IN THE SUPREME COURT
STATE OF GEORGIA

S19C1619

FULTON COUNTY, GEORGIA,

Petitioner,

v.

SANDRA WARD-POAG,

Respondent.

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

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On Behalf of the Georgia
Defense Lawyers Association

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AMICUS CURIAE BRIEF OF
THE GEORGIA DEFENSE LAWYERS ASSOCIATION

The Georgia Defense Lawyers Association ("GDLA") files this brief as *amicus curiae* in the above-styled appeal, showing the Court as follows:

INTRODUCTION

The Court of Appeals has ruled that a party's attempted deception with respect to its bankruptcy filings should not be held against that party through application of the doctrine of judicial estoppel ("the doctrine" or "judicial estoppel"). In doing so, the Court of Appeals relied on a string of Georgia precedent providing that "if [a] debtor initially fails to list the claim as a potential asset but later amends the bankruptcy filing or moves to reopen the bankruptcy proceeding to include the claim, judicial estoppel will not bar a later recovery on the claim." *Ward-Poag v. Fulton Cty.*, 351 Ga. App. 325, 329 (2019) (quotation omitted); *see also Benton v. Benton*, 280 Ga. 468, 470 (2006) ("Generally, judicial

estoppel is inapplicable when a plaintiff has successfully amended his or her bankruptcy petition to include any claim against the defendant as a potential asset because then it cannot be said that the position in the trial court is inconsistent with the position asserted by the plaintiff in the bankruptcy proceeding and, therefore, judicial estoppel does not bar his or her claim."). According to the Court of Appeals, this line of precedent purportedly permits amendments to bankruptcy schedules made solely in response to dispositive motions.

The Court of Appeals' decision and the precedent upon which it relied leaves the doctrine toothless in the bankruptcy context and jeopardizes the proper administration of justice in both bankruptcy courts and in related litigation pending in Georgia courts. Rigid application of this precedent to forbid trial courts from applying the doctrine, **particularly where (as here) there was an express and supported finding of deception by the trial court**, condones a lack of candor in Georgia courts. This rigid application ensures that the doctrine can no longer prevent perversion of the judicial process.

Georgia precedent also recognizes that judicial estoppel is a federal doctrine, and the line of precedent relied on by the Court of Appeals marks a divergence from the treatment of the doctrine in the Eleventh Circuit, to which Georgia courts have often referred for its persuasive authority. As the Eleventh Circuit similarly recognized,

> [j]udicial estoppel serves to prevent the perversion of the judicial process and protect its integrity. It cannot serve that purpose as well if a duplicitous debtor is assured that [s]he can always avoid the doctrine's bite by dismissing his bankruptcy petition [or amending her schedules] after [her] duplicity is found out. . . . To guarantee [Respondent] and others in [her] situation that, if caught, they could always undo the application of the judicial estoppel doctrine would render it toothless.

Weakley v. Eagle Logistics, 894 F.3d 1244, 1247 (11th Cir. 2018) (per curiam) (quotation and citation omitted). In *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017) (en banc), the Eleventh Circuit properly recognized that judicial estoppel was not to be applied inflexibly and instead continued applying the circuit's two-factor test, which "considers both the plaintiff's actions—whether he made inconsistent statements—and his motive—whether he intended to make a mockery of the judicial system." *Id.* at 1181. It is this test that the trial court in this case applied and which this Court should condone.

The divergence between federal law applying judicial estoppel and Georgia court application of that law combined with the resulting damage done to the doctrine are of central prominence in this case. Nullification of the doctrine of judicial estoppel in the bankruptcy context, which is the consequence of the Court of Appeals' decision in this case, certainly constitutes a matter of "great concern, gravity, or importance to the public" that will have a lasting negative impact in courts across this state. Ga. Sup. Ct. R. 40. Accordingly, the Court should grant certiorari to reconsider Georgia precedent with respect to the doctrine of judicial

estoppel in this context, particularly in light of the *Slater* decision. Trial courts should be permitted to engage in a more flexible inquiry such as that used by the trial court in this case that preserves the function of the judicial estoppel doctrine and encourages forthright behavior from litigants involved in a contemporaneous bankruptcy proceeding.

I. STATEMENT OF INTEREST

The GDLA is an association of more than 950 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice.

