No. 15-245

In the Supreme Court of the United States

STEWART CONRAD MANN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked jurisdiction to expunge petitioner's conviction for health care fraud on purely equitable grounds.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) and the order of the district court (Pet. App. 2a-3a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2015. On July 1, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 26, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2010, following a guilty plea in the United States District Court for the District of Arizona, petitioner was convicted of health care fraud, in violation of 18 U.S.C. 1347 (Supp. IV 2010). The district court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. In

2014, petitioner filed a motion in the district court, asking that the records of his conviction be expunged. The district court denied the motion. Pet. App. 2a-3a. The court of appeals summarily affirmed. *Id.* at 1a.

1. Petitioner was a medical doctor who participated in the Medicare program. 10-cr-460 Docket entry No. (Docket entry No.) 26, at 6 (Aug. 2, 2010) (Plea Agreement). From March 2005 through January 2009, he falsely diagnosed numerous patients with malignant skin lesions and performed medically unnecessary procedures as treatment. *Id.* at 7-8. Petitioner then fraudulently billed Medicare for more expensive medical procedures that he did not actually perform. *Ibid.* He also billed Medicare for performing procedures on dates that he did not see patients. *Ibid.* When audited by Medicare, petitioner falsified patient records to make his billings appear legitimate. *Id.* at 8-9.

Petitioner was charged with health care fraud, in violation of 18 U.S.C. 1347 (Supp. IV 2010). Docket entry No. 2, at 1-5 (Apr. 8, 2010) (Information). He pleaded guilty and was sentenced to 18 months of imprisonment, to be followed by three years of supervised release. Plea Agreement 1, 11; Docket entry No. 27, at 1-2 (Aug. 3, 2010) (Judgment). Petitioner did not file an appeal. Docket entry No. 39, at 1 (Sept. 25, 2014) (Gov't Resp. to Mot. to Expunge). In November 2011, he was released from prison. *Id.* No. 38, at 1 (Sept. 11, 2014) (Mot. to Expunge).

2. In September 2014, before the completion of his term of supervised release, petitioner sent a letter to the judge who had overseen his criminal case, asking the judge "to expunge [his] [f]elony in order to help [him] secure employment as a recent Master of Sci-

ence, Chemical Engineering graduate." Mot. to Expunge 1. Petitioner expressed concern that "having a [f]elony on [his] record may be preventing [him] from obtaining face to face interviews" in his new field. *Ibid.*

The district court denied petitioner's motion in a brief unpublished order. Pet. App. 2a-3a. The court explained that it lacked authority to expunge a valid conviction on purely equitable grounds. *Ibid.* (citing *United States* v. *Crowell*, 374 F.3d 790, 793 (9th Cir. 2004), cert. denied, 543 U.S. 1070 (2005) and *United States* v. *Sumner*, 226 F.3d 1005, 1115 (9th Cir. 2000)).

3. On December 11, 2014, petitioner filed a notice of appeal. Docket entry No. 45, at 1-2. The clerk of court ordered petitioner to explain in writing (1) why petitioner's notice of appeal was not untimely, because the notice was not filed within 14 days after the entry of judgment, see Fed. R. App. P. 4(b)(1)(A); and (2) why the district court's decision should not be summarily affirmed because the district court lacked jurisdiction under *Sumner* and *Crowell*. Pet. App. 4a.

After receiving submissions from both parties, the court of appeals summarily affirmed the denial of petitioner's motion in an unpublished order. Pet. App. 1a (finding petitioner's claims "so insubstantial as not to require further argument"). The court stated that "[i]n light of this disposition," it did not need to decide whether petitioner's appeal was timely. *Id.* at 1a n.1.

ARGUMENT

Petitioner contends (Pet. 18-22) that the courts below erred in concluding that the district court lacked ancillary jurisdiction to expunge the records of petitioner's health care fraud conviction on purely equitable grounds. Petitioner is incorrect, and his claim

does not warrant further review. This Court has repeatedly denied review of petitions for writs of certiorari raising the claims alleged here, and the same result is warranted in this case. See *Sapp* v. *United States*, 133 S. Ct. 2389 (2013) (No. 12-882); *Coloian* v. *United States*, 552 U.S. 948 (2007) (No. 07-72); *Rowlands* v. *United States*, 549 U.S. 1032 (2006) (No. 06-501).

1. Federal courts are courts of limited jurisdiction, which "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citations omitted). Nevertheless, "the doctrine of ancillary jurisdiction * * * recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." *Id.* at 378. In *Kokkonen*, this Court explained that its cases had sanctioned ancillary jurisdiction in only two contexts: "(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 (citations omitted).

