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IN THE

**Supreme Court of the United States**

ARTIN H. COLOIAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA

*Respondent.*

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

**PETITION FOR A WRIT OF CERTIORARI**

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### QUESTION PRESENTED

Petitioner, Artin H. Coloian, an attorney and the former Chief of Staff to the Mayor of Providence, Rhode Island, was indicted on bribery charges as part of an infamous and politically-charged prosecution of the Mayor. The lead prosecutor was sanctioned, suspended from the case and fined for certain conduct during the proceedings, and Mr. Coloian received relief short of dismissal of the indictment for an alleged due process violation during the proceedings. After he was acquitted of all charges, Mr. Coloian sought to have the judicial records of his indictment expunged in light of the egregious circumstances of the proceedings against him and the continuing harm that those records have caused to his reputation and law practice. The district court determined that it had jurisdiction over Mr. Coloian's motion, but denied relief. The First Circuit refused to address the merits of Mr. Coloian's appeal and instead held, based on its interpretation of this Court's decision in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), that the district court lacked jurisdiction to consider Mr. Coloian's motion. In doing so, the court of appeals joined a now 5-4 split in the circuits over whether a federal court has jurisdiction to expunge judicial criminal records on the basis of its inherent power over its own records.

The question presented is thus:

Whether a federal district court has inherent or ancillary jurisdiction to expunge judicial criminal records based on equitable considerations.

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## **PETITION FOR A WRIT OF CERTIORARI**

Artin Coloian respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

### **OPINIONS BELOW**

The district court's order was issued orally from the bench on February 10, 2006, and a transcript of that proceeding is reprinted at Pet. App. 25a-36a. The opinion of the United States Court of Appeals for the First Circuit issued on March 20, 2007, is reported as *United States v. Coloian*, 480 F.3d 47 (1st Cir. 2007), and is reprinted at Pet. App. 1a-9a.

### **JURISDICTION**

The judgment of the First Circuit was entered on March 20, 2007. On June 7, 2007, Justice Souter extended the time for filing this petition to and including July 18, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **STATEMENT OF THE CASE**

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 actions that they have taken since those proceedings were commenced.<sup>1</sup> The federal courts of appeals have traditionally held that, while such relief should be granted only in extraordinary

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<sup>1</sup> There are very limited federal statutory grounds for expunging criminal records that are not at issue in this case. *See, e.g.*, 10 U.S.C. § 1565(e) (mandating expungement of DNA records when military conviction is overturned); 18 U.S.C. § 3607(c) (allowing for expungement of criminal records in certain drug possession cases); 42 U.S.C. § 14132(d) (allowing for expungement of DNA records held by the FBI in certain cases where conviction is overturned).

cases, the federal courts have jurisdiction to consider equitable claims for expungement of judicial records. *See, e.g., Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974).

In *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), this Court held that a federal court lacks jurisdiction to enforce a settlement agreement where its accompanying order of dismissal did not reserve jurisdiction. In light of *Kokkonen*, several federal circuits have held that a federal court also lacks jurisdiction to consider claims seeking expungement of judicial criminal records based on equitable grounds. Notwithstanding the unusual and troubling circumstances of Mr. Coloian's prosecution and acquittal, the First Circuit below refused to consider the merits of Mr. Coloian's claims and joined with the Third, Eighth and Ninth Circuits to hold that *Kokkonen* compels the conclusion that the federal courts lack jurisdiction to consider claims for expungement of judicial criminal records based on equitable grounds. Thus, there is now a 5-4 split in the federal courts of appeals, with the Second, Fourth, Seventh, Tenth and D.C. Circuits holding that such jurisdiction exists, while the First, Third Eighth, and Ninth Circuits holding that it does not. This conflict is particularly troubling since it concerns the jurisdiction of the federal courts and because the general scope of ancillary jurisdiction in criminal cases has not been defined by this Court.

