No. 16-521

# In The Supreme Court of the United States

SANDRA MARSHALL,

*Petitioner,*

v.

HONEYWELL TECHNOLOGY SYSTEMS INC., *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF FOR RESPONDENTS HONEYWELL TECHNOLOGY SOLUTIONS, INC.; ENGILITY CORPORATION; AND SGT, INC. IN OPPOSITION


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## QUESTION PRESENTED

Whether, given the totality of circumstances, the District Court abused its discretion by finding that Petitioner's failure to disclose her employment-discrimination claims as Chapter 7 bankruptcy assets judicially estopped her from later asserting those undisclosed claims in an employment-discrimination lawsuit against Respondents.

## PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner is Sandra Marshall.

Respondents are Honeywell Technology Solutions, Inc.; Engility Corporation; and SGT, Inc.

Honeywell Technology Solutions, Inc. was acquired in September 2016 by KBR, Inc. Honeywell International, Inc., former parent company of Honeywell Technology Solutions, Inc., retains responsibility for this claim. Honeywell International, Inc. is a publicly traded corporation with no parent corporation. There is no single investor which owns more than 10% of Honeywell International, Inc.'s stock.

EER Systems, Inc. was merged into L-3 Communications Government Services, Inc., and was merged into L-3 Services, Inc. On July 17, 2012, L-3 Services, Inc. was spun off by L-3 Communications Corporation and renamed as Engility Corporation. Engility Corporation converted into a limited liability company on February 26, 2015, and is presently known as Engility LLC. Kohlberg Kravis Roberts & Co. LP owns 10% or more of Engility's stock.

SGT has no parent companies and no publicly-held entities hold 10% or more of SGT stock.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1-27) is reported at 828 F.3d 923. The opinion of the United States District Court for the District of Columbia (Pet. App. 30-42) is reported at 73 F. Supp. 3d 5.

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming summary judgment in favor of Respondents, was filed on July 12, 2016. Pet. App. 28-29. The Petition for Writ of Certiorari was filed on October 11, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATEMENT

Petitioner Sandra Marshall filed a $2 million employment-discrimination lawsuit against Respondents in December 2005. During her concurrent Chapter 7 bankruptcy, however, Petitioner concealed those discrimination claims – omitting them from her enumeration of assets and never telling the Bankruptcy Court about them. The United States District Court for the District of Columbia found that this concealment judicially estopped Petitioner from prosecuting her discrimination lawsuit. Accordingly, it granted Respondents' motions for summary judgment. The

United States Court of Appeals for the District of Columbia Circuit affirmed.

1. Petitioner was a government contract employee at the National Aeronautics and Space Administration, working as a "voice control manager." Pet. App. 2. She was employed by Engility (then known as L-3), a subcontractor to Honeywell, the prime contractor. *Id.* In late 2003, SGT took over the subcontract from Engility. *Id.* During the transition, SGT interviewed Petitioner but did not hire her. *Id.*

On December 29, 2003, Petitioner filed a Charge of Discrimination against SGT with the Prince George's County, Maryland Human Relations Commission and the United States Equal Employment Opportunity Commission. On February 2, 2004, Petitioner filed similar charges against Honeywell and Engility. Pet. App. 2-3.

While those administrative Charges were pending, Petitioner filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Columbia. Pet. App. 3. A bankruptcy-petition preparer helped her complete the forms. *Id.*

During this bankruptcy – Petitioner's second – she submitted a "Statement of Financial Affairs" that purported to enumerate "all suits and administrative proceedings" to which she "is or was a party" currently or in the preceding year. Pet. App. 4. In that statement, she listed two civil actions in which she was the defendant as well as a pending administrative proceeding in which she was also a defendant. *Id.* Petitioner

did not, however, list her three then-pending Charges against Respondents. Pet. App. 5. Petitioner signed the Statement and declared "[u]nder penalty of perjury" that she had read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are "true and correct." *Id.*

Petitioner also completed and filed a "Personal Property" Schedule with the Bankruptcy Court, which purported to disclose all of her "contingent and unliquidated claims of every nature." *Id*. Once again, she failed to disclose her three then-pending Charges; attesting, instead, that she had no contingent or unliquidated claims. *Id*. Petitioner signed the Schedule and declared, under penalty of perjury, that she had "read the foregoing summary and schedules, consisting of 24 sheets and that they are true and correct to the best of [her] knowledge, information and belief." *Id*.

In November 2005, Petitioner appeared for a Section 341 hearing with the Bankruptcy Court Trustee. *Id.* While Petitioner told the Trustee that she had a pending Charge against Honeywell, she did not reveal her pending Charges against SGT and Engility. Pet. App. 63-71. Nor did she amend her bankruptcy pleadings to disclose that she had pending Charges against Honeywell, SGT, and Engility. Pet. App. 49-62.

