No. 15-245

IN THE

Supreme Court of the United States

STEWART CONRAD MANN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958 and has a nationwide membership of approximately 10,000 direct members and up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and fair administration of justice, including—as most relevant here—the impact of a criminal conviction on an individual's ability to successfully reintegrate into society and avoid future encounters with the criminal justice system. In keeping with that commitment, NACDL files numerous amicus briefs each year in the Supreme Court and many other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), Petitioner Mann and the United States received timely notice of, and consented to, amicus curiae's filing of this brief. Their consent letters have been filed with this brief.

defendants, criminal defense lawyers, and the criminal justice system as a whole.

This is such a case. It asks the basic—and potentially life-altering—question whether federal district courts can, under *any* circumstances, expunge a federal conviction on equitable grounds, thereby facilitating the efforts of deserving individuals to obtain employment, housing, and other necessities of life that are routinely, if not reflexively, denied to those with federal convictions. NACDL writes to underscore the depth of division on this issue in the federal courts of appeals and the importance of resolving that conflict without delay.

INTRODUCTION AND SUMMARY

The petition raises fundamental issues of equitable jurisdiction and power over which the Courts of Appeals are deeply and irreconcilably divided. In five circuits, no individual—from the former civil rights protester to the starving single mother—may ask a federal court to expunge her prior federal conviction on equitable grounds. In those circuits, district courts have no jurisdiction to consider such equitable requests. In seven other circuits, however, such requests are permissible—albeit rarely granted, given the high bar that the courts of equity have set for such relief—and therefore allow the federal courts their traditional ability to do equity and to shape relief as circumstances justify.

The impact of this division is not academic. There is now widespread access to criminal records, no matter how stale the records or how little, if any, relevant information they provide about an individual's post-conviction circumstances, including her rehabilitation, character and capabilities. A

multitude of studies have shown that, due to the increasing accessibility of criminal records online, individuals who have served their time and/or fulfilled the terms of their federal probation are unable to reintegrate into society. In particular, employers frequently judge and eliminate job applicants—and fire employees who originally impressed them enough to hire—based on a spot on an individual's criminal history, regardless of her exemplary conduct and rehabilitation post-conviction and sentence. This disadvantage extends to housing and other government benefits, and this inability to successfully re-integrate into society perpetuates recidivism, thus contravening our justice system's central purpose.

Yet, solely depending on the circuit in which an ex-offender's underlying federal conviction originated, she either will be completely deprived of remedies to address the adverse consequences that stem from the conviction even years after its sentence has been satisfied, or can have a claim of equitable expungement heard on the merits. Based on the happenstance of geography, a federal district judge who entered a conviction and supervised the individual's release and rehabilitation can be deprived of the ability to even hear an equitable claim for expungement no matter how strongly that court believes that the repercussions flowing from the conviction it entered have become unjust and inequitable after the sentence it imposed has been satisfied.

NACDL urges the court to grant this petition to resolve the circuit split and to restore consistency on a recurring issue directly affecting individual ex-offenders and impacting the greater society. The

equitable power that all district courts should possess to expunge criminal records in limited circumstances is vital to allowing courts to remedy the undesired, unintended, and potentially debilitating consequences facing released offenders seeking to reenter society as law-abiding, productive citizens.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S REJECTION OF EQUITABLE EXPUNGEMENT AUTHORITY MISREADS THIS COURT'S PRECEDENTS AND CONFLICTS WITH SEVEN CIRCUITS.

A. Sitting In Equity, The Federal Courts Have The Ability To Expunge Convictions They Entered.

For centuries, it has been a bedrock premise of Anglo-American law that "[t]he Office of the Chancellor is to correct . . . Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law . . . ." *The Earl of Oxford's Case*, 1 Chan. Rep. 485, 486-88 (1615). As such, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht* v. *Bowles*, 321 U.S. 321, 329 (1944); see, *e.g.*, *Swann* v. *Bd. of Educ.*, 402 U.S. 1, 31 (1971) (stressing the "sense of basic fairness inherent in equity").