#### **A. Background**

Operation Plunder Dome was a federal investigation into allegations of corruption in the administration of the former Mayor of Providence, Rhode Island, Vincent "Buddy" Cianci, Jr. *See, e.g.,* Brian Carovillano, *After three years of hype, Plunder Dome trial heads to court this week*, THE STANDARD TIMES, Apr. 15, 2002, at A13, available at <http://archive.southcoasttoday.com/daily/04-02/04-15-02/a13sr065.htm>. The investigation led to several indictments and the resulting court cases involved a "crush of pretrial publicity." *Id.* In February 2000, Providence Tax

Board Vice Chairman David C. Ead pleaded guilty to arranging bribes with city officials. *See id.*

Mr. Coloian is an attorney and the former Chief of Staff for Mayor Cianci. (Pet. App. 12a). On April 2, 2001, a federal grand jury in the District of Rhode Island returned a superseding, twenty-nine count indictment charging six individuals, including Mr. Coloian, with various public corruption offenses. (Pet. App. 1a, 11a). Mr. Coloian was charged in only two counts of the indictment: bribery and conspiracy to commit bribery, under 18 U.S.C. § 666(a)(1)(B) and 18 U.S.C. § 371. (Pet. App. 12a). The charges were based on allegations that Mr. Coloian took part in an incident in which Mayor Cianci was allegedly paid \$5,000 for obtaining a job for Christopher Ise. (Pet. App. 2a, 12a). Those allegations, in turn, were based solely on the uncorroborated statements of Mr. Ead—an admitted felon—in return for which Mr. Ead had been promised leniency by the prosecution. (Pet. App. 12a & n.1).

Mr. Coloian moved to sever his case from the other defendants named in the indictment on the grounds that a joint trial with the other defendants as to all 29 counts of the indictment would effectively deny him due process of law. (Pet. App. 28a, 30a). In granting Mr. Coloian's motion to sever, the district court noted the risk that the evidence presented against the other defendants would prejudice Mr. Coloian and also that Mr. Coloian appeared to be the least culpable of all of the defendants. (Pet. App. 28a, 30a, 65a).

#### **B. Mr. Coloian's Acquittal**

The Government's prosecution involved a number of irregularities. For instance, during the grand jury proceedings, a juror complained that the Government was not cooperating with the grand jury and was withholding material information. (Pet. App. 13a, 18a, 64a). Furthermore, the Government's lead prosecutor was fined and suspended from the case when he showed an evidentiary

video in the case to guests at his house during a party. (Pet. App. 65a ).

At trial, the Government's principal evidence against Mr. Coloian was the uncorroborated testimony of Mr. Ead, who had reached a plea bargain with the Government and had been promised leniency for his cooperation. (Pet. App. 12a, 13a). After the testimony of Mr. Ead was read back to the jury, the jury returned a verdict with respect to Mr. Coloian of not guilty on both charges in June 2002. (Pet. App. 18a, 43a). Mr. Coloian was subsequently acquitted of both of the charges brought against him. (Pet. App. 43a).

### **C. Mr. Coloian's Motion to Expunge**

In December 2005, Mr. Coloian filed a motion in the U.S. District Court for the District of Rhode Island, under the same docket number as the criminal case against him, to seal and expunge the judicial records of the charges against him. (Pet. App. 59a-61a). Mr. Coloian acknowledged that expungement is "not routinely granted," but asserted that the remedy was warranted in this case on equitable grounds as a result of the unusual circumstances of his indictment and prosecution, the pronounced stigma that the charges had created against him, and because his arrest and the charges brought against him have impeded and will continue to impede his ability to practice law and transact business. (Pet. App. 60a). Mr. Coloian asserted that the charges brought against him have been particularly harmful to his credibility as a practicing attorney because they alleged a crime of dishonesty. (Pet. App. 60a-61a).

