

No. _____

In The
Supreme Court of the United States

—◆—
TERESA R. MANNING,

Petitioner,

v.

CAROLYN JONES and GAIL B. AGRAWAL,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

The circuits are confused regarding when the government can be subject to judicial estoppel.

Petitioner sued Carolyn Jones, Iowa College of Law Dean, pursuant to 42 U.S.C. §1983, alleging First Amendment discrimination in hiring based upon Petitioner's conservative views. The case was tried in 2012. Respondent, represented by the Iowa Attorney General, maintained that she was not liable since the faculty made hiring decisions and not her.

The jury deadlocked but the District Court entered judgment for Respondent, after having declared a mistrial.

On the ensuing appeal Respondent, seeking advantage through the "business judgment rule", changed position by claiming that "of course" the Dean was the decision-maker. Petitioner then moved in the 8th Circuit to prevent the Dean from arguing the opposite at any second trial, based on judicial estoppel.

In a footnote, the 8th Circuit's opinion granting a new trial held that the Dean had final hiring authority. Nevertheless, Respondent repeatedly argued the opposite on retrial. The jury returned a verdict for Respondent, and a different panel of the 8th Circuit affirmed.

The Question Presented is:

Should Respondent have been judicially estopped, and was Petitioner denied a fair trial and due process of law because she wasn't?

LIST OF PARTIES TO THE PROCEEDING

TERESA R. MANNING (*f/k/a* WAGNER) (Petitioner)

CAROLYN JONES (Respondent)

GAIL B. AGRAWAL (Respondent)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
LIST OF PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVI- SIONS.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT.....	5
POINT I – THE LAW IS IN A STATE OF CON- FUSION NATIONWIDE OVER WHETHER EQUITABLE DOCTRINES – IN THIS CASE JUDICIAL ESTOPPEL – CAN BE APPLIED AGAINST THE GOVERNMENT IN FAVOR OF A PRIVATE LITIGANT	5
A. ESTOPPEL AGAINST THE GOVERN- MENT – GENERALLY	5
B. THE ISSUE HAS BEEN EXPLICITLY LEFT OPEN BY THIS COURT AND NEVER RESOLVED.....	6
POINT II – THIS IS A RECURRING ISSUE.....	10
POINT III – THIS CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO RESOLVE THE CONFUSION IN LINE WITH THE WEIGHT OF AUTHORITY FROM THE COURTS OF APPEAL.....	12

TABLE OF CONTENTS – Continued

	Page
A. THE GOVERNMENT INCONSISTENCY CONSTITUTED AFFIRMATIVE MIS- CONDUCT.....	12
B. THE GOVERNMENT INCONSISTENCY IS OF RECORD	13
C. THERE WAS SERIOUS CONSTITUTIONAL INJUSTICE TO THE PETITIONER.....	13
D. THE PUBLIC INTEREST WILL NOT SUFFER UNDUE DAMAGE.....	14
CONCLUSION.....	15

APPENDIX

2017 opinion of the 8th Circuit Court of Appeals	A-1
2016 Order of the United States District Court for the Southern District of Iowa	A-7
2014 opinion of the 8th Circuit Court of Appeals	A-59
2017 order of the 8th Circuit Court of Appeals denying rehearing	A-74
Relevant portion of 8th Circuit oral argument on February 13, 2014	A-75
Relevant portion of Petitioner’s 8th Circuit post- argument motion.....	A-76
Relevant portions of 2015 trial transcript.....	A-80