Two related and fundamental purposes of the GDLA are to elevate the standards of trial practice and to develop, establish, and secure court adoption or approval of a high standard code of trial conduct and courtroom manners. Additionally, it is part of the GDLA's policy to file amicus briefs where the issue or issues involved are of peculiar significance to the administration of justice. This case implicates all of these principles. The Court of Appeals decision jeopardizes basic standards of candor in trial practice, implicitly condones conduct that makes a mockery of the court, and undermines an intended purpose of the judicial

estoppel doctrine. Accordingly, the GDLA submits this brief in support of Petitioner Fulton County's Petition for Certiorari ("the petition").

II. BACKGROUND

The genesis of the underlying case is relatively simple and undisputed. As set forth by the Court of Appeals:

> In May 2013, Ward-Poag filed a voluntary petition for Chapter 13 bankruptcy, which was confirmed in March 2014 and required a payment plan that would conclude in March 2019.
>
> While her bankruptcy petition was pending, Ward-Poag alleged numerous instances from September 2015 to August 2016 in which a Fulton County commissioner attempted to use the amphitheater for his private gain, including repeated demands for dates to promote his own concerts. Ward-Poag rejected the commissioner's requests and, as a result, she alleged that she was demoted and faced other forms of retaliation by the commissioner. In August 2016, Ward-Poag sent ante litem notice of her whistleblower claim to the County. Thereafter, she filed the action at issue in this appeal in October 2016.
>
> On September 5, 2017, the County filed a motion for summary judgment, arguing, inter alia, that judicial estoppel barred Ward-Poag's claim because she failed to disclose her cause of action against the County as an asset in her bankruptcy proceeding. Thereafter, Ward-Poag filed an amended bankruptcy schedule on October 2, 2017, in which she identified her cause of action against the County as an asset; the value listed for the claim was $1.00.

Ward-Poag, 351 Ga. App. at 326-27.

After hearing the parties' positions on the motion at oral argument, the trial court issued an oral ruling granting the motion for summary judgment. In doing so, the trial court found as follows:

> THE COURT: I have had a chance to look at the *Slater* case over the recess and am aware that the Georgia case came out in August, *Slater* came out in October, 17th.
>
> MS . PARSONS: September.
>
> THE COURT: September, excuse me, a month later. And I'm going to, out of an abundance of caution, consider the *Slater* case for ruling on this issue. Your client did take an inconsistent position by not timely disclosing the – the asset – the potential asset this case would bring to her bankruptcy. And looking at motive that she may have had, intent, she certainly had plenty of time to make that disclosure. But, most importantly, I look at the intent that she had in announcing that her asset in this case was believed to be in the amount of $1, and I find that this is a mockery of this Court and a mockery of the bankruptcy court for her to – late disclosure coming on the heels when it did and then saying that it's a $1 -- $1 asset, and here she is asking for considerably more money than $1. And it's done with an intent to deceive creditors. And so I am going to grant – I'm going to consider that case, but I'm going to rule that she's judicially estopped from proceeding with this case as a result of that filing.
>
> MS. WEST: Your honor, if – if I may, would it change your mind if my client doesn't know anything about bankruptcy, it was her bankruptcy attorney that –
>
> THE COURT: No. She had a bankruptcy attorney. She had you during the pendency of this action. She is, in fact, an attorney. And that's my ruling . . . .

Proceedings Transcript Heard October 17, 2017 (T-48 to 49). The parties subsequently litigated a motion to reconsider, and each submitted evidence with regarding to Respondent's intent to deceive. Trial court held another hearing, in which it again heard argument on the matter and indicated it would deny the motion. Motions Transcript Heard December 19, 2017 (T-57).

The trial court subsequently issued a written order laying out its rulings with respect to the judicial estoppel issue. In that order, the trial court expressly found

that Respondent "had the requisite intent to deceive." May 22, 2018 Order on Pending Motions at 9 (R-4954). The trial court based this determination on several uncontroverted facts, including Respondent's amendment after the filing of the motion for summary judgment, her under-valuation of her claim ($1.00 in the bankruptcy matter for claims she had alleged were valued at $3,000,000 in the civil case), her level of sophistication as a law school graduate, her engagement of experienced bankruptcy counsel from the outset of her bankruptcy case, her failure to describe the nature of her claims in the bankruptcy court, and her delay in failing to make the appropriate disclosure of her claims. *Id.* at 9-10 (R4954-55).

