No. 15-____

# In The
# Supreme Court of the United States

STEWART C. MANN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the district court has jurisdiction to expunge an individual's criminal record on equitable grounds.

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## PETITION FOR WRIT OF CERTIORARI

Stewart C. Mann respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a) is not reported. The district court's opinion (App., *infra*, 2a) is not reported.

## JURISDICTION

The court of appeals entered its order on April 13, 2015. App., *infra*, 1a. On July 1, 2015, Justice Kennedy extended the time for filing this petition to and including August 26, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL PROVISION

Article III, Section 2 of the United States Constitution provides, in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the Laws of the United States * * * [and] to Controversies to which the United States shall be a party."

## STATEMENT OF THE CASE

1. Petitioner Stewart C. Mann was a "doubly boarded" physician who practiced medicine for twenty years before he became addicted to prescription drugs and broke the law by defrauding Medicare. On April 8, 2010, in the United States District Court for the District of Arizona, Mann pleaded guilty to health care fraud in violation of 18 U.S.C. § 1347. App., *infra*, 2a. By that time Mann had already entered rehab and, given the circumstances surrounding his conviction, the federal prosecutor asked the court not to incarcerate him. Nevertheless, Mann was sentenced to 18 months imprisonment, 36 months of supervised release, and restitution of $480,000. App., *infra*, 2a.

2. Mann stayed focused on self-improvement and used his prison time to study math. After his discharge he enrolled in a master's program in chemical engineering at Arizona State University. There, he was accepted into the honor society and into an elite research group, and he successfully defended his thesis and graduated with honors in 2014. Throughout this time Mann also remained successfully involved in twelve-step programs to continue his recovery from his drug addiction. On September 9, 2014 – trying to restart his life at 62 with a new career in chemical engineering – Mann wrote a letter asking the district court to expunge his criminal record so that he could find employment and return "to being productive in society."

Historically, every circuit has recognized the district court's jurisdiction to expunge criminal records. *See*, *e.g.*, *United States v. Sweeney*, 914 F.2d 1260, 1264-1265 (9th Cir. 1990) (recognizing court's power to order expungement "after a hearing and * * * consideration of all facts necessary to balance the individual's need for privacy against the government's need to keep criminal records"); *United States v. Schnitzer*, 567 F.2d 536, 538 (2d Cir. 1977) (holding district courts have "ancillary jurisdiction to issue protective orders," including orders to expunge or control dissemination of criminal records); *United States v. Doe*, 556 F.2d 391, 393 (6th Cir. 1977) ("[I]t is within the inherent equitable powers of a federal court to order the expungement of criminal records in an appropriate case."); *see also* Section 1, *infra*.

But in 2000, the United States Court of Appeals for the Ninth Circuit drew a sharp distinction between (a) motions to expunge based on allegations that the individual's arrest or conviction was invalid and (b) motions to expunge based "purely on equitable grounds." *United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000). Interpreting this Court's general description of ancillary jurisdiction in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 379 (1994) ("Generally speaking, we have asserted ancillary jurisdiction * * * for two separate, though sometimes related, purposes"), as a new restriction on the scope of ancillary jurisdiction, the Ninth Circuit acknowledged the district court's jurisdiction to expunge criminal records but became the first federal

circuit court in history to hold this jurisdiction does not include the power to expunge valid criminal records "solely for equitable considerations." *Sumner*, 226 F.3d at 1014. This has been the Ninth Circuit's position ever since. *See*, *e.g.*, *United States v. Crowell*, 374 F.3d 790, 793 (9th Cir. 2004).

3. In this case, citing *Sumner* and *Crowell*, the district court refused to consider the merits of Mann's motion to expunge his criminal record, denying it for lack of jurisdiction. App., *infra*, 2a. Mann filed a notice of appeal, but the deputy clerk of the court of appeals immediately suspended briefing and – again, citing *Sumner* and *Crowell* – ordered Mann to "show cause why summary affirmance of the district court's judgment is not appropriate." App., *infra*, 4a. Mann responded to the court's show-cause order on January 7, 2015; the government responded on January 16, 2015; and Mann replied on January 23, 2015. Mann's arguments against summary affirmance were similar to those presented here, for certiorari – namely, that *Sumner* should be reconsidered because it was wrongly decided and has created a circuit split over the district court's jurisdiction to expunge criminal records. But on April 13, 2015, the Ninth Circuit summarily affirmed the district court's jurisdictional ruling, App., *infra*, 1a, implicitly relying on *Sumner* and its progeny.

Just a month later, the United States District Court for the Eastern District of New York granted an individual's motion to expunge her criminal record on

purely equitable grounds, highlighting the disparate treatment Mann and others face as a result of the circuit split created by *Sumner*. *See Doe v. United States*, ___ F. Supp. 3d ___, 2015 WL 2452613, at *6 (E.D.N.Y. May 21, 2015), appeal docketed, No. 15-1967 (2d Cir.) (filed June 19, 2015).