TABLE OF AUTHORITIES

	Page
UNITED STATES SUPREME COURT	
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	13
<i>Bradshaw v. Stumpf</i> , 545 U.S. 175 (2005).....	11
<i>Calderon v. Thompson</i> , 523 U.S. 538 (1998).....	10
<i>Federal Crop Insurance Co. v. Merrill</i> , 332 U.S. 380 (1947).....	12
<i>Heckler v. Community Health Services, Inc.</i> , 467 U.S. 51 (1984)	7
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001).....	6
<i>Nix v. Whiteside</i> , 475 U.S. 157 (1986).....	13
<i>Office of Personnel Management v. Richmond</i> , 464 U.S. 414 (1990)	7, 8, 11
<i>Pyle v. Kansas</i> , 317 U.S. 213 (1942).....	14
<i>Rock Island A. & L. R. Co.</i> , 254 U.S. 141 (1920)	12
<i>St. Regis Paper Co. v. United States</i> , 368 U.S. 208 (1961).....	12
COURTS OF APPEAL	
<i>Allen v. Zurich Insurance Co.</i> , 667 F.2d 1162 (4th Cir., 1982)	6
<i>Bartko v. SEC</i> , 845 F.3d 1217 (D.C. Cir., 2017).....	5, 9
<i>Calderon v. Thompson</i> , 120 F.3d 1045 (9th Cir., 1997).....	10
<i>Gutierrez v. Gonzales</i> , 458 F.3d 688 (7th Cir., 2006).....	8

TABLE OF AUTHORITIES – Continued

	Page
<i>Maryland Dept. Human Resources v. U.S. Dept. of Agriculture</i> , 976 F.2d 1462 (4th Cir., 1992)	8
<i>Nagle v. Acton-Boxborough School Dist.</i> , 576 F.3d 1 (1st Cir., 2009)	5, 8
<i>Robb-Evans & Assoc. LLC v. United States</i> , 850 F.3d 24 (1st Cir., 2017)	8
<i>Scarano v. Central R. Co.</i> , 203 F.2d 510 (3d Cir., 1953)	13
<i>United States v. Bell</i> , 602 F.3d 1074 (9th Cir., 2010)	9
<i>United States v. Bloom</i> , 112 F.3d 200 (5th Cir., 1997)	8
<i>Watkins v. U.S. Army</i> , 875 F.2d 699 (9th Cir., 1989)	9
<i>Whaley v. Belleque</i> , 520 F.3d 997 (9th Cir., 2008)	10
 OTHER AUTHORITIES	
<i>SEC v. Electronics Warehouse, Inc.</i> , 689 F. Supp. 53 (D. Conn., 1988)	5
<i>Stretch v. Watson</i> , 6 NJ Superior 456 (1949)	6
ABA Professional Standards Model Rule 3.3	13
Anne Bowen Poulin, “Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight”, 89 Cal. L. Rev. 1423 (2001)	11

OPINIONS BELOW

The most recent opinion of the Court of Appeals affirming the judgment in favor of the Respondent is published at *Manning v. Jones*, 875 F.3d 408 (8th Cir., 2017) and is included in the Appendix at A-1. Rehearing *en banc* was denied in an unpublished order dated December 21st, 2017, included in the Appendix at A-74. A prior opinion of the Court of Appeals is reported at *Wagner v. Jones*, 758 F.3d 1030 (8th Cir., 2014), and is included in the Appendix at A-59.

**JURISDICTION**

The Court of Appeals affirmed the judgment of the District Court by decision dated November 7th, 2017 and denied rehearing by order dated December 21st, 2017. This Court has jurisdiction to review the final decisions of the Court of Appeals under 28 U.S.C. §1254(1).

**CONSTITUTIONAL AND
STATUTORY PROVISIONS**

Amendments V and XIV – “No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .”



STATEMENT OF THE CASE

In 2009 the Petitioner brought an action in the District Court for the Southern District of Iowa pursuant to 42 U.S.C. §1983 against the Respondent Jones (hereinafter “Respondent”), claiming that Respondent refused to hire her for a legal writing instructor position at the University of Iowa College of Law due to Petitioner’s well known conservative political views. It was not disputed that at the time the law school faculty was overwhelmingly liberal in political orientation, with (for example) only one registered Republican on a fifty member faculty.

