No. 17-772

In The
Supreme Court of the United States

BRENT NICHOLSON, et al.,

Petitioners,

v.

THRIFTY PAYLESS, INC., and
RITE AID CORPORATION,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Petition demonstrates that there is an increasingly recurring conflict among the circuits regarding their treatment of "inadvertence or mistake" in the bankruptcy context in determining the application of judicial estoppel to bar a plaintiff from pursuing a meritorious claim as set forth in *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).

There has been a dramatic increase in cases[1] throughout the circuits where savvy defendants have sought to dispose of litigation on the merits where a plaintiff has filed a bankruptcy and failed to disclose or adequately disclose the existence of the claim. The increased litigation is due, in large part, to the disparate interpretations of "inadvertence and mistake" as set forth in *New Hampshire*.

In its opposition, Thrifty argues the *New Hampshire* decision, and the five-to-six conflicting decisions it has spawned, are explained by factual distinctions among those cases – that "there is no fundamental conflict[.]" Opp. at 9. But Thrifty's interpretation of the various conflicts is incorrect. Panels, like the one here, refuse to consider evidence of the debtor's actual inadvertence and instead apply a presumption of deceit on the debtor's part where she has knowledge of a potential claim but failed to disclose it in her bankruptcy.

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[1] Judicial estoppel was the subject of only 206 cases from 1988-2003. In the past decade, the doctrine has been the subject of nearly 18,000 federal court opinions.

Disregarding the subjective intent of a debtor and applying judicial estoppel to prevent her from having her day in court flouts the Court's instruction in *New Hampshire* that "it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.'" *New Hampshire*, 532 U.S. at 753.

The split in the circuits has exacerbated uncertainty in the courts and, until remedied, serves as an invitation to savvy defendants to scour bankruptcy filings to identify failures to disclose the existence of a claim and thereafter seek to dismiss the plaintiff's claim as a result. A defendant's success does not hinge on evidence of the debtor's actual inadvertence or mistake, if the case is in a circuit that presumes deceit, or as this case serves as example – if the panel assigned does not consider it. Petitioner respectfully submits that is not what this Court intended in *New Hampshire*.

ARGUMENT

I. Thrifty Does Not Address the Five-to-Six Circuit Split Regarding the Treatment of the Issue of "Inadvertence" to the Application of Judicial Estoppel.

The Petition explains how the decision below is one of many decisions in the five-to-six inter-circuit conflict and is a good example of how panel decisions result in intra-circuit splits as well.

Thrifty argues there is no fundamental split in the circuits to resolve. Opp. at 10. Thrifty does not address even one of the cases in the five circuits that require consideration of actual subjective intent. It merely asserts that the decisions are fully reconcilable on their facts. Thrifty is wrong.

As set forth in the Petition, the First, Third, Fifth, Eighth, Tenth, and D.C. Circuits treat the fact of the debtor's omission as evidence that there can be no inadvertence or mistake; the omission is tantamount to making a mockery of the judicial system. *See*, *e.g.*, *Slater v. U.S. Steel Corporation*, 871 F.3d 1174, 1180 (11th Cir. 2017).

Thrifty's misunderstanding of the circuit split is apparent when it incorrectly states "Petitioners argue . . . six circuits do not consider whether failure to disclose an asset in bankruptcy was inadvertent." Opp. at 10-1. It is not disputed that those circuits apply an analysis of "inadvertence or mistake" but the analysis they conduct and the facts they consider is materially different.

Judge Griffith, dissenting in *Marshall v. Honeywell Technology Sys. Inc.*, 828 F.3d 923, 933 (D.C. Cir. 2016), provides an example of the narrow review of the facts conducted by those circuits:

> The majority does not dispute that judicial estoppel is inappropriate in cases of mistake. But [it] improperly limits the evidence that it considers in evaluating whether Marshall made a mistake. It concluded that Marshall

> lied to the bankruptcy court solely because . . . she concealed her assets. . . . But this conclusion overlooks Marshall's oral disclosure, which suggests she made a mistake on her forms. . . . Nowhere does the majority acknowledge that Marshall's oral disclosure might also bear on whether she made a mistake on her written forms.

Marshall, 828 F.3d at 933-4 (Griffith, J., dissenting).

The courts in those six circuits apply a presumption of deceit without regard to evidence of a debtor's subjective mistake or inadvertence, where she has knowledge of a claim and has failed to disclose it in her bankruptcy. In those circuits, the courts will apply judicial estoppel.