Generally, courts have inherent equitable jurisdiction and powers that are "necessary to the exercise of all others." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States* v. *Hudson,* 7 Cranch 32, 34 (1812)); see also *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 598 (1978)

("Every court has supervisory power over its own records and files . . . ."). One manifestation of that "inherent equitable power," *Hall* v. *Cole*, 412 U.S. 1, 5 (1973), is the federal courts' jurisdiction to expunge criminal convictions. That authority fulfills core purposes of equity and flows from the courts' recognized need to ensure the administration of justice generally and in criminal cases specifically. See generally *Hecht*, 321 U.S. at 329–30 ("The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.").

There are serious, documented harms that stem from the judicial maintenance of criminal conviction records, which may, in extreme situations, substantially outweigh the governmental interest in keeping records after the sentence has been satisfied. See *infra* § II. Given the relative infrequency of these circumstances, courts will rarely have occasion to invoke the "extraordinary remedy" of expungement. *United States* v. *Flowers*, 389 F.3d 737, 739 (7th Cir. 2004) (collecting authorities emphasizing that expungement is exceptional). However, when the harms flowing from maintaining criminal conviction records are sufficiently severe that doing so is no longer just, courts may exercise their inherent equitable power to expunge convictions they entered.

The courts' inherent equitable authority to expunge convictions also fills a gap in the rules of criminal procedure to allow courts to adequately administer justice. See *McNabb* v. *United States*, 318 U.S. 332, 340 (1943). The courts' equitable authority to expunge their own conviction records runs parallel to courts' historic equitable power to alter a judgment

when "applying it prospectively is no longer equitable," a rule eventually codified in Federal Rule of Civil Procedure 60(b)(5)." See Fed. R. Civ. P. 60 advisory committee's note (1946). Courts' equitable power to expunge convictions they themselves entered remains, even in the absence of an express statutory grant, an important means to ensure that the rules of criminal procedure facilitate the fair administration of justice.

While Congress has expressly authorized expungement in a narrow class of cases, see, *e.g.*, Federal First Offender Act, 18 U.S.C. § 3607 (authorizing expungement for certain narcotics offenders), no federal legislation *circumscribes* courts' inherent authority to expunge criminal convictions. This is not a situation in which Congress has sought to restrict the judiciary's equitable power. See *Miller* v. *French*, 530 U.S. 327, 336 (2000) ("we do not lightly assume that Congress meant to restrict the equitable powers of the federal courts"); *Ex Parte Peterson*, 253 U.S. 300, 312 (1920) ("in the absence of legislation to the contrary" courts are free to exercise equitable powers). Instead, a number of federal statutes contemplate that criminal records can be expunged. See 18 U.S.C. § 921(a)(20); 42 U.S.C. §§ 1320a-7(i), 1320b-6(j)(3)(A).

B. The Circuits Are Widely Divided, And The Rule Of The Ninth Circuit And Its Sister Circuits Rests On A Fundamental Misinterpretation Of This Court's Precedents.

Before the Ninth Circuit's decision in *United States* v. *Sumner*, 226 F.3d 1005 (9th Cir. 2000), the circuits agreed that federal district courts' equitable jurisdiction gave them the authority to equitably

expunge their own records of lawfully imposed criminal convictions. The D.C. Circuit, for instance, had characterized the courts' ability to expunge convictions as "well settled" under "the courts' inherent equity power." *Doe* v. *Webster*, 606 F.2d 1226, 1232 (D.C. Cir. 1979); see, *e.g.*, *United States* v. *Noonan*, 906 F.2d 952, 956 (3d Cir. 1990); *Reyes* v. *Supervisor of DEA*, 834 F.2d 1093, 1095, 1098 (1st Cir. 1987); *United States* v. *Doe*, 747 F.2d 1358, 1360 (11th Cir. 1984); *Shipp* v. *Todd*, 568 F.2d 133, 134 (9th Cir. 1978); *United States* v. *Doe*, 556 F.2d 391, 393 (6th Cir. 1977); *United States* v. *McMains*, 540 F.2d 387, 389–90 (8th Cir. 1976).

