No. __ - __

IN THE

Supreme Court of the United States

VINCENT SAPP,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Sixteen years after Petitioner Vincent Sapp was coerced into committing a crime and provided substantial assistance to the prosecution including by testifying against a co-defendant, he moved to expunge the judicial records of his criminal conviction. Pet. App. 25a. The district court made clear that, based on Mr. Sapp's post-conviction rehabilitation, the support of the Assistant U.S. Attorney who prosecuted him, and the detrimental effect of his conviction on his ability to obtain employment, it would have expunged Mr. Sapp's conviction if it were located within any of the six federal circuits—the Second, Fourth, Fifth, Seventh, Tenth, or D.C. Circuits—that follow the majority rule recognizing district courts' inherent jurisdiction to expunge their own records for equitable reasons. Pet. App. 16a-23a. However, based on Ninth Circuit authority, now followed by the First, Third and Eighth Circuits, holding that this Court's opinion in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), divests federal courts of jurisdiction to expunge their own records for equitable reasons, the district court denied Mr. Sapp's expungement motion. Pet. App. 22a. The question presented is:

> Notwithstanding this Court's opinion in *Kokkonen*, does a federal district court have inherent or ancillary jurisdiction to expunge its own records of a criminal conviction based on equitable considerations?

PARTIES TO THE PROCEEDING

The parties in the proceeding in the Court of Appeals for the Ninth Circuit were Petitioner Vincent Sapp and Respondent United States.

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PETITION FOR WRIT OF CERTIORARI

A significant number of former criminal defendants move in the federal courts to have judicial records of their indictments or convictions expunged for equitable reasons related to their underlying criminal proceedings, the context of the actions that gave rise to those proceedings, the effects that those records have on their livelihood, or their post-conviction rehabilitation. Six federal courts of appeals have held that, while such relief should be granted only in extraordinary circumstances, the federal courts have jurisdiction to consider equitable claims for expungement of judicial records. In this case, the district court held that if it were located within one of those six circuits, it would expunge the criminal conviction of Petitioner Vincent Sapp on the basis of several equitable considerations.

The district court, however, held that it lacked jurisdiction to consider Mr. Sapp's expungement motion under Ninth Circuit precedent. Relying on *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), in which this Court held that a federal court lacks jurisdiction to enforce a settlement agreement in a civil case where its accompanying order of dismissal did not reserve jurisdiction, the Ninth Circuit and three other federal courts of appeals have held that a federal court lacks jurisdiction to consider claims seeking expungement of judicial criminal records based on equitable grounds. Thus, there is now a 6-4 split in the federal courts of appeals, with the Second, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits holding that such jurisdiction exists, while the First, Third, Eighth, and Ninth Circuits hold that it does not. This conflict is

particularly troubling and warrants this Court's immediate review because it is predicated on a misreading of this Court's *Kokkonen* opinion, and because this Court has not yet defined the general scope of ancillary jurisdiction in criminal cases.

OPINIONS BELOW

The district court issued its unpublished order denying Mr. Sapp's motion to expunge on July 18, 2011. Pet. App. 3a. The Ninth Circuit summarily affirmed the district court's order on September 4, 2012. Pet. App. 1a.

JURISDICTION

The judgment of the Ninth Circuit was entered on September 4, 2012. On November 26, 2012, Justice Kennedy extended the time for filing this petition to and including January 17, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Background

In 1995, when Mr. Sapp was 23 years old, the federal government filed an indictment charging him with conspiracy to commit bank robbery under 18 U.S.C. § 371. Pet. App. 3a-4a. Mr. Sapp was not involved in the actual robbery, but instead was coerced into acting as the driver of the getaway car. Pet. App. 4a, 16a-17a. Early in the proceedings, Mr. Sapp agreed to plead guilty and assisted the government by testifying against a co-defendant who ultimately was convicted. Pet. App. 4a.

The district court sentenced Mr. Sapp to six months in a halfway house, which reflected his substantial assistance to the government and the fact that he "was coerced to participate in the robbery, to

some extent, after being threatened by one of his co-defendants." Pet. App. 4a. The district court also noted that Mr. Sapp had been steadily employed, was attending college, and had no significant prior criminal history, which suggested that his involvement was "aberrant." *Id.* Mr. Sapp successfully completed his term in the halfway house and, in 2004, paid the court's restitution order in full. Pet. App. 4a-5a.

In the over sixteen years since his conviction, Mr. Sapp has avoided any legal problems, "not even receiving a traffic ticket since his release." Pet. App. 6a. After he was released from the halfway house, Mr. Sapp "resumed his education and obtained a college degree, maintained steady employment, purchased a home and continued to care for . . . and raise his family." *Id.* For eleven years, Mr. Sapp has delivered gas with a truck. Pet. App. 16a. Now, however, Mr. Sapp wants to transition to selling real estate. *Id.* Mr. Sapp took and passed the California Department of Real Estate's exam for salesmen, but his record of conviction has prevented him from obtaining a license. Pet. App. 25a.

B. Mr. Sapp's Motion to Expunge

On May 5, 2011, Mr. Sapp sent a letter to the district court, informing it that he was "trying to get this charge taken off [his] records." Pet. App. 25a. The letter noted that in the sixteen years since his conviction, Mr. Sapp had purchased a home, completed training to drive a truck, returned to college to major in Real Estate, and passed the California Department of Real Estate's salesmen exam. *Id.* Due to his felony conviction, however, Mr. Sapp was "put on hold to obtain [his] license." *Id.*

Mr. Sapp stated that he had "an ample amount of remorse" for what he did in 1995, was attempting to "play a positive role in society and in the life of my family," and asked for the district court's assistance in removing his conviction from his records so he could "move on with the greatness of my future and not be chained down and haunted by my past." Pet. App. 26a.