Petitioner asserts that, following the Section 341 hearing, her employment lawyer spoke on the telephone with the Trustee about the Charges. Pet. App. 6. Once again, however, Petitioner did not correct her

Statement of Financial Affairs or her Personal Property Schedule to disclose the three Charges to the Bankruptcy Court or her creditors. Pet. App. 49-62.

2. On December 30, 2005, while her bankruptcy action was still pending, Petitioner filed a one-count age-discrimination suit against Respondents in the District Court. Pet. App. 6. The Complaint sought, *inter alia*, an award of $2 million. *Id.* Bankruptcy law requires a debtor to amend her petition if circumstances change during the bankruptcy. *See* 11 U.S.C. §541(a)(7). Petitioner, however, did not do so: she did not amend her Bankruptcy Petition, her Statement of Financial Affairs, or her Personal Property Schedule so as to advise her creditors and the Bankruptcy Court that she had just filed a lawsuit seeking millions of dollars. Pet. App. 7.

Petitioner claims that her counsel spoke with the Trustee's secretary the following week about the newly-filed lawsuit. *Id.* But it is undisputed that Petitioner did not amend her Statement of Financial Affairs or her Personal Property Schedule following this alleged conversation. Pet. App. 49-62.

Indeed, the Bankruptcy Court docket shows that, before her discharge: (1) Petitioner did not file any document with the Bankruptcy Court disclosing the Charges or the present lawsuit as an asset of the Estate; (2) the Trustee did not file any document with the Bankruptcy Court identifying the Charges or the present lawsuit as an asset; (3) the Trustee did not enter an appearance in the present lawsuit; and (4) the

Trustee did not notify creditors of any intent to abandon the Charges or the present lawsuit. *Id*. For all the Bankruptcy Court knew, the claims did not exist. Likewise, any creditor or judge reviewing the Bankruptcy Court docket would have seen no evidence that Petitioner had a pending $2 million lawsuit. Pet. App. 16.

Because Petitioner never amended her bankruptcy filings to reflect her $2 million lawsuit as an asset of the Estate, the Bankruptcy Court closed Petitioner's case as a "no asset" case and discharged her $135,884.74 of debt. Pet. App. 56.

In January 2007, Petitioner filed an Amended Complaint that added claims for racial and sexual harassment, hostile work environment, retaliation, violations of the Fifth and Eighth Amendments under 42 U.S.C. §1981, negligent supervision, negligent retention, intentional infliction of emotional distress, and violations of the Equal Pay Act against Respondents. Pet. App. 7-8. All of these claims had accrued before Petitioner's bankruptcy. Although she had a continuing legal obligation to do so, Petitioner did not apprise the Bankruptcy Court of these developments or move to reopen the case to amend her schedules. Pet. App. 49-62.

During discovery in the District Court action, Respondents learned about Petitioner's Chapter 7 bankruptcy and about her concealment from the Bankruptcy Court of the three Charges and this subsequent lawsuit. Pet. App. 8. Respondents moved to dismiss for lack of standing, asserting that the claims belonged to

the Trustee, not Petitioner. Pet. App. 33. Even at this late date, however, Petitioner did not return to the Bankruptcy Court to correct her false pleadings. Pet. App. 49-62.

The District Court granted Respondents' motions and dismissed the case without prejudice. Pet. App. 8. It held that, by filing for bankruptcy protection, Petitioner had lost any right to pursue her claims; the Trustee was the proper party in interest. Pet. App. 8-9.

It was only then that Petitioner tried to correct her false pleadings. Pet. App. 9. In January 2010, she asked the Bankruptcy Court to reopen the case. *Id.* The Bankruptcy Court granted this request. *Id.* Petitioner then filed an amended schedule that disclosed her employment-discrimination lawsuit as an asset valued at $1 million. *Id.* At the same time, Petitioner identified her employment lawyer as a new creditor with a claim of "$150,000 Plus" – more than the rest of the creditors combined. *Id.*

At this point, the Trustee moved to reinstate this lawsuit, but with the Trustee as plaintiff. *Id*. After the District Court granted the motion, the Trustee tried to find new employment counsel and tried to settle the matter. *Id.* Both efforts failed. *Id.* Unwilling to prosecute the claims any further, the Trustee abandoned them in Petitioner's favor. Pet. App. 9, 40-41. Once the claims reverted to Petitioner, Respondents moved for summary judgment. Pet. App. 9.