Today, in the aftermath of *Sumner*, there is a deep and well-established circuit split. As petitioner details (Pet. 3–4, 9–10), in *Sumner*, the Ninth Circuit held that federal courts cannot expunge criminal convictions "solely for equitable considerations." 226 F.3d at 1014. In abandoning the formerly prevailing consensus in the circuits, the Ninth Circuit reasoned that this Court's disposition of *Kokkonen* v. *Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994)—which involved none of the equitable, legal, factual, or policy issues implicated here—deprives federal courts of their formerly established power to expunge convictions they entered. Four additional circuits have followed *Sumner* and interpreted *Kokkonen* in the same manner. However, four other circuits hold post-*Kokkonen* that courts retain the ability to expunge on equitable grounds the convictions they entered, and another three circuits have not questioned their pre-*Kokkonen* holdings that district courts can do so.

1. *Kokkonen* Does Not Address, Much Less Limit, The Equitable Authority At Issue Here.

The litigants in *Kokkonen* were originally parties to a civil case under the district court's diversity jurisdiction. 511 U.S. at 376. After a settlement, the district court dismissed that case with prejudice. *Id.* at 376–77. The dismissal order did not refer to the parties' settlement agreement or reserve jurisdiction over it. *Id.*; see *id.* at 381 (explaining that Federal Rule of Civil Procedure 41(a)(2) permits a court to retain jurisdiction over the parties' settlement).

Based on a dispute over the settlement's provisions, the respondent brought suit in district court, asserting that the court possessed "ancillary jurisdiction" over the follow-on action, in which respondent sought to compel compliance with the settlement. *Id.* at 378. Agreeing that it possessed such jurisdiction, the district court granted relief, and the Ninth Circuit affirmed. *Id.* at 377.

This Court reversed, holding that the courts below erred in analyzing ancillary jurisdiction. The Court recognized that its precedents lacked precision about when ancillary jurisdiction applies, *id.* at 379, but noted:

> *Generally speaking*, we have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, [or] (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and

> effectuate its decrees.

Id. at 379-80 (emphasis added; citations omitted).

Kokkonen did not fit either mold: (1) Whether one party had breached the settlement had little to do with the substance of the underlying suit; and (2) the assertion of jurisdiction in a case where the parties could have, but did not, provide for jurisdiction when the underlying suit was dismissed was a power "quite remote from what courts require in order to perform their functions." *Id.* at 380-81. Thus, this Court found the subsequent dispute had a more "tenuous" relationship to the original suit than in any other case in which it had exercised ancillary jurisdiction. *Id.* at 380.

In short, the parties' subsequent dispute was simply "a claim for breach of a contract, part of the consideration for which was dismissal of an earlier federal suit," *id.* at 381, and that frail linkage did not justify pulling the parties' contest back into federal court. *Id.* at 381-82.

As the facts of *Kokkonen* make plain, that decision does not bear on the issues here. *First*, *Kokkonen* is a decision that sounds in federalism, see *id.* at 377, not the courts' ability to revisit their judgments and to consider the consequences of those judgments when sitting in equity. Nowhere did *Kokkonen* suggest that the ancillary jurisdiction doctrine—or its decision to limit that rule—was related to "equity jurisdiction" or "the power of the Chancellor to do equity." *Hecht*, 321 U.S. at 329; see *Kokkonen*, 511 U.S. at 377, 380 (noting that the courts below had referred to their "'inherent power,'" but making no mention of equitable jurisdiction generally); cf. *id.* at 379

(discussing equity in the ancillary jurisdiction context).

Second, *Kokkonen* did not announce—or purport to announce—a comprehensive framework for all invocations of federal jurisdiction that lack an independent statutory basis. Contra *Sumner*, 226 F.3d at 1014 (rejecting argument that the district court had inherent equitable power to expunge conviction, because the case did not fit into either of the two categories noted in *Kokkonen*).[2] Rather, it merely set out to answer the narrow question presented: whether the appellee was correct that the district court possessed ancillary jurisdiction over the enforcement of a settlement agreement not approved by the court or embodied in any federal court order or decree. See 511 U.S. at 378. As a result, the jurisdictional analysis for equitable expungement cases should be the same now as it was before *Kokkonen*, and there is no need for courts to view that analysis through the lens of *Kokkonen*-circumscribed ancillary jurisdiction.

