No. _____

In The
Supreme Court of the United States

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.,

Petitioner,

v.

JOHN J. SHUFELDT, M.D.,

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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QUESTIONS PRESENTED

Under federal common law, a district court may utilize the doctrine of judicial estoppel to protect the judicial system from improper gamesmanship by litigants. In the majority of federal courts of appeals, the second factor of judicial estoppel—judicial acceptance—is flexible; those courts have held that judicial acceptance can occur when a prior court denies a preliminary motion. Moreover, nearly all courts of appeals review judicial estoppel rulings for abuse of discretion. But the Court of Appeals for the Sixth Circuit has adopted a rigid, formulaic approach to judicial acceptance, and the Sixth Circuit alone applies a de novo standard of review to judicial estoppel rulings. In this case, the Sixth Circuit created a circuit split over judicial acceptance and reinforced its divergent de novo standard of review.

The questions presented are:

1. Whether a prior court's denial of a preliminary motion based on a litigant's prior inconsistent position constitutes judicial acceptance of that position, as the First, Second, Seventh, Ninth, and D.C. Circuits have held, or whether it cannot constitute judicial acceptance, as the Sixth Circuit has effectively held.

2. Whether a district court's application of judicial estoppel under federal common law is properly reviewable de novo, as the Sixth Circuit held, or for abuse of discretion, as in every other circuit.

PARTIES TO THE PROCEEDING

Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. is Petitioner here and was Defendant-Appellee below.

John J. Shufeldt, M.D. is Respondent here and was Plaintiff-Appellant below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. states that it has no parent company, and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Shufeldt v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., No. 20-5877 (6th Cir.) (opinion issued April 2, 2021).

Shufeldt v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., No. 18-cv-01078 (M.D. Tenn.) (order and memorandum opinion granting motion to dismiss issued July 23, 2020).

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Between prior state court litigation and the case below, Respondent advanced two contradictory positions to suit the exigencies of the moment. The district court thoughtfully exercised its discretion to dismiss Respondent's claims under judicial estoppel, a doctrine that prevents litigants from undermining judicial integrity.

But the Sixth Circuit cursorily reversed, bearing out two circuit splits in the process. First, the Sixth Circuit created a circuit split about the scope of the judicial acceptance factor of judicial estoppel analysis, effectively holding that judicial acceptance cannot occur as a preliminary matter.

Second, the Sixth Circuit reinforced a separate circuit split over the appropriate standard of review for a district court's application of judicial estoppel. Though every other circuit applies abuse-of-discretion review, the Sixth Circuit reviewed the district court's discretionary application of the equitable doctrine de novo.

In the two decades since *New Hampshire v. Maine*, this Court has provided little guidance about the proper application of judicial estoppel. As a result, the circuits have utilized it inconsistently, as evidenced by the two circuit splits reflected in this case. Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit to correct these two circuit splits and fill the void in this Court's guidance on an important

federal common law doctrine designed to protect the integrity of the judicial system.

OPINIONS BELOW

The opinion of the Sixth Circuit is unreported but available at 2021 WL 1235832 and reproduced at pages 1–21 of the appendix. The opinion of the District Court for the Middle District of Tennessee is unreported but available at 2020 WL 4227508 and reproduced at pages 22–47 of the appendix.

JURISDICTION

The Sixth Circuit issued its opinion on April 2, 2021. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. then timely filed this petition for certiorari. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

No constitutional provisions, statutes, or rules are implicated because the question at hand is purely a matter of federal common law.

STATEMENT OF THE CASE

A. Factual Background.

In 2010, the Department of Justice began a False Claims Act investigation into NextCare Holdings, Inc., an operator of urgent care clinics based in Arizona. App.2. In turn, NextCare's Board of Directors urged John J. Shufeldt, M.D., the founder, Chief Executive Officer, Chief Medical Officer, and Chairman of the Board of Directors, to resign from the company. App.2. Shufeldt resigned. App.2.

In 2013, Shufeldt retained Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. to investigate whether Shufeldt's ownership interest in NextCare had been unlawfully diluted following his resignation. App.2, 23. During its representation, Baker Donelson informed Shufeldt of statute-of-limitations issues related to potential claims against NextCare. App.3. Shufeldt eventually hired different counsel to litigate the matter. App.23. Later, Shufeldt took issue with Baker Donelson's representation and entered into a Tolling Agreement. App.3, 23.