3. The District Court granted Respondents' motions, holding that Petitioner's original failure to

disclose her discrimination claims in Bankruptcy Court judicially estopped her from pursuing those claims. Pet. App. 30-42. In analyzing Petitioner's conduct, the District Court followed this Court's approach to judicial estoppel, outlined in *New Hampshire v. Maine*, 532 U.S. 742 (2001). Thus, the District Court asked the three questions that this Court identified as framing the judicial estoppel analysis: (1) Was Petitioner's present position inconsistent with her earlier position? (2) Did Petitioner succeed in persuading a court to accept her earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled? (3) Would Petitioner derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped? Pet. App. 36-37.

The District Court answered all of these questions in the affirmative. *First*, it found that Petitioner's sworn statements to the Bankruptcy Court that she had no unliquidated causes of action contradicted her later actions in maintaining a lawsuit based on pre-bankruptcy activity. Pet. App. 38. *Second*, those sworn statements created the appearance that a court had been misled, because they led the Bankruptcy Court to find that Petitioner had "no assets" and to grant her a bankruptcy discharge, and led the District Court to allow Petitioner to prosecute this lawsuit, despite the fact she lacked standing. Pet. App. 39. *Third*, Petitioner's strategy, if Respondents had not unmasked it, would have allowed her to keep any proceeds received from this case. And by delaying the Trustee's

involvement in this suit for four years and then adding her employment lawyer as a new creditor, Petitioner hampered the Trustee's ability to litigate or settle the matter. Pet. App. 39-41.

The District Court acknowledged that Petitioner had told the Trustee about her employment-discrimination claims. Pet. App. 40. But it held that these oral communications did not relieve Petitioner "of the obligation to provide complete information in her Bankruptcy Petition and to supplement that information." *Id.* Because Petitioner "did not amend or supplement her Bankruptcy Petition to reveal the existence of her discrimination claims until almost four years after the bankruptcy was discharged and closed as a 'no asset' case," the District Court held that the oral communications were insufficient to correct the multiple "misrepresentations in her Bankruptcy Petition." *Id.*

Finally, the District Court considered Petitioner's claim that her multiple omissions resulted from inadvertence or mistake. It rejected this argument, concluding that she "clearly understood what she was required to include in her Bankruptcy Petition because she disclosed three claims against her that would lessen the value of her estate." Pet. App. 42. For all these reasons, the District Court granted the Respondents' motions for summary judgment and dismissed the case. Pet. App. 43.

4. The Court of Appeals affirmed in a 2-1 decision. Pet. App. 1-27. It held that the District Court correctly applied judicial estoppel because: (1) Petitioner's position in the District Court was inconsistent with her position in the Bankruptcy Court; (2) Petitioner persuaded the Bankruptcy Court to close her case as a "no asset case" while simultaneously pursuing a multi-million dollar suit while she lacked standing, thereby creating the perception that either the first or second court had been misled; and (3) Petitioner's inconsistent positions adversely affected the Trustee and the Respondents and, left undiscovered, would have allowed her to reap an unfair advantage. Pet. App. 12-14.

The Court of Appeals agreed that Petitioner's oral communications did not excuse her concealment of those claims from the Bankruptcy Court: "oral disclosure to the trustee did not constitute notice to her creditors and could not correct the false information she conveyed on her schedules." Pet. App. 15. The Court of Appeals explained that a creditor who reviewed the bankruptcy pleadings would see that Petitioner had no assets and so would have "given up the chase." Pet. App. 15-16.

The Court of Appeals also rejected Petitioner's argument that "inadvertence or mistake" caused her to make false representations in her bankruptcy filings. Pet. App. 16-18. The Record showed that Petitioner understood her disclosure obligations sufficiently to list three other actions (including another administrative proceeding). *Id.* So she knew that pending claims could materially affect her bankruptcy. *Id.*

Petitioner's incomplete disclosures systematically benefitted her. Disclosing claims against her inflated the stated value of her debts. Pet. App. 17-18. Omitting her affirmative discrimination claims, by contrast, hid those assets from her creditors. *Id.* This selective listing of legal claims belied Petitioner's protestations of "inadvertence or mistake." *Id.* Thus, the Court of Appeals held that the District Court did not abuse its discretion in granting Respondents' motions for summary judgment.