Said otherwise, regardless of an expunction proceeding's factual relation to the original criminal case, or its relation to a court's ability to vindicate its authority, courts properly have jurisdiction over such proceedings in order to ensure the fair administration of justice.

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[2] It thus strains plausibility to maintain that this Court's resolution of a narrow, federalism-implicating question of ancillary jurisdiction also—and without a word about the centuries of equity jurisprudence it would be sweeping aside—shut the federal courts to everyone who might seek expungement of a prior federal conviction on equitable grounds.

2. The Circuits Are In Conflict.

Despite the markedly different factual and legal context in which *Kokkonen* was decided, the Ninth Circuit failed to recognize those key distinctions in *Sumner*, which controlled the outcome of the decision below (Pet. App. 4a) and gave rise to the circuit split implicated here. Instead, the Ninth Circuit and its sister circuits have wrenched *Kokkonen* from its proper context and expanded it far beyond its stated bounds, treating it as exhaustively enumerating situations in which federal courts can hear a matter without an original, independently sufficient source of jurisdiction. As already shown, however, *Kokkonen* propounded no such rule.

Nonetheless, four circuits have followed the Ninth Circuit's lead. See *United States* v. *Coloian*, 480 F.3d 47, 52 (1st Cir. 2007) ("*Kokkonen* forecloses any ancillary jurisdiction to order expungement based on Coloian's proffered equitable reasons."); *United States* v. *Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001) ("Thus, we hold that in the absence of any applicable statute enacted by Congress, or an allegation that the criminal proceedings were invalid or illegal, a District Court does not have the jurisdiction to expunge a criminal record, even when ending in an acquittal."); *United States* v. *Meyer*, 439 F.3d 855, 860 (8th Cir. 2006) ("We hold . . . that post-*Kokkonen* a motion to expunge a criminal record that is based solely on equitable grounds does not invoke the ancillary jurisdiction of the district court."); *Tokoph* v. *United States*, 774 F.3d 1300, 1305 (10th Cir. 2014) ("There is no applicable inherent equitable authority to grant expunction of a valid conviction."); see also Pet. 10

(discussing the First, Third and Eighth Circuits' rules).[3]

The rules in these five circuits not only are in tension with this Court's jurisprudence on equitable jurisdiction generally, they conflict with the governing law of the remaining seven circuits. Post-*Kokkonen*, four circuits have expressly adhered to their pre-*Kokkonen* rules holding that federal courts have jurisdiction to expunge their own conviction records on equitable grounds. *Sealed Appellant* v. *Sealed Appellee*, 130 F.3d 695, 697 n.2 (5th Cir. 1997) (noting that district courts "have supervisory powers [to expunge] their own records"); *United States* v. *Flowers*, 389 F.3d 737, 739 (7th Cir. 2004) (recognizing "that district courts do have jurisdiction to expunge records maintained by the judicial branch"); *United States* v. *Carey*, 602 F.3d 738, 740 (6th Cir. 2010) ("An order on a motion to expunge a conviction is within the equitable jurisdiction of a federal district court."); *Abdelfattah* v. *Department of Homeland Security*, 787 F.3d 524, 536 (D.C. Cir. 2015) (concluding that "'federal courts are empowered to order the expungement of Government records where necessary to vindicate rights secured by the Constitution or statute'").[4]

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[3] Petitioner appears unaware of the Tenth Circuit's holding in *Tokoph*. *Cf.* Pet. 10-11.

[4] It is, at best, a sideshow that some circuits, including the Sixth and Seventh Circuits, hold that although district courts have the ability to expunge their conviction records, they cannot do so for arrest records. *Cf.* Pet. 12–13, 15–16. This case involves only *conviction* records, which are subject to the expungement power in those circuits. But *cf. id.* at 15-16 (mistakenly characterizing the Sixth Circuit's position as unclear). In holding that separation-of-power concerns