The Respondent was the sole named Defendant in the action¹, since 1983 actions are brought only against the responsible persons in their individual or official capacities, the legal doctrine of respondeat superior being not applicable in such cases.

The case went to a trial before a jury in 2012.

At this first trial the Respondent argued that she herself could not be held liable because the faculty had final authority to make all hiring decisions, taking advantage of §1983’s technical restrictions that made her the sole party Defendant to begin with.

Although the jury deadlocked, the District Court entered judgment for the Respondent. The Petitioner timely appealed to the United States Court of Appeals

¹ Gail B. Agrawal was later named Dean of the law school and added as a party Defendant for purposes of prospective relief only.

for the 8th Circuit, and the appeal was argued on February 13th, 2014. At the oral argument of the appeal the Respondent, represented by the Iowa State Attorney General, and seeking to take advantage of the 8th Circuit's business judgment jury instruction², and in so doing argued that in fact she had final authority in hiring decisions, the opposite of the argument that she had made at the trial. A-75.

The Petitioner then filed motions with the Court of Appeals on judicial estoppel and due process grounds, seeking to have the Respondent precluded from arguing at any retrial what she had argued at the first – namely, that the faculty had final authority in hiring decisions and not her. A-76 – A-79. These motions were not formally granted, but in its opinion reversing the judgment of the District Court and remanding for a new trial the Court of Appeals included this footnote (“footnote 1”):

The record establishes that although the College of Law uses a multifaceted process for receiving advice and consent from relevantly involved faculty and staff, especially in the selection of new members of the teaching faculty, the Dean has final authority and responsibility for the exercise of the College's employment actions. In this case, Dean Jones acted in her individual capacity as a supervisor. Under such circumstances, a supervisor

² “You may not return a verdict for the plaintiff just because you might disagree with the defendant's decision or believe it to be harsh or unreasonable.” 8th Circuit Model Civil Jury Instruction 5.11.

may incur liability under 42 U.S.C. § 1983 for a violation of a federally protected right when the supervisor is personally involved in the violation or when the supervisor's corrective action constitutes deliberate indifference toward the violation.

A-60.

Despite this, on remand at a second jury trial held in 2015 the Respondent again argued repeatedly that it was the faculty, and not her, that had final authority in hiring decisions. A-80 – A-82.

The second jury returned a verdict for Respondent. On appeal from the ensuing judgment a different panel of the Court of Appeals affirmed, holding that the prior panel's guidance in footnote 1 did not constitute a "judicial admission" and thus did not preclude or estop the Respondent from making her inconsistent argument at the second trial. A-4 – A-5.



**REASONS FOR GRANTING THE WRIT
POINT I – THE LAW IS IN A STATE OF
CONFUSION NATIONWIDE OVER WHETHER
EQUITABLE DOCTRINES – IN THIS CASE
JUDICIAL ESTOPPEL – CAN BE APPLIED
AGAINST THE GOVERNMENT IN FAVOR
OF A PRIVATE LITIGANT.**

**A. ESTOPPEL AGAINST THE GOVERNMENT –
GENERALLY**

The application of equitable doctrines against the government has been described by one lower court as “strictly limited”. *See, Bartko v. SEC*, 845 F.3d 1217 (D.C. Cir., 2017), citing *SEC v. Electronics Warehouse, Inc.*, 689 F. Supp. 53, 73 (D.Conn. 1988), *aff’d*, 891 F.2d 457 (2d Cir. 1989).³

Judicial estoppel, which is at issue in this case, is one such equitable doctrine.

This Court had occasion to discuss that doctrine while applying it in the exercise of its original jurisdiction to resolve a border dispute between two states:

“Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter,

³ While most federal court authorities discussing this issue involve the application of equitable defenses to the *federal* government or its agencies and not (as here) the states, this distinction is not generally observed in the lower courts, and state governments appear to benefit equally from the near immunity to equitable defenses. *See, e.g., Nagle v. Acton-Boxborough Reg’l School District*, 576 F.3d 1 (1st Cir., 2009).

simply because his interests have changed, assume a contrary position. . . .”