Although the Court of Appeals noted that it could "end our opinion here," it "add[ed] a few words" about how other appellate courts had handled claims of inadvertence or mistake in the judicial estoppel context. Pet. App. 19. It recognized that its sister circuits had articulated different approaches, with most circuits purporting to use the Fifth Circuit's narrow definition of "inadvertence or mistake," but with the Ninth Circuit purporting to use a broader test. Pet. App. 19-20. The Court of Appeals stated that "[w]e see no need to take sides in this debate, if indeed there are discrete sides at all," *id.* at 20, explaining that the difference between the circuits was more apparent than real: the courts claiming to use a narrow definition of "inadvertence or mistake" had, in practice, adopted a broader view, bringing them closer to the Ninth Circuit's approach. *Id.* Accordingly, the Court of Appeals concluded, "even those courts of appeals that have followed the Fifth Circuit's lead have not been 'as rigid as one would expect' in practice." *Id.*

The Court of Appeals endorsed a flexible approach, citing this Court's observation that the judicial estoppel inquiry did not lend itself to a formulaic approach:

> The Supreme Court doubted that there is "any general formulation of principle" that governs all cases involving judicial estoppel. *New Hampshire*, 532 U.S. at 750. *If some courts of appeals have held otherwise – and we are not convinced that they have – we disagree.*

Pet. App. 20 (emphasis added).

Judge Griffith dissented. Although he "agree[d] with most of what the majority says," Pet. App. 22, he believed that Petitioner's claims of inadvertence or mistake should have been considered by a jury. Pet. App. 25.

## SUMMARY OF THE ARGUMENT

This Court should deny certiorari for three reasons:

*First*, the case does not present the question that Petitioner asks the Court to decide. Although Petitioner says that the Court of Appeals applied a rigid test when evaluating her claim of inadvertence or mistake, the text of the opinion shows otherwise. The Court of Appeals expressly rejected a rigid "general formulation" for evaluating claims of inadvertence or mistake and, instead, applied the same flexible and

fact-specific judicial estoppel analysis that Petitioner says it should have applied.

*Second*, the purported circuit split that Petitioner asks this Court to resolve is illusory. Petitioner contends that different circuits use different tests for determining whether inadvertence or mistake excuses a party's failure to disclose a cause of action as a bankruptcy asset. Yet the circuits themselves observe that any perceived differences between them are more semantic than substantive. The circuits may *describe* their analyses in different terms. But, as a practical matter, they *apply* the same method, reviewing the facts holistically and in context.

*Third*, as a substantive matter, Petitioner's appeal is a nonstarter. In her bankruptcy, Petitioner knew enough to disclose lawsuits and administrative claims against her. Yet she claims that she did not know that she needed to disclose her own administrative claims and lawsuit against Respondents. The Court of Appeals rightly concluded that Petitioner had to have known that she needed to disclose those claims. Petitioner's failure to disclose those claims judicially estopped her from pursuing them after her discharge.

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## REASONS FOR DENYING THE WRIT

### I. This Case Does Not Present the Question That Petitioner Asks the Court to Decide

#### A. The Court of Appeals Did *Not* Adopt a "Rigid" Standard or a "Presumption of Deceit"

As a threshold matter, this Court should deny certiorari because Petitioner has mischaracterized the opinion below. According to Petitioner, certain courts, including, she claims, the Court of Appeals here, apply a "rigid" test that leads to a "presumption of deceit" when evaluating claims of inadvertence or mistake in the judicial estoppel context. Pet. at 7-8.

Contrary to Petitioner's arguments, the Court of Appeals neither adopted a "rigid" approach to judicial estoppel nor invoked any "presumption of deceit." Instead, it used a flexible approach that evaluated the issue in the specific factual context of this case.

Take, first, the Court of Appeals' stated basis for its decision. The Court of Appeals first analyzed the three judicial estoppel factors that this Court used in *New Hampshire v. Maine*, 532 U.S. 742 (2001). Pet. App. 12-14. The analysis did not end there, however. The court also considered other factors, such as Petitioner's assertions that she and her counsel told the Trustee about her Charges and this suit and that she inadvertently omitted them from her bankruptcy schedules. Pet. App. 15-19. Contrary to Petitioner's arguments, the Court of Appeals did not purport to establish a rigid standard for how to handle claims of

inadvertence or mistake in the judicial estoppel context. To the contrary, it concluded that the inquiry was not amenable to a standard, generalizable test.

Nor did the Court adopt any "presumption of deceit." It simply agreed with the District Court that, viewing the circumstances as a whole, Petitioner's omissions were not inadvertent. The Court of Appeals noted that, because Petitioner had listed another administrative action (an IRS proceeding pending against her) on her bankruptcy schedules, she must have known that she also needed to list her own pending administrative actions against Respondents:

> [S]he must have understood that administrative proceedings had to be listed. Otherwise there is no explanation – Marshall offered none – for her reporting . . . the IRS administrative proceeding.

Pet. App. 18.

Viewing the situation as a whole, the Court of Appeals concluded that the District Court correctly rejected Petitioner's argument that her omission of the three Charges or this subsequent lawsuit was due to inadvertence or mistake. Contrary to Petitioner's straw-man argument, this was not a mechanical application of a rigid test or presumption of deceit. It was a careful application of the law to the particular facts of this case.