In 2015, Shufeldt filed suit against NextCare and others in Arizona state court (the "Underlying Action"). App.3. In his Arizona complaint, Shufeldt provided a detailed justification for the timeliness of the action under the applicable statutes of limitations. App.3–4, 24. In turn, the NextCare defendants moved to dismiss the Underlying Action on statute of limitations grounds. App.24. Shufeldt vehemently opposed the

motion, emphasizing numerous factual allegations that proved the timeliness of his claims. App.3–4, 24.

The Arizona court accepted Shufeldt's position, stating in its ruling from the bench that "what's at issue here is whether [Shufeldt] . . . knew that the company was undervalued. That's the key. And . . . it appears that he did not know that until 2015." App.80. Accepting that Shufeldt had sufficiently alleged facts to establish the timeliness of his claims, the Arizona court denied the motion to dismiss. App.49–50, 80–81.

After the Arizona court denied the motion to dismiss, Shufeldt and NextCare entered into a confidential settlement agreement. App.4, 24–25. The settlement provided a full release of claims against NextCare in exchange for a $2 million payment to Shufeldt, with the prospect of additional cash under defined circumstances. App.4.

B. Shufeldt's Lawsuit against Baker Donelson and the District Court's Decision.

Three months after his lucrative settlement with NextCare, Shufeldt sued Baker Donelson for malpractice. App.4. Before, Shufeldt convinced the Arizona court to deny NextCare's motion to dismiss by vigorously asserting that the statute of limitations could not have run based on his factual allegations. App.3–4, 24. But now, Shufeldt unequivocally alleged that the statute of limitations had expired, admittedly in direct contradiction to his prior positions. App.4, 32. Given these contradictory positions, Baker Donelson moved

to dismiss Shufeldt's amended complaint on judicial estoppel grounds. App.5–6, 25.

The district court agreed, holding that Shufeldt had advanced contradictory positions in the Underlying Action, the Arizona court had accepted Shufeldt's position at the motion to dismiss stage, and Shufeldt would receive an unfair advantage if allowed to advance contradictory positions in a subsequent lawsuit. App.30–45. The district court held that judicial estoppel applied and exercised its discretion to dismiss Shufeldt's claims against Baker Donelson. App.45–48.

C. The Sixth Circuit Decision.

On appeal, the Sixth Circuit cursorily reviewed the application of judicial estoppel de novo. App.8. The Sixth Circuit agreed that Shufeldt had advanced contradictory positions in the Underlying Action against NextCare. App.10–15. But the Sixth Circuit held that the Arizona court had not accepted Shufeldt's prior contradictory position when it denied the motion to dismiss his prior claims. App.15–19. The Sixth Circuit concluded that judicial acceptance did not occur because "[t]he Arizona court did not make any findings of fact or law against NextCare." App.18. And because Shufeldt and NextCare settled the Underlying Action after the Arizona court's ruling on the motion to dismiss, the Sixth Circuit found that the Arizona court had not accepted Shufeldt's prior position, even as a preliminary matter. App.18. Though judicial estoppel consists of factors, not elements, the Sixth Circuit

concluded that it did not need to address the third factor—any unfair advantage received by Shufeldt's advancement of contradictory positions. App.19.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision below rests on two circuit splits over the federal common law doctrine of judicial estoppel. The first split—the scope of judicial acceptance—stems directly from the opinion below. The Sixth Circuit effectively held that denial of a motion to dismiss based on a litigant's prior position *cannot* constitute judicial acceptance unless a court makes findings of fact and conclusions of law against the litigant's opponent before resolution of the case. As a result, a litigant may adopt any position that repels a preliminary motion, confident that he may advance a contrary position in subsequent litigation as it suits him. After surviving a preliminary motion, both a lucrative settlement and a future, contradictory lawsuit remain on the table for a litigant, so long as he is in the Sixth Circuit. The same result would not obtain, however, in other circuits, which have held that denial of preliminary motions supports a finding of judicial acceptance and the application of judicial estoppel.