Relying on language like "totality of the circumstances," Thrifty attempts to frame these decisions in broader terms. Opp. at 11-4.[2] But Thrifty does not cite to any case among these circuits where a debtor's evidence of inadvertence or mistake was applied to resist the application of the doctrine.[3]

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[2] Thrifty ignores citations to recent cases in the Eighth and Fifth Circuits. Compare Opp. at 12-3 to Petition at 21-4.

[3] Thrifty cites *Stallings v. Hussmann Corp.*, 447 F.3d 1041 (8th Cir. 2006) as permitting an exception to application of judicial estoppel if the facts warrant it. Opp. at 13. Thrifty ignores the more recent case in the same circuit applying the presumption of deceit: *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030 (8th Cir. 2016) (" . . . a debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.").

Thrifty does not address the Fifth Circuit's decision in *Flugence v. Axis Surplus Ins.* (*In re Flugence*), 738 F.3d 126 (5th Cir. 2013). Pet. at 23-4. There, the Fifth Circuit rejected a debtor's evidence of inadvertence because she did not initially have a cause of action when she filed her bankruptcy, she relied upon her attorney's advice, and the flux in the state of the law regarding a debtor's duty to disclose. *Id.*[4] Despite referring to the hypothetical situation where application of judicial estoppel might not be warranted, the decisions make clear that the presumption of deceit is indiscriminately applied in these circuits, despite evidence of actual inadvertence. These decisions cannot square with *New Hampshire*.

Thrifty cites a recent opinion from the D.C. Circuit for the proposition that even courts that ignore a debtor's subjective intent still recognize that they must examine the facts. Opp. at 13, *citing Marshall*, 828 F.3d at 932. If anything, Thrifty's reliance on *Marshall* makes clear that these cases consume significant judicial resources,[5] result in disparate outcomes that require intervention, and are inconsistent with *New Hampshire.*

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[4] Thrifty similarly ignores that the determinative issue regarding inadvertence and mistake in the First and Third Circuits is the debtor's knowledge of a claim and failure to disclose it, not actual mistake or inadvertence. Compare Petition at 24 to Opp. at 11-2.

[5] "Cases such as this one are legion in the other circuits." *Marshall*, 828 F.3d at 931.

Applying an abuse of discretion standard, the *Marshall* court found no abuse where a court rejected the debtor's argument that her non-disclosure was inadvertent as evidenced by her oral testimony to the trustee regarding the claim itself at the creditor's meeting. *Id.*

The dissent explained summary judgment was improper because there was a genuine dispute regarding debtor's actual mistake:

> Because Marshall told the trustee about her civil claims, there is a genuine dispute over whether she lied or simply made a mistake on her bankruptcy forms. [A] straightforward approach to mistake is particularly appropriate in the bankruptcy context, where honest mistakes and oversights are not unheard of. . . .
>
> [There is] little to be gained by jumping to the conclusion that [a debtor] lied. When we apply judicial estoppel based on bankruptcy omissions, the costs primarily fall not on the plaintiff, but on her creditors, who might otherwise recover assets from successful lawsuits.

Id. at 933-5 (internal citations omitted).

As the Petition establishes, there are five circuits that will consider evidence of a debtor's actual subjective intent with regard to inconsistent disclosures.[6] If evidence of inadvertence exists, she will not be barred

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[6] The Fourth, Sixth, Seventh, Ninth, and most recently the Eleventh Circuits apply the common understanding of inadvertence and mistake.

from pursuing that claim. Thrifty fails to address any of the opinions of the circuits that require consideration of actual subjective intent.

II. The Decision Below Creates an Intra-Circuit Split and Reflects Inconsistent Treatment of Inadvertence or Mistake by Circuit and By Panel.

The Petition explains how the decision below created an intra-circuit split because the panel departed from its own precedent. *See Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013). In *Ah Quin*, the Ninth Circuit rejected the "narrow" interpretation of inadvertence because it was "too stringent" where there is evidence of inadvertence or mistake in the record. *Id.* at 272.

The Ninth Circuit adopted the ordinary understanding of "mistake" and "inadvertence." The *Ah Quin* court explained:

> [R]ather than applying a presumption of deceit, judicial estoppel requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood. Courts *must determine whether the omission occurred by accident or was made without intent to conceal. The relevant inquiry is not limited to the plaintiff's knowledge of the pending claim and the universal motive to conceal a potential asset – though those are certainly factors. The relevant inquiry is, more broadly, the plaintiff's*

> *subjective intent when filling out and signing the bankruptcy schedules.*

Id. at 276-7 (emphasis added).