### B. The Court of Appeals' Discussion of Its Sister Circuits' Analyses of "Inadvertence or Mistake" Was Dicta

After analyzing the facts and deciding to affirm, the Court of Appeals observed that "[w]e could end our opinion here." Pet. App. 19. But it elected to "add a few words about how the courts of appeals have evaluated the frequent contentions of bankruptcy debtors" that their omissions were mistaken or inadvertent. *Id*. In this (supererogatory) discussion, the Court of Appeals discussed the various ways that other circuits have analyzed the issue. Pet. App. 19-20.

The Court of Appeals' statement that "we could end our opinion here" makes it clear, however, that this ensuing discussion was inessential to its decision. As such, any alleged error in this analysis would be dicta – not a proper basis for granting certiorari: "This Court 'reviews judgments, not statements in opinions.'" *California v. Rooney* 483 U.S. 307, 311 (1987) (dismissing writ as having been improvidently granted) (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)). *See also Holly Farms Corp. v. Nat'l Labor Relations Bd.*, 517 U.S. 392, 400 n.7 (1996) (citing *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996)) ("we 'generally do not address arguments that were not the basis for the decision below'").

A review of the Court of Appeals' Opinion confirms that its conclusion did not rest on any choice between the various approaches taken by its sister circuits. The Court of Appeals said so itself: "*We see no need to take*

*sides in this debate*, if indeed there are discrete sides at all." Pet. App. 20 (emphasis added). The Record thus contradicts Petitioner's assertion that the Court of Appeals "clearly chose the inflexible approach." Pet. at 10. The discussion of the various approaches taken by other circuits was, instead, pure dicta.

### C. The Court of Appeals Used the Flexible Approach That Petitioner Claims It Should Have Used

Finally, Petitioner argues that certiorari is warranted to make clear that a flexible approach is required, and that courts should not apply a rigid test for inadvertence or mistake. Pet. at 14. Yet that is what the Court of Appeals did here. It *rejected* the notion that judicial estoppel was amenable to a simple test:

> The Supreme Court doubted that there is "any general formulation of principle" that governs all cases involving judicial estoppel. *New Hampshire*, 532 U.S. at 750. *If some courts of appeals have held otherwise – and we are not convinced that they have – we disagree.*

Pet. App. 20 (emphasis added).

This was not just lip service. As explained *supra*, the Court of Appeals' judicial estoppel analysis went well beyond the three *New Hampshire* considerations. It took a myriad of other facts and circumstances of the case into consideration. For instance, the Court of Appeals addressed (but rejected) Petitioner's claim that her oral statement to the Trustee somehow cured the

false written statements she made to the Bankruptcy Court. And, citing her listing of other administrative claims, the Court of Appeals addressed (but rejected) Petitioner's argument that her failure to apprise the Bankruptcy Court of her three Charges and subsequent $2 million lawsuit was inadvertent.

In short, the Court of Appeals used the flexible approach that Petitioner claims it should have applied. Petitioner is just unhappy with the outcome. Because the Court of Appeals did not adopt the "rigid" test that Petitioner claims it did; because the Court of Appeals' discussion of the various standards for evaluating inadvertence or mistake was dicta; and because the Court of Appeals used the very standard that Petitioner claims was appropriate, this Court should deny certiorari.

## II. There Is No Meaningful Disagreement Between the Circuits on How to Analyze "Inadvertence or Mistake"

Even if the legal issues that Petitioner raises were properly before the Court, and they are not, the Court still should deny certiorari because the "circuit split" that Petitioner identifies is illusory. The case law shows no practical difference in how the circuits review claims of inadvertence or mistake. Although different courts might articulate their approaches differently, they apply a flexible analysis that takes into account the particular context in which the issues arise.

Petitioner nevertheless contends that "[o]n the issue of whether the failure to disclose a pending civil or administrative claim in the bankruptcy was due to mistake or inadvertence," several courts have applied a narrow, inflexible rule: that an omission "is 'inadvertent' only when, in general the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment." Pet. at 7 (citations omitted; emphasis in original). She then claims that the Ninth Circuit has adopted a contrasting approach, which looks beyond those two questions and considers other evidence that might bear on whether the omission was inadvertent or a mistake. Pet. at 7-8. She asks the Court to grant certiorari, to adopt the Ninth Circuit's flexible approach, and to "instruct the courts that in entertaining a motion for judicial estoppel in a bankruptcy context, they should consider all evidence of the subjective intent of the plaintiff. . . ." Pet. at 14.

