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No. 07-72

In the Supreme Court of the United States

ARTIN H. COLOIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court had jurisdiction to entertain petitioner's request for expungement of records relating to petitioner's criminal prosecution.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 480 F.3d 47.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2007. On June 7, 2007, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including July 18, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In June 2002, after a jury trial in the United States District Court for the District of Rhode Island, petitioner was acquitted of conspiring to commit bribery (18 U.S.C. 371) and the substantive offense of bribery (18

U.S.C. 666(a)(1)(B)). In December 2005, petitioner filed a motion to expunge the record of his criminal case. See Pet. App. 2a, 59a-61a. The district court concluded that it had jurisdiction, but rejected the motion on the merits. See *id.* at 25a-36a. The court of appeals concluded that the district court lacked jurisdiction, and it vacated the district court's order, remanding with instructions to dismiss for want of jurisdiction. *Id.* at 1a-9a.

1. Petitioner and five co-defendants were indicted on federal corruption charges. On petitioner's motion, the district court severed his case from that of his co-defendants. In June 2002, the jury found petitioner not guilty on both of the counts with which he was charged. Pet. App. 1a-2a, 45a.

In December 2005, petitioner filed a motion to expunge the record of his criminal case, using the docket number of the original prosecution. Pet. App. 59a-61a; see *id.* at 2a, 45a-46a. He argued that expungement was warranted on equitable grounds because he suffered an "extreme and unusual" "stigma" from the prosecution and was impeded in his ability to practice law and conduct business. *Id.* at 2a, 46a. At a hearing in the district court, petitioner's counsel argued:

> Although [petitioner] has been exonerated and cleared, he still faces the stigma which hovers over him, and at any time in the future, the cloud of prosecution against him remains for whomever, or by one way or another, they may gain access to that record. 28 United States Code 534 allows the Attorney General to disseminate, collect, and record records from not only state proceedings, but also various agencies, and they're collected through that statute, and the Attorney General's allowed to disseminate them to various agencies. And those agencies are not just

> law enforcement agencies. They're banks, credit agencies, professional employment insurance companies. And also the information is given out when a person applies and is running for public office, that information is sent back to those people who are applying.

Id. at 27a. The government opposed the motion to expunge, arguing that the district court lacked jurisdiction to entertain it and that expungement was in any event inappropriate. See *id.* at 2a.

The district court determined that it had authority to order expungement of records in appropriate circumstances, but that such "power should be very sparingly exercised." Pet. App. 33a; see *id.* at 3a. While suggesting that expungement might be appropriate if the underlying criminal proceedings had been unconstitutional or otherwise invalid, or if maintenance of the records would cause "extreme hardship" in a particular case, the court held that petitioner could not satisfy either of those criteria. *Id.* at 33a-34a. The court found "nothing that suggests that the charges against [petitioner] were unlawful or unconstitutional or that there was anything about the Grand Jury's proceedings that could be categorized as such." *Id.* at 34a. The court also observed that the record of the criminal proceedings "includes not only the fact that [petitioner] was indicted and charged, but also that a Jury acquitted him." *Ibid.* In the district court's view, that fact "mitigate[d] * * * any argument that [petitioner] suffers some unusual or extreme hardship as a result of this record being in the Court file." *Ibid.*

2. On petitioner's appeal, the court of appeals vacated the district court's order and remanded the case with instructions to dismiss for lack of jurisdiction. Pet. App. 1a-9a.

In contending on appeal that expungement of his criminal record was appropriate, petitioner argued that the Attorney General's dissemination of information collected pursuant to 28 U.S.C. 534 "may impose a tremendous hardship on an individual." Pet. App. 19a. The court of appeals recognized that in some circumstances a district court "may assert ancillary jurisdiction 'to adjudicate claims and proceedings related to a claim that is properly before the court.'" *Id.* at 5a (quoting *Black's Law Dictionary* 868 (8th ed. 2004)). The court explained, however, that, under this Court's decision in *Kokkonen* v. *Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), ancillary jurisdiction may appropriately be exercised only (1) to permit a single court to dispose of claims that are factually interdependent; or (2) to enable a court "to manage its proceedings, vindicate its authority, and effectuate its decrees." Pet. App. 5a-6a (quoting *Kokkonen*, 511 U.S. at 380).

