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No. 20-170

IN THE
SUPREME COURT OF THE UNITED STATES

KAREN C. HAN,

Petitioner,

v.

HANKOOK TIRE CO., LTD.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTION PRESENTED

Whether the doctrine of judicial estoppel can be applied to defeat subject matter jurisdiction that otherwise exists—while it cannot be used to create subject matter jurisdiction that otherwise does not exist—such that a federal court has discretion to dismiss a plaintiff's diversity action with prejudice for its alleged change in position regarding matters of subject matter jurisdiction that are unrelated to the merits of a case?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Karen C. Han was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings. Respondent Hankook Tire Co., Ltd. was the defendant in the district court proceedings and appellee in the court of appeals proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Karen C. Han ("Han") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") in this case.

OPINIONS BELOW

The Sixth Circuit's unreported opinion and order denying petition for panel rehearing and rehearing *en banc* are reproduced at App. 1a-6a and App. 28a, respectively. The unreported opinion of the United States District Court for the Northern District Of Ohio and its order denying motion for reconsideration are reproduced at App. 18a-22a and App. 7a-17a, respectively.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Sixth Circuit issued its opinion and judgment on January 23, 2020. App. 1a-6a. The Sixth Court denied the timely petition for panel rehearing and rehearing *en banc* on March 11, 2020. App. 28a. On March 19, 2020, in light of the public health concerns relating to COVID-19, this Court extended the time for filing any petition for a writ of certiorari to 150 days from the date of the order denying a timely petition for rehearing. *See* (Order List: 589 U.S.)¹

¹ As permitted by this Court's order dated April 15, 2020, Han files a single paper copy of this petition for writ of certiorari, formatted on 8 1/2 x 11 inch paper.

STATUES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory and constitutional provisions.

INTRODUCTION AND STATEMENT OF THE CASE

The intersection of an invocation of judicial estoppel and an infringement on a citizen's statutory and constitutional right of court access is precisely what defines this case. The Sixth Circuit concluded that it is "within the court's discretion" to dismiss Han's claims with prejudice as a sanction for reasons unrelated to the merits of the case "[b]ecause Han previously disavowed the capacity to bring the claims she sets out in the present complaint[.]" App. 5a-6a.

The Sixth Circuit was wrong to do so and it is of exceptional public importance that this error be corrected since this decision infringes on citizens' constitutional right of access to federal court. Furthermore, this conclusion that the doctrine of judicial estoppel can be applied to defeat subject matter jurisdiction that otherwise exists directly contradicts this Court's precedent that a federal court's diversity jurisdiction over a case is "not discretionary" such that the court cannot properly eliminate the case from its docket, whether by a remand or by a dismissal. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 356 (1988).

This conclusion also placed the Sixth Circuit at odds with other circuits

which have held that judicial estoppel does not apply not only to create the subject matter jurisdiction that otherwise lacks but also to defeat the subject matter jurisdiction that otherwise exists.

I. The First Action

In 2004, Han and her business entity, Peninsula Asset Management (Cayman) Ltd. ("Peninsula"), instituted an action against Respondent Hankook Tire Co., Ltd. ("Hankook") in the United States District Court for the Northern District Court of Ohio ("the district court"), alleging breach of contract, fraud and other causes of action (the "First Action"). App. 24a-27a. Han and Peninsula's inability to obtain discovery from a third party, *Peninsula Asset Management (Cayman) Ltd. v. Hankook Tire*, 476 F.3d 140, 142 (2nd Cir. 2007), resulted in the award by the district court of summary judgment in favor of Hankook, from which Han and Peninsula appealed. *Peninsula Asset Management (Cayman) Ltd. v. Hankook Tire*, 509 F.3d 271, 272 (6th Cir. 2007).

The Sixth Circuit, *sua sponte*, raised the question of subject matter jurisdiction, finding that diversity was defeated because of presence of alien companies on both sides of the dispute. *Id.* at 272-273.

Upon remand from the Sixth Circuit, simply agreeing with the Sixth Circuit with regard to the jurisdictional defect, the district court dismissed the First Action for lack of subject matter jurisdiction without considering or accepting any positions of the parties. App. 26a. The district court specifically

stated that: "its conclusion that diversity jurisdiction exists" was "an erroneous legal conclusion." *Id.* Rejecting Hankook's argument that "Peninsula is a dispensable and nominal party and probably did not even exist at the time of the filing of the complaint[,] by reference only to allegations in the complaint and making paragraph citations to the complaint, the district court also concluded that Peninsula was neither dispensable nor nominal because the complaint alleges facts sufficient to indicate that Peninsula's business was the subject of or basis for plaintiffs' claims in the First Action. *Id.* 26a -27a.