The second split—concerning the standard of review for judicial estoppel—stubbornly persists. The Sixth Circuit reviewed the district court's exercise of discretion de novo. All other circuits, however, would have applied abuse-of-discretion review. As a result,

every other circuit would have correctly deferred to the district court's thoroughly reasoned exercise of discretion. But as it stands, federal litigants find starkly contrasting standards between the circuits on matters of this federal common law doctrine. Both circuit splits warrant certiorari review in this action.

I. The Sixth Circuit Has Created A Split Over The Scope Of Judicial Acceptance.

Judicial estoppel is a doctrine intended "to protect the integrity of the judicial process." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)).[1] Thus, if "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. . . ." *Id.* at 749 (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

Though not formulaic in its application, judicial estoppel rests on three factors: (1) two "clearly inconsistent" positions adopted by a litigant, *id.* at 750 (quoting *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999)); (2) judicial acceptance of the prior position that creates "the perception that either the first or the second court was misled," *id.* (quoting *Edwards*, 690 F.2d

[1] The doctrine of judicial estoppel originated in Tennessee state court. *See Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39 (1857); T.H. Malone, *The Tennessee Law of Judicial Estoppel*, 1 Tenn. L. Rev. 1, 4–5 (1922) (discussing the origins of the judicial estoppel doctrine).

at 599); and (3) an "unfair advantage" derived by the flip-flopping litigant if not estopped, *id*.

Prior judicial acceptance does not require success on the merits of the position. Rather, courts of appeals generally agree that judicial acceptance of the party's position can occur "either as a preliminary matter or as part of a final disposition." *Allen v. C & H Distribs., L.L.C.*, 813 F.3d 566, 573 (5th Cir. 2015) (quoting *In re Superior Crewboats, Inc.*, 374 F.3d 330, 335 (5th Cir. 2004)); *see Egenera, Inc. v. Cisco Sys., Inc.*, 972 F.3d 1367, 1379 (Fed. Cir. 2020); *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 34 (1st Cir. 2004). But, through the decision below, the Sixth Circuit has effectively split from its sister circuits as to whether judicial acceptance can occur during preliminary motions.

A. The Majority View: A Court's Denial of a Preliminary Motion Can Constitute Judicial Acceptance.

Most courts of appeals have agreed that a court "accepts" a party's position when it denies a preliminary motion if the court relies on that position to do so. *See, e.g.*, *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 34 (1st Cir. 2004) (holding that a court accepted a litigant's prior contrary position when it denied a motion to dismiss); *Intellivision v. Microsoft Corp.*, 484 F. App'x 616, 620–21 (2d Cir. 2012) (same).

The First Circuit has squarely held that a prior court's denial of a preliminary motion to stay constituted judicial acceptance, even though the order itself

contained no reasoning: "Although the [prior] court gave no reasons, it is reasonable to believe that it was influenced by the [contrary] representation." *Patriot Cinemas, Inc. v. Gen. Cinemas Corp.*, 834 F.2d 208, 213 (1st Cir. 1987). In other words, explicit findings and detailed reasoning are not required.

A court's application of judicial estoppel, a flexible, equitable doctrine, is best appreciated in context. In *Patriot Cinemas*, the same parties were simultaneously engaged in parallel proceedings before both the First Circuit and a state trial court. *Id.* at 210–11. The defendants moved to stay the state proceedings pending the resolution of the federal appeal. *Id.* at 211. To rebuff the motion, the plaintiff suggested to the state court that it would abandon the legal claim in dispute if allowed to proceed to discovery without the disputed claim. *Id.* Without explanation, the state court denied the motion to stay. *Id.* The defendants then argued that the plaintiff's position in the state court action justified dismissal of the First Circuit appeal. *Id.*

The First Circuit agreed and rejected the plaintiff's flip-flopping on judicial estoppel grounds. *Id.* at 214–15. Though the state court made no findings of fact or conclusions of law, the First Circuit was unequivocal that judicial acceptance had occurred. The context made clear that the litigant had "made a bargain with the . . . court." *Id.* at 213.