Upon receiving electronic notification of Mr. Sapp's letter, the Assistant United States Attorney who prosecuted Mr. Sapp in 1995 submitted her own letter in support of his motion. Pet. App. 27a. In her personal capacity, the AUSA "fully support[ed] his request to have his conviction 'taken off his record.'" *Id.* Based on her recollection of the investigation and prosecution, Mr. Sapp's role in the offense, her memory of Mr. Sapp as a person, and the information provided in his letter, the AUSA urged the court to give Mr. Sapp's request "serious consideration" to provide him with an opportunity "to accomplish his new goals in life." Pet. App. 27a-28a.

C. The Decision Below

The district court expressed its desire to expunge Mr. Sapp's conviction for equitable purposes. The court acknowledged that Mr. Sapp had committed "a very serious mistake," but found that he "had done everything right" since his sixteen-year old conviction and that "from all the things you have accomplished since then that there's so much more to you and you have so much more to offer than this one mistake that occurred in the – in your life." Pet. App. 17a-20a. And it noted that Mr. Sapp's "dedication and determination are extraordinary compared to many of the individuals that I see." Pet. App. 18a.

Nonetheless, on July 15, 2011, the district court denied Mr. Sapp's expungement motion based on Ninth Circuit precedent holding that district courts lack jurisdiction to expunge their own records for equitable reasons. Pet. App. 19a. The court made clear that "if I had the authority to expunge your record, Mr. Sapp, as would be the case in other jurisdictions, I would certainly be inclined to do so." *Id.* The court stated that "it is truly unfortunate that the law does not afford me the ability to expunge your records because, as I mentioned, I would be inclined to do just that." Pet. App. 19a-20a. The court emphasized that "[t]he only problem is that [Mr. Sapp is] in this Circuit," and "for that reason alone," denied his motion. Pet. App. 7a, 21a.

On September 4, 2012, the Ninth Circuit summarily affirmed, finding that Mr. Sapp's appeal was controlled by *United States v. Sumner*, 226 F.3d 1005, 1015 (9th Cir. 2000), which, based on its reading of *Kokkonen*, had held that "a district court does not have ancillary jurisdiction in a criminal case to expunge an arrest or conviction record where the sole basis alleged by the defendant is that he or she seeks equitable relief." Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ for three reasons.

First, there is now a sharp and deep 6-4 split on the question whether a federal district court has inherent or ancillary jurisdiction to expunge its own records of a criminal conviction based on equitable considerations. Resolution of that split, which turns on the proper reach of this Court's opinion in *Kokkonen*, requires this Court's intervention.

Second, the question presented is important and recurring as a significant number of former criminal defendants move to expunge their judicial records, and the confusion in the lower courts over the federal courts' jurisdiction to address such claims for expungement, as well as the contours of the doctrine of ancillary or inherent jurisdiction in the criminal law context, will not be resolved without this Court's intervention.

Third, the Ninth Circuit's ruling below is predicated on an erroneous interpretation of *Kokkonen* as compelling the conclusion that federal courts lack jurisdiction to address claims for expungement of judicial criminal records based on equitable grounds. *Kokkonen* concerned whether a federal court should adjudicate a state law claim arising from an alleged breach of a settlement agreement when state courts can ably do so. But nothing in *Kokkonen* purported to undermine the role of ancillary jurisdiction in providing a necessary remedy when a person's rights would otherwise be irretrievably lost or to overturn the traditional rule that federal courts have ancillary jurisdiction to revise their own prior orders. Given the substantial history and sound reasoning underlying the uniform pre-*Kokkonen* rule in the courts of appeals that federal courts do have such jurisdiction, there is no persuasive justification for holding that *Kokkonen* compels the opposite result.

Even if *Kokkonen* were apposite, Mr. Sapp's appeal succeeds under its standards. According to *Kokkonen*, ancillary jurisdiction may be exercised to enable a court to function successfully by managing its proceedings and effectuating its decrees and to

dispose of factually interdependent claims. The exercise of jurisdiction over a motion for expungement of judicial records of criminal proceedings based on equitable grounds fits under both of these heads of ancillary jurisdiction.

I. THE COURTS OF APPEALS ARE SHARPLY DIVIDED ON THE QUESTION PRESENTED

There is now a 6-4 split among the circuits as to whether a federal court has jurisdiction to expunge judicial records of a criminal proceeding based on equitable grounds. *See* Lahny R. Silva, *Clean Slate: Expanding Expungements & Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 196 (2010) ("The federal courts remain divided questioning if they even have the authority to expunge."). The Second, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits have concluded that district courts have ancillary jurisdiction to expunge records based on equitable considerations, while the First, Third, Eighth, and Ninth Circuits have ruled that federal courts lack such jurisdiction. To resolve this split, the Court should grant review.

1. Before this Court issued its *Kokkonen* opinion in 1994, the federal courts of appeals uniformly held that district courts have jurisdiction over motions to expunge judicial records of federal crimes for any reason, including equitable considerations. In *Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974), the D.C. Circuit held that "[t]he judicial remedy of expungement is inherent and is not dependent on express statutory provision." Later, in an opinion joined by then-Circuit Judge Bader Ginsburg, the D.C. Circuit again acknowledged that "courts have the inherent, equitable power to

expunge arrest records." *Livingston v. Dep't of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985). The court emphasized that a decision whether to expunge records depends on the facts of each case and requires a balancing of the equities involved. *See id.*

After canvassing the case law, the Tenth Circuit held in *United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975), that "it is fairly well established . . . that courts do possess the power to expunge" records, but that the power "should be reserved for the unusual or extreme case." *See also United States v. Friesen*, 853 F.2d 816, 817-18 (10th Cir. 1988) ("Our analysis begins with the principle that the district court has the authority to order expunction.").