The Government submitted a consolidated opposition to Mr. Coloian's motion to seal and expunge. It argued that, under its interpretation of this Court's decision in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994), a federal district court does not have the jurisdiction to consider a motion for expungement. (Pet. App. 68a-69a). The Government acknowledged, however, that the circuits were split on this jurisdictional issue, with several federal

appellate courts ruling that a district court has the jurisdiction to entertain a motion to expunge records and may exercise it in “extraordinary circumstances,” and other federal appellate courts holding that, unless there is a showing that the underlying criminal proceedings were unlawful or invalid, a district court does not have the jurisdiction to hear motions to expunge judicial criminal records. (Pet. App. 69a-72a).

The district court ruled on Mr. Coloian’s motions from the bench. The court concluded that “courts do have the inherent authority and control over their own records and can, in appropriate circumstances, expunge records, but that power should be sparingly exercised.” (Pet. App. 3a, 32a-33a). The court ruled, however, that Mr. Coloian had not demonstrated “extreme hardship” to warrant expungement of the court’s records of his criminal case. (Pet. App. 33a).

#### **D. The Decision Below**

Mr. Coloian appealed from the district court’s order, urging that the district court had applied an erroneous and unduly restrictive legal standard to the merits of Mr. Coloian’s expungement motion. (Pet. App. 16a-21a). On appeal, the Government again focused its argument on the issue of whether the district court had jurisdiction to rule on Coloian’s motion for expungement. (Pet. App. 47a-54a). Once again, the Government acknowledged the circuit split on this issue. (Pet. App. 48a-50a).

The United States Court of Appeals for the First Circuit vacated the district court’s order. The court of appeals held that a federal court does not have jurisdiction over a motion to expunge brought on equitable grounds. (Pet. App. 9a). In so holding, the court acknowledged, (Pet. App. 4a-5a), that it had previously addressed the issue of a court’s jurisdiction over a motion to expunge in *Reyes v. Supervisor of DEA*, 834 F.2d 1093 (1st Cir. 1987), where the First Circuit had stated that a court’s jurisdiction to “exercise its equitable discretion to expunge . . . files” is a “narrow” power. *Id.* at 1098.

The court also acknowledged a circuit split, recognizing that the Second, Seventh, Tenth, and D.C. Circuits had concluded that district courts have jurisdiction to expunge records based on equitable considerations, and that the Third, Eighth, and Ninth Circuits had interpreted this Court's decision in *Kokkonen* to preclude the exercise of jurisdiction over such motions to expunge. (See Pet. App. 7a-8a). The First Circuit ruled that, under *Kokkonen*, which held that a federal court lacks ancillary jurisdiction to enforce a settlement agreement where its accompanying order of dismissal did not reserve jurisdiction, a district court does not have jurisdiction to order expungement on equitable grounds. (Pet. App. 8a-9a). The First Circuit reasoned that *Kokkonen* permits ancillary jurisdiction "only (1) to permit disposition of interrelated claims by a single court and (2) to enable a court to 'manage its proceedings, vindicate its authority, and effectuate its decrees.'" (Pet. App. 8a) (quoting *Kokkonen*, 511 U.S. at 379-80). The First Circuit then determined that a federal court lacks ancillary jurisdiction to expunge judicial criminal records on equitable grounds because such "equitable grounds" have "nothing to do" with the "original claims brought before the district court," and because "the power asked for" is "quite remote from what courts *require* in order to perform their functions." (Pet. App. 9a). The court rejected the reasoning of the cases on the majority side of the circuit conflict on the basis that they either predated *Kokkonen* or failed to address that decision. (See Pet. App. 9a).

In light of its ruling that the district court lacked jurisdiction, the First Circuit did not reach the merits of Mr. Coloian's motion to expunge the court's record of his criminal proceeding, did not address Mr. Coloian's argument that the district court had applied an erroneous legal rule to his motion to expunge, and vacated the district court's order with instructions to dismiss Mr. Coloian's motions. (See Pet. App. 9a).



### REASONS FOR GRANTING THE WRIT

This Court should grant the writ for three reasons.