II. The Second Action

In 2017, Han re-filed her claims against Hankook, pursuing them individually and as the real party in interest for Peninsula (the "Second Action"), which Han asserted no longer existed at the time of the filing of the Second Action. App. 3a. Hankook filed its motion to dismiss for failure to state a claim, and for the first time in its reply brief argued that Han was judicially estopped from claiming that Peninsula was a dispensable party in the Second Action. App. 8a.

Finding the non-joiner of non-diverse Peninsula in the Second Action to be inconsistent with her alleged prior representation in the First action that Peninsula was indispensable, the district court applied the doctrine of judicial estoppel and dismissed the Second Action with prejudice. App. 20a-22a. In dismissing the Second Action, the district court made it clear that its holding

was not a disposition on the merits. App. 20a. ("Recognizing the procedural background of this case, the Court holds that the merits of the claims are irrelevant to adjudication on this matter.").

III. The District Court's Judicial Estoppel Decision To Defeat Subject Matter Jurisdiction That Otherwise Exists.

Han filed her Fed.R.Civ.P. 59(e) motion for reconsideration of the district court's order granting Hankook's motion to dismiss, principally asserting that judicial estoppel cannot be applied to questions of subject matter jurisdiction. App. 10a.

The district court denied Han's motion for reconsideration, concluding, relying on *Sexual Minorities Uganda v. Lively*, 899 F.3d 24 (1st Cir. 2018), that the doctrine of judicial estoppel can be applied to defeat jurisdiction although the doctrine cannot be invoked to create jurisdiction. App. 11a-12a.

IV. The Sixth Circuit's Decision

The Sixth Circuit affirmed the district court's judicial estoppel decision, concluding that: because "[t]o sidestep the summary-judgment loss in the first case [which was vacated by the court on appeal due to lack of subject matter jurisdiction], [on remand] Han argued that she (1) lacked the capacity to pursue claims on behalf of Peninsula and (2) had no individual claims that could be adjudicated without Peninsula[,]" Han's claims should be dismissed with prejudice due to Han's inconsistent position taken in the Second Action that she, as the real party in interest for Peninsula, can bring the action without Peninsula.

Id. 6a.

Relying on *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) "(observing that 'outright dismissal of a lawsuit,' although it is a 'particularly severe sanction' is 'within the court's discretion')[,]" the Sixth Circuit also held that: "[b]ecause Han previously disavowed the capacity to bring the claims she sets out in the present complaint, dismissal with prejudice is the only adequate sanction." App. 5a-6a.

Han filed a timely petition for panel rehearing and rehearing *en banc*. The Sixth Circuit denied the petition. App. 28a.

REASONS FOR GRANTING THE PETITION

About ten years after the dismissal of the First Action for lack of subject matter jurisdiction, the district court dismissed the Second Action with prejudice, finding that Han was judicially estopped from asserting her claims since she played fast and loose with the district court by taking an inconsistent position regarding her non-diverse business entity, Peninsula. App. 20a-22a.

A question should quickly arise: what did Han do so wrong that the district court terminated her claims for good without ruling on the merits of her claims? The answer is: Han did nothing improper. Han did not name Peninsula as co-plaintiff in the Second Action because Peninsula ceased to exist at the time of the filing of the Second Action in 2017 as it was costly to maintain its registration in the place of its incorporation with no hope of getting back in

finance business since the First Action was dismissed in 2008.

This Court held in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) that since "[s]ubject-matter jurisdiction [] is an Art. III as well as a statutory requirement...principles of estoppel do not apply [to questions of subject-matter jurisdiction]" ("the *Insurance Corp. of Ireland* principle"). The district court interpreted this fundamental principle to mean that although judicial estoppel cannot be applied to establish or create jurisdiction that otherwise exists, it can be used to defeat or decline jurisdiction over a case. App. 11a-12a.

The Sixth Circuit's decision to approve such use of judicial estoppel by the district court—which resulted in an infringement on a citizen's statutory and constitutional right of access to federal forum—added to an existing circuit split of exceptional importance regarding invocation of judicial estoppel in the context of subject matter jurisdiction.

This Court should grant review to eliminate discrepancies among circuits, and clarify the *Insurance Corp. of Ireland* principle.

I. The Sixth Circuit Decision Reflects An Existing Circuit Split Regarding The Use of Judicial Estoppel To Defeat Subject Matter Jurisdiction That Otherwise Exists.