The Second Circuit joined the majority of the circuits on this issue in *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977), and ruled that district courts have the power to expunge records in their equitable discretion, but noted that "relief usually is granted only in extreme circumstances." *Id.* at 539 (internal quotation marks omitted). As in the D.C. Circuit, the Second Circuit's rule is that any request to expunge judicial records must be examined individually and after weighing the "equities," in light of the principle that the power to expunge should be reserved only for unusual cases. *See id.* at 539-40.

In *Allen v. Webster*, 742 F.2d 153 (4th Cir. 1984), the Fourth Circuit followed the Second Circuit in acknowledging that district courts have inherent authority to expunge criminal records in "'exceptional circumstances.'" *Id.* at 154-55 (quoting *Schnitzer,* 567 F.2d at 155). The Fourth Circuit ruled in *Webster* that the district court had not abused its

discretion in denying the motion for expungement because the movant had failed to demonstrate exceptional circumstances. *Id.*

After expressly framing the issue as a jurisdictional one, the Seventh Circuit upheld the inherent power of a federal district court to manage its own judicial records. *See United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993) ("[O]ur 'inherent' power extends to the management of *judicial* business.") (emphasis in original); *see also id.* at 471 ("We must, as an initial matter, satisfy ourselves both of our own jurisdiction and the jurisdiction of the district court."). The court held that expungement of judicial records is appropriate "if the dangers of unwarranted adverse consequences to the individual outweigh the public interest in maintenance of the records." *Id.* at 472.

2. Four circuits have agreed that district courts generally have inherent or ancillary jurisdiction to expunge their own records in criminal cases—but, relying on this Court's decision in *Kokkonen*, 511 U.S. 375, have held that such jurisdiction does not extend to expungement based on equitable grounds. In *Kokkonen*, the Court addressed whether a federal district court had subject-matter jurisdiction to enforce a settlement agreement in a civil case that the district court had dismissed pursuant to the settlement agreement and Federal Rule of Civil Procedure 41(a)(1)(ii) (providing for dismissal "by filing a stipulation of dismissal signed by all parties"). The Court reasoned that none of its prior cases had permitted ancillary jurisdiction over an action "upon a relationship so tenuous as the breach

of an agreement that produced the dismissal of an earlier federal suit." 511 U.S. at 379.

The Court stated that "[g]enerally speaking" there are two "heads" of ancillary jurisdiction:

> 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; and (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 (citations omitted). The Court went on to rule that neither of these heads supports the assertion of ancillary jurisdiction to enforce the terms of a settlement agreement in a dismissed case except where the order of dismissal "retain[ed] jurisdiction" to enforce the settlement agreement. *See id.* at 382. In doing so, the Court emphasized that, without such a retention clause, "enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction." *Id.*

3. The Ninth Circuit was the first circuit to invoke *Kokkonen* as support for a ruling that a federal district court lacks jurisdiction to order expungement of judicial records of a lawful arrest and conviction for equitable reasons. *See Sumner*, 226 F.3d 1005. The Ninth Circuit generally agreed with the Second and D.C. Circuits that "district courts possess ancillary jurisdiction to expunge criminal records." *Id.* at 1014. The court held, however, that when a motion for expungement is

made "solely for equitable considerations," such as to reward a defendant's post-conviction conduct or rehabilitation, a district court does not have jurisdiction to entertain it. *Id.* According to the Ninth Circuit, a court's inherent jurisdiction to order expungement of criminal records is "limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error." *Id.* The court reasoned that *Kokkonen* permits a court to expunge records "to manage its proceedings, vindicate its authority, and effectuate its decrees," but that expungement of a lawful conviction "solely on equitable grounds" does not serve any of those goals. *Id.* (internal quotation marks omitted).

Since *Sumner*, three other courts of appeals have adopted the Ninth Circuit's reasoning. Thus, the Third Circuit has held that a district court does not have jurisdiction to expunge criminal records unless there is "an allegation that the criminal proceedings were invalid or illegal" or an applicable statute permits expungement. *United States v. Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001).

Similarly, the Eighth Circuit has held that, in light of *Kokkonen*, "ancillary jurisdiction does not extend to expungement of a criminal conviction where the petitioner asserts solely equitable grounds." *United States v. Meyer*, 439 F.3d 855, 862 (8th Cir. 2006). The court reasoned, however, that "[a] district court may have ancillary jurisdiction to expunge criminal records in extraordinary cases to preserve its ability to function successfully by enabling it to correct an injustice caused by an illegal or invalid criminal proceeding." *Id.* at 861-62.

Finally, the First Circuit held in *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007), that "*Kokkonen* forecloses any ancillary jurisdiction to order expungement based on . . . equitable reasons." *Id.*[1]

4. On the other hand, since *Kokkonen*, at least two federal courts of appeals have followed the majority rule recognizing federal court's jurisdiction to adjudicate expungement motions based on equitable considerations. Thus, in *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004), the Seventh Circuit reaffirmed that "district courts do have jurisdiction to expunge records maintained by the judicial branch."