New Hampshire v. Maine, 532 U.S. 742, 749 (2001).

Judicial estoppel is invoked “. . . to prevent the perversion of the judicial process . . .” and to prevent parties from “. . . playing fast and loose with the courts. . . .” *New Hampshire*, 532 U.S. at 750, quoting *Allen v. Zurich Insurance Co.*, 667 F.2d 1162, 1166 (4th Cir., 1982) and *Stretch v. Watson*, 6 NJ Superior 456, 469 (1949), respectively.

B. THE ISSUE HAS BEEN EXPLICITLY LEFT OPEN BY THIS COURT AND NEVER RESOLVED

Following these principles, this Court showed little hesitation in applying judicial estoppel against the State of New Hampshire in favor of the State of Maine. But the open question remaining is whether that specific equitable doctrine can be similarly applied against a government not only “. . . in a case between two states, in which each owes the other a full measure of respect. . . .” as in *New Hampshire* (532 U.S. at 756), but rather in favor of a private litigant.

In the two most recent cases where this Court has explicitly considered whether the government may be subject to an estoppel at the urging of a private litigant, a consensus of sorts seemed to coalesce around two answers: a) almost no; and b) absolutely no.

Thus in *Heckler v. Community Health Services*, 467 U.S. 51 (1984) the Court left the door ajar, ever so slightly, variously remarking that “. . . the government may not be estopped on the same terms as any other litigant . . . ” (467 U.S. at 60) and that the arguments in favor of “. . . a flat rule that estoppel may not in any circumstances run against the Government . . . ” are “substantial”. *Id.* But the *Heckler* Court also noted “. . . the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government” (467 U.S. at 61) and accordingly “hesitated” to hold that there could be *no* cases where estoppel might be applied to the government. *Id.*

In the end, in *Heckler* this Court declined – as it had on numerous prior occasions – to rule on the issue (“We have left the issue open in the past, and do so again today”) (467 U.S. at 60) (citations omitted), while Justice Rehnquist, in a concurring opinion, expressed concern that some of the language in the majority opinion gave “. . . an impression of hospitality towards claims of estoppel against the Government which our decided cases simply do not warrant” (467 U.S. at 68) (Rehnquist, J., concurring).

The Court reached a similar impasse in *Office of Personnel Management v. Richmond*, 496 U.S. 414, 434 (1990) where, in again finding an alternative ground for deciding that case, noted that the estoppel issue had “. . . taken on something of a life of its own” 496 U.S. at 421. While acknowledging that “. . . federal courts have continued to accept estoppel claims

[against the government] under a variety of rationales and analyses . . .” (496 U.S. at 422) the *Richmond* opinion went on to note that this Court had nevertheless “reversed every finding of estoppel that we have reviewed.” *Id.*

This history has led one Court of Appeals to recently remark that “. . . estoppel against the government is hen’s teeth rare. . . .” *Robb Evans & Associates, LLC v. United States*, 850 F.3d 24, 33 (1st Cir., 2017); see also, *Nagle v. Acton-Boxborough Regional School Dist.*, 576 F.3d 1, 3-4 (1st Cir., 2009) (characterizing *Richmond* as “. . . a step back from *Heckler’s* dictum [leaving the door open to estoppel claims against the government] . . .”). The 4th Circuit has noted that “The Supreme Court has never held that the federal government may be equitably estopped.” *Maryland Dep’t of Human Resources v. U.S. Dep’t of Agric.*, 976 F.2d 1462 (4th Cir., 1992).

The 5th Circuit appears to entertain claims of estoppel against the government so long as “affirmative misconduct” is shown. *United States v. Bloom*, 112 F.3d 200, 205 (5th Cir., 1997) (citing dicta from *Heckler*) The same appears to be true for the 7th Circuit. *Gutierrez v. Gonzales*, 458 F.3d 688, 691 (7th Cir., 2006).