The First Circuit has repeatedly reaffirmed the *Patriot Cinemas* view of judicial acceptance. For example, another First Circuit panel found judicial

acceptance in a denial of a motion to dismiss, even though the court had not made findings of fact or conclusions of law and relegated the litigant's position to a footnote. *See Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23 (1st Cir. 2004). In *Synopsys*, the plaintiff avoided the statute of frauds by denying any oral contract theory in opposition to a motion to dismiss. *Id.* at 34. In its partial denial of the motion, the district court made no explicit judicial findings about the claim. *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, No. CIV. 00-546-B, 2001 WL 920029, at *2 (D.N.H. Aug. 2, 2001) ("*ASC I*"). In other words, the court "tentatively deemed the statute of frauds impuissant," which gave the plaintiff "a direct (if temporary) benefit from its original position." *Synopsys*, 374 F.3d at 27, 34. But the plaintiff later attempted to evade a summary judgment motion by invoking "its nascent oral contract theory." *Id.* at 34. The district court applied judicial estoppel.

Affirming, the First Circuit held that judicial acceptance of the prior contrary position was "present in spades" since the district court "bought what [the plaintiff] was selling the first time around." *Id.* The First Circuit was again unfazed by the lack of explicit findings in the plaintiff's favor. A later First Circuit panel made this principle clear: "An issue need not always be decided explicitly but, rather, may sometimes be decided implicitly, as when the resolution of that issue comprises, either logically or practically, an essential part of the ordering court's decision." *Sexual Minorities Uganda v. Lively*, 899 F.3d 24, 33 (1st Cir. 2018).

The Second Circuit has also found judicial acceptance where the district court adopted a position advanced to repel a motion to dismiss. *See Intellivision v. Microsoft Corp.*, 484 F. App'x 616, 620 (2d Cir. 2012). In *Intellivision*, the plaintiffs placed their claims in the hands of a Connecticut joint venture at the motion to dismiss stage. *Id.* This position led the court to apply Connecticut law, rather than a fatal application of New York law. *Intellivision v. Microsoft Corp.*, No. 07 CIV. 4079 (JGK), 2008 WL 3884382, at *5–6 (S.D.N.Y. Aug. 20, 2008). The district court denied the motion to dismiss because of the plaintiffs' position. *Id.* But it was out the frying pan into the fire—summary judgment motions revealed insurmountable statutes of limitations under Connecticut law. *Intellivision*, 484 F. App'x at 618. So the plaintiffs reversed course, arguing that the principals, and not the joint venture, were the true claimants, which allowed them to seek refuge in New York's longer statutes of limitations. *Id.* The district court dismissed the claims on judicial estoppel grounds, concluding that it had previously "accepted the accuracy" of the plaintiffs' contrary statements in opposition to the motion to dismiss. *Intellivision v. Microsoft Corp.*, 784 F. Supp. 2d 356, 364–65 (S.D.N.Y. 2011) (quoting *In re Adelphia Recovery Tr.*, 634 F.3d 678, 696 (2d Cir. 2011)).

Affirming, the Second Circuit concluded that the court's prior ruling on the motion to dismiss necessarily "adopted [the litigants' prior] representations," as a logical implication of the ruling. *Intellivision*, 484 F. App'x at 620.

Similarly, the Ninth Circuit has held that judicial acceptance can occur when a court denies a preliminary injunction motion. *See United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772 (9th Cir. 2009). In *Spectrum Worldwide*, an insurance coverage dispute followed the settlement of a prior trade dress infringement case. *Id.* In the prior suit, the defendant had faced a preliminary injunction motion. *Id.* To challenge the motion, the defendant suggested that a 1999 label, not a 2001 label, contained the disputed trade dress features, eliminating the possibility of irreparable harm. *Id.* The preliminary injunction motion was denied, and the case later settled. *Id.* at 775–76. But in the subsequent coverage case, the defendant argued the opposite—that the 2001 product label triggered the underlying suit, placing the claim within the scope of coverage. *Id.* at 779. The second court followed the lead of the first, granting summary judgment to the insurer since the 1999 label—the first-offending trade dress according to defendant in the prior suit—fell within an applicable policy exclusion. *Id.* at 776.

Affirming, the Ninth Circuit invoked judicial estoppel. *Id.* at 778–80. Distinct legal contexts and different parties had little import. Why? The defendant "benefitted" from its prior position. *Id.* at 779. Permitting contradictory positions would allow "the possibility of prevailing on the very position [the defendant] successfully discredited" while opposing the preliminary motion. *Id.* Judicial acceptance occurred at the preliminary stage because the litigant "obtained a favorable decision in the district court as a result of its

assertions," even though no findings had been made on the merits in the prior court's order. *Id.* at 780.