## REASONS FOR GRANTING THE WRIT

This Court has never addressed the district court's jurisdiction to expunge criminal records. This case asks whether the district court has jurisdiction to expunge criminal records on equitable grounds. But subsumed in this question are three intersecting subquestions, and the circuits are conflicted over each of them. Thus, granting this petition would enable the Court to resolve three intersecting conflicts over the nature and scope of the district court's jurisdiction to expunge criminal records.

The circuits are conflicted over: (1) whether the district court's jurisdiction to expunge criminal records is *inherent* or whether it is *ancillary* to the court's jurisdiction over the original criminal case; (2) whether the court's jurisdiction includes not only the power to expunge *judicial* records but also the power to order the expungement of *executive* records; and (3) whether the grounds on which expungement is sought go to the merits of the request or to the court's jurisdiction – or, in other words, whether the

court has jurisdiction to expunge criminal records "purely on equitable grounds."

### 1. The circuits are divided on the question presented, making relief available to some individuals but not to others.

If there is one thing that should be consistent across all circuits, and in every district court, it is the nature and scope of the court's jurisdiction. Yet, though Mann's motion to expunge was denied for lack of jurisdiction in Arizona, if Mann lived just 200 miles north or 200 miles east, in Utah or New Mexico, his motion would have been considered on its merits – because the Tenth Circuit still recognizes the district court's jurisdiction to expunge criminal records on equitable grounds. *See*, *e.g.*, *United States v. Williams*, 582 F. Supp. 2d 1345, 1348 (D. Utah 2008) (granting expungement on equitable grounds).

Alternatively, if Mann had sought expungement in Arizona in 1999, his motion likewise would have been considered on its merits because historically the Ninth Circuit – like the Tenth – recognized the district court's jurisdiction to expunge criminal records on equitable grounds. *See Sumner*, 226 F.3d at 1010-1011, 1014 (discussing earlier cases and noting "Government conceded [in a 1999 case] that the court had the inherent equitable power" to expunge criminal records).

Indeed, as of 1999, though they did not agree precisely on the nature of the jurisdiction, *all* the circuits still recognized – or at least assumed – the district court's "inherent," "equitable," or "ancillary" jurisdiction to expunge criminal records:

- *Reyes v. Supervisor of the D.E.A.*, 834 F.2d 1093, 1095, 1098 (1st Cir. 1987) ("The district court also considered its equitable powers to expunge Reyes' records, but declined to exercise them.");
- *United States v. Schnitzer*, 567 F.2d 536, 538 (2d Cir. 1977) (holding district court has "ancillary jurisdiction to issue protective orders" including orders to expunge or control dissemination of criminal records);
- *United States v. Noonan*, 906 F.2d 952, 956 (3d Cir. 1990) ("Clearly, a federal court has the inherent power to expunge an arrest and conviction record.");
- *Allen v. Webster* ("*Webster*"), 742 F.2d 153, 154-155 (4th Cir. 1984) (recognizing court's "power to expunge" and holding district court did not abuse discretion by denying motion to expunge federal criminal records);
- *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 697 n.2 (5th Cir. 1997) (noting district courts "have supervisory powers [to expunge] their own records");
- *United States v. Doe*, 556 F.2d 391, 393 (6th Cir. 1977) ("[I]t is within the inherent equitable powers of a federal court to order the

expungement of criminal records in an appropriate case.");

- *United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993) (holding district courts have "inherent" power to expunge judicial records);
- *United States v. McMains*, 540 F.2d 387, 389-390 (8th Cir. 1976) ("It is established that the federal courts have inherent power to expunge criminal records.");
- *United States v. Sweeney*, 914 F.2d 1260, 1264-1265 (9th Cir. 1990) (recognizing district court's power to order expungement "after a hearing and * * * consideration of all facts necessary to balance the individual's need for privacy against the government's need to keep criminal records");
- *United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975) (recognizing "it is fairly well established" that "courts do possess the power to expunge an arrest record");
- *United States v. Doe*, 747 F.2d 1358, 1360 (11th Cir. 1984) (referring to "the district court's equitable powers to expunge" and affirming denial of expungement because Doe "fail[ed] to argue that the district court abused its discretion");
- *Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974) (holding courts have inherent authority to order expungement of criminal records).