*First*, there is now a sharp 5-4 split in the circuits on the question whether a federal court has jurisdiction over motions to expunge judicial criminal records based on equitable grounds, and this Court's intervention is necessary to resolve the split.

*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 jurisdiction in the criminal law context, will not be resolved without this Court's intervention.

*Third*, the First Circuit below erroneously ruled that this Court's previous decision in *Kokkonen* compels the conclusion that the federal courts lack jurisdiction to address claims for expungement of judicial criminal records based on equitable grounds. The Court in *Kokkonen* neither addressed nor purported to address the application of the doctrine of ancillary jurisdiction to expungement of criminal records; that decision simply does not resolve the question presented here. In all events, this Court's explanation in *Kokkonen* of the bases for ancillary jurisdiction actually supports federal court jurisdiction over claims for expungement based on equitable grounds. A motion to expunge judicial records of a criminal charge should be deemed "in varying respects and degrees, factually interdependent" with the underlying criminal proceedings themselves. *Kokkonen*, 511 U.S. at 379. And to "function successfully" and "manage its proceedings" a federal court requires the power to manage its own records. *Id.* at 380.

## I. THE DECISION BELOW DEEPENS AN ALREADY-MATURE CIRCUIT CONFLICT, CREATING A 5-4 SPLIT

There is now a 5-4 split among the circuits as to whether a federal court has jurisdiction to expunge judicial records of a criminal proceeding based on equitable grounds: The Second, Fourth, Seventh, Tenth, and D.C. circuits have concluded that district courts have ancillary jurisdiction to expunge records based on equitable considerations, while the Third, Eighth, Ninth, and now the First Circuit, have ruled that federal courts lack ancillary jurisdiction over orders to expunge criminal records based solely on equitable grounds. (See Pet. App. 7a-8a). To resolve this split, the Court should grant the writ.

A. The federal courts of appeals first began to address jurisdiction to expunge records more than thirty years ago. 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.* at 78.

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 an arrest record where the arrestee has been acquitted,” but that an acquittal alone is not sufficient to exercise this authority” and that it “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 . . . . [M]ere acquittal of the subsequent charge is an insufficient reason to grant 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 of an arrest 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.

The First Circuit below did not mention the Fourth Circuit as among those courts that have recognized a federal court’s authority to expunge criminal records. But 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 ruled, however, that, in the absence of any applicable statutory authority, federal courts do not have any inherent power to order an agency in the Executive Branch to

expunge its records. *See id.* Most recently, 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 . . . . It is fair to say that our view of the balancing test is like that of other courts which have emphasized that expungement is an extraordinary remedy.”

B. On the other hand, the circuits that have held that there is no inherent or ancillary jurisdiction to order expungement of criminal records on equitable grounds have all relied on this Court’s decision in *Kokkonen*, 511 U.S. 375. In *Kokkonen*, the Court addressed whether a federal district court had subject-matter jurisdiction to enforce a settlement agreement in a 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.

*Kokkonen*, 511 U.S. 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 case that had been dismissed, but

established that such jurisdiction would exist if the order of dismissal had language stating that the court “retain[ed] jurisdiction” over the settlement agreement. *See id.* at 381. 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.* at 382.

C. The Ninth Circuit was the first circuit to rely on *Kokkonen* as support for a ruling that, at least in certain circumstances, a federal district court does not have jurisdiction to order expungement of judicial records of a lawful arrest and conviction. *See United States v. Sumner*, 226 F.3d 1005 (9th Cir. 2000). 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 proceedings, vindicate authority, and effectuate decrees,” but, according to the Ninth Circuit, expungement of a lawful conviction “solely on equitable grounds” does not serve any of those goals. *Id.* (internal quotation marks omitted).