Other circuits align with this majority view. The Seventh Circuit has held that "[t]he fact that [a litigant's] success [from a contrary position] had come at a preliminary stage in the litigation is no bar to the application of the [judicial estoppel] doctrine. *Al's Serv. Ctr. v. BP Prod. N. Am., Inc.*, 599 F.3d 720, 727–28 (7th Cir. 2010).

The D.C. Circuit has adopted an arguably broader view, stating that this Court has not "suggested the party's inconsistent position must be a but-for cause of the first tribunal's decision," because "'judicial acceptance of an inconsistent position in a later proceeding' may itself be enough to 'create the perception that either the first or the second court was misled.'" *Temple Univ. Hosp., Inc. v. Nat'l Lab. Rels. Bd.*, 929 F.3d 729, 735–36 (D.C. Cir. 2019) (quoting *New Hampshire*, 532 U.S. at 750).

At bottom, the First, Second, Seventh, Ninth, and D.C. Circuits have all recognized that a ruling denying a preliminary motion can satisfy the judicial acceptance factor. This is true even when the prior court's order: (1) provides no explanation, *Patriot Cinemas*, 834 F.2d at 213; (2) makes no judicial findings on the position, *Synopsys*, 374 F.3d at 34; *Intellivision*, 484 F. App'x at 620; (3) relies on the position only for a preliminary procedural matter, *Patriot Cinemas*, 834 F.2d at 213; *Spectrum Worldwide*, 555 F.3d at 775; or (4) is not caused by the prior contrary position, but

subsequent acceptance would suggest that one of the courts was misled, *Temple Univ. Hosp.*, 929 F.3d at 736.

B. The Sixth Circuit's New View: Judicial Acceptance Cannot Occur Unless a Prior Court Makes Explicit Findings of Fact or Conclusions of Law Based on a Party's Prior Position.

In contrast, the Sixth Circuit's decision below functionally holds that judicial acceptance *cannot* occur without findings of fact and conclusions of law against the prior adverse party, which effectively converted a flexible factor into a formulaic element.

Previously, the Sixth Circuit tracked with its sister circuits on preliminary judicial acceptance. *See Valentine-Johnson v. Roche*, 386 F.3d 800, 802 (6th Cir. 2004); *see also Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 n.5 (6th Cir. 1982) ("judicial acceptance means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition"). In *Valentine-Johnson*, the Sixth Circuit found that an administrative judge had accepted a litigant's position in a motion to dismiss through the judge's later actions, even though the judge did not grant the motion. *Id.* at 811–12. Judicial estoppel barred the litigant's contradictory position in federal court. *Id.* at 812.

But through its opinion in this action, the Sixth Circuit has charted a path away from its sister circuits, its own prior opinions, and the guidance of this Court.

On its face, the Sixth Circuit's rejection of the majority approach is tacit. In the case below, the majority approach was briefed at length. But the Sixth Circuit disregarded its sister circuits completely, along with its own precedent in *Valentine-Johnson*.

Instead, the Sixth Circuit held that judicial acceptance did not occur for two reasons: (1) the prior court's favorable ruling on a motion to dismiss "did not make any findings of fact or law *against*" the prior defendant; and (2) the case later settled after the court's ruling on the motion to dismiss. App.18. The panel conceded that the Arizona court expressly relied on Shufeldt's prior contrary position when ruling from the bench: "[W]hat's at issue here is whether the plaintiff . . . knew that the company was undervalued. . . . [I]t appears that he did not know that until 2015." App.18. Nevertheless, because the case settled after the prior court's ruling, the prior court "never actually had the opportunity to determine—even as a preliminary matter—whether in fact Shufeldt's claims were timely filed." App.18.