Respondent appealed from the trial court's decision, and the Court of Appeals reversed, noting that

> At that time, her bankruptcy proceeding had not been discharged, dismissed, or otherwise adjudicated. Following the County's motion for summary judgment on the issue of judicial estoppel, Ward-Poag amended her bankruptcy petition to disclose her cause of action against the County. Although the County's concern with the timing of Ward-Poag's amendment is not unfounded, our precedent does not punish a litigant for amending her pending bankruptcy petition, after the filing of a dispositive motion rooted in judicial estoppel, to disclose a cause of action that ripened after the original bankruptcy petition was filed.

Ward-Poag, 351 Ga. App. at 330.

On its most granular level, the question presented to the Court by the petition is whether the trial court erred by applying the judicial estoppel doctrine to these facts. It did not. The trial court properly exercised its discretion and

considered several factors including Respondent's sophistication, her delay in amending her bankruptcy schedule to include her cause of action against Petitioner, and the value and description that she assigned to her cause of action in determining that judicial estoppel applied to bar Respondent from continuing to litigate her case against Petitioner. By impeding the trial court's application of these factors in making a judicial estoppel determination, the decision of the Court of Appeals has undermined the doctrine and completed the transformation of judicial estoppel from the equitable, flexible analysis it was intended to be into a rigid application of precedent that fails to deter even intentional deception. For the reasons explained in more detail below, the Court should grant the petition.

III. ANALYSIS

Judicial estoppel is a "federal doctrine" that "was first followed by Georgia courts in 1994." *Nat'l Bldg. Maint. Specialists, Inc. v. Hayes*, 288 Ga. App. 25, 26 (2007). "The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 745 (2001). "It is most commonly invoked to prevent bankruptcy debtors from concealing a possible cause of action, asserting the claim following the discharge of the bankruptcy and excluding resources from the bankruptcy estate that might

have otherwise satisfied creditors." *Period Homes v. Wallick*, 275 Ga. 486, 488 (2002).

Because of its nature as a federal doctrine and because of the interests sought to be preserved in bankruptcy litigation,

> [w]hen judicial estoppel is asserted in an action brought in a Georgia court and a bankruptcy proceeding is the earlier proceeding in which the debtor/plaintiff took a position allegedly inconsistent with that taken in the state court action, **the Georgia appellate courts historically have striven to apply the federal doctrine of judicial estoppel, in an effort to afford the judgment of the bankruptcy court the same effect here as would result in the court where that judgment was rendered.**

Ibf Participating Income Fund v. Dillard-Winecoff, 275 Ga. 765, 766 (2002) (emphasis added) (quotation omitted). The preservation of this purpose is so important that "[i]t is the duty of an appellate court to invoke judicial estoppel *sua sponte* in appropriate cases because the purpose of the doctrine is 'to prevent the perversion of the judicial process' and to 'protect the courts rather than the litigants.'" *Ga. Gov't Transparency & Campaign Fin. Comm'n v. State Mut. Ins. Co.*, 321 Ga. App. 480, 486 n.3 (2013) (quoting *In the Matter of Cassidy*, 892 F2d 637, 641 (7th Cir. 1990)).

Thus, the Court has applied the following factors, recognized by the United States Supreme Court, in determining whether a party was judicially estopped:

> (1) the party's later position must be "clearly inconsistent" with its earlier position; (2) the party must have succeeded in persuading a court to accept the party's earlier position; here the Supreme Court

> noted that "absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,', and thus poses little threat to judicial integrity"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Ibf, 275 Ga. at 766-67 (quoting *New Hampshire*, 532 U.S. at 750-51). The Supreme Court's formulation of these factors was so important to this Court that the Court reviewed them and determined that "the law as developed in Georgia passes muster." *Id.* at 766.