Thrifty does not address *Ah Quin*. Opp. at vii. Instead, it summarily proclaims: "The Ninth Circuit here followed the rule that petitioners advocate. . . . This case presents no controversy regarding the applicable rule in the Ninth Circuit as it was followed." Opp. at 10. This is a misstatement of fact and law.

The decision below disregarded the subjective intent analysis required by *Ah Quin*, and ignores the rationale supporting it. The opinion below instead relied upon the presumption of deceit rule: "If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action." Pet. App. 3 (citing the rule applied and disregarding evidence that contradicted assertion that debtor offered no explanation).

Nicholson's initial disclosures could indicate that he intended to hide the existence of four of his business interests and their subsequent claims against Thrifty. But the evidence of his actual disclosure of those interests made before confirmation and before Thrifty claimed judicial estoppel points in the other direction. That is precisely the type of material fact that the district court should not have resolved at summary judgment – where it should have construed all facts and inferences in favor of Nicholson – the non-moving

party. *See*, *e.g.*, *Marshall*, 828 F.3d at 935 (Griffith, J., dissenting).

Nicholson's failure to disclose on his initial schedules, without more, does not answer the question that *New Hampshire* and *Ah Quin* require be answered; namely, whether Nicholson's failure was *deliberate*, and so warranted application of judicial estoppel.

The panel's refusal to consider evidence of inadvertence – including his actual disclosure of the information to the Trustee, whose job it is to administer assets for the estate – puts the decision squarely in line with those circuits who apply a presumption of deceit where a debtor has failed to disclose without regard to actual inadvertence or mistake. *See*, *e.g.*, *Marshall*, 828 F.3d at 935. Petitioner respectfully submits that is not what this Court intended in *New Hampshire*.

III. This Case Is the Appropriate Vehicle to Resolve the Conflicts Central to the Viability of a Meritorious Claim when a Plaintiff Has Filed Bankruptcy and Failed to Disclose.

Thrifty argues, without support and disregarding the split in the circuits, that there "is no conflict with any decision of another United States Court of Appeal." Opp. at 9. The decision in this case, however, evidences both an inter-circuit and an intra-circuit split on an important issue affecting creditors in bankruptcy and a debtor's right to a trial on the merits.

Before *New Hampshire*, the doctrine of judicial estoppel was rarely invoked, but now it is applied by defendants to defeat litigation whenever an inconsistency in a plaintiff's bankruptcy case might be uncovered.

At present, debtors in five circuits are entitled to present evidence of inadvertence regarding inconsistent bankruptcy disclosures to resist application of judicial estoppel. Those circuit courts recognize that "[o]missions frequently occur" in the scheduling of debtor's assets, and "inconsistent statements made under oath are ubiquitous in litigation. . . ." *Slater v. U.S. Steel Corporation*, 820 F.3d 1193, 1238 (11th Cir. 2016). In six circuits, debtors cannot do so and failure to disclose will result in the barring of debtors' claims, thereby serving to reward the bad actor to the detriment of the creditors.

Thrifty claims there is "little reason for the Court to review the sole issue addressed[.]" Opp. at 19.[7] Beyond the circuits' struggles to apply the doctrine, this particular decision warrants the Court's attention because it expanded the doctrine of judicial estoppel to bar third-party plaintiffs from pursuing their claims because of the debtor's imperfect disclosure in his personal bankruptcy.

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[7] Thrifty argues that petitioners' claims were alternatively dismissed. Opp. at 17. The district court rejected arguments cutting off Thrifty's liability for the termination letters in prior motions for summary judgment and orders denying reconsideration. *See generally*, Opp. App. 16-22.

By affirming, the panel sanctioned the district court's summary judgment finding of privity between Nicholson and the LLCs. This finding against the non-moving party judicially estopped the LLCs from pursuing their claims against Thrifty. *See generally*, Pet. App. 1-8. This broad expansion of judicial estoppel prevents innocent non-debtor entities from pursuing claims, conflicts with Ninth Circuit precedent, and expands the doctrine's application when other circuits are contracting it. *See*, *e.g.*, *Slater*, 871 F.3d 1174 (11th Cir. 2017). The application of judicial estoppel to the third party plaintiffs who had no obligation to disclose is not appropriate and "undermines [the district court's] own integrity in the eyes of the public and implies that the Bankruptcy Court is either unwilling or incapable of overseeing debtor compliance with the law." *See*, *e.g.*, *Slater*, 820 F.3d at 1250.

CONCLUSION

For the reasons set forth above, and in the Petition, Petitioners urge the Court to grant the Petition.

Respectfully submitted,

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