At base, the judicial acceptance factor evaluates "the perception that either the first or the second court was misled." *New Hampshire*, 532 U.S. at 750 (quoting *Edwards*, 690 F.2d at 599). Rather than evaluating perceptions through the equitable lens of the doctrine, the Sixth Circuit "establish[ed] inflexible prerequisites," something this Court was loath to do. *New Hampshire*, 532 U.S. at 751. The error of this inflexibility is exacerbated by the secondary nature of the judicial acceptance factor. Though the litigant's "later

position must be clearly inconsistent" with an earlier position, judicial acceptance is just a factor about which "courts regularly inquire." *Id.* at 750 (cleaned up); *see* Nicole C. Frazer, *Reassessing the Doctrine of Judicial Estoppel: The Implications of the Judicial Integrity Rationale*, 101 Va. L. Rev. 1501, 1506 (2015) (concluding that *New Hampshire* "seems to indicate that this factor should normally be applied, but is not absolutely necessary"). At base, the key to judicial acceptance is flexible, contextual review, not formulaic requirements.

II. The Sixth Circuit Is Intractably Split From All Other Circuits Over The Appropriate Standard Of Review.

The Sixth Circuit's de novo review of a district court's application of judicial estoppel conflicts with the standard applied in every other circuit. This Court should grant review to resolve this persistent split that an en banc Sixth Circuit has refused to redress.

A. The Majority View: Review Judicial Estoppel Rulings for Abuse of Discretion.

This Court has explained that "judicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'" *New Hampshire*, 532 U.S. at 750 (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)). Thus, the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits—all but the Sixth Circuit—have held that a

district court's judicial estoppel determination is reviewable for abuse of discretion. *See Guay v. Burack*, 677 F.3d 10, 15–16 (1st Cir. 2012); *Clark v. AII Acquisition, LLC*, 886 F.3d 261, 265–66 (2d Cir. 2018); *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 780 (3d Cir. 2001); *Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 457 (4th Cir. 2017); *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 599–600 (5th Cir. 2005); *United States v. Trudeau*, 812 F.3d 578, 584 (7th Cir. 2016); *E.E.O.C. v. CRST Van Expedited, Inc.*, 679 F.3d 657, 678 (8th Cir. 2012); *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1000 (9th Cir. 2007); *Eastman v. Union Pac. R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007); *Smith v. Haynes & Haynes P.C.*, 940 F.3d 635, 642 (11th Cir. 2019); *Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 927–28 (D.C. Cir. 2016); *Agility Pub. Warehousing Co. K.S.C.P. v. United States*, 969 F.3d 1355, 1368 (Fed. Cir. 2020)

Abuse-of-discretion review makes doctrinal and pragmatic sense; judicial estoppel is "invoked by a court at its discretion." *New Hampshire*, 532 U.S. at 750 (cleaned up). This Court has instructed that, "[t]raditionally, . . . decisions on matters of discretion are reviewable for abuse of discretion." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014) (cleaned up).

And as the Second Circuit has noted, "[t]he district court is the 'judicial actor . . . better positioned' to determine whether the criteria for invoking judicial estoppel have been met within the particular factual

context of a given case." *Clark v. AII Acquisition, LLC*, 886 F.3d 261, 265 (2d Cir. 2018) (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). The First Circuit likewise insists "that a reviewing court remain mindful of its obligation 'not to substitute its judgment for that of the [district court].'" *Synopsys*, 374 F.3d at 32 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

B. The Sixth Circuit's View: Review Judicial Estoppel Rulings De Novo.

Still, the Sixth Circuit perpetuates de novo review for one express reason: it has always done so. To be sure, the Sixth Circuit has repeatedly had misgivings about the propriety of de novo review. *See Javery v. Lucent Techs., Inc. Long Term Disability Plan for Mgmt. or LBA Emps.*, 741 F.3d 686, 697 (6th Cir. 2014) (explaining that the Sixth Circuit has "questioned the continuing viability of the de novo standard for judicial estoppel"); *Davis v. Fiat Chrysler Autos. U.S., LLC*, 747 F. App'x 309, 313 (6th Cir. 2018) (noting the "the seeming incongruity of applying de novo review to the inherently discretionary decision of a court to apply judicial estoppel.")

Even still, an en banc Sixth Circuit has refused to harmonize itself with its sister circuits. *See In re Ohio Execution Protocol*, 860 F.3d 881, 891 (6th Cir. 2017); *id.* at 906 n.1 (Moore, J., dissenting). The Sixth Circuit has made clear that de novo review of judicial estoppel will continue until it receives explicit direction from

this Court. *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008) ("Without a more definitive statement from the Supreme Court," the Sixth Circuit will "apply the de novo standard to" judicial estoppel rulings); *In re Ohio Execution Protocol*, 860 F.3d at 906 n.1 (Moore, J., dissenting) (noting the en banc Sixth Circuit's opportunity to align its standard of review with other circuits and failing to do so). The Sixth Circuit has made clear that it will not align with its sister circuits until this Court instructs it to do so.