Adhering to those limits, this Court concluded in *Kokkoken* that a district court did not possess "inherent power" to consider a particular type of claim (a lawsuit to enforce a settlement agreement that had been entered before the district court) because it was outside those traditional categories of ancillary jurisdiction. 511 U.S. at 377, 380 (citation omitted). The district court did not need to exercise ancillary jurisdiction to permit disposition of factually interdepend-

ent claims, the court explained, because the facts underlying the parties' initial lawsuit and the facts underlying a claim of breach of a settlement agreement were distinct. *Id.* at 380. And the district court did not need ancillary jurisdiction over the breach-of-settlement suit in order to effectuate the decree it had entered in the parties' original case, the court observed, because that decree simply ordered "that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement." *Id.* at 380-381.

Under the principles set forth in *Kokkonen*, the district court lacked jurisdiction to consider petitioner's motion to expunge his indisputedly valid conviction on purely equitable grounds. While federal statutes authorize courts to expunge certain types of convictions under specified circumstances, no statute authorizes expungement of convictions such as petitioner's on purely equitable grounds. See *United States* v. *Lucido*, 612 F.3d 871, 874 (6th Cir. 2010) (compiling federal statutes). Nor are equitable expungement actions within the categories of "ancillary" jurisdiction set out in *Kokkonen*. Because claims for equitable expungement turn principally on arguments about a defendant's post-conviction conduct and hardships, they do not depend on resolving the questions of guilt resolved in a defendant's earlier criminal trial. See, *e.g.*, *id.* at 875; *United States* v. *Coloian*, 480 F.3d 47, 50, 52 (1st Cir.), cert. denied, 552 U.S. 948 (2007); *United States* v. *Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000). And because "[t]he existence and availability" of accurate records of criminal proceedings "do not frustrate or defeat" a court's ability to conduct criminal proceedings or effectuate the resulting judgments,

Coloian, 480 F.3d at 52, the power to expunge convictions is not a necessary adjunct to courts' underlying power to conduct trials. See *ibid.* ("[T]he power asked for here is quite remote from what courts *require* in order to perform their functions.") (quoting *Kokkonen*, 511 U.S. at 380).

Petitioner asserts (Pet. 20) that *Kokkonen* is inapposite because it "had nothing to do with expunging criminal records." But because *Kokkonen* held that a district court lacked any "inherent power" to exercise jurisdiction over a claim on the ground that the claim was not authorized by any statute and fell outside the two heads of ancillary jurisdiction described above, *Kokkonen* is fatal to petitioner's claim—since petitioner's claim is also not authorized by statute and also falls outside those heads of ancillary jurisdiction. 511 U.S. at 377 (citation omitted). Nor is petitioner correct to suggest (Pet. 20) that *Kokkonen* is consistent with ancillary jurisdiction over equitable expungement claims because *Kokkonen* emphasized that the categories of permissible ancillary jurisdiction were to be derived from "the holdings of our cases." 511 U.S. at 379. This Court's cases have never sanctioned ancillary jurisdiction over equitable expungement claims; rather, as *Kokkonen* explains, those cases have generally authorized ancillary jurisdiction only over claims that are factually interdependent with an initial lawsuit and claims over which jurisdiction is necessary to enable a court to function successfully. *Id.* at 379-380.

2. Contrary to petitioner's suggestion (Pet. 6-18), this Court's intervention is not now needed to resolve disagreement among courts of appeals concerning courts' authority to expunge convictions on equitable

grounds, because it is not evident that any such disagreement exists after *Kokkonen*. Every court of appeals to consider whether courts may exercise ancillary or inherent jurisdiction over purely equitable expungement claims in light of *Kokkonen* has found that *Kokkonen* forecloses jurisdiction over such claims. See *Sumner*, 226 F.3d at 1014; *Coloian*, 480 F.3d at 52; *United States* v. *Dunegan*, 251 F.3d 477, 479-480 (3d Cir. 2001); *Lucido*, 612 F.3d at 874-875; *United States* v. *Field*, 756 F.3d 911, 916 (6th Cir. 2014); *United States* v. *Meyer*, 439 F.3d 855, 859-860 (8th Cir. 2006). In addition, the Tenth Circuit has relied on its own precedent concerning courts' inherent equitable powers to reach the same result. *Tokoph* v. *United States*, 774 F.3d 1300, 1305 (2014), as amended on reh'g (Jan. 26, 2015).[*]

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[*] Petitioner suggests that cases in the Sixth and Tenth Circuits predating *Lucido* and *Tokoph* support his position. See Pet. 5-16 (asserting "confusion" in the Sixth Circuit in light of *United States* v. *Carey*, 602 F.3d 738, cert. denied, 562 U.S. 895 (2010)); Pet. 10-11 (claiming support from *Camfield* v. *City of Okla. City*, 248 F.3d 1214, 1234 (10th Cir. 2001), without addressing *Tokoph*). But any intracircuit disagreement created by decisions predating *Lucido* and *Tokoph* would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, petitioner is incorrect to suggest *Carey* and *Camfield* support jurisdiction to expunge valid convictions on purely equitable grounds. As *Lucido* explained, *Carey*'s single-sentence discussion of jurisdiction lacks precedential weight because it was simply a "[d]rive-by" ruling. 612 F.3d at 876 (citation omitted). And even that "drive-by" ruling found jurisdiction only over a claim that the Constitution required expungement of a conviction—not over a claim (like petitioner's) that lacks any statutory or constitutional basis. See *ibid.*; *Carey*, 602 F.3d at 740-741.