Relying on *Kokkonen* and the Ninth Circuit’s decision in *Sumner*, the Third Circuit has held that a district court does not have jurisdiction to expunge criminal records, even when the criminal proceedings end in an acquittal, unless there is “an allegation that the criminal proceedings were invalid or illegal” or there is an applicable statute that 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, in this case, the First Circuit held that the district court lacked jurisdiction to rule on Mr. Coloian’s request for expungement. Although that request was predicated on irregularities in the criminal proceedings brought against Mr. Coloian and the stigma of the criminal charges of which he was later acquitted, the First Circuit ruled that “the original claims brought before the district court in this case have nothing to do with the equitable grounds on which Coloian seeks the expungement of his criminal record.” (Pet. App. 8a-9a). The court concluded that “*Kokkonen* forecloses any ancillary jurisdiction to order expungement based on Coloian’s proffered equitable reasons.” (Pet. App. 9a).

D. In sum, the rule in five circuits is that federal courts have jurisdiction to rule upon a motion to expunge criminal records based on equitable grounds, but that a court should order expungement only in narrow and extraordinary circumstances. Four circuits, including the First Circuit in this case, have ruled to the contrary that whether a court has jurisdiction to rule on a motion for expungement turns on the reason that the movant seeks the relief. Those circuits hold that a district court does not have jurisdiction to rule on a motion for expungement, even of a court’s own judicial records, if the court determines that the bases for the motion are “equitable grounds.” This deep circuit split is ripe for the Court to resolve.

## II. WHETHER A FEDERAL COURT HAS THE POWER TO EXPUNGE ITS OWN RECORDS IS AN IMPORTANT AND RECURRING JURISDICTIONAL ISSUE

The Court should also grant the writ because the issue presented by the decision below is an important and recurring one. While motions to expunge judicial records are granted only rarely, the issue of a court's power to rule on a motion for expungement is a recurring issue that, because it concerns federal courts' jurisdiction, is inherently an important one.

In the last ten years alone, more than fifty decisions from federal courts have addressed a request to expunge criminal records.<sup>2</sup> With the circuits in conflict on this issue, district

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<sup>2</sup> See, e.g., *United States v. Meyer*, 439 F.3d 855 (8th Cir. 2006); *United States v. Rowlands*, 451 F.3d 173 (3d Cir. 2006); *United States v. Crowell*, 374 F.3d 790 (9th Cir. 2004); *United States v. Flowers*, 389 F.3d 737 (7th Cir. 2004); *United States v. Dunegan*, 251 F.3d 477 (3d Cir. 2001); *United States v. Sumner*, 226 F.3d 1005 (9th Cir. 2000); *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695 (5th Cir. 1997); *Lyp v. United States*, 2007 WL 188689 (E.D.N.Y. 2007); *United States v. Saah*, 2007 WL 734984 (E.D. Mich. 2007); *Jackson v. Quarterman*, 2007 WL 1138645 (N.D. Tex. 2007); *In re TwoBears*, 2007 WL 1232043 (W.D. Tenn. 2007); *United States v. McFarlane*, 2007 WL 1452069 (D. Kan. 2007); *United States v. Daisley*, 2006 WL 3497855 (E.D.N.Y. 2006); *United States v. Rahman*, 2006 WL 2466251 (S.D.N.Y. 2006); *United States v. Lemus-Perez*, 2006 WL 2802011 (S.D.N.Y. 2006); *United States v. Fowler*, 2006 WL 3388405 (D. Colo. 2006); *United States v. Ritman-Defelice*, 2006 WL 2361726 (D. Colo. 2006); *United States v. Whitson*, 2006 WL 2645139 (S.D. Ohio 2006); *United States v. Jones*, 2006 WL 2345017 (S.D. Ohio 2006); *United States v. Peralta*, 2006 WL 1804449 (S.D. Ohio 2006); *United States v. Lymum*, 2006 WL 1804543 (S.D. Ohio 2006); *Lind v. United States*, 2006 WL 2087726 (E.D. Mich. 2006); *United States v. Vertel*, 2006 WL 250672 (W.D. Mich. 2006); *United States v. Davis*, 2006 WL 1409761 (D.D.C. 2006); *Holmes v. United States*, 2005 WL 1320149 (E.D.N.Y. 2005); *Payne v. United States Marshal's Office*, 2005 WL 3742789 (N.D. Tex. 2005); *Maul v. Logan County Bd. of County Comm'rs*, 2005 WL 3558057 (W.D. Okla. 2005); *United States v. Doe*, 2004 WL 2071781 (S.D.N.Y. 2004); *Doe v.*