The standard of review split is not only entrenched, it is outcome determinative here. The district court and the Sixth Circuit agree—Shufeldt's positions were clearly inconsistent. App.10–15, 30–34. But the courts diverged on whether judicial acceptance had occurred.

Under de novo review, the Sixth Circuit reviewed the decision anew, substituting its own judgment for the district court's well-reasoned conclusion. App.8. But on abuse-of-discretion review, the district court's boots-on-the-ground perspective would have received meaningful deference. The reviewing court would "remain mindful of its obligation not to substitute its judgment for that of the [district court]." *Synopsys*, 374 F.3d at 32 (cleaned up); *cf. Ardese v. DCT, Inc.*, 280 F. App'x 691, 696 (10th Cir. 2008) (Gorsuch, J.) ("[T]hat another judge in another case might have made a different decision about applying an equitable doctrine does not suggest that the district court in this case abused its discretion.").

III. This Case Presents An Ideal Vehicle For This Court To Fill A Doctrinal Void And Resolve Two Circuit Splits.

This Court has provided little clarification on the federal common law doctrine in the two decades since *New Hampshire*. *See* 18B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4477 (2d ed. & Supp. 2021) ("The lack of clear [judicial estoppel] theory may be due in part to the relative dearth of Supreme Court decisions."). The result has been inconsistent application of the doctrine between circuits, as evidenced by the two circuit splits embodied in this case. This case presents the opportunity to resolve circuit splits and fill the void in this Court's guidance.

First, this case provides an ideal vehicle to address two circuit splits—the proper scope of preliminary judicial acceptance and the proper standard of review for a district court's application of judicial estoppel. Judicial estoppel is a tool to "prevent improper use of judicial machinery." *New Hampshire*, 532 U.S. at 750 (cleaned up). A flexible, context-driven approach to the judicial acceptance factor ensures that district courts can wield this tool effectively against litigant chicanery. Because both the district court and the Sixth Circuit agree that respondent advanced two clearly inconsistent positions, this case presents an opportunity to nip the Sixth Circuit's rigid, formulistic approach to judicial acceptance in the bud.

Moreover, this case presents an opportunity for this Court to resolve the persistent split over the

proper standard of review of a district court's application of judicial estoppel. This Court has not shied from correcting an improper vestigial standard of review that exists only as a lone circuit's relic. *See McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1167 (2017). Though an "inquiry into the appropriate standard of review cannot be resolved by a head-counting exercise," the Sixth Circuit's ongoing isolation from its sister circuits is complete, unchanging, and explicitly awaits this Court's correction. *Id.*

These divergences call out for correction. Though the decision below is unpublished, this should carry "no weight in [the Court's] decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam); *see also Ricci v. DeStefano*, 557 U.S. 557, 576 (2009). Rather, the crystalline nature of these questions warrants certiorari.

Second, this case presents an opportunity to end this Court's silence and harmonize the circuits on an equitable doctrine of great importance. Judicial estoppel is part of the warp and weft of judicial integrity, and "justice must satisfy the appearance of justice." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). This Court serves as a watchful sentinel for threats to that integrity and oversees the lower courts that must likewise protect the judicial machinery from manipulation. The doctrine, though perhaps not as ubiquitous as other equitable doctrines, touches on all corners of substantive law, often appearing in bankruptcy, tax, patent, and other cases. *See, e.g.*, *Egenera, Inc. v. Cisco*

Sys., Inc., 972 F.3d 1367, 1379 (Fed. Cir. 2020) (patent); *Javery v. Lucent Techs., Inc. Long Term Disability Plan for Mgmt. or LBA Emps.*, 741 F.3d 686, 698 (6th Cir. 2014) (bankruptcy and ERISA); *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) (tax). Given the importance and the reach of the doctrine, certiorari review is necessary to fill the void in this Court's guidance on the doctrine and resolve these circuit splits.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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