The remaining three circuits, which had long recognized district courts' expungement authority, have not revisited the issue post-*Kokkonen*. See, *e.g.*, *United States* v. *Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977) ("[E]xpungement lies within the equitable discretion of the court, and relief usually is granted only in "extreme circumstances.");[5] *Allen* v. *Webster*, 742 F.2d 153 (4th Cir. 1984) (arrest records); *United States* v. *Doe*, 747 F.2d 1358, 1360 (11th Cir. 1984) (affirming denial of expungement of conviction and arrest records where appellant failed to argue that

precluded a district court from exercising jurisdiction over a request to expunge executive branch records, the Sixth Circuit did not disturb *Carey*, its precedent regarding a court's equitable oversight over conviction records. *United States* v. *Lucido*, 612 F.3d 871, 875-77 (6th Cir. 2010) ("Keep in mind that Lucido is not asking the court to remove records of its *own* proceedings. . . . Lucido's request, if granted, would amount to an extraordinary inter-branch incursion, one that should not lightly be effectuated through the federal courts' unexceptional right to oversee their own criminal cases."). In any event, just as was the case pre-*Kokkonen*, *see*, *e.g.*, *Livingston* v. *U.S Dept. of Defense*, 759 F.2d 74, n.1 (D.C. Cir. 1985); *United States* v. *Linn,* 513 F.2d 925, 927 (10th Cir. 1975); *infra* at 13 & n.5, other circuits still hold that the courts' expungement jurisdiction extends to arrest and other executive records. *E.g.*, *Abdelfattah*, 787 F.3d at 536.

[5] *Schnitzer* also involved arrest records. Given the significant intrusion into the operations of a coequal branch that inhere in expungement of executive records, *Schnitzer* properly has been read as authorizing the less intrusive act of expunging records of the judiciary. *See Doe* v. *United States*, --- F. Supp. 3d ---, 2015 WL 2452613 (E.D.N.Y. 2015), *appeal pending*, No. 15-1967 (2d Cir.); *United States* v. *Doe*, 935 F. Supp. 478, 480-81 (S.D.N.Y. 1996).

the district court's decision was an abuse of discretion).[6]

As District Judge John Gleeson, a jurist and former United States Attorney with a wealth of criminal law experience, recently held, there is no reason that a court should do so. *Doe*, --- F. Supp. 3d ---, 2015 WL 2452613. Judge Gleeson reasoned that whereas the breach of contract claim in *Kokkonen* was "'quite separate from the facts to be determined in the principal suit, and automatic jurisdiction over such contracts is in no way essential to the conduct of federal-court business,'" "[a]n expungement proceeding is different in kind." *Id.* at *4 n.16 (quoting 511 U.S. at 381). "Its sole focus is the record of the conviction that occurred in this case, and the exercise of discretion it calls for is informed by, *inter alia,* the facts underlying the conviction and sentence and the extensive factual record created while [defendant] was under this Court's supervision for five years." *Id.*

Given the depth and breadth of the conflict in the courts of appeals, the Court should grant review to reestablish a uniform rule of jurisdiction for equitable expungement requests.

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[6] District courts in some of these circuits have questioned the continued vitality of their court of appeals' respective pre-*Kokkonen* precedents, but as yet the relevant Courts of Appeals have not addressed the issue. *E.g.*, *United States* v. *Taylor*, No. 12-mj-230, 2014 WL 1713485, at *3 (E.D. Va. 2014) (noting the lack of Supreme Court guidance on this issue despite *Kokkonen*'s holding); *United States* v. *Tyler*, 670 F. Supp. 2d 1346, 1349 (M.D. Fla. 2009) (adopting *Sumner*'s rule in the absence of Eleventh Circuit precedent post-*Kokkonen*); *United States* v. *Ware*, No. 97-cr-47-02, 2015 WL 2137133, at *3-5 (N.D. W. Va. May 7, 2015) (finding no jurisdiction), *appeal pending*, No. 15-6970 (4th Cir. June 19, 2015).

C. THE QUESTION PRESENTED IS RIPE FOR RESOLUTION

The question presented here implicates a mature and entrenched conflict that warrants immediate review.