A. The Sixth Circuit Approved The District Court's Judicial Estoppel Decision To Decline Subject Matter Jurisdiction That Otherwise Exists.

In the proceedings below, citing *Insurance Corp. of Ireland*, Hankook

conceded that "judicial estoppel cannot be employed to *establish* or *expand* federal jurisdiction" since "no action of the parties can confer subject-matter jurisdiction upon a federal court[,"] *id.*, 456 U.S. at 702; but it insisted that "this case is different. Here, [the C]ourt properly applied judicial estoppel *not* to establish or expand jurisdiction, but to *dismiss* a case because of Han's unseemly gamesmanship." App. 11a (alteration and emphasis in original).

Hankook's argument rested on the First Circuit's decision in *Sexual Minorities Uganda* that judicial estoppel can be applied to decline, not establish, jurisdiction over a case. App. 11a. The First Circuit explained:

"[Defendant] overlooks, though, that this is a one-way ratchet. Even though federal subject-matter jurisdiction cannot be established through waiver or estoppel, it may be defeated by waiver or estoppel. For example, a federal court is not required to assume jurisdiction under a theory that a party has waived. So, too, although the doctrine of judicial estoppel cannot be applied to create federal subject-matter jurisdiction that is otherwise lacking, it may be applied to prevent a party from basing federal subject-matter jurisdiction on facts that directly contradict his previous representations to another tribunal."

Sexual Minorities Uganda, 899 F.3d at 34 (citations omitted); App. 11a.

Adopting the reasoning in *Sexual Minorities Uganda*, the district court concluded that: "the Court did not apply judicial estoppel for the improper purpose of creating jurisdiction where it was otherwise lacking. Instead, the Court applied the doctrine to protect the integrity of the judicial system by holding a party to a previously asserted position." App. 12a. Thus, the district court dismissed the Second Action, invoking judicial estoppel to defeat the

subject matter jurisdiction that otherwise exists in this case.² The Sixth Circuit sanctioned such use of judicial estoppel to decline subject matter jurisdiction, stating that:

"Finding [Han's jurisdictional] assertion [in the Second Action] to be inconsistent with her prior representation that Peninsula was indispensable, the district judge applied the doctrine of judicial estoppel and dismissed the case with prejudice... Because the district judge properly applied judicial estoppel to dismiss Han's claims with prejudice, we affirm."

App. 1a-2a.

B. Majority Of Circuits Have Declined To Use Judicial Estoppel To Defeat Subject Matter Jurisdiction As Well As To Create Subject Matter Jurisdiction.

As shown below, unlike the First and Sixth Circuits, other circuits that have weighed in on this issue have declined to use judicial estoppel to defeat subject matter jurisdiction when it exists. Hence, if the Second Action had been filed in such circuits that have refused to invoke judicial estoppel in this context, the district court's judicial estoppel decision would have been reversed on appeal.

"The interests of the courts in protecting themselves and opposing parties

² It was undisputed in the proceedings below that diversity jurisdiction was established at the time of the filing of the Second Action since the non-diverse Peninsula was not named as plaintiff in the complaint and Han asserted Peninsula did not exist as of the filing of the Second Action. *See Jackson v. Richards Medical Co.*, 961 F.2d 575, 578 (6th Cir. 1992) ("[i]n considering a motion to dismiss for lack of subject matter jurisdiction, the complaint is to be liberally construed and all uncontested factual allegations on the face of the complaint are to be taken as true.") (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974))

against inconsistency may yield to such interests as the desire to protect against deciding a case when federal subject-matter jurisdiction does not exist [footnote 83 collecting cases addressing 'No subject-matter jurisdiction estoppel'], [and] to exercise federal subject-matter jurisdiction when it does exist [footnote 84 collecting cases addressing 'Exercise subject-matter jurisdiction.']" 18B Wright, Miller & Cooper, Federal Practice and Procedure ("Wright & Miller"), Jurisdiction 2d § 4477, at 599-600.

For instance, the Fifth Circuit held that the doctrine of judicial estoppel would not be applied to defeat jurisdiction of a diversity action against a corporation that averred it was a Missouri corporation with its principal place of business in Missouri, even if in an earlier state-court action it had asserted that it was a Texas corporation domiciled in Texas. *In re Southwestern Bell Tel. Co.*, 535 F.2d 859, 860-861 (5th Cir. 1976). Thus, contrary to the First and Sixth Circuit's conclusion, the Fifth Circuit concluded that the doctrine of judicial estoppel does not apply to decline jurisdiction as well as to create jurisdiction. The court in the case reasoned that:

"Whatever the scope of the doctrine [of judicial estoppel] may be, so far as we have been able to discover it has never been employed to prevent a party from taking advantage of a federal forum when he otherwise meets the statutory requirements of federal jurisdiction. Persons who meet those criteria have a statutory, and indeed a constitutional, right to resort to the federal courts. A district court has no authority to negate that right simply because such a person has not observed the consistency in pleading..."