The Fifth Circuit likewise has held in a post-*Kokkonen* case that district courts have jurisdiction to expunge their own criminal records for equitable reasons. *See Sealed Appellant v. Sealed Appellee*, 130 F.3d 695 (5th Cir. 1997). In *Sealed Appellant*, the Fifth Circuit contrasted motions to expunge executive records—over which, the court stated, federal courts lack jurisdiction—with motions to expunge judicial records, over which federal courts do have jurisdiction. Recognizing that "[c]ourts have supervisory powers over their own records," the court stated that a district court could entertain a motion

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[1] The Sixth Circuit recently held that federal courts lack jurisdiction to expunge criminal records held by the executive branch. *United States v. Lucido*, 612 F.3d 871, 875 (6th Cir. 2010). However, "[k]eep in mind," the court emphasized, "Lucido is not asking the court to remove records of its *own* proceedings." *Id.* (emphasis in original). Mr. Sapp does not seek expungement of executive records, which might raise separation of powers problems absent when the court seeks only to remove from the public record its own criminal records.

by "a person asking for expungement of judicial records." *Id.* at 697 & n.2.

Moreover, even after *Kokkonen*, district courts within the circuits that have adopted the majority rule continue to consider expungement motions based on equitable factors, notwithstanding the Ninth Circuit's conclusion that *Kokkonen* altered the jurisprudential landscape. *See, e.g.*, *United States v. Kotsiris*, 543 F. Supp. 2d 966, 969 (N.D. Ill. 2008) (holding that even post-*Kokkonen*, court had "jurisdiction to order judicial records of Kotsiris' criminal conviction expunged"); *Edwards v. Inglehart*, 648 F. Supp. 2d 164, 165 n.2 (D.D.C. 2009) (reaffirming that courts have inherent, equitable power to expunge records); *United States v. Doe*, No. 71-892, 2004 WL 1124687, at *3 (S.D.N.Y. May 20, 2004) (expunging defendant's conviction records on basis "of the harm he is exposed to so long as the records in question remain generally accessible"); *United States v. Sizemore*, No. 04-29, 2006 WL 1366020, at *2 (S.D. Miss. May 18, 2006) (holding that "the showing of interference with employment opportunities may justify a court's decision to expunge judicial records" and expunging judicial records associated with defendant's case); *United States v. Williams*, 582 F. Supp. 2d 1345, 1346, 1348 (D. Utah 2008) (expunging criminal record under "well established equitable power of the district court to expunge criminal records").

Thus, since *Kokkonen*, district courts have expunged criminal records where, as here, the defendant was induced into committing the crime, the conviction is relatively old and the defendant has committed no further legal infractions, and a

prosecuting official agreed that expungement would be appropriate in light of all the circumstances. *See, e.g.*, *United States v. Sahadeo*, No. 94-03, 2011 WL 5828339, at *2 (S.D.N.Y. Nov. 17, 2011) (expunging criminal record where defendant likely was induced into committing the act for which she was originally convicted); *United States v. Doe*, 935 F. Supp. 478, 480-81 (S.D.N.Y. 1996) (expunging criminal record where conviction occurred 20 years previously, defendant had no subsequent incidents with law, and defendant had been gainfully employed since that time); *Williams*, 582 F. Supp. 2d at 1346, 1348 (expunging criminal record after AUSA agreed that adverse consequences suffered by defendant due to record of conviction far outweighed value to the government of keeping a record of the conviction).

In sum, the rule in four circuits governing whether a court has jurisdiction to rule on a motion for expungement turns on the basis for relief that the movant invokes. Those circuits hold that a district court does not have jurisdiction to rule on a motion for expungement, even of its own records, if it determines that the motion rests on "equitable grounds." Federal courts within six other circuits continue to rule to the contrary that federal courts have jurisdiction to adjudicate a motion to expunge criminal records based on equitable grounds, but that a court should order expungement only in narrow and extraordinary circumstances. This deep circuit split warrants this Court's intervention.

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING JURISDICTIONAL ISSUE

This case presents the important and recurring jurisdictional question whether federal courts have

the power to expunge their own records based on equitable considerations.

The issue of a court's power to rule on a motion for expungement is a recurring one. In the last ten years alone, more than fifty decisions from federal courts have addressed a request to expunge criminal records.[2] With the circuits in conflict on this issue,

[2] *See, e.g.*, *Lucido*, 612 F.3d 871; *Coloian*, 480 F.3d 47; *Meyer*, 439 F.3d 855; *United States v. Rowlands*, 451 F.3d 173 (3d Cir. 2006); *United States v. Crowell*, 374 F.3d 790 (9th Cir. 2004); *Flowers*, 389 F.3d 737; *Sumner*, 226 F.3d 1005; *United States v. Harris*, 847 F. Supp. 2d 828 (D. Md. 2012); *United States v. Thompson*, No. 95-0172, 2012 WL 2992366 (D. Md. July 19, 2012); *United States v. Barlow*, No. 01-114, 2012 WL 125150 (W.D.N.Y. Jan. 17, 2012); *United States v. Williams*, No. 05-40, 2012 WL 3886309 (W.D.N.Y. Sept. 6, 2012); *United States v. Bass*, No. 89-138, 2012 WL 871215 (S.D. Ohio Mar. 13, 2012); *United States v. Partlow*, No. 98-0378, 2011 WL 2940665 (N.D. Cal. July 21, 2011); *United States v. Page*, No. 51-12585, 2011 WL 2173733 (D. Colo. June 2, 2011); *United States v. Williams*, No. 08-0021, 2011 WL 489771 (N.D. Okla. Feb. 7, 2011); *United States v. Nedelcu*, No. 05-330, 2011 WL 2972077 (D. Utah July 20, 2011), *aff'd* 441 Fed. App'x 614 (10th Cir. 2011); *Sahadeo*, 2011 WL 5828339; *Hall v. Alabama*, No. 09-342, 2010 WL 582076 (M.D. Ala. Feb. 18, 2010); *United States v. Smith*, No. 07-00243, 2010 WL 4809118 (E.D. Ark. Nov. 19, 2010); *United States v. Mitchell*, 683 F. Supp. 2d 427 (E.D. Va. 2010); *In re Petition of Reid*, 593 F. Supp. 2d 233 (D.D.C. 2009); *United States v. Tyler*, 670 F. Supp. 2d 1346 (M.D. Fla. 2009); *United States v. Doan*, No. 97-01039, 2009 WL 587391 (D. Haw. Mar. 6, 2009); *Edwards*, 648 F. Supp. 2d 164; *Williams*, 582 F. Supp. 2d 1345; *Kotsiris*, 543 F. Supp. 2d 966; *United States v. Paxton*, No. 99-91, 2007 WL 2081483 (M.D. Ala. July 20, 2007); *Lyp v. United States*, No. 06-361, 2007 WL 188689 (E.D.N.Y. Jan. 22, 2007); *United States v. Saah*, No. 98-80504, 2007 WL 734984 (E.D. Mich. Mar. 8, 2007); *Jackson v. Quarterman*, No. 07-223, 2007 WL 1138645 (N.D. Tex. Apr. 16, 2007); *In re TwoBears*, No. 80-20073, 2007 WL 1232043 (W.D. Tenn. Apr. 26, 2007); *United States v. McFarlane*, No. 90-20012, 2007 WL 2316923 (D. Kan. Aug. 8, 2007); *United States v. Daisley*, No. 95-059,