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, and thus particularly well-suited for this Court to 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

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*Immigration & Customs Enforcement*, 2004 WL 1469464 (S.D.N.Y. 2004); *United States v. Doe*, 2004 WL 1124687 (S.D.N.Y. 2004); *United States v. Carson*, 366 F. Supp. 2d 1151 (M.D. Fla. 2004); *United States v. Lau*, 2003 WL 22698810 (S.D.N.Y. 2003); *United States v. James*, 2003 WL 21056989 (E.D.N.Y. 2003); *United States v. Hasan*, 2002 WL 31946712 (E.D.N.Y. 2002); *United States v. Gary*, 206 F. Supp. 2d 741 (D. Md. 2002); *Smith v. United States Parole Comm'n*, 2002 WL 32841640 (D. Md.), *aff'd*, 48 F. App'x 463 (4th Cir. 2002); *United States v. Steelwright*, 179 F. Supp.2d 567 (D. Md. 2002); *United States v. Flagg*, 178 F. Supp.2d 903 (S.D. Ohio 2001); *Schaeuble v. Reno*, 87 F. Supp. 2d 383 (D.N.J. 2000); *Humbles v. District of Columbia*, 2000 WL 246578 (D.D.C. 2000); *United States v. Mcfadzean*, 1999 WL 993641 (S.D.N.Y. 1999); *United States v. Seibel*, 1999 WL 681276 (S.D.N.Y. 1999); *United States v. Morelli*, 1999 WL 459784 (S.D.N.Y. 1999); *United States v. Eustache*, 1999 WL 292707 (S.D.N.Y. 1999); *United States v. Ortiz*, 1999 WL 92281 (S.D.N.Y. 1999); *United States v. Doe*, 36 F. Supp. 2d 143 (S.D.N.Y. 1999); *Cupeta v. United States*, 1999 WL 754281 (E.D.N.Y. 1999); *Akwurah v. United States*, 1999 WL 390832 (E.D.N.Y. 1999); *United States v. Vasquez*, 74 F. Supp. 2d 964 (S.D. Cal. 1999); *United States v. Wiley*, 89 F. Supp. 2d 909 (S.D. Ohio 1999); *United States v. Payne*, 1998 WL 426135 (D. Or. 1998); *United States v. Fletcher*, 1997 WL 557394 (D. Kan. 1997); *Doe v. United States*, 964 F. Supp. 1429 (S.D. Cal. 1997); *United States v. Fields*, 955 F. Supp. 284 (S.D.N.Y. 1997).



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. The Court should grant the petition and resolve this issue to provide needed guidance to district courts and the courts of appeals on this threshold issue.

In addition, granting the petition in this case would provide the Court an opportunity to further clarify the boundaries of the doctrine of ancillary jurisdiction, which has remained an unsettled area of the law. This Court’s decision in *Kokkonen* applied the doctrine of ancillary jurisdiction in the context of determining whether a federal court may assert jurisdiction over a state law claim for breach of a settlement agreement. Notwithstanding this Court’s guidance, however, courts continue to struggle with issues of the proper application of ancillary jurisdiction. Ten 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.”).

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.

### **III. THE FIRST 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 the writ is that the decision below, and the other cases in the minority of the circuit split at issue, misapply this Court's decision in *Kokkonen* and the doctrine of ancillary jurisdiction.

A. *Kokkonen* directly 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. *See* 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. *See id.* at 381. The Court ruled that in these particular circumstances a federal court does not have jurisdiction over a claim under state law for a breach of contract:

No case of ours asserts, nor do we think the concept of limited federal jurisdiction permits us to assert, ancillary jurisdiction over any agreement that has as part of its consideration the dismissal of a case before a federal court.