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Id. at 861.

The Federal Circuit also held that:

"We do not rely primarily on the theory of estoppel to negate federal jurisdiction, for even if judicial estoppel can be founded on jurisdiction...[the plaintiff] sufficiently changed his complaint to require a fresh look in the district court. However, he still has not brought an action for patent infringement; his counts sound in contract and tort, as before."

Bonzel v. Pfizer, Inc., 439 F.3d 1358, 1363 (Fed. Cir. 2006) (internal quotation mark and citation omitted).

"[Plaintiffs] were not judicially estopped from continuing to argue there was jurisdiction of their claims" after making a representation that the holdings in the parallel action should resolve the jurisdictional issues on appeal. 18B Wright & Miller, § 4477 (2d ed. 2018 Supplement), at 258 n. 84 (citing *Prati v. U.S.*, 603 F.3d 1301, 1304-1305 (Fed. Cir. 2010)).

The Second Circuit in *Da Silva* held that although the plaintiff-appellant invoked the jurisdiction of the district court, on appeal she, having lost the merits of her pendant state law claims, challenged the district court's subject matter jurisdiction in order to relitigate these claims in state court; on the other hand, the defendant-appellee, having disputed the district court's jurisdiction, contended on appeal that the district court had subject matter jurisdiction. *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 361 (2d Cir. 2000).

Noting that "the parties, in Justice Jackson's memorable phrase, have

order to reject the First and Sixth Circuits' approach in this matter, and to clarify the *Insurance Corp. of Ireland* principle.

II. The Circuit Split Has Serious Impact And Legal Ramification On Citizens' Statutory And Constitutional Access To Federal Forum.

This case provides a good illustration of a federal court's infringement on a citizen's statutory and constitutional right of access to federal forum.

As discussed above, majority of circuits have declined to use judicial estoppel to defeat federal subject-matter jurisdiction when it does exist. The purpose of refusal to invoke judicial estoppel in this context reflects two other fundamental principles of law developed for decades in federal jurisprudence. First, federal courts have "virtually unflagging obligation [] to exercise the jurisdiction given them." *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 817 (1976); *see also* *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("Subject-matter jurisdiction can never be waived or forfeited"); *Carnegie-Mellon Univ.*, 484 U.S. at 356 ("The court had diversity jurisdiction over the case, which is not discretionary").

Second, more importantly, from the perspective of civil rights, citizens have statutory and constitutional right of access to federal courts as long as their claims meet the statutory and Article III requirements. *See, e.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition [under the First Amendment]").

Accordingly, having in mind these two principles, majority of courts have consistently rejected the very conclusion the First and Sixth Circuits reached that judicial estoppel can be applied to defeat subject matter jurisdiction that otherwise exists.

Klein v. Stahl GMBH Co. Maschinenfabrik, 185 F.3d 98 (3rd Cir. 1999) provides a good example of the danger that judicial estoppel will be used as a sanction. The district court in *Klein* invoked judicial estoppel as a sanction for bad faith inconsistency, granting summary judgment. *Id.* at 101. The Third Circuit reversed the judgment, invoking the rule that the court must first explore all sanctions explicitly provided by the Civil Rules, then—if no Rule proves sufficient—use the least damaging sanction drawn from inherent authority and suitable to the task. 18B Wright & Miller, Jurisdiction 2d § 4477, at 611 n.98 (discussing *Klein*).

"Any desire to impose sanctions for playing fast and loose with the removal question can be satisfied by refusing remand, so long as there is subject matter jurisdiction." *Id.* (discussing *Pegram v. Herdrich*, 530 U.S. 211 (2000)). As set forth above, here in this case, even if judicial estoppel can be applied to preclude Han from asserting Peninsula is a dispensable party, the maximum estoppel sanction permitted by law is a dismissal of this action for failure to join an indispensable party without prejudice, after conducting a Fed.R.Civ.P. 19 analysis.

In light of the foregoing reasons, this Court should grant this petition for writ of certiorari in order to correct the Sixth Circuit's erroneous holding that has serious impact and legal ramifications on citizens' statutory and constitutional right of access to federal courts.

CONCLUSION

For the foregoing reasons, the Court should grant Han's petition for writ of certiorari.

Respectfully Submitted,



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