A close review of the law, however, shows that Petitioner is asking this Court to resolve a "split" that the circuits themselves say is nonexistent. Take, for example, the Ninth Circuit's decision in *Ah Quin v. County of Kauai Dep't of Transp.*, 733 F.3d 267 (9th Cir. 2013) – the supposed outlier on the issue. There, the debtor/plaintiff filed for Chapter 7 bankruptcy in the middle of her employment-discrimination lawsuit. She did not disclose her discrimination suit during the bankruptcy and so the bankruptcy court issued an order of discharge and closed the case. Her separate counsel in the discrimination suit discovered the bankruptcy proceeding and volunteered information about the

bankruptcy to opposing counsel and the district court. The debtor/plaintiff then immediately moved to reopen the bankruptcy and to amend her schedules. The defendant in the discrimination lawsuit, however, moved for summary judgment, arguing that the debtor/plaintiff's failure to disclose the action in her original bankruptcy filings judicially estopped her from maintaining it in the district court. The district court granted the motion.

On appeal, the Ninth Circuit reversed. Like the Court of Appeals in this case, the court held that the law of judicial estoppel rested on equitable considerations and must be applied on a case-by-case basis. And like the Court of Appeals here, the Ninth Circuit looked to the particular circumstances to determine whether the plaintiff's claim of inadvertence or mistake was valid.

But in *Ah Quin*, unlike the present case, the debtor/plaintiff did not selectively disclose only those claims that would benefit her. Unlike the present case, the debtor/plaintiff voluntarily disclosed the omission to the defendants. Unlike the present case, the debtor/plaintiff voluntarily reopened the bankruptcy court proceedings. And, unlike the present case, the debtor/plaintiff corrected the erroneous omissions without first being forced to do so by the district court. *Id.* at 276-77. Taking those considerations into account, the Ninth Circuit held that the debtor/plaintiff raised a legitimate issue of inadvertence or mistake.

As to the standard to employ for mistake and inadvertence, the Ninth Circuit acknowledged that other jurisdictions *claimed* to apply a narrower test – one that appeared, at first blush, to differ from the Ninth Circuit's approach. But after reviewing the facts of the sister-circuit cases that purportedly used a rigid test, the Ninth Circuit observed that, in practice, those courts actually applied a broader test, making exceptions where warranted by equitable considerations:

> Our review of our sister circuits' case law, however, suggests that their application of the rule has not been as rigid as one would expect. We read many of the cases as implicitly recognizing the harsh results to which the narrow interpretation leads and avoiding that harsh result.

*Id.* at 277.

The Court of Appeals made a similar observation in the present case (albeit in dicta). After surveying the legal landscape, it agreed that, "[i]n practice, even those courts of appeals that have followed the Fifth Circuit's lead have not been 'as rigid as one would expect' in practice." Pet. App. 20 (quoting *Ah Quin*, 733 F.3d at 277). The Court of Appeals cited decisions from the Fifth Circuit, Seventh Circuit and Eleventh Circuit to show that, while these courts appeared to embrace a narrow definition of inadvertence or mistake, they had, in practice, analyzed such claims flexibly. Pet. App. 20.

Indeed, the Fifth Circuit, which Petitioner identifies as the standard bearer for a narrow and rigid analysis (Pet. at 7), has eschewed that sort of approach. In *Reed v. City of Arlington*, 620 F.3d 477 (5th Cir. 2010), *rev'd on other grounds en banc*, 650 F.3d 571 (5th Cir. 2011), for example, it held that judicial estoppel requires a "holistic, fact-specific consideration of each claim. . . ." *Id.* at 482.

And, just last year, the Fifth Circuit stated that those who, like Petitioner, interpret its older cases as imposing a "strict stance" were mistaken:

> To the extent that district courts and bankruptcy courts within our circuit have interpreted our precedent as requiring a "strict stance" that requires applying judicial estoppel every time the elements are met, without regard to the specific facts and equities of the case, that interpretation is a misunderstanding of our precedent. As discussed in the text below . . . judicial estoppel is a flexible doctrine that should be applied in light of its purpose of protecting the judicial process.

*United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 270 n.3 (5th Cir. 2015).

The other cases that Petitioner cites as examples of an inflexible approach are nothing of the sort. In each case, the courts did not simply consider the debtor/plaintiff's knowledge and motive, but went further, considering countless other facts and conduct

that might bear on whether the omission was inadvertent or a mistake.[1]

Although different circuits may label their approaches differently, they apply the same equitable analysis. To the extent different courts reach different results, those outcomes stem from different facts, not from different legal standards. Because the circuits do not differ substantively in their approaches toward