But in 2000 the Ninth Circuit broke from this established recognition of the district court's jurisdiction. In *Sumner*, an individual who had been convicted of a minor drug offense in 1972 moved to expunge his decades-old criminal record in 1999 because he wanted to get certified as a school teacher in Nevada. 226 F.3d at 1008. The Ninth Circuit denied this request – but not because it found the equitable reasons for the request were insufficient to warrant expungement. Instead, the Ninth Circuit distinguished between (a) motions to expunge based on the alleged invalidity of the individual's arrest or conviction and (b) motions to expunge "based purely on equitable grounds." *Id.* at 1014. Then, after drawing this distinction, the Ninth Circuit became the first federal court of appeals to hold that, while district courts do generally "possess ancillary jurisdiction to expunge criminal records," they do not have jurisdiction "to expunge an arrest or conviction record where the sole basis alleged by the defendant is that he or she seeks equitable relief." *Id.* at 1014-1015.

Since *Sumner* was decided, the nation's federal courts have become increasingly conflicted and confused over this jurisdictional issue, resulting in disparate treatment for individuals like Mann seeking to expunge their criminal records on equitable grounds. *Compare*, *e.g.*, *Doe*, ___ F. Supp. 3d ___, 2015 WL 2452613 (expunging individual's criminal record on equitable grounds) *with United States v. Sapp*, No. CR 95-40068 SBA, 2011 WL 2837913 (N.D. Cal. July 18, 2011), cert. denied, 133 S. Ct. 2389 (2013)

(acknowledging expungement was warranted on equitable grounds and expressing regret that relief must be denied for lack of jurisdiction).

The Ninth Circuit's summary affirmance in this case cements the Ninth Circuit's position as the perpetrator of the jurisdictional confusion that has followed *Sumner*.

### 1.1. The First, Third, and Eighth Circuits have followed the Ninth Circuit's decision to strip the district court of jurisdiction to expunge criminal records on equitable grounds.

The First, Third, and Eighth Circuits have followed *Sumner*, holding district courts lack jurisdiction to expunge criminal records on equitable grounds. *United States v. Coloian*, 480 F.3d 47, 50-52 (1st Cir. 2007) (relying on *Sumner*); *United States v. Meyer*, 439 F.3d 855, 859-860 (8th Cir. 2006) (same); *United States v. Dunegan*, 251 F.3d 477, 478-480 (3d Cir. 2001) (same).

### 1.2. The Second, Tenth, and D.C. Circuits continue to recognize the district court's jurisdiction to expunge criminal records on equitable grounds.

Neither the Second Circuit nor the D.C. Circuit has revisited this jurisdictional question since the Ninth Circuit decided *Sumner*. But at least one district court in the Second Circuit has explicitly

rejected *Sumner* as wrongly decided. *See Doe*, ___ F. Supp. 3d ___, 2015 WL 2452613, at *4 n.16. And district courts in both of these circuits have stayed true to circuit precedent recognizing the district court's jurisdiction to expunge criminal records, even on equitable grounds. *E.g.*, *id.* at *6 (granting expungement); *United States v. Robinson*, 23 F. Supp. 3d 15 (D.D.C. 2014) (denying expungement on equitable grounds).

District courts in the Tenth Circuit have also continued to recognize – and even exercise – their jurisdiction to expunge criminal records on equitable grounds. *E.g.*, *Williams*, 582 F. Supp. 2d at 1348 (granting expungement). And, though it has not addressed *Sumner* directly, the Court of Appeals for the Tenth Circuit has issued at least one post-*Sumner* decision stating: "It is well settled in this circuit that courts have inherent equitable authority to order the expungement of an arrest record or a conviction in rare or extreme instances." *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1234 (10th Cir. 2001).

Notably, the government has filed a notice of appeal in *Doe*, ___ F. Supp. 3d ___, 2015 WL 2452613, but it has declined to appeal in other cases, *e.g.*, *Williams*, 582 F. Supp. 2d 1345.

### 1.3. The Fifth and Seventh Circuits continue to recognize the district court's jurisdiction to expunge its own records on equitable grounds, but have held the district court lacks jurisdiction to order the expungement of executive records.

The Fifth Circuit has not addressed this issue since *Sumner* was decided, but the Seventh Circuit has issued one post-*Sumner* decision recognizing "that district courts do have jurisdiction to expunge records," even on equitable grounds. *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004). And, like district courts in the Second, Tenth, and D.C. Circuits, district courts in both the Fifth and Seventh Circuits have continued to recognize their jurisdiction to consider expunging criminal records on equitable grounds. *E.g.*, *United States v. Barnes*, No. 3:93-mj-33-CAN, 2012 WL 6624198, at *3 (N.D. Ind. Dec. 19, 2012) (denying expungement on equitable grounds); *United States v. Kotsiris*, 543 F. Supp. 2d 966, 970 (N.D. Ill. 2008) (same); *Jackson v. Quarterman*, No. 3-07-CV-223-N, 2007 WL 1138645, at *2 (N.D. Tex. April 16, 2007) (same).

