a party may be estopped from pressing an inconsistent position on a legal issue. See, *e.g.*, *Republic of Ecuador*, 708 F.3d at 657 (5th Cir.); *Transclean Corp.* v. *Jiffy Lube Int'l, Inc.*, 474 F.3d

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different purposes animate the doctrines of equitable and judicial estoppel, *Sturm* does not clearly bar the application of judicial estoppel to legal positions, as *New Hampshire* demonstrates.

1298, 1307 (Fed. Cir.) (applying Eighth Circuit law), cert. denied, 552 U.S. 825 (2007); *Helfand* v. *Gerson*, 105 F.3d 530, 535 (9th Cir. 1997), *Cassidy*, 892 F.2d at 641 (7th Cir.); *Murray* v. *Silberstein*, 882 F.2d 61, 66-67 (3d Cir. 1989). In contrast, the Second Circuit appears to agree with the Tenth Circuit that judicial estoppel should be limited to inconsistent factual positions. See, *e.g.*, *Bates* v. *Long Island R.R. Co.*, 997 F.2d 1028, 1037 (2d Cir.), cert. denied, 510 U.S. 992 (1993).[3]

Although there is a circuit conflict on the question presented in this case, it is not clear that every circuit should be compelled to adopt the same approach to the judicial-estoppel doctrine. This Court emphasized in *New Hampshire* that "judicial estoppel is an equitable doctrine invoked by a court at its discretion." 532 U.S. at 750 (citation and internal quotation marks omitted). "Because the rule is intended to prevent improper use of judicial machinery," *ibid.* (citation and internal quotation marks omitted), the Court

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[3] The Fourth Circuit has also stated that "the position sought to be estopped must be one of fact rather than law or legal theory." *Lowery* v. *Stovall*, 92 F.3d 219, 224 (1996), cert. denied, 519 U.S. 1113 (1997); see, *e.g.*, *Tenneco Chems., Inc.* v. *William T. Burnett & Co.*, 691 F.2d 658, 655 (4th Cir. 1983). An earlier Fourth Circuit decision, however, applied judicial estoppel to an inconsistent legal position because "it [wa]s sufficiently important to the integrity of the federal courts that their judicial processes should not be lent to this plain example of intentional self-contradiction . . . as a means of obtaining unfair advantage." *Allen* v. *Zurich Ins. Co.*, 667 F.2d 1162, 1167-1168 (1982) (footnote, citation, and internal quotation marks omitted); see *id.* at 1166 (observing that "[i]n certain circumstances a party may properly be precluded as a matter of law from adopting a legal position in conflict with one earlier taken in the same or related litigation").

could conclude that individual circuits should have leeway to decide which litigation tactics pose a threat to the integrity of the judicial process. Thus, although the Court in *New Hampshire* applied judicial estoppel to preclude a party's inconsistent argument on a legal issue, it is not evident that all lower federal courts must give the doctrine the same scope.

Relatedly, the Court observed in *New Hampshire* that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principles," and it emphasized that its decision did "not establish inflexible prerequisites or an exhaustive formula for determining the applicability of" the doctrine. 532 U.S. at 750, 751 (citation and brackets omitted). In light of the flexibility and discretion courts retain to apply the judicial-estoppel doctrine, review of the circuit conflict does not appear to be warranted. Cf. *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993) (noting that courts of appeals have supervisory authority to structure discretionary principles of appellate practice, and that there is no need for "uniformity among the circuits in their approach" to such rules).

3. An additional factor weighing against this Court's review is that reversal of the court of appeals' judgment would not necessarily change the ultimate outcome of this case. Unlike the court of appeals, the district court did not rely on a per se rule that judicial estoppel is inapplicable to questions of law. Rather, the court analyzed the three factors set forth in *New Hampshire* and concluded that they did not support the application of judicial estoppel based on the facts of this case. Pet. App. 44a-46a. Specifically, the court

determined that BancInsure's interrogatory answer was not clearly inconsistent with its coverage position in this lawsuit because the interrogatories were promulgated in a suit involving different issues. *Id.* at 45a. The court further concluded that BancInsure's prior position on coverage had "no bearing on the resolution of the *Columbian* case" and that the FDIC had "suffer[ed] no unfair detriment" because it "was not a party to the *Columbian* case." *Ibid.*

The district court's analysis is flawed. See p. 9, *infra*. Although *Columbian* involved a different coverage issue, BancInsure's representation in that case that the policy covered claims brought by a receiver of the Bank is clearly inconsistent with its position in this litigation that the FDIC's claims are barred by the "insured v. insured" exclusion. Both the district court and the Tenth Circuit relied on BancInsure's prior position. See *Columbian Fin. Corp.* v. *BancInsure, Inc.*, No. 08-2642-CM, 2009 WL 4508576, at *5 (D. Kan. Nov. 30, 2009) (interpreting the policy to "provide[] coverage for actions brought by deposit insurance organizations as receivers"), rev'd, 650 F.3d 1372 (10th Cir. 2011); *Columbian*, 650 F.3d at 1385 (finding no live case or controversy in part because BancInsure had "stated that a claim brought by a deposit insurance organization acting as receiver of [the Bank] would be covered") (citation and internal quotation marks omitted). And McCaffree—who was a party to both suits—suffered an unfair detriment from BancInsure's inconsistent positions because BancInsure's prior concession of coverage prompted the court of appeals to vacate a district court decision in McCaffree's favor. See *ibid.*

Although the government believes that the prerequisites to judicial estoppel were satisfied here, it is unclear whether the court of appeals would find that the district court's contrary ruling was an abuse of discretion. It is therefore unclear whether reversal by this Court on the question presented in the certiorari petition would affect the ultimate disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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