district courts throughout the country have thus ruled, and will continue to rule until this Court resolves the split, inconsistently on whether they have jurisdiction to consider (and possibly grant) requests for expungement.

The question presented here is also an important one. *First*, the ability of federal district courts to

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2006 WL 3497855 (E.D.N.Y. Dec. 5, 2006); *United States v. Rahman*, No. 95-375, 2006 WL 2466251 (S.D.N.Y. Aug. 24, 2006); *United States v. Lemus-Perez*, No. 79-914, 2006 WL 2802011 (S.D.N.Y. Oct. 2, 2006); *United States v. Fowler*, No. 66-00171, 2006 WL 3388405 (D. Colo. Nov. 21, 2006); *United States v. Ritman-Defelice*, No. 95-345, 2006 WL 2361726 (D. Colo. Aug. 15, 2006); *United States v. Whitson*, No. 99-071, 2006 WL 2645139 (S.D. Ohio Sept. 14, 2006); *United States v. Jones*, No. 98-158, 2006 WL 2345017 (S.D. Ohio Aug. 10, 2006); *United States v. Peralta*, No. 90-222, 2006 WL 1804449 (S.D. Ohio June 28, 2006); *United States v. Lynum*, No. 98-4, 2006 WL 1804543 (S.D. Ohio June 28, 2006); *Lind v. United States*, No. 97-80218, 2006 WL 2087726 (E.D. Mich. July 25, 2006); *United States v. Vertel*, No. 91-162, 2006 WL 250672 (W.D. Mich. Jan. 31, 2006); *United States v. Davis*, No. 342-72, 2006 WL 1409761 (D.D.C. May 23, 2006); *Sizemore*, 2006 WL 1366020; *Holmes v. United States*, No. 19990106, 2005 WL 1320149 (E.D.N.Y. June 2, 2005); *Payne v. United States Marshal's Office*, No. 05-0369, 2005 WL 3742789 (N.D. Tex. Nov. 2, 2005); *Maul v. Logan County Bd. of County Comm'rs*, No. 05-605, 2005 WL 3558057 (W.D. Okla. Dec. 29, 2005); *United States v. Doe*, No. 71-439, 2004 WL 2071781 (S.D.N.Y. Sept. 16, 2004); *Doe v. Immigration & Customs Enforcement*, No. M-54, 2004 WL 1469464 (S.D.N.Y. June 29, 2004), *motion for reconsideration on other grounds granted*, 2006 WL 1294440 (S.D.N.Y. May 10, 2006); *Doe*, 2004 WL 1124687; *United States v. Carson*, 366 F. Supp. 2d 1151 (M.D. Fla. 2004); *United States v. Lau*, No. 94-1682, 2003 WL 22698810 (S.D.N.Y. Nov. 14, 2003); *United States v. James*, No. 97-715, 2003 WL 21056989 (E.D.N.Y. Feb. 13, 2003).

reward a criminal defendant's post-conviction rehabilitation and promote the defendant's reintegration into society is of significant importance to the criminal justice system. The primary driving force behind the increasing cost of federal corrections "is the historically high rate of criminal recidivism." Silva, *supra*, 79 U. CIN. L. REV. at 156. In turn, "employment appears to be a, if not the, determinative factor in post-release success." *Id.* at 162. One study indicates that ex-offenders with post-release employment "had a recidivism rate of 27.6% compared to 53.9% of those who did not." *Id.*

The stigmatic consequences of even one adjudication can cause criminal defendants to struggle to find employment after release, making them more likely to reoffend. Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile & Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 148 (1966). That problem is presented in stark terms by this case where, notwithstanding Mr. Sapp's sixteen years of rehabilitation, his reintegration into society through gainful employment has been impeded by the district court's record of conviction. In appropriate cases, district courts should have the discretion to expunge a criminal record as perhaps the final step toward total rehabilitation. Whether district courts have this authority to balance the criminal justice system's interest in rehabilitation and reintegration against the government's interest in maintaining criminal records should not turn on the geographic location where the defendant was convicted.