But the Fifth and Seventh Circuits have set themselves apart by distinguishing between criminal records held by the Judicial Branch and criminal records held by the Executive Branch (*e.g.*, DOJ, FBI, *etc.*). The Seventh Circuit has clearly held that district courts do have jurisdiction to order the expungement of *judicial* records – but not *executive* records. *Flowers*, 389 F.3d at 738-739 (citing *United States v.*

*Janik*, 10 F.3d 470, 472 (7th Cir. 1993)). And the Fifth Circuit appears to have held likewise, though perhaps not as clearly. *See Sealed Appellant*, 130 F.3d at 697-702 (relying in part on *Janik* to reverse district court's order to expunge executive records, but also indicating "defendant has not made an adequate showing of harm" and concluding order was "abuse of discretion").

Thus, while the First, Third, Eighth, and Ninth Circuits have taken the position that district courts do not have jurisdiction to expunge *any* criminal records on equitable grounds – and while the Second, Tenth, and D.C. Circuits have taken the position that district courts do have jurisdiction to expunge criminal records on equitable grounds, without distinguishing between types of records – the Fifth and Seventh Circuits (and now perhaps the Sixth Circuit, too, *see* Section 1.4, *infra*) have split the issue, taking the position that district courts have jurisdiction to expunge their own records, but not to order the expungement of executive records.

### 1.4. The Fourth, Sixth, and Eleventh Circuits have displayed internal confusion over this jurisdictional question.

The Court should grant certiorari to resolve the conflicts described, and these conflicts are perhaps nowhere more apparent than in the Fourth, Sixth, and Eleventh Circuits. Because the majority of expungement motions are filed pro se – often in the

form of a simple letter written to the district court – most orders denying expungement are never appealed, presumably because the individual does not know an appeal is available or how to pursue it. Consequently, many circuits have not had the opportunity to weigh in on this issue since *Sumner* was decided. In the Fourth and Eleventh Circuits, *Sumner* and the absence of a post-*Sumner* decision from the circuit court have produced internal confusion.

Since its creation in 1981, the Court of Appeals for the Eleventh Circuit has referred only once – in 1984 – to the district court's "equitable powers to expunge" criminal records. *See Doe*, 747 F.2d at 1360. Some district courts have rightly followed pre-1981 Fifth Circuit precedent in continuing to recognize the district court's jurisdiction to expunge criminal records on equitable grounds. *See*, *e.g.*, *United States v. Woods*, No. 08-20267-CR, 2013 WL 3189081, at *2-3 (S.D. Fla. June 20, 2013) (denying motion to expunge on equitable grounds). But other district courts have noted the absence of post-*Sumner* circuit authority and have followed *Sumner* and its progeny to find they no longer have this jurisdiction. *E.g.*, *United States v. Tyler*, 670 F. Supp. 2d 1346, 1347-1349 (M.D. Fla. 2009). Meanwhile, still others have demonstrated the confusion that exists by following the Fifth and Seventh Circuits' lead in splitting the issue. *See*, *e.g.*, *United States v. Carson*, 366 F. Supp. 2d 1151, 1154-1155, 1159 (M.D. Fla. 2004) (exercising jurisdiction to deny motion to expunge judicial records on equitable

grounds but finding no jurisdiction to expunge executive records).

Similarly – though the Fourth Circuit has historically recognized the district court's jurisdiction to expunge criminal records, *see Webster*, *supra* – since *Sumner*, its district courts have split into two camps. *Compare*, *e.g.*, *United States v. Masciandaro*, 648 F. Supp. 2d 779, 794 (E.D. Va. 2009), aff'd, 638 F.3d 458 (4th Cir. 2011) ("To be sure, courts have inherent equitable power to order the expungement of criminal records." (internal quotations omitted)) *with United States v. Mitchell*, 683 F. Supp. 2d 427, 428-433 (E.D. Va. 2010) (rejecting *Webster* and following *Sumner* to find no jurisdiction to expunge criminal records on equitable grounds).[1]

The Sixth Circuit, however, has displayed its own brand of confusion. Unlike the Fourth and Eleventh Circuits, the Sixth Circuit has issued several post-*Sumner* decisions addressing the district court's jurisdiction to expunge criminal records on equitable grounds. Yet it remains unclear which side of the post-*Sumner* conflict the Sixth Circuit is on. In

[1] See also *United States v. Ware*, No. 5:97CR47-02, 2015 WL 2137133, at *3-5 (N.D.W. Va. May 7, 2015) (relying on *Mitchell*, *supra*, to find no jurisdiction). *Ware* is currently pending on appeal, No. 15-6970 (filed June 19, 2015), presenting the Fourth Circuit with its first opportunity to address this issue since *Sumner* was decided. Counsel of record in this case is also counsel in *Ware*.