Georgia courts, including the Court of Appeals in the decision below, have continued to apply these factors as the test for determining whether application of judicial estoppel is appropriate. *See Ward-Poag*, 351 Ga. App. at 328 ("Under the doctrine, a party is precluded from asserting a position in a judicial proceeding which is inconsistent with a position previously successfully asserted by it in a prior proceeding."); *see also, e.g.*, *Gatto v. City of Statesboro*, Nos. A19A1408, A19A1409, 2019 Ga. App. LEXIS 673, at *14 (Ct. App. Oct. 21, 2019) (discussing *New Hampshire* and applying the three factors); *Sure, Inc. v. Premier Petroleum, Inc.*, 343 Ga. App. 219, 225 (2017) (noting that "Georgia courts consider three factors to determine whether the doctrine bars a claim" and applying the three factors above); *D'Antignac v. Deere & Co.*, 342 Ga. App. 771, 774 (2017) (stating that "Georgia courts have followed the United States Supreme Court in considering

[these] three factors pertinent to the decision whether to apply the doctrine in a particular case . . . ." (quotation omitted)).

Application of these factors and the judicial estoppel analysis as a whole, however, was never intended to be an inflexible exercise; **it was seen even in *New Hampshire* as a flexible, equitable exercise of court discretion**. *See New Hampshire*, 532 U.S. at 750 ("Because the rule is intended to prevent improper use of judicial machinery, **judicial estoppel is an equitable doctrine invoked by a court at its discretion** . . . ." (emphasis added) (quotation and citations omitted)); *see also Benton*, 280 Ga. at 471 ("[A]fter judicial estoppel is raised, the question of whether the debtor acted with requisite diligence is within the sound discretion of the trial court."); 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 134.31 (3d ed. 2010) ("Because the doctrine is designed to protect the integrity of the judicial system, judicial estoppel is frequently described as equitable in nature. Because the doctrine is equitable in nature, it should be applied flexibly, with an intent to achieve substantial justice."). In fact, "[c]ourts have observed that the circumstances under which judicial estoppel may appropriately be invoked **are probably not reducible to any general formulation of principle** . . . ." *New Hampshire*, 532 U.S. at 745 (emphasis added). In setting forth the three factors that have now become the rubric Georgia courts typically use in their analysis, the Supreme Court recognized that these factors "typically inform the decision

whether to apply the doctrine in a particular case." *Id.* at 750. **The Supreme Court even explicitly cautioned against rigid analysis in this context:**

> In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. In this case, we simply observe that the factors above firmly tip the balance of equities in favor of barring New Hampshire's present complaint.

Id. at 751.

After *New Hampshire*, the Eleventh Circuit decided *Slater*.[1] Faced with the three factors laid out in *New Hampshire* (and used by Georgia courts as discussed above), the Eleventh Circuit was tasked with both determining whether its own precedent establishing a two-part test for applying the judicial estoppel doctrine survived *New Hampshire* as well as clarifying its own precedent in the context of a plaintiff who failed to disclose a civil lawsuit in bankruptcy filings.

First, the Eleventh Circuit considered the impact of *New Hampshire* on the circuit's two-part test, which looked to apply judicial estoppel when "(1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were calculated to make a mockery of the judicial system."

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[1] Before the trial court, even Respondent argued that *Slater* was owed deference. *See* Oct. 17, 2017 Hearing at 17 ("So, your honor, our position is that that – there is no argument that this Court should now ignore 11th Circuit or federal court case[s] in this instance but in all other instances raised by Defendant in their motion for summary judgment, then give such federal authority due deference. The *Slater* case, your honor, is directly on point.").

Id. at 1181 (quotation omitted). The court recognized that *New Hampshire* announced the three-part test as something that "typically informs" the decision of whether to apply judicial estoppel and emphasized that it was "not establish[ing] inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." *Id.* (quoting *New Hampshire*, 532 U.S. at 750-51). The court ultimately concluded that *New Hampshire* applied where "the party seeking to apply judicial estoppel, Maine, was a party to the prior law suit in which New Hampshire had taken an inconsistent position," and that *New Hampshire* was inapplicable to cases where the party seeking to apply the doctrine was not a party to the prior suit because that party cannot be said to have been disadvantaged by any position taken by the party to be bound. "Consistent with *New Hampshire*'s recognition that its test was not exhaustive, [the circuit court] adhere[d] to [its] two-part test in the scenario before [it]." *Id.* at 1182.