The court of appeals explained that "[t]he Third, Eighth and Ninth Circuits have read *Kokkonen* to preclude ancillary jurisdiction over orders to expunge criminal records based solely on equitable grounds." Pet. App. 7a (citing *United States* v. *Meyer*, 439 F.3d 855, 859-860 (8th Cir. 2006); *United States* v. *Dunegan*, 251 F.3d 477, 479 (3d Cir. 2001); and *United States* v. *Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000)). The court acknowledged that other circuits had "concluded that district courts do have ancillary jurisdiction to expunge records based on equitable considerations." *Id.* at 8a (citing *Livingston* v. *United States Dep't of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985), as amended Apr. 5, 1985; *United States* v. *Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977), cert. denied, 435 U.S. 907 (1978); *United States* v. *Flowers*, 389 F.3d 737, 739 (7th Cir. 2004); and *United*

States v. *Linn*, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836 (1975)). The court observed, however, that the decisions authorizing expungement on equitable grounds "either predate *Kokkonen* or they fail to address that decision, which raises questions as to their continued viability." *Ibid.*

The court of appeals concluded that *Kokkonen* was controlling, and that this Court's decision in that case mandated dismissal for lack of jurisdiction of petitioner's request for expungement of his criminal record. Pet. App. 8a-9a. The court of appeals explained that, "[a]s in *Kokkonen*, the original claims brought before the district court in this case have nothing to do with the equitable grounds upon which [petitioner] seeks the expungement of his criminal record." *Ibid.* The court also observed that, again as in *Kokkonen*, "the power asked for here is quite remote from what courts *require* in order to perform their functions." *Id.* at 9a (quoting *Kokkonen*, 511 U.S. at 380). The court further explained that "[t]he existence and availability of [petitioner's] criminal records do not frustrate or defeat his acquittal. In fact, the records are entirely consistent with and respectful of the jury's ultimate judgment in [petitioner's] case, as they accurately document his arrest, trial and acquittal." *Ibid.*

ARGUMENT

1. Petitioner seeks review of the question "[w]hether a federal district court has inherent or ancillary jurisdiction to expunge *judicial* criminal records based on equitable considerations." Pet. i (emphasis added). In arguing that district courts may appropriately exercise jurisdiction in these circumstances, petitioner frames the

relevant issue as whether a federal court may exercise control over "its own records." See Pet. 16, 20.

In the courts below, however, petitioner's request for expungement of his "record" (Pet. App. 59a) was not limited to records in the custody of the Judicial Branch. To the contrary, in both the district court and the court of appeals, petitioner focused almost exclusively on the *Attorney General's* collection and dissemination of records pursuant to 28 U.S.C. 534, and on the harm to petitioner's reputation and professional standing that the Attorney General's implementation of that statute was alleged to have caused. See Pet. App. 27a (transcript of district court oral argument on petitioner's motion to expunge); *id.* at 19a (court of appeals brief for petitioner); pp. 2-3, 4, *supra*. Petitioner did not contend, let alone identify any sound basis for concluding, that expungement of the district court's *own* records would effectively redress his alleged injuries if the relevant Executive Branch practices remained unchanged.

With respect to petitioner's request for expungement of Executive Branch records, the court of appeals' jurisdictional ruling was clearly correct. Federal courts are courts of limited jurisdiction and "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen*, 511 U.S. at 377 (citations omitted). Except in certain narrow areas, federal courts have no common-law power unrooted in a congressional grant of authority, see *Northwest Airlines, Inc.* v. *Transportation Workers Union*, 451 U.S. 77, 95-96 (1981), and cannot grant relief except to vindicate a right created by Congress, *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001), or the Constitution, *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392-394 (1971).

Absent a specific statutory provision authorizing or precluding judicial review, a contention that the Attorney General was maintaining or disseminating criminal records in violation of law would be cognizable under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* (APA), in a suit brought by a person aggrieved by the alleged violation. The questions presented in such a suit, however, would be wholly unrelated to those involved in the underlying criminal case and would therefore lie outside the ancillary jurisdiction of the court in which the prosecution was brought. See *United States* v. *Janik*, 10 F.3d 470, 471 (7th Cir. 1993) (explaining that 18 U.S.C. 3231, which vests the district courts with jurisdiction over federal criminal offenses, "does not vest federal district courts with authority to invade the Executive Branch of government, in particular the Attorney General").[1] And even in an APA suit, the district court would have no general equitable authority to order expungement of Executive Branch records maintained in accordance with applicable statutes, particularly in light of Congress's "clear mandate that the Attorney General preserve all criminal records." *Geary* v. *United States*, 901 F.2d 679, 680 (8th Cir. 1990).

Thus, in limiting the question presented to expungement of "*judicial* criminal records," Pet. i (emphasis added), petitioner has fundamentally altered the nature of the request that was submitted to the courts below. Because the potential harms identified by petitioner were alleged to have resulted from the Attorney Gen-

[1] In the court of appeals, petitioner contended, without meaningful elaboration, that the Attorney General's dissemination of records concerning his criminal prosecution "exceed[ed] [the] scope of 28 U.S.C. § 534." Pet. App. 19a. Petitioner does not press that claim in this Court.

eral's maintenance and dissemination of the relevant records, petitioner would have no colorable equitable claim to expungement of records in the custody of the Judicial Branch, even if the court that heard the prior criminal case had jurisdiction to entertain that request. The instant case would therefore be an unsuitable vehicle for resolution of the question presented, even if that question otherwise warranted this Court's review.