First, all twelve regional circuits have directly addressed the rule of decision implicated here, and nine have done so post-*Kokkonen*. This conflict will not resolve itself without this Court's intervention. Even if the three circuits that have not revisited their expungement precedents post-*Kokkonen* were to adopt the Ninth Circuit's *Sumner* rule, an 8-4 conflict would still exist. Moreover, as discussed, any dissipation of the conflict would result from a misinterpretation of *Kokkonen* and would create conflicts with this Court's precedents regarding "[t]he essence of equity jurisdiction." *Hecht*, 321 U.S. at 329.

Second, the rule subject to the conflict is not fact-dependent and is squarely presented here. The Ninth Circuit summarily affirmed (Pet. App. 1a) the district court's holding that simply because petitioner did not challenge his underlying conviction's validity, the court was altogether without "equitable power to grant the relief requested." Pet. App. 2a. Whether a district court has any equitable authority to expunge a conviction that it entered lends itself to a neat, up-or-down determination.[7]

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[7] This case does not present (and the courts below did not address) the far different and fact-sensitive question of whether a court with such equitable authority should, within its discretion, exercise it to grant relief to a particular individual who served her time and/or successfully completed her term of probation in light of the adverse consequences that individual

Third, as detailed *infra* § II, uniformity in the circuits is important because the law of the Ninth Circuit and the four circuits that follow *Sumner* leads to inequitable results that contravene the purposes of the federal criminal law and the executive's own interests. Many federal courts' ability to do equity where appropriate already has been artificially and erroneously circumscribed for 15 years. It should not be allowed to continue in light of the gravity of these issues.

II. EASY ACCESS TO CONVICTION RECORDS CONTRIBUTES TO RECIDIVISM AND FAILED POST-INCARCERATION REENTRY

Records of federal convictions now have a life of their own and repercussions that extend long past when sentences have been satisfied. Congress, while expanding the federal law's criminal reach, scarcely could have predicted these phenomena, and it similarly seems unlikely that district courts imposing criminal convictions imagine these long-term consequences, let alone wanted no equitable recourse no matter how reformed the individual and how great the harms a conviction continues to inflict long after the individual has satisfied her sentence. The prevalence and accessibility of criminal background checks in America today and the potential that they will prevent rehabilitation—and instead increase criminality—support allowing district courts to retain their equitable discretion to grant expungement where circumstances warrant.

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will continue to face without expungement. *See* Pet. 23 (acknowledging that the merits issue is not presented here).

Criminal background checks were once rare and difficult to obtain. "Fifty years ago, practically no one, other than the police, knew anything about someone's criminal record." James B. Jacobs, *The Eternal Criminal Record* 303 (2015) ("*Eternal Criminal Record*"). Until at least the 1930s, one could not look up a criminal record from another state, and even police departments within the same states did not routinely make information available to one another. *Id.* at 37. In 1972, however, Congress passed a criminal records statute allowing private organizations to obtain rap sheet information from the FBI. Pub. L. No. 92-544, 86 Stat. 1109, 1115 (1972).

Today, criminal background checks are routine and ubiquitous. Although when Congress legislated to make criminal records available to private entities, it had no contemplation of the internet—which has made such records both universally available and everlasting—now "a person's criminal record is a more easily accessible 'credential' than his or her educational record and employment history." *Eternal Criminal Record* at 303. Many commercial databases locate and provide criminal record information to subscribers.[8] The use of such background checks grows more prevalent. "In 2005 the FBI processed approximately 9.8 million criminal background checks for . . .public agencies and private

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[8] *See* Backgroundreport.com, http://www.backgroundreport.com/ (last visited Sept. 16, 2015); AmericanChecked Inc., http://americanchecked.com/ (last visited Sept. 16, 2015); AccurateBackground, http://accuratebackground.com/ (last visited Sept. 16, 2015); BackTrack, http://backtracker.com/services/background-checks/ (last visited Sept. 16, 2015).

organizations. By 2013, the number had practically doubled to 17 million." *Eternal Criminal Record* at 46 (citing Department of Justice statistics).[9]