[1] *See*, *e.g.*, *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030, 1034 (8th Cir. 2016) (also considering the circumstances surrounding the debtor/plaintiff's initial failure to disclose and the debtor's later return to the bankruptcy court to reopen the estate); *Eastman v. Union Pacific Railroad Co.*, 493 F.3d 1151, 1159 (10th Cir. 2007) (also considering the debtor/plaintiff's answers to questions from the bankruptcy trustee, his counsel's responses to the trustee's questions and his conduct in completing the bankruptcy court forms, in which he included two collection suits against him, but omitted a personal injury action he was then pursuing); *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1294 (11th Cir. 2003) (opining that "courts must always give due consideration to all of the circumstances of a particular case" and also considering the debtor/plaintiff's oral disclosure to the trustee and her returning to the bankruptcy court to reopen the case and file amended pleadings); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1287-1288 (11th Cir. 2002) (also considering length of extended bankruptcy proceeding, including conversion from Chapter 13 to Chapter 7, which provided plaintiff multiple disclosure opportunities, along with the fact plaintiff never sought to reopen bankruptcy case); *In re Flugence*, 738 F.3d 126, 130-131 (5th Cir. 2013) (also considering plaintiff's reasons for omission, including that cause of action occurred after the initial bankruptcy filing; allowing trustee to pursue claims notwithstanding omissions; and refusing to limit potential damages to plaintiff's debt); *Krystal Cadillac-Oldsmobile GMC Truck*, *Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 320-325 (3d Cir. 2003) (also considering plaintiff's multiple misrepresentations in various forums and substance of misrepresentations).

claims of mistake and inadvertence, there is no split for this Court to resolve.

## III. The Court of Appeals Correctly Applied the Law of Judicial Estoppel

Petitioner's arguments on the merits fare no better. To begin with, they are much narrower than the purported circuit split she asks the Court to resolve.

Petitioner asserts that evidence that a debtor/plaintiff has orally disclosed a claim to the trustee always suffices to establish, for summary judgment purposes, that the omission of that claim in the debtor's bankruptcy filings was inadvertent. Pet. at 14. In the present case, Petitioner presented evidence of disclosure to the Trustee. So, she claims, the District Court should have denied the Respondents' motions for summary judgment.

Before responding to this argument, it is important to emphasize what Petitioner is *not* claiming. *First*, she does not claim, and cannot claim, that the Court of Appeals failed to consider the three *New Hampshire* factors that this Court identified as being central to the judicial estoppel issue. As noted above, the Court of Appeals spent several pages of its Opinion doing just that. *Second*, she does not claim, and cannot claim, that the Court of Appeals failed to consider the fact that she orally apprised the Trustee of her omitted claims. Again, the Court of Appeals thoroughly addressed that fact in its Opinion. *Third*, she does not claim, and cannot claim, that the Court of Appeals

held that communications with a Trustee *never* could establish inadvertence or mistake. The Court of Appeals merely held that the communications here did not do so.[2]

Plaintiff's argument is, instead, that once a debtor/plaintiff presents *some* evidence that she orally informed the trustee of the omitted claims, this establishes *as a matter of law* (at least for summary judgment purposes) that the debtor/plaintiff's omission of the claims was mistaken or inadvertent: "a debtor's oral disclosure to the bankruptcy trustee of a pending administrative matter is material evidence of mistake or inadvertence sufficient to defeat a motion for summary judgment on the ground of judicial estoppel in civil litigation arising out of the administrative matter." Pet. at 14.

Yet that is exactly the kind of rigid, cookie-cutter approach to judicial estoppel that this Court, in *New Hampshire*, admonished courts not to use.[3] The better, and legally correct, approach is to say: "it depends." In some cases, a debtor's communications and conduct might demonstrate that the debtor truly was confused about his or her obligations to report administrative

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[2] *See* Pet. App. 27 (Griffith, J., dissenting) ("I do not read the majority opinion to limit the ability of a district court to consider a debtor's oral disclosure as evidence of mistake in a future case").

[3] *New Hampshire*, 532 U.S. at 751 ("In enumerating these factors, this Court does not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts").

proceedings to the bankruptcy court. In other cases, there may be countervailing facts that demonstrate that the omission was deliberate. Contrary to Petitioner's arguments, the issue is not amenable to a *per se* rule. It must be decided on a case-by-case basis.

This is exactly what courts do. In some cases in which the debtor/plaintiff disclosed claims to the trustee, the surrounding circumstances show that the debtor/plaintiff's omission of the claim on his or her bankruptcy filings likely resulted from inadvertence or mistake.[4]