2. Petitioner contends (Pet. 8-10) that this Court's review is warranted because five courts of appeals have held that district courts possess equitable authority to order expungement of judicial records pertaining to prior criminal prosecutions. As the court of appeals in the instant case explained, however, the decisions on which petitioner relies "either predate *Kokkonen* or they fail to address that decision, which raises questions as to their continued viability." Pet. App. 8a. Of the cases on which petitioner relies to establish a circuit conflict, only *United States* v. *Flowers*, 389 F.3d 737 (7th Cir. 2004), was decided after *Kokkonen*. The court's jurisdictional ruling in *Flowers* was based entirely on pre-*Kokkonen* circuit precedent, see *id.* at 739, and the court did not cite *Kokkonen*.[2] By contrast, the four other circuits that have addressed the question since *Kokkonen* have all relied on *Kokkonen* to hold that a district court lacks ancillary jurisdiction to expunge records in a criminal case on purely equitable grounds. See Pet. App. 8a-9a; *Meyer*, 439 F.3d at 859-860; *Dunegan*, 251 F.3d at 479; *Sumner*, 226 F.3d at 1014. The clear trend in the circuits since this Court's decision

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[2] The Seventh Circuit in *Flowers* also reaffirmed its prior holding in *Janik* that federal courts do *not* possess jurisdiction to order expungement of *Executive Branch* records. See 389 F.3d at 738; p. 7, *supra*.

in *Kokkonen* counsels against further review in this case.

3. Further review of the jurisdictional question petitioner presents is also unwarranted because his claim fails on the merits. Petitioner identifies no court of appeals decision *granting* expungement of judicial records under circumstances similar to those presented here. As the district court explained, petitioner failed to show either that his indictment was unlawfully obtained or that he would suffer "extreme hardship" if his record was not expunged. See Pet. App. 34a. In the court of appeals, petitioner noted but did not challenge the district court's finding that the grand jury proceedings were lawfully conducted. See *id.* at 21a-22a. He contended, however, that he would suffer "unusual or extreme hardship" if his record was not expunged because the crimes with which he had been charged (bribery and conspiracy to commit bribery) "raise suspicion as to the character and credibility of the accused," and because his profession as an attorney made it particularly important that he maintain a reputation for trustworthiness. *Id.* at 22a, 23a.[3]

Petitioner cites no decision holding that the prospect of adverse employment consequences constitutes "extreme hardship" warranting expungement of judicial records. The Seventh Circuit in *Flowers*—the only post-

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[3] In both the district court and the court of appeals, petitioner referred without elaboration to the complaint of an unnamed grand juror that the government had been uncooperative with the grand jury and had withheld material information. See Pet. App. 18a, 64a. In his court of appeals brief, however, petitioner did not challenge the district court's determination that no illegality in the grand jury proceedings had been shown. Rather, he based his claim for expungement solely on an assertion of "unusual or extreme hardship." See *id.* at 21a-23a.

Kokkonen court of appeals decision that has adopted petitioner's position on the jurisdictional question—squarely held that impairment of employment prospects is *not* a valid ground for expungement. See 389 F.3d at 739-740. Petitioner's status as an attorney does not alter that analysis. To the extent that potential clients prefer not to retain a lawyer who has been indicted and later acquitted on bribery charges, expungement of the relevant records would hinder the clients' ability to make a choice that is theirs to make. And in any event, petitioner has identified no basis for concluding that expungement of Judicial Branch records alone would redress the alleged injury to his professional reputation. See pp. 5-8, *supra*.

Moreover, at least when a request for expungement is premised on harms occurring after the conclusion of the criminal proceedings, rather than on an asserted legal infirmity in the prosecution itself, the court that heard the criminal case clearly lacks ancillary jurisdiction under the standards announced in *Kokkonen*. The exercise of ancillary jurisdiction may be appropriate "(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." *Kokkonen*, 511 U.S. at 379-380 (citations omitted); see Pet. App. 5a-6a. The first prong of that test is not satisfied here because issues concerning the existence or extent of current harm to petitioner's professional reputation and ability to attract business are unrelated to any question that was resolved in the underlying criminal prosecution. And because the court in the criminal case did not find the government's initiation or conduct of the prosecution to

be unlawful, expungement of judicial records would not further the court's ability "to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 380.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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