*United States v. Carey*, 602 F.3d 738 (6th Cir. 2010), the Sixth Circuit clearly recognized that "[a]n order on a motion to expunge a conviction is within the equitable jurisdiction of a federal district court." *Id.* at 740. But then, just three months later, a different panel rejected *Carey* and relied on *Sumner* to hold "federal courts lack ancillary jurisdiction to consider expungement motions [based on equitable grounds]." *United States v. Lucido*, 612 F.3d 871, 875-876 (6th Cir. 2010).

The dissent in *Lucido* noted that the panel should have been bound by the court's prior decision in *Carey*. *Id.* at 878-879 (Batchelder, C.J., dissenting). But motions for rehearing and rehearing en banc were denied. *See id.* at 871 & n.* ("Chief Judge Batchelder would grant rehearing for the reasons stated in her dissent."). Because *Carey* is the prior decision, but *Lucido* rules more squarely on the jurisdictional issue, it is unclear whether *Carey* or *Lucido* is the controlling authority.

At least one district court has agreed with the *Lucido* dissent and followed *Carey*, finding district courts in the Sixth Circuit still have jurisdiction to consider expunging criminal records on equitable grounds. *See United States v. Johnson*, No. 6-CR-261, 2012 WL 2135627, at *1-2 (S.D. Ohio June 12, 2012). But the *Johnson* court reached this conclusion in part by distinguishing *Lucido* as holding only that district courts lack jurisdiction to order the expungement of *executive* records – meaning, according to *Johnson*,

district courts in the Sixth Circuit have ancillary jurisdiction to expunge only judicial records. *Ibid.*

In *United States v. Field*, 756 F.3d 911 (6th Cir. 2014), the Sixth Circuit again addressed the district court's jurisdiction to expunge criminal records, and in *Field* the panel distinguished *Carey* and followed *Lucido* to hold (again) that district courts lack jurisdiction to expunge criminal records on equitable grounds. *Id.* at 915-916. But, like *Lucido*, *Field* is (again) distinguishable as addressing only the district court's jurisdiction to order the expungement of executive records. *See id.* at 916-917 ("[T]he record that Field seeks to have expunged is an FBI record having no relation to any district court order."). Nevertheless, some district courts have refused to recognize this distinction as dispositive and have cited *Lucido* and *Field* to hold district courts lack jurisdiction to expunge *any* criminal record on equitable grounds. *E.g.*, *United States v. Revels*, No. 1:90-cr-00090(1), 2014 WL 7340369, at *1-2 (S.D. Ohio Dec. 23, 2014).

Thus, according to *Johnson* and a careful reading of *Carey*, *Lucido*, and *Field*, the Sixth Circuit belongs with the Fifth and Seventh Circuits, as having drawn a jurisdictional line between judicial and executive records. See Section 1.3, *supra*. Alternatively, according to *Revels* and a broader reading of *Lucido* and *Field* – and ignoring *Carey* – the Sixth Circuit belongs with those circuits that have followed *Sumner*. See Section 1.1, *supra*.

To resolve this conflict and confusion among the nation's federal courts – and to end the disparate impact that it has on individuals like Mann – the Court should grant certiorari. *See* SUP. CT. R. 10(a).

**2. The conflict and confusion over the question presented stem from the Ninth Circuit's misapplication of *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994).**

Nearly all of the conflict and confusion described stems from the Ninth Circuit's decision in *Sumner* – or, more precisely, from *Sumner*'s misapplication of this Court's opinion in *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994). The Court should therefore grant certiorari to correct and clarify the meaning of *Kokkonen*. *See* SUP. CT. R. 10(c).

This Court has never specifically addressed the district court's jurisdiction to expunge criminal records. Rather, the Court has addressed – more generally – the district court's inherent jurisdiction over its own records, *e.g.*, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files."), and the basic scope of the district court's ancillary jurisdiction. *E.g.*, *Kokkonen*, 511 U.S. at 378-380 (describing, "[g]enerally," two purposes of ancillary jurisdiction).

In *Kokkonen*, an insurance agent brought state-law claims against an insurance company and the company removed the case to federal court on the basis of diversity jurisdiction. 511 U.S. at 376. Before the case was submitted to the jury, the parties reached a settlement agreement and the case was dismissed. *Id.* at 376-377. Then, a month later, the parties disagreed over obligations under the settlement agreement and the company filed a motion to enforce the agreement. *Id.* at 377. The district court entered an enforcement order and the Ninth Circuit affirmed, but this Court granted certiorari and reversed, holding the district court did not have jurisdiction to resolve the dispute over the settlement agreement. *Id.* at 377-378, 381-382.