The Eleventh Circuit also considered how the second element of its two-part test was to be analyzed in the bankruptcy context. On that topic, the Court held that

> to determine whether a plaintiff's inconsistent statements were calculated to make a mockery of the judicial system, a court should look to all the facts and circumstances of the particular case. When the plaintiff's inconsistent statement comes in the form of an omission in bankruptcy disclosures, the court may consider such factors as the plaintiff's level of sophistication, whether and under what circumstances the plaintiff corrected the disclosures, whether the plaintiff told his bankruptcy attorney about the civil claims before

> filing the bankruptcy disclosures, whether the trustee or creditors were aware of the civil lawsuit or claims before the plaintiff amended the disclosures, whether the plaintiff identified other lawsuits to which he was party, and any findings or actions by the bankruptcy court after the omission was discovered.

Id. at 1185. The court explained the virtues of this approach versus a one-size-fits-all analysis embodied in inferences applied in the Eleventh Circuit prior to *Slater*:

> First, such an inquiry ensures that judicial estoppel is applied only when a party acted with a sufficiently culpable mental state. Second, it allows a district court to consider any proceedings that occurred in the bankruptcy court after the omission was discovered, arguably a better way to ensure that the integrity of the bankruptcy court is protected. Third, limiting judicial estoppel to those cases in which the facts and circumstances warrant it is more consistent with the equitable principles that undergird the doctrine. By rejecting a one-size-fits-all approach, we reduce the risk that the application of judicial estoppel will give the civil defendant a windfall at the expense of innocent creditors.

Id. at 1185-86; *see also* 18 MOORE'S FED. PRACTICE ¶ 134.31 ("The doctrine of judicial estoppel is not a set of hard and fast rules that might be circumvented by a clever litigant, on the one hand, or serve as a trap for an unwary litigant, on the other."). It is this analysis that was performed by the trial court and performed correctly.

The foregoing establishes that this Court should accept certiorari to establish that the trial court did not err in considering the factors outlined in *Slater*.[2] As

[2] In its decision, the Court of Appeals determined that it did not need to address Petitioner's argument regarding whether *New Hampshire* or *Slater* controlled because the "relevant inquiry is whether the debtor amended her Chapter 13

discussed above, Georgia courts have applied the test as set forth in *New Hampshire*, but *New Hampshire* made it clear that the judicial estoppel analysis was not to be applied rigidly. *Slater* correctly points out that the *New Hampshire* test is not even directly applicable to the bankruptcy context in any event and sets forth an analysis that properly and ably upholds the purpose of the judicial estoppel analysis, ensures its continuing vitality, and adequately allows for trial court discretion in balancing the equities. This is consistent with Georgia precedent establishing that "a trial court has broad discretion to fashion an equitable remedy based upon the exigencies of the case, and an appellate court sustains the trial court's action where such discretion has not been abused." *Tafel v. Lion Antique Cars & Invs.*, Inc., 297 Ga. 334, 339 (2015) (quotation omitted). Indeed, this Court has recognized that "after judicial estoppel is raised, the question of whether the debtor acted with requisite diligence is within the sound discretion of the trial court." *Benton*, 280 Ga. at 471.

To remove the judicial estoppel analysis from the sound discretion of the trial court and rigidly forbid the trial court from applying the doctrine simply because Respondent amended her bankruptcy schedule after the doctrine was

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bankruptcy petition, before discharge or some other resolution of the bankruptcy proceeding, to include a claim that arose after the original bankruptcy petition was filed." *Ward-Poag*, 351 Ga. App. at 329 n.8. Accordingly, the Court of Appeals concluded that the "trial court erred in exceeding this limited inquiry." *Id. New Hampshire*, *Slater*, and the other authorities cited herein, however, demonstrate that this is an improper application of the doctrine with deleterious effects.

raised not only leaves the judicial estoppel doctrine impotent, but also condones deception. The Eleventh Circuit has explicitly recognized this concern. *See Weakley*, 894 F.3d at 1247 ("Judicial estoppel serves to prevent the perversion of the judicial process and protect its integrity. It cannot serve that purpose as well if a duplicitous debtor is assured that he can always avoid the doctrine's bite by dismissing his bankruptcy petition after his duplicity is found out." (quotation and citation omitted)). And the Eleventh Circuit is not alone in this recognition:

> And Moses's argument that he cured his failure to disclose by reopening his Chapter 7 case, amending his "Statement of Financial Affairs," and inviting Nesse to intervene in the suit, is wholly unpersuasive. As the Eleventh Circuit noted, allowing such a debtor to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive for the debtor to provide the bankruptcy court with a truthful disclosure of his assets, and would similarly diminish the doctrine's ability to deter the debtor from pursuing claims in the District Court to which he is not entitled.