These databases can inflict a scarlet letter. Decades of data have shown that a criminal record has a severe negative impact on an individual's ability to reintegrate into society. Field experiments long have shown that a single conviction greatly inhibits employability.[10] Recent studies, moreover, show that employers remain reluctant to hire a worker with a criminal record—regardless of the circumstances of the crime or the individual's life post-release. For example, approximately 60% of employers "definitely" or "probably" would not hire someone with a criminal record. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and Their Determinants* 7-18 (2002). Research funded by the U.S. Department of Justice shows that "a criminal record reduced the likelihood of a callback or job offer by nearly 50%." Devah Pager and Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men* 4, U.S. Dep't

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[9] *See*, *e.g.*, SEARCH, National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Criminal Backgrounding of America*, at 1 (2005) (discussing prevalence); Alfred Blumstein and Kiminori Nakamura, *Redemption in an Era of Widespread Criminal Background* Checks, 263 National Institute of Justice Journal (June 2009) (similar).

[10] *See*, *e.g.*, Christy A. Visher and Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 Annual Review of Sociology 89, 96 (2003); Richard D. Schwartz and Jerome Skolnick, *Two Sides of Legal Stigma*, 10 Soc. Problems 133 (1962).

of Justice (Oct. 2009). Even employers who say they will hire ex-offenders are in practice "no more likely to hire an ex-offender than those employer respondents who said they would not." *Eternal Criminal Record* at 281-82.

Both the information contained in background checks and employers' treatment of them place considerable hurdles before individuals who may have repaid their debt to society years or decades earlier, and whose offenses, in any event, may have minimal relevance to the job skills required. Background checks often provide little information about the incident underlying the conviction and employers regularly do not permit prospective employees the chance to explain their circumstances.[11]

A recent report issued by the University of Texas School of Law summarizes that the increased accessibility of criminal records from government and

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[11] *See, e.g.*, IntelliCorp, Sample Reports, https://www.intellicorp.net/marketing/uploadedFiles/SampleReport-PreferredFedCrimBackgroundCheck.PDF (providing case number, file date, court ID, arrest date, arresting agency, case note, charge code and description, disposition date and description, plea, sentence, and offense date); Background Report, Background Check Sample Premium Report, http://www.backgroundreport.com/sample (same). Thirty-seven percent of employers associated with the Society for Human Resources—the largest association of human resources personnel—do not give the prospective employee a chance to provide context in a way that would affect the hiring decision. *See* Society for Human Resources Management, Background Checking: Conducting Criminal Background Checks (Jan. 22, 2010) (Twelve percent gave no opportunity, and twenty-five percent only gave the opportunity after a hiring decision was made.)

commercial databases has severe negative "collateral consequences" (or "invisible punishments") that make it almost impossible for an individual to overcome a criminal history. Helen Gaebler, *Criminal Records in the Digital Age: A Review of Current Practices and Recommendations for Reform in Texas*, William Wayne Justice Center for Public Interest Law (Mar. 2013). These collateral consequences include lifelong barriers to employment, housing, government resources (*e.g.*, student loans and food stamps), and forfeiture of constitutional rights such as jury service or the right to bear arms. See *id.*; *Eternal Criminal Record* at 249-252.[12]

The problems these individuals face, in turn, can have severe societal consequences. For example, studies have shown that unemployment leads to recidivism while the reverse is also true; steady employment makes it less likely for ex-offenders to commit a future crime. See, *e.g.*, Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. of Sociology 937, 961 (2003) ("Research consistently shows that finding quality steady employment is one of the strongest predictors of desistance from crime."). As President George W. Bush summarized in 2008:

> We know from long experience that if [former inmates] can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison . . . America is the land of the second chance, and when the gates of the prison

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[12] *See also* Alfred Blumstein and Kiminori Nakamura, '*Redemption' in an Era of Widespread Criminal Background Checks*, 263 National Institute of Justice Journal (June 2009); Christy A. Visher and Jeremy Travis, *Life on the Outside: Returning Home after Incarceration*, 91 The Prison Journal 3, 103S (2011).

> open, the path ahead should lead to a better life.

Statement Upon Signing H.R. 1593, 2008 U.S.C.C.A.N. S10, 2008 WL 2242414 (Apr. 9, 2008). The prevalent use of background checks and the inability or unwillingness of employers to look beyond an old criminal record therefore can have devastating collateral effects that extend far beyond a single job rejection.