The insurance company argued that the district court had ancillary jurisdiction over the motion to enforce the agreement, but the Court rejected this argument. "Generally speaking," said the Court, "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 379-380 (internal citations omitted). Because the insurance company's motion to enforce the settlement agreement was essentially a new suit for breach of contract, the motion did not fall within the district

court's ancillary jurisdiction but instead "require[d] its own basis for jurisdiction." *Id.* at 377-378, 381-382.

*Kokkonen* had nothing to do with expunging criminal records. It did not even purport to change the scope of ancillary jurisdiction, but instead only explained why the company's motion to enforce the settlement agreement was outside that scope. Moreover, in *Kokkonen* the Court explicitly warned against relying on general language from this Court's opinions as a basis for narrowing or expanding the scope of ancillary jurisdiction – saying the focus instead should be on the holdings of past cases. 511 U.S. at 378-379.

Nevertheless, in *Sumner* the Ninth Circuit ignored or rejected all the holdings of past cases involving the expungement of criminal records, and instead relied on *Kokkonen*'s general description of ancillary jurisdiction to strip district courts of their jurisdiction to consider motions to expunge that are based "purely on equitable grounds." *See Sumner*, 226 F.3d at 1013-1015.

In doing so, *Sumner* misinterpreted and misapplied *Kokkonen* – first, because *Kokkonen* did not purport to establish a formal, restrictive test for determining whether the district court was properly exercising its ancillary jurisdiction; and second, because even if *Kokkonen* intended to rigidly define the scope of ancillary jurisdiction, the Ninth Circuit was wrong to hold that a motion to expunge criminal records on equitable grounds fell outside that scope. *See*

*Doe*, ___ F. Supp. 3d ___, 2015 WL 2452613, at *4 n.16 (explaining how a motion to expunge criminal records on equitable grounds satisfies *Kokkonen*'s description of the purposes of ancillary jurisdiction).

By recognizing the district court's general power to expunge criminal records, then relying on *Kokkonen* to carve out a jurisdictional exception for motions to expunge "based purely on equitable grounds," *see Sumner*, 226 F.3d at 1014-1015, the Ninth Circuit wrongfully wrapped a merits decision in jurisdictional garb. *Cf. Mata v. Lynch*, ___ U.S. ___, 135 S. Ct. 2150, 2156 (2015) ("What the [court] may not do is wrap such a merits decision in jurisdictional garb."). And every court that has followed the Ninth Circuit's lead, denying district courts their jurisdiction to consider expunging criminal records on equitable grounds, has invoked *Sumner*'s misapplication of *Kokkonen*. *See*, *e.g.*, *Coloian*, 480 F.3d at 50-52; *Meyer*, 439 F.3d at 859-862; *Dunegan*, 251 F.3d at 478-480; *see also United States v. Taylor*, No. 3:12mj230 (DJN), 2014 WL 1713485, at *2-3 (E.D. Va. April 29, 2014) (recognizing district courts in Fourth Circuit previously had jurisdiction to expunge criminal records on equitable grounds, but citing *Sumner* and its progeny to hold this jurisdiction no longer exists after *Kokkonen*).

Here, the district court explicitly relied on *Sumner* to find it lacked jurisdiction to consider Mann's motion on its merits, and the Ninth Circuit implicitly relied on *Sumner* to summarily affirm that the district court lacks jurisdiction to expunge

criminal records on equitable grounds. In doing so, both courts reasserted the Ninth Circuit's misapplication of *Kokkonen*. To correct this misapplication of *Kokkonen* and to settle this important question of federal court jurisdiction, the Court should grant this petition. *See* SUP. CT. R. 10(c).

### 3. This case presents a good vehicle for the Court to resolve at least three intersecting conflicts regarding the district court's jurisdiction to expunge criminal records.

The federal courts do not agree on whether the district court's jurisdiction to expunge criminal records is "inherent" or "ancillary" in nature, nor do they agree on whether the scope of that jurisdiction includes the power to expunge executive records or the power to expunge records on purely equitable grounds. See Section 1, *supra*. Mann's motion to expunge his criminal record is based on equitable grounds and does not distinguish between judicial and executive records. Thus, this case is a good vehicle for the Court to resolve *all* these conflicts regarding the district court's jurisdiction to expunge criminal records.

The Court was asked to resolve this issue at least once before, but the Court declined. *See Sapp*, *supra*. In *Sapp*, the government contended that certiorari should be denied either (1) because the petitioner's underlying motion was without merit or (2) because the circuit split created by *Sumner* is "not a live one."

*See Sapp*, No. 12-882, Gov't Br. 5-15. These arguments against certiorari, if reasserted here, should be rejected.