Moses v. Howard Univ. Hosp., 606 F.3d 789, 800 (D.C. Cir. 2010) (quotation and citations omitted).

> We will not consider favorably the fact that White updated her initial filings after the motion to dismiss was filed. To do so would encourage gamesmanship, since White only fixed her filings after the opposing party pointed out that those filings were inaccurate. Furthermore, she did not adequately fix those filings but, instead, only updated a part of them (so that they still did not reflect the estimated value of the lawsuit).

White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 481-82 (6th Cir. 2010) (citation omitted).

> As the Bankruptcy Court properly noted, the language in the Amended Disclosure Statement was little more than boilerplate. It did not specify any of the claims contained in the instant complaint against GM, much less attempt to place any monetary value on them. We agree that such boilerplate language is simply not adequate to provide the level of notice required. The bankruptcy rules were clearly not intended to encourage this kind of inadequate and misleading disclosure by creating an escape hatch debtors can duck into to avoid sanctions for omitting claims once their lack of candor is discovered.
>
> Allowing Krystal to back-up, . . . and amend its bankruptcy filings, only after its omission has been detected, suggests that a debtor should consider disclosing potential assets only if . . . caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the Bankruptcy Court with a truthful disclosure of the debtors' assets.

Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. GMC, 337 F.3d 314, 321 (3d Cir. 2003) (quotation omitted).

> Although abandonment or exemption may restore a plaintiff's standing, it does not preclude application of judicial estoppel. This is as it should be, because allowing a debtor to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. Such an approach would only diminish a debtor's incentive to provide a true and complete disclosure of her assets to the bankruptcy courts.

Vanderheyden v. Peninsula Airport Comm'n, Civil Action No. 4:12-cv-46, 2013 U.S. Dist. LEXIS 399, at *47 (E.D. Va. Jan. 2, 2013) (quotation and citations

omitted); see also *Timmons v. Scotch Plywood Co.*, No. 18-0152-WS-N, 2019 U.S. Dist. LEXIS 127236, at *7 (S.D. Ala. July 31, 2019) ("Correcting a misrepresentation before being called on it might suggest an innocent omission, but a correction made only after being threatened with dismissal of one's lawsuit just as easily suggests a scramble to undo a deliberate omission. The timing of the plaintiff's disclosure is thus at best a neutral consideration."). The Court should act to prevent the outcome so cautioned against.

CONCLUSION

The decision below allows form to decimate function and erodes the judicial estoppel doctrine in the bankruptcy context by insisting on inflexible application in a manner that creates an "escape hatch" for duplicitous debtors. *See Krystal Cadillac-Oldsmobile*, 337 F.3d at 321. This outcome is wholly problematic for the numerous reasons raised above.

As the United States Supreme Court recognized in *New Hampshire*, the factors announced therein and the judicial estoppel analysis as a whole are not to be rigidly applied. "These three [*New Hampshire*] factors simply cannot overshadow the clear purpose of judicial estoppel: to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Daniel v. Fulton Cty.*, 324 Ga. App. 865, 869 (2013) (Boggs, J., dissenting) (quotation omitted). Should this Court

allow the Court of Appeals' decision to stand, this purpose will be overridden, and an important procedural safeguard to the integrity of both Georgia trial courts and bankruptcy courts will be rendered ineffective.

Accordingly, this case presents the Court with a matter of great concern, gravity, and importance to the public. The Court should grant certiorari to clarify the state of Georgia law post-*Slater*, condone the analysis undertaken by the trial court as a proper exercise of its equitable discretion, restore the potency of judicial estoppel, and allow courts and litigants continued access to an important tool to combat deception.

Respectfully submitted this 13th day of December, 2019.

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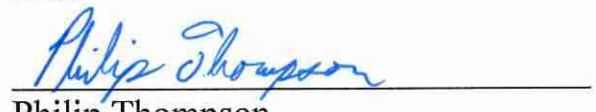

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On Behalf of the Georgia Defense Lawyers Association

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** with the Clerk of Court using the SCED online system and served all of the parties below by depositing a copy of the same in the United States Postal Service with adequate First-Class Mail postage thereon and addressed as follows:

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