Second, the question presented is important and particularly well-suited to this Court's review

because it is a jurisdictional issue that concerns the scope of a federal court's power, an aspect of the law where the Court has "prime responsibility." *See* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE § 4.15, at 252 (8th ed. 2002) ("On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility."); *see also, e.g.*, *Cunningham v. Hamilton County*, 527 U.S. 198, 210 (1999) (Kennedy, J., concurring) ("This case comes to our argument docket, of course, so that we may resolve a split of authority in the Circuits on a jurisdictional issue, not because there is any division of opinion over the [underlying merits issue]."). Indeed, despite the reliance placed by certain of the courts of appeals on this Court's decision in *Kokkonen*, that case did not address a district court's jurisdiction over its own records, in general, or a request for expungement, in particular. As a result, the lower courts have only the decisions of the sharply divided federal courts of appeals to rely upon in determining whether they have jurisdiction to adjudicate a request to expunge judicial records of criminal proceedings.

Granting the petition and resolving this issue not only would provide needed guidance to district courts and the courts of appeals on this threshold issue, but also would afford the Court an opportunity to further clarify the boundaries of the doctrine of ancillary jurisdiction. Notwithstanding this Court's guidance in the narrow circumstances presented in the civil case in *Kokkonen*, courts continue to struggle with issues of the proper application of ancillary jurisdiction. Indeed, nearly twenty years after

Kokkonen, the courts of appeals still characterize the doctrine as "not easily defined" and "not well settled." *Stein v. KPMG, LLP*, 486 F.3d 753, 760 (2d Cir. 2007) ("[T]he proper scope of ancillary jurisdiction is not well-settled by our case law."); *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006) ("The boundaries of ancillary jurisdiction are not easily defined and the cases addressing it are hardly a model of clarity."). And in a variety of contexts, the federal courts of appeals remain divided on the proper scope of a federal court's ancillary jurisdiction. *Compare Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007) (holding that despite limitations imposed by *Kokkonen*, district court had ancillary judgment to restrain foreign litigation even after payment of money judgment), *with Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355 (8th Cir. 2007) (holding that district court lacks ancillary jurisdiction to enjoin foreign litigation after satisfaction of money judgment).

Of particular relevance here, the lower courts have dealt with the issue of whether, since the codification of the doctrine of supplemental jurisdiction for civil actions under the Judicial Improvement Act of 1990, *see* 28 U.S.C. § 1367(a), federal courts may exercise ancillary jurisdiction at all in connection with a criminal action. *See, e.g.*, *Garcia*, 443 F.3d at 207 (addressing whether courts have ancillary jurisdiction in criminal cases to award attorney's fees). The lower courts have generally held that such jurisdiction does exist, *see, e.g.*, *id.* (relying on criminal records expungement cases as examples), but this Court has never squarely addressed the viability of ancillary jurisdiction in the context of a

criminal matter. Resolution of the question presented here would clarify whether the doctrine of ancillary jurisdiction indeed applies in criminal cases.

In short, whether a federal district court has the power to rule on a motion for expungement is an important and recurring issue, which this Court should decide both to clarify the scope of the doctrine of ancillary jurisdiction and in furtherance of this Court's responsibility to resolve fundamental issues concerning the scope of the power of the federal courts.

Finally, this case presents an excellent vehicle for resolving these fundamental issues. While motions to expunge judicial records are granted only rarely, the district court indicated that it would grant Mr. Sapp's motion under the balancing test used in the majority of circuits that permit expungement on equitable grounds. Resolution of the question presented thus will be dispositive of the outcome of Mr. Sapp's case.

III. THE NINTH CIRCUIT IMPROPERLY APPLIED THIS COURT'S DECISION IN *KOKKONEN* IN RULING THAT A COURT LACKS JURISDICTION TO EXPUNGE ITS OWN RECORDS

An additional reason to grant review is that the decision below, and the other cases in the minority of the split at issue, misapply this Court's decision in *Kokkonen* and the doctrine of ancillary jurisdiction.

1. The minority view, most thoroughly developed by the Ninth Circuit in *Sumner*, is predicated on the mistaken view that *Kokkonen* intended to alter hundreds of years of jurisprudence governing the

scope of ancillary or inherent jurisdiction in criminal cases. Yet nothing in *Kokkonen* so much as addresses, much less supports, the view that district courts' ancillary jurisdiction to expunge their own records in criminal cases does not extend to expungement based on equitable considerations.

Indeed, although the Court in *Kokkonen* invoked the doctrine of ancillary jurisdiction to resolve whether a federal court may adjudicate a state law claim for breach of a settlement agreement, it did not purport to make any sweeping determination of *every* circumstance in which a federal court may assert ancillary jurisdiction or even to address ancillary jurisdiction in criminal cases. In fact, in describing the doctrine, the Court was careful to note that "[t]he doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise." 511 U.S. at 379.

As early as 1812, this Court recognized that even when Congress does not expressly confer federal jurisdiction, a federal court is imbued with "an implied power to preserve its own existence and promote the end and object of its creation." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812). The notion that federal courts retain inherent jurisdiction over particular matters can be traced back to "the common law of England," which was incorporated into colonial and early federal jurisprudence. *Id.* at 34. Ancillary jurisdiction is derived from the English Courts of Chancery, which developed this form of jurisdiction to prevent unfairness that might result from forcing a party to litigate simultaneously in two courts or "be left remediless" entirely. Mary Brigid McManamon,

Dispelling the Myths of Pendent & Ancillary Jurisdiction, 46 WASH. & LEE L. REV. 863, 886 (1989).