First, the merits of the petitioner's underlying motion are irrelevant. The district court did not consider the merits of Mann's motion, due to its jurisdictional ruling. App., *infra*, 2a. And the merits of Mann's motion should not backwardly determine the district court's jurisdiction to consider the motion in the first place. It may be that the district court, upon considering the equitable merits of Mann's motion, will conclude that expungement is not warranted. But the question before this Court is whether the district court has jurisdiction to make that determination. To consider the merits of Mann's motion in deciding whether to answer the jurisdictional question is to put the proverbial cart before the horse.

Second, it would be wrong for the government to continue to claim that the circuit split created by *Sumner* is "not a live one." As demonstrated, there is ongoing disagreement and confusion among the circuits and especially among the district courts where these expungement decisions are made. See Section 1, *supra*. And because most expungement motions are brought pro se, and are almost never appealed, it would be unreasonable to further postpone the

resolution of this important jurisdictional issue on the hope of hearing from more circuit courts.[2]

In *Sapp*, the government claimed the petitioner "significantly overstate[d] the tension among the courts of appeals," because the cases recognizing the district court's jurisdiction to expunge criminal records on equitable grounds either predate *Kokkonen* or fail to address it. No. 12-882, Gov't Br. 5, 7. But this argument is specious. The Fifth, Sixth, Seventh, and Tenth Circuits have all issued decisions after *Kokkonen* that continue to recognize the district court's jurisdiction to expunge criminal records on equitable grounds. *See Carey*, 602 F.3d at 740; *Flowers*, 389 F.3d at 739; *Camfield*, 248 F.3d at 1234; *Sealed Appellant*, 130 F.3d at 697 n.2; *see also Masciandaro*, 648 F. Supp. 2d at 794 ("To be sure, courts have inherent equitable power to order the expungement of criminal records."), aff'd, 638 F.3d 458 (4th Cir. 2011). Dismissing these decisions as irrelevant for failing to address *Kokkonen* is misguided, because it presupposes the correctness of the Ninth Circuit's interpretation of *Kokkonen*.

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[2] As noted, pp. 5 and 15 note 1, *supra*, there are appeals pending in the Second and Fourth Circuits. But, even with decisions from these circuits, the broader conflict will still exist between the First, Third, Eighth, and Ninth Circuits on one side and the Tenth and D.C. Circuits on the other – with the Fifth and Seventh Circuits splitting the issue.

As demonstrated, *Kokkonen* had nothing to do with expunging criminal records and it did not purport to narrow the scope of ancillary jurisdiction – or to provide a formal test for determining whether a proceeding falls within that scope. Therefore, there is no readily ascertainable need for a court of appeals to address *Kokkonen* when recognizing the district court's jurisdiction to expunge criminal records on equitable grounds. In fact, at least three circuits have characterized the district court's jurisdiction to expunge criminal records as "inherent" or "equitable" – rather than "ancillary" – which further obviates any need to address *Kokkonen*. *See Carey*, 602 F.3d at 740; *Camfield*, 248 F.3d at 1234; *Sealed Appellant*, 130 F.3d at 697 n.2. In other words, the need to address *Kokkonen* arises only if (1) the court's jurisdiction to expunge records is "ancillary" in nature and (2) *Sumner* was right to interpret *Kokkonen* as significantly narrowing the scope of ancillary jurisdiction as it pertains to expunging criminal records.

Because it is not clear the district court must rely only on its ancillary jurisdiction to expunge criminal records, and because *Sumner* was wrong in its application of *Kokkonen*, the post-*Kokkonen* decisions that purportedly "fail" to address *Kokkonen* do not – as the government has previously contended – indicate that the circuit split is "not a live one." To the contrary, they illustrate and perpetuate the live, ongoing conflict over the nature and scope of the district court's jurisdiction to expunge criminal records.

Finally, as noted, p. 11, *supra*, the government has declined to appeal in cases like *Williams*, 582 F. Supp. 2d 1345, where district courts have *granted* motions to expunge criminal records on purely equitable grounds. It would be disingenuous for the government to continue to claim that the split over this issue is "not a live one," when the government has declined to provide appellate courts the opportunity to demonstrate whether this claim is true.

This case presents a good vehicle for resolving the ongoing conflict and confusion over the jurisdictional question presented.[3] Therefore, the Court should grant certiorari.



[3] At the court of appeals, the deputy clerk apparently assumed that, because the original case was criminal in nature, Federal Rule of Appellate Procedure 4(b) applied, instead of 4(a). Consequently, because Mann had not filed his notice of appeal within 14 days, the clerk requested show-cause briefing on why the appeal should not be dismissed as untimely. App., *infra*, 4a-5a. The parties briefed this issue in response to the court's show-cause order, but the court summarily affirmed the district court's order without addressing this timeliness question. *See* App., *infra*, 1a.