The 9th and D.C. Circuits, however, have offered the most elaborate elucidation of when estoppel may be applied to a government litigant:

Before the government will be estopped, however, two additional elements must be satisfied beyond those required for traditional

estoppel. First, “[a] party seeking to raise estoppel against the government must establish ‘affirmative misconduct going beyond mere negligence; even then, estoppel will only apply where the government’s wrongful act will cause a serious injustice, and the public’s interest will not suffer undue damage by imposition of the liability.’”

Watkins v. U.S. Army, 875 F.2d 699, 707 (9th Cir., 1989) (*en banc*) (applying equitable estoppel “where justice and fair play require it”) *Accord, United States v. Bell*, 602 F.3d 1074, 1082 (9th Cir., 2010).

Again, the D.C. Circuit very recently put it this way:

“Where courts have permitted equitable defenses to be raised against the government, they have required that the agency’s misconduct be egregious and the resulting prejudice to the Respondent rise to a constitutional level.”

Bartko v. SEC, 845 F.3d 1217, 1227 (D.C. Cir., 2017).

To address this confusion in the circuits, then, this Court should entertain a case containing the “additional elements” set forth by the D.C. and 9th Circuits, namely: a) affirmative misconduct by the government actor; b) serious injustice to the opposing litigant(s); and c) no undue damage to the public interest.

As more fully explained below, this is that case.

POINT II – THIS IS A RECURRING ISSUE.

While it may appear from the foregoing that the question of whether estoppel (and particularly judicial estoppel) may be applied to the government in favor of a private litigant arises only infrequently – this Court having addressed the issue sparingly over three decades – the courts of appeal in fact confront the issue regularly, albeit mainly in the context of government overreaching in criminal cases.

For example, in a 1997 case, Judge Kozinski of the 9th Circuit dissented from the grant of relief in a habeas case, but openly worried that the government had obtained its conviction by taking inconsistent positions, lamenting that he could find no criminal case in which judicial estoppel had been invoked against the government. *Calderon v. Thompson*, 120 F.3d 1045, 1070-71 (9th Cir., 1997) (en banc) [reversed, *Calderon v. Thompson*, 523 U.S. 538 (1998)] More recently, the 9th Circuit applied judicial estoppel to preclude the state from arguing that a parolee’s claim was not moot when it had argued in the state courts that it was. *Whaley v. Belleque*, 520 F.3d 997 (9th Cir., 2008).

One scholar put the matter this way:

In a surprisingly large number of criminal cases, the prosecution advances inconsistent positions on a common set of facts in separate proceedings. For example, in a number of cases where two Respondents were charged with capital murder and the victim died as a result of a single gun shot, the prosecution has argued in separate proceedings that each of

the two Respondents fired the fatal shot. The prosecution not only argued for conviction on the basis that the particular Respondent on trial shot the victim, but also, the prosecution argued for the death sentence, emphasizing the Respondent's role as the shooter. Using these inconsistent arguments, the prosecution obtained convictions and death sentences for both Respondents. Unfortunately, the law has no defined response to this problem.

Anne Bowen Poulin, "Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight", 89 Cal. L. Rev. 1423 (2001) (emphasis supplied)

Moreover, this Court may have unintentionally engendered a tolerance for government inconsistency not only by leaving the estoppel issue technically open for decades while taking a very restricted view of the potential for an individual's recourse to equitable relief, as in *Richmond*; but also by concurring opinions in which at least some members of this Court have *explicitly* indicated tolerance for deliberate government inconsistency.⁴

Whether in the criminal context or – as here – a civil one, Justice Jackson's observation should be finally addressed by this Court; namely, that while "Men must turn square corners when they deal with the

⁴ "This Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting Respondents based on inconsistent theories." *Bradshaw v. Stumpf*, 545 U.S. 175, 190 (2005) (Thomas, J., concurring).

government.” [*Rock Island, A. & L. R. Co.*, 254 U.S. 141, 143 (1920) (Holmes, J.)], there is nevertheless “. . . no reason why the square corners should constitute a one-way street.” *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 387-388 (1947) (Jackson, J. dissenting) *See also, St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (“It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government” (Black, J. dissenting)).