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[4] *See*, *e.g.*, *Spaine v. Cmty. Contracts, Inc.*, 756 F.3d 542, 545-546 (7th Cir. 2014) (evidence sufficed to establish inadvertence where, in addition to orally disclosing claims, debtor/plaintiff's employment lawyer conferred with trustee about the omitted claim's value, and where debtor/plaintiff wrote to trustee and bankruptcy court about the omitted claims); *Stephenson v. Malloy*, 700 F.3d 265, 267-270 (6th Cir. 2012) (finding inadvertence where (1) the debtor/plaintiff disclosed another lawsuit arising out of same case, and (2) the trustee submitted an affidavit that he corresponded regularly with the debtor/plaintiff's personal injury attorney); *Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 895-897 (6th Cir. 2004) (in addition to orally informing the trustee of the omitted claim, debtor/plaintiff amended his schedules to include claim, repeatedly asked whether the trustee intended to pursue the claim on behalf of the estate, moved the Bankruptcy Court to set a status conference regarding his liability claim against the defendant, and moved to allow the trustee to be substituted for the plaintiff in the federal court action); *Matthews v. Potter*, 316 Fed. Appx. 518, 520-521 (7th Cir. 2009) (considering that the debtor/plaintiff had included a then-pending claim for workers' compensation on her bankruptcy schedules, had orally advised the trustee about her pending charge, and had promptly moved to amend and correct her schedules prior to the defendant moving to dismiss the federal court lawsuit).

But in many other cases, the surrounding circumstances show that the debtor's omission was not the result of inadvertence or mistake.[5] The cases often hinge on unique facts, including whether the debtor/plaintiffs have selectively disclosed administrative claims against them but omitted administrative claims they themselves have brought. This is consistent with a long line of case law applying judicial estoppel in circumstances of selective disclosure of similar classes of assets and liabilities.[6]

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[5] *See*, *e.g.*, *Guay v. Burack*, 677 F.3d 10, 19-21 (1st Cir. 2012) (even though debtor/plaintiff orally disclosed claim to trustee, debtor/plaintiff's pattern of deception led court to conclude that the failure to list the claim on bankruptcy filings was deliberate); *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1296-1297 (11th Cir. 2003) (although plaintiff/debtor orally disclosed her employment-discrimination suit to the trustee, court found that omission of suit from bankruptcy filings was not inadvertent in light of facts that plaintiff/debtor's disclosure to trustee was misleading and that debtor/plaintiff did not attempt to reopen and correct the bankruptcy court proceeding until after defendants had moved for summary judgment on judicial estoppel grounds); *Lewis v. Weyerhaeuser Co.*, 141 Fed. Appx. 420, 427 (6th Cir. 2005) (although debtor orally disclosed the employment-discrimination suit to the trustee's administrative assistant, record showed that the omission of claim on debtor/plaintiff's bankruptcy filings was not inadvertent where the debtor never sought to amend her bankruptcy schedules, and failed to inform the bankruptcy court of her discrimination action).

[6] *See*, *e.g.*, *Ibok v. SAIC-Sector Inc*., 470 Fed. Appx. 27, 29 (2d Cir. 2012) (affirming dismissal of lawsuit based upon judicial estoppel and holding that plaintiff's failure to disclose claim in bankruptcy pleadings was not a mistake "considering that he disclosed other lawsuits in his petition to the bankruptcy court"); *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 482 (6th Cir. 2010) (affirming summary judgment based upon judicial

The ultimate lesson to be drawn from this body of law is that no simple rule can answer the highly fact- and case-specific question of whether a debtor/plaintiff's omission of a claim from her bankruptcy filings was the result of inadvertence or mistake. Each case must be examined on its own facts to determine whether judicial estoppel applies. *See New Hampshire*, 532 U.S. at 751 (rejecting "inflexible prerequisites or an exhaustive formula" for judicial estoppel and instructing that each case must be considered within its "specific factual contexts").

Here, the lower courts carefully analyzed the circumstances presented by the factual record and concluded that, because Petitioner specifically listed an administrative claim pending against her, she must have known that she needed to disclose affirmative administrative claims. Reinforcing that conclusion was the fact that Petitioner never attempted to correct her omission until compelled to do so by the dismissal of

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estoppel because, *inter alia*, the fact the plaintiff included a suit in which she was a defendant, but omitted her affirmative claims belied a claim of inadvertence or mistake); *Eastman v. Union Pacific Railroad Co.*, 493 F.3d 1151, 1159 (10th Cir. 2007) (rejecting claim of inadvertence or mistake and affirming summary judgment based upon judicial estoppel where facts showed that debtor included two lawsuits in which he was a defendant, but omitted federal court action in which he was a plaintiff); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 800 (D.C. Cir. 2010) (rejecting plaintiff's claim of inadvertence or mistake because record showed that he "failed to disclose the existence of this case in two separate bankruptcy proceedings, yet in both of those proceedings he listed pending lawsuits that, unlike the instant case, reduced the overall value of his assets through wage garnishment").

her action for lack of standing. The District Court did not abuse its discretion in finding that Petitioner was judicially estopped from reasserting the omitted claims. And the Court of Appeals correctly affirmed this decision.

## CONCLUSION

The petition for writ of certiorari should be denied.

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