Timeliness is a nonissue, and should not be construed as a procedural defect that taints this case as a good vehicle for resolving the jurisdictional question presented. Though it arises out of a criminal case, Mann's motion to expunge his criminal record is not "a step in the criminal case," nor does it have any affect on the underlying criminal case; in other words, Mann's motion to expunge is a civil matter. *See United States v. Yacoubian*, 24 F.3d 1,

(Continued on following page)

## CONCLUSION

For the foregoing reasons, Mann's petition should be granted.

Respectfully submitted,

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August 26, 2015

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4 (9th Cir. 1994) (recognizing matters that do not constitute "a step in the criminal case" are civil in nature, and orders on civil matters can be issued in criminal cases); *see also Crowell*, 374 F.3d at 792 (noting expungement of the *record* of a conviction does not affect "the conviction itself"). An appeal from an order on a civil matter is governed by Rule 4(a) – not Rule 4(b) – even if the order was issued in the context of a criminal case. *Yacoubian*, 24 F.3d at 4. Mann's notice of appeal was filed within the 60 days allowed under Rule 4(a)(1)(B)(i). App., *infra*, 4a. Thus, Mann's appeal was timely and timeliness is not an issue.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>STEWART CONRAD MANN,<br>Defendant-Appellant. | No. 14-10545<br>D.C. No. 2:10-cr-00460-DJH-1<br>District of Arizona, Phoenix<br>ORDER<br>(Filed Apr. 13, 2015) |

Before: GOODWIN, CANBY, and NGUYEN, Circuit Judges.

A review of the record and the responses to the court's order to show cause indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard).

Accordingly, we summarily affirm the district court's judgment.[1]

**AFFIRMED.**

[1] In light of this disposition, we do not reach appellee's request to dismiss the appeal as untimely.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | |
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| United States of America,<br>Plaintiff,<br>vs.<br>Stewart C. Mann,<br>Defendant. | CR 10-0460-PHX-FJM<br>**ORDER**<br>(Filed Oct. 15, 2014) |

Before the court is defendant's motion to "expunge" his conviction (doc. 38) and the government's response (doc. 39). Defendant did not file a reply and the time for doing so has expired.

On April 8, 2010, defendant pled guilty to health care fraud in violation of 18 U.S.C. § 1347. He lied to patients about the removal of supposedly "malignant" skin lesions, and falsely billed Medicare for the procedures. He was sentenced to 18 months imprisonment, 36 months of supervised release, and restitution of $480,000. By letter dated September 9, 2014, defendant now asks this court to "expunge my Felony in order to help me secure employment." (Doc. 38). However, because defendant's conviction is valid, this court has no equitable power to grant the relief requested. *United States v. Crowell*, 374 F.3d 790, 793 (9th Cir. 2004) ("Congress has not expressly granted to the federal courts a general power to expunge criminal records"); *United States v. Sumner*, 226 F.3d 1005, 1115 (9th Cir. 2000) (holding 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"). Therefore, we lack authority to grant the relief requested.

**IT IS ORDERED DENYING** defendant's motion to expunge his conviction (doc. 38).

DATED this 15th day of October, 2014.

/s/ **Frederick J. Martone**
**Frederick J. Martone**
**Senior United**
**States District Judge**

**General Docket**
**United States Court of Appeals**
**for the Ninth Circuit**

**Court of Appeals Docket #:** 14-10545
USA v. Stewart Mann

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| 12/18/2014 | 2 | Filed clerk order (Deputy Clerk: DL): On December 11, 2014, appellant filed a notice of appeal from the judgment entered by the district court on October 15, 2014. Because the notice of appeal was not filed within 14 days after entry of the judgment, see Fed. R. App. P. 4(b)(1)(A), or within the additional 30 days provided in Federal Rule of Appellate Procedure 4(b)(4), this appeal appears to be untimely. In addition, a review of the record suggests that this appeal may be appropriate for summary disposition because the district court lacked jurisdiction to expunge appellant's criminal conviction. See United States v. Sumner, 226 F.3d 1005, 1014 (9th Cir. 2000) (district court lacks power to expunge valid criminal conviction on equitable grounds); United States v. Crowell, 374 U.S. 790, 795-96 (9th Cir. 2004) (same); see also United States v. Hooton, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (summary disposition appropriate where review of record shows that the questions raised in appeal are so insubstantial as not to require further argument). Within 21 |

days after the date of this order, appellant shall file a motion for voluntary dismissal of this appeal or: (1) show cause in writing why it should not be dismissed for lack of a timely notice of appeal and (2) show cause why summary affirmance of the district court's judgment is not appropriate. Appellee may respond within 10 days after service of appellant's memorandum. If appellant does not comply with this order, the court may dismiss this appeal for failure to prosecute. See 9th Cir. R. 42-1. Briefing is suspended pending further order of the court. [9355507] (AF) [Entered: 12/18/2014 04:23 PM]

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