**POINT III – THIS CASE IS AN EXCELLENT
VEHICLE FOR THIS COURT TO RESOLVE
THE CONFUSION IN LINE WITH THE
WEIGHT OF AUTHORITY FROM
THE COURTS OF APPEAL.**

The facts of this Petitioner’s case contain all of the “additional elements” alluded to by those courts of appeal (the 9th and the D.C. Circuits) that have considered the question in detail. Moreover, there can be no dispute about the relevant facts, since they are incontrovertible matters of record.

A. THE GOVERNMENT INCONSISTENCY CONSTITUTED AFFIRMATIVE MISCONDUCT

The Respondent’s counsel’s representation to the 8th Circuit Court of Appeals, contradicting what he ultimately argued to two juries, is affirmative misconduct of the most basic sort. It undermined the search

for truth to which every trial aspires. *Nix v. Whiteside*, 475 U.S. 157, 171 (1986). It was inconsistent with the obligations of government attorneys not to engage in “improper methods” in a quest to win at all costs. *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also*, Model Rules of Professional Conduct 3.3 (“Candor Toward the Tribunal”).

B. THE GOVERNMENT INCONSISTENCY IS OF RECORD

The representations of counsel to the 8th Circuit are part of the appellate record and included at A-75. The contradictory representations to the jury on remand are in the trial transcripts and the relevant portions are included at A-80 – A-82.

C. THERE WAS SERIOUS, CONSTITUTIONAL INJUSTICE TO THE PETITIONER

The Petitioner was denied a law school teaching position to which a jury might otherwise have found her entitled, and suffered 1st Amendment discrimination for her conservative political views. But more than that, she was denied her right to a fair adjudication of her dispute against the Respondent by a government actor who “played fast and loose with the [federal] courts” [*Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir., 1953)], asserting contradictory facts whenever it seemed advantageous, and regardless of their truth. Confusion aside, there seems little question that the perversion of the judicial process by the government’s

taking contradictory positions amounts to a violation of due process in the criminal context where liberty is at stake.⁵ There is no principled reason why this Petitioner's First Amendment, due process and fair trial rights should not also be regarded as serious enough to arguably entitle her to equitable relief, even as over and against the government. This Court should decide that issue in this case.

D. THE PUBLIC INTEREST WILL NOT SUFFER UNDUE DAMAGE

All that is at stake should the Petitioner finally prevail is a modest salary for a law school teaching position and attorney's fees as a prevailing party. It is inconceivable that either one of these, or both together, would constitute a significant drain on Iowa's public resources. In any event, an informed ruling on that issue should await the participation of the Respondent at the merits stage assuming certiorari is granted.

In sum, this Petition affords this Court the opportunity to resolve an important and long standing area of confusion in the law where it can strike a balance between the legitimate prerogatives of the government and the individual's need for equitable relief from

⁵ *Pyle v. Kansas*, 317 U.S. 213, 214 (1942) (finding due process violation where “. . . the record in the trial of one Merl Hudson for complicity in the same murder and robbery for which petitioner was convicted, held about six months after petitioner's direct appeal from his conviction, reveals that *the evidence there presented is inconsistent with the evidence presented at petitioner's trial. . .*”) (emphasis supplied).

government overreach, taking into account all the factors that have been cited by the courts of appeals that have considered the issue in the most detail.



CONCLUSION

WHEREFORE, the Petitioner respectfully prays that this Court grant her petition for a writ of certiorari.

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