As the doctrine of ancillary jurisdiction developed, this Court confirmed that federal courts have ancillary jurisdiction over subsequent actions that challenge or impeach a prior court decree. For example, in *Minnesota Co. v. St. Paul Co.*, 69 U.S. 609 (1864), a party requested a construction of the court's earlier decree. Finding that the court retained jurisdiction over the matter, this Court explained that it "has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law." *Id.* at 633. Similarly, in *Pacific R.R. of Mo. v. Missouri Pac. Ry. Co.*, 111 U.S. 505, 522 (1884), a second suit alleging fraud in connection with a prior foreclosure suit and asking that the decree in the first suit be set aside, was ancillary to the first suit and within the federal court's jurisdiction despite a lack of diversity among the parties. *See also Carey v. Houston & Tex. C. Ry. Co.*, 161 U.S. 115, 130-31 (1896) (discussing well-settled principle that bill filed in federal court to enjoin court's judgment is considered continuation of main proceeding). By the early twentieth century, federal courts took it as a "broad general rule that where a bill in equity is necessary to have a construction of an order or decree of a federal court, or to explain, enforce, or correct it, such bill may be filed in and entertained by such court, notwithstanding the parties interested in having such construction made would not, for want of diverse citizenship, be entitled to proceed by original bill of any kind in a federal court." *Cincinnati, I. & W. R. Co. v. Indianapolis*

Union Ry. Co., 279 F. 356, 362 (6th Cir. 1922). As explained by Judge Skelly Wright, federal courts applied these jurisdictional doctrines with the goal of "insur[ing] that 'complete justice may be done,'" and promoting judicial economy by ensuring that "disputes related to a single dispute should be resolved in the original forum." *Morrow v. District of Columbia*, 417 F.2d 728, 740 (D.C. Cir. 1969) (citation omitted).

Federal courts' ancillary jurisdiction over subsequent actions that impeach or challenge a prior decree dovetails with the traditional rule that "[e]very court has supervisory power over its own records and files." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). Thus, for example, a federal court has inherent power to dispose of records held under seal, even after a case has concluded or been dismissed. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2d Cir. 2004) ("[A] protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, even after judgment.") (internal quotation marks omitted).

The case for jurisdiction over a court's own records is even stronger where, as here, a federal court is the only forum that may conceivably have jurisdiction. Ancillary jurisdiction plays an important role in preserving review over claims by a "person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978); *see also Krippendorf v. Hyde*, 110 U.S. 276, 281-82 (1884) (justifying ancillary jurisdiction over dispute regarding the ownership of

attached property on the unfairness of leaving a third-party claimant without a remedy in the court that has sole possession and control over the subject property). Indeed, this Court has left open the possibility that, under the doctrine of "jurisdiction by necessity," federal courts have inherent jurisdiction over any claim where the party would otherwise be left without a possible remedy. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 419 n.13 (1984). Under traditional principles of ancillary jurisdiction, therefore, district courts have several jurisdictional bases for expunging their own criminal records for equitable purposes.

2. This Court's opinion in *Kokkonen* did not purport to undermine these long-standing principles of ancillary jurisdiction. In *Kokkonen*, this Court addressed whether a federal court or a state court should adjudicate a state law claim arising from an alleged breach of a settlement agreement. The underlying case, which was for breach of a separate agency agreement, had been brought in diversity in federal court and was dismissed after the parties reached a settlement. *Kokkonen*, 511 U.S. at 376. The district court in that case had not, as is commonly done, retained jurisdiction over the case for purposes of enforcing a settlement agreement. *Id.* at 381. The Court ruled that in those circumstances, a federal court does not have jurisdiction over a claim under state law for breach of contract. *Id.* at 380. In particular, the Court reasoned that the district court could not properly assert ancillary jurisdiction over the state law breach of contract claim because: (1) it was unrelated to the underlying lawsuit for breach of a separate agency agreement; and (2) a federal court does not have to retain jurisdiction over claims for

breach of a settlement agreement to perform its judicial functions. *Id.* ("the facts underlying respondent's dismissed claim for breach of agency agreement and those underlying its claim for breach of settlement agreement have nothing to do with each other"); *id.* at 381 ("automatic jurisdiction over such [settlement] contracts is in no way essential to the conduct of federal-court business").

Importantly, *Kokkonen* did not address the scope of a federal court's ancillary jurisdiction to expunge its own criminal records—an issue that is quite different from whether, in the absence of diversity jurisdiction, a federal court has the power to adjudicate a state law claim for breach of contract. Unlike the question presented in *Kokkonen*, the question presented here has nothing to do with the proper allocation of jurisdiction between the federal and state courts over matters traditionally resolved in the state courts. The holding in *Kokkonen* reflects this Court's historical wariness of exercising ancillary jurisdiction in a manner that results in "needless decisions of state law," which generally "should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Here, however, there is no state law remedy available that would result in the expungement of a federal court's judicial records, nor does such expungement intrude in any way into the traditional jurisdiction of the state courts. Nothing in *Kokkonen* warrants the harsh result that *no* court, state or federal, has jurisdiction to consider motions to expunge based on equitable considerations.

Moreover, *Kokkonen* indicated that ancillary jurisdiction would have been proper had the district court made the settlement terms part of its dismissal order, since breach of the agreement would then have been a violation of the order, "and ancillary jurisdiction to enforce the agreement would therefore exist." 511 U.S. at 381; *see also Julian v. Central Trust Co.*, 193 U.S. 93, 112 (1904) (holding that federal district courts can, on their own pronouncement, retain jurisdiction to aid their own jurisdiction and render their decrees effectual). Thus, under *Kokkonen*'s own reasoning, district courts retain ancillary jurisdiction over litigation concerning the force and effect of their prior orders. *See* 511 U.S. at 381; *see also* Fed. R. Civ. P. 60(b)(6) (authorizing civil litigants to seek relief from a federal civil judgment or order at any time for "any . . . reason that justifies relief"). And that is precisely what motions to expunge entail: the criminal defendant's effort to revisit and revise the district court's prior judgment or order.