The equitable expungement power gives courts the modest ability "to do equity" in light of "the necessities of the particular case," *Hecht*, *supra*, and the purposes of the federal criminal justice system, see 18 U.S.C. 3553(a)(2). It gives courts a tool to remedy the most egregious unintended consequences of the convictions they imposed, which linger long after the convictions and the completion of incarceration and/or probation.

In *Doe*, for example, Judge Gleeson expunged a minor's conviction for a nonviolent offense of fraud 17 years prior, after which the individual had no incidents with the law. 2015 WL 2452613 (E.D.N.Y. May 21, 2015). The individual, who had been convicted of a heath care fraud from which she received $2,500, experienced undue hardship in finding and maintaining employment. See *id.* at *3 ("Once they learn of Doe's conviction, she gets fired. This has happened to her half a dozen times."). After "presiding over the trial in Doe's case and her subsequent sentencing, [Judge Gleeson] . . . reviewed every page of the extensive file that was created during her five years under probation supervision." *Id.* at *1. Having done so, the court determined that because Doe's conviction was "distant in time and nature from [her] present life," her criminal record "has had a dramatic adverse impact on her ability to

work," and she had been a "minor participant in a nonviolent crime," the case presented extraordinary circumstances warranting expungement. *Id.* at *4-5 (noting "the public safety is better served when people with criminal convictions are able to participate as productive members of society by working and paying taxes").

Similarly, in *United States* v. *Williams,* 582 F. Supp. 2d 1345 (D. Utah 2008), the district court conducted a balancing analysis in which it determined that the actual harms suffered by the defendant outweighed the interests of the state in maintaining records. *Id.* at 1347. Williams had provided evidence of his company's policy disallowing his promotion due to his past criminal record of distributing a controlled substance; not only that, Williams had been a law-abiding citizen for twenty years since his conviction, was a father of three children, and yet his conviction had also kept him from coaching his children's sports teams. *Id.* at 1346, 1348; see also Pet. 2 (discussing petitioner's completion of his sentence and rehabilitation, as well as his difficulty finding employment in light of his conviction). The court deemed expunction an appropriate remedy. *Williams*, 582 F. Supp. 2d at 1348.

By contrast, within the Ninth Circuit and other jurisdictions that have adopted *Sumner*, the courts are handcuffed no matter how compelling the equities may be. In *United States* v. *Hailey*, No. 01-cr-00128, 2014 WL 2798378 (N.D. Cal. June 19, 2014), the court acknowledged the strong equitable reasons why an Army First Sergeant, who served two tours in Iraq, should have his record of a misdemeanor conviction expunged, but found that it had no legal

foundation to do so. Likewise, in *Gonzalez-Reyes* v. *United States*, No. 09-1265, 2009 WL 890486 (D.P.R. Mar. 30, 2009), the court applauded the individual's efforts to secure employment and recognized his inability to do so because of his prior conviction, but was forced to deny relief out of hand.[13]

These, among many other cases, are distressing examples of how depriving courts of the expungement power runs headlong into the core purposes of equity jurisdiction. Consistent with Judge Gleeson's decision in *Doe,* if equity has a role to play in the federal courts it surely should encompass situations where individuals are "shut . . . out from the social, economic, and educational opportunities they desperately need in order to reenter society successfully." 2015 WL 2452613, at *6. The conflict in the circuits demands resolution.

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[13] *See also*, *e.g.*, *United States* v. *Smith*, No. 4:07CR00243, 2010 WL 4809118 (E.D. Ark. Nov. 19, 2010) (finding that despite petitioner's successful completion of probation, lack of another offense, expressed remorse, and attendance at a university, the court could not expunge the criminal record to help the petitioner secure future employment); *United States* v. *Lewis*, No. 4:73CR192, 2007 WL 2360067 (E.D. Mo. Aug. 15, 2007) (the court stated that while sympathetic to the petitioner, a productive member of society for over 30 years after his conviction who was being denied for certain types of employment, it was without jurisdiction to grant his request).

CONCLUSION

For these reasons and those stated by the petitioner, the writ should be granted.

Respectfully submitted,

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