*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 (i) it was unrelated to the underlying lawsuit for breach of a separate agency agreement; and (ii) a federal court does not have to retain jurisdiction over claims for breach of a settlement agreement to perform its functions. *See id.* at 380 (“[T]he 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 (“[A]utomatic jurisdiction over such [settlement] contracts is in no way essential to the conduct of federal-court business.”).

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. Indeed, in describing the doctrine—as developed in the Court’s precedents—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.

Importantly, nothing in *Kokkonen* purported to address whether a court may assert ancillary jurisdiction over 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. 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. Moreover, the *Kokkonen* decision did not purport to address the contours of ancillary jurisdiction in the context of criminal proceedings.

Accordingly, as a threshold matter, the reliance on *Kokkonen* by the First Circuit below, and by the other courts of appeals that have similarly ruled that federal courts lack ancillary jurisdiction to expunge criminal records on equitable grounds, appears 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 *do* have jurisdiction to consider expungement claims based on equitable grounds, *see supra* Part I, there is no persuasive justification for holding that *Kokkonen* compels the opposite rule.

B. In all events, contrary to the reasoning of the First Circuit below, 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*.

*First*, 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. The decision below stated, in conclusory terms, that "the original claims brought before the district court in this case have nothing to do with the equitable grounds on which Coloian seeks the

expungement of his criminal record.” (Pet. App. 8a-9a). But in this case Mr. Coloian asserts that the stigma of having been charged with bribery, even though he was acquitted, is impeding his ability to practice law and his career in politics and has damaged his reputation; moreover, Mr. Coloian has also asserted that expungement is justified in part because of irregularities in the conduct of the prosecution itself. (Pet. App. 59a-61a, 64a-65a).

Mr. Coloian’s claim, which is exemplary of those raised in motions for expungement based on the effects of having been charged with a federal crime, is plainly “interdependent” with the underlying criminal charge. Indeed, it is *because* of that charge that Mr. Coloian is seeking to expunge the court’s records of the criminal proceedings. As the district court’s order illustrates, ruling on a motion for expungement on such a ground necessarily entails an inquiry into the underlying criminal charges, their disposition, and the effect of those charges on the movant—all of which are “factually interdependent” with the underlying criminal proceeding. (See Pet. App. 28a) (asking whether “the fact that he was acquitted . . . remove[s] much of the sting here”); (Pet. App. 28a) (counsel’s argument that “this is an unusual and extreme case,” due to the unusual events during trial, including the sanctioning of the lead prosecutor and the high profile nature of the prosecution); (Pet. App. 34a) (court reasoning expungement is not favored because the record “includes not only the fact that Mr. Coloian was indicted and charged, but that a Jury acquitted him”).

A motion to expunge records of a criminal proceeding is thus at least as “factually interdependent” with the underlying federal court proceeding as is, for example, a request for attorney’s fees. And, 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.").

*Second*, under the other "head" of jurisdiction set forth in *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 function successfully as a court. Surely, for example, a federal court can dispose of records held under seal, even after a case has concluded or been dismissed. *See Gamble 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); *see generally Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files . . . ."). Indeed, several of the courts of appeals that have held that federal courts do not have jurisdiction to expunge records on equitable grounds have acknowledged that courts may correct clerical errors in records long after a case has been resolved or can expunge records in cases where there is 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 First Circuit, conflates the jurisdictional and merits inquiries. The jurisdictional inquiry, as framed in the *Kokkonen* decision, 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.

C. Finally, it should be noted that 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—in those circuits that recognize federal courts’ jurisdiction to rule on expungement motions based on equitable grounds—even for acquitted defendants. 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.”). There is thus no reason to believe that acknowledging the federal courts’ jurisdiction to rule on a motion for expungement would make such motions routine or mean that they would be commonly granted.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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