In contrast, the appellate decisions petitioner cites that have accepted federal jurisdiction over purely equitable expungement claims concerning judicial records either "predate *Kokkonen*" or simply rely on pre-*Kokkonen* circuit precedent and "fail to address that decision, which raises questions as to their continuing viability." *Coloian*, 480 F.3d at 52; see *United States* v. *Flowers*, 389 F.3d 737, 738-741 (7th Cir. 2004); *Sealed Appellant* v. *Sealed Appellee*, 130 F.3d 695, 697-702 (5th Cir. 1997), cert. denied, 523 U.S. 1077 (1998). Moreover, neither of those decisions paid substantial attention to the issue of ancillary jurisdiction to expunge judicial records. *Sealed Appellant* considered equitable power to expunge executive records, which it found that courts lacked, and the court of appeals specifically noted that the "portion of the petition" involving judicial records "was not challenged in the district court and is not on appeal." 130 F.3d at 697 n.2. The court's discussion of jurisdiction with respect to judicial records was therefore a brief

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Similarly, while *Camfield* stated in dictum that prior decisions "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 circumstances," 248 F.3d at 1234 (citing *United States* v. *Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993) and *United States* v. *Linn*, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836 (1975)), the cases cited in *Camfield* establish that the "rare or extreme" instances in which that court treated expungement as within a court's "inherent equitable powers" involve convictions that were "somehow invalidated, such as by a finding that [they were] unconstitutional, illegal, or obtained through government misconduct." *Pinto*, 1 F.3d at 1070; see *Linn*, 513 F.2d at 927-928. In contrast, *Pinto* explained that a court is "without power to expunge" a conviction when "there is no allegation that the conviction was in any way improper." 1 F.3d at 1070; accord *Tokoph*, 774 F.3d at 1305.

aside in dictum. *Id.* at 697. And *Flowers*—a case in which the parties do not appear to have made jurisdictional arguments to the court of appeals—simply cited a pre-*Kokkonen* decision and stated in a single sentence that "district courts do have jurisdiction to expunge records maintained by the judicial branch," without distinguishing between requests made on equitable grounds and those made for other reasons. *Flowers,* 389 F.3d at 739 (citing *United States* v. *Janik*, 10 F.3d 470, 472 (7th Cir. 1993)). Such "drive-by jurisdictional rulings" have little if any weight. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 511 (2006) (citation omitted).

3. Petitioner's case would in any event be a poor vehicle for consideration of courts' jurisdiction to order expungement on equitable grounds. First, even if jurisdiction existed, petitioner's claim would fail on its merits. The courts of appeal that have proceeded to the merits of equitable expungement claims (without considering *Kokkonen*) have explained that expungement is appropriate only in "truly * * * extraordinary" circumstances—beyond a defendant simply being "impeded in finding employment." *Flowers,* 389 F.3d at 739; see *Sealed Appellant*, 130 F.3d at 702 (defendant's "claim[] that he is having a hard time getting a job in law enforcement" was not "an adequate showing of harm"); see also *United States* v. *Robinson*, 23 F. Supp. 3d 15, 16-17 (D.D.C. 2014) (stating that "difficulties obtaining employment * * * are not regarded as extreme circumstances" warranting expungement); *United States* v. *Baccous*, No. 99-0596, 2013 WL 1707961, at *2 (D.D.C. Apr. 22, 2013) ("Defendant's concerns regarding his employment * * * do not afford the court discretion to

expunge his record."). Petitioner's claim would thus clearly fail on its merits even if jurisdiction were established, because the basis for petitioner's request was that a felony record might prevent petitioner from obtaining job interviews. Mot. to Expunge 1.

Second, petitioner's motion is ambiguous about the form of expungement he seeks. Petitioner argues (Pet. 5, 12-13) that whether jurisdiction exists in an expungement action may depend on the branch of government that controls the records at issue, mirroring a distinction drawn in some cases. See *Flowers*, 389 F.3d at 738; *Sealed Appellant*, 130 F.3d at 699-700. Petitioner, however, has never identified whether the records he seeks to expunge are judicial records, executive records, or both, see Mot. to Expunge 1 (requesting only that court "expunge [petitioner's] [f]elony" from his "record"). Even if there were a current conflict concerning expungement claims, a petition that is ambiguous about a fact relevant to the scope and nature of his jurisdictional claim would be a poor vehicle for addressing that conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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