Accordingly, as a threshold matter, the reliance on *Kokkonen* by the Ninth Circuit, and by the other courts of appeals that have similarly ruled that federal courts' ancillary jurisdiction to expunge criminal records does not extend to equitable grounds, is misplaced. *Kokkonen* simply does not resolve the question presented here. Given the substantial history and sound reasoning underlying the uniform pre-*Kokkonen* rule in the courts of appeals that federal courts' jurisdiction to consider expungement does extend to equitable grounds, there is no persuasive justification for holding that *Kokkonen* compels the opposite rule.

3. In all events, contrary to the reasoning of the Ninth Circuit, the exercise of jurisdiction over a motion for expungement of judicial records of criminal proceedings based on equitable grounds fits under both of the "heads" of ancillary jurisdiction that the Court identified in *Kokkonen*. Indeed, as explained, *Kokkonen* recognizes that a federal court *always* retains jurisdiction over litigation regarding the force and effect of its own orders. *See* 511 U.S. at 381.

First, under *Kokkonen*, a court should have ancillary jurisdiction over its own records to "enable [it] to function successfully" and "manage its proceedings." *Kokkonen*, 511 U.S. at 380. It cannot be seriously questioned, that, at least in some contexts, a federal court requires control over its own records if it is to perform its judicial function successfully.

Indeed, several of the courts of appeals that have held that federal courts do not have jurisdiction to expunge records on equitable grounds have nonetheless acknowledged that courts may correct clerical errors in records long after a case has been resolved or expunge records in cases tainted by a constitutional violation. *See, e.g.*, *Sumner*, 226 F.3d at 1014 (court's "ancillary jurisdiction is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error"); *Dunegan*, 251 F.3d at 480 (court has jurisdiction to expunge criminal records where there is "an allegation that the criminal proceedings were invalid or illegal"); *Meyer*, 439 F.3d at 861 (same).

But the specific contours of how a court, in its discretion, should exercise its power over its own

judicial records should not determine the threshold issue of whether a court has *jurisdiction* over those records. The approach taken by the courts in the minority of the split at issue here, including the Ninth Circuit, conflates the jurisdictional and merits inquiries. The jurisdictional inquiry, as framed in *Kokkonen*, is whether a court requires control over its own documents to function successfully and manage its proceedings. *See* 511 U.S. at 379-80. The answer to that question is obviously "yes," and the courts in the minority have not seriously contended otherwise. Whether and when to expunge records on equitable grounds, remedy constitutional or statutory violations, or correct clerical errors is not a jurisdictional question, but rather a question of how a court's underlying authority should be exercised.

Second, a motion to expunge judicial records of a criminal proceeding is "in varying respects and degrees, factually interdependent" with the underlying criminal proceeding in federal court. *Kokkonen*, 511 U.S. at 379.

Expungement is warranted here, among other reasons, because of Mr. Sapp's limited and unwilling role in the offense for which he was convicted, his assistance to the government, and the fact that the record of conviction is impeding his employment status. Mr. Sapp's expungement motion is "interdependent" with the underlying criminal charge. Indeed, it is *because* of that charge that Mr. Sapp is seeking to expunge the court's record of conviction. To evaluate Mr. Sapp's claims, the district court would have to re-familiarize itself with the underlying criminal proceedings and evaluate the

impact of its own judgment on Mr. Sapp's post-conviction life and rehabilitation.

Mr. Sapp's motion is at least as "factually interdependent" with the underlying federal court proceeding as is, for example, a request for attorney's fees. Both before and after *Kokkonen*, courts have routinely asserted ancillary jurisdiction over requests for attorney's fees arising from the underlying litigation. *See, e.g.*, *Kokkonen*, 511 U.S. at 380 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), as an example of an assertion of ancillary jurisdiction over a motion to compel payment of attorney's fees as a sanction); *Stein*, 486 F.3d at 760 ("The most common exercise of ancillary jurisdiction is, probably, to resolve fee disputes between a party and its attorney arising in litigation in which the attorney represented the party.").

Just as a court awarding attorney's fees must be familiar with the underlying proceeding in order to evaluate the reasonableness of a request for fees (*see Cluett, Peabody & Co. v. CPC Acquisition Co.*, 863 F.2d 251, 256 (2d Cir. 1988) (ancillary jurisdiction over fee request proper because "the lower court's familiarity with the subject matter of the suit lent support to the exercise of jurisdiction")), a court asked to expunge a criminal record for equitable reasons must be familiar with the underlying conviction and the circumstances of the movant's involvement in the underlying offense in order to evaluate the propriety of the expungement motion. Here, for example, the district court expressed its inclination to grant Mr. Sapp's expungement motion because he was coerced into committing the underlying crime, he provided substantial assistance

to the government, and, at the time of sentencing, his involvement in the crime was atypical of his behavior. To properly analyze any of these factors, the district court required factual familiarity with the subject matter of Mr. Sapp's criminal conviction.

4. Finally, recognizing a court's jurisdiction to entertain a motion for expungement based on equitable grounds does not mean that such motions would become commonplace or that they would be frequently granted. As the courts of appeals have noted, expungement is not commonly granted. *See, e.g.*, *Flowers*, 389 F.3d at 739 ("[O]ur view of the balancing test is like that of other courts which have emphasized that expungement is an extraordinary remedy. . . . '[U]nwarranted adverse consequences' must be uniquely significant in order to outweigh the strong public interest in maintaining accurate and undoctored records."). But in the rare case where expungement is justified, a federal court should not be prevented from exercising its sound discretion because the law of its circuit is based on a misreading of this Court's precedent.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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January 17, 2012