No. _____

IN THE

Supreme Court of the United States

JANE DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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January 9, 2017

QUESTION PRESENTED

Does a federal district court's ancillary jurisdiction in criminal cases include the power to hear motions to expunge criminal records?

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JURISDICTION

The Court of Appeals for the Second Circuit entered judgment on August 11, 2016 and stayed its mandate on September 8, 2016, pending the filing of the instant Petition. On October 27, 2016, Justice Ginsburg granted an extension of time to file this Petition until January 9, 2017. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case concerns the scope of ancillary jurisdiction in federal criminal cases. 18 U.S.C. § 3231 provides:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

This case also concerns the district court's statutory obligation to impose a sentence in a criminal case consistent with 18 U.S.C. § 3553(a), which provides, in pertinent part:

> The court shall impose a sentence sufficient, but not greater than

necessary to comply with the purposes set forth in paragraph (2) of this subsection.

PRELIMINARY STATEMENT

This case concerns whether federal courts have ancillary jurisdiction in criminal cases to hear motions to expunge criminal records. The decision below held that district courts lack ancillary jurisdiction to hear motions to expunge criminal convictions but preserved ancillary jurisdiction to hear motions to expunge arrest records, further complicating the inconsistent and mutually exclusive split of opinions in the circuit courts.

These conflicting rules include: (a) A court has ancillary jurisdiction to hear *all* expungement motions. (b) A court *never* has ancillary jurisdiction to hear any expungement motions. (c) A court has ancillary jurisdiction to hear only expungement motions that raise *certain kinds* of claims. (d) A court has ancillary jurisdiction only to hear expungement motions concerning judicial records but not executive branch records. (e) A court has ancillary jurisdiction only to hear motions to expunge arrest records but not conviction records, as the Second Circuit held in the decision below. *See* App., *infra*, 6a-11a & n.2.

The courts' power to hear expungement motions and order the remedy of expungement is a matter of national importance. District courts have a statutory obligation in criminal cases to impose a sentence "sufficient, but not greater than necessary," to serve the purposes of punishment. *See* 18 U.S.C. § 3553(a). But without a clear mandate from this Court explaining the scope of ancillary criminal jurisdiction and whether it includes the ability to order expungement, the lower courts cannot satisfy this obligation. As a result, rehabilitated individuals

with criminal records suffer harsh collateral consequences, including the inability to obtain and retain employment, that far outweigh the public benefit of maintaining such records, and which permanently disable the ability of millions of Americans to reenter the workforce and society.

This Court last opined on ancillary jurisdiction in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1995), which involved the proper application of Federal Rule of Civil Procedure 41(a)(1)(ii). In that context, the Court stated that ancillary jurisdiction generally serves two purposes: *first*, "to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent," and, *second*, "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-80. The federal circuit courts disagree whether *Kokkonen* applies to criminal cases to limit a court's ability to hear motions to expunge criminal records. Moreover, the circuit courts that apply *Kokkonen* to criminal cases do not agree on the extent to which *Kokkonen* limits the inherent power of a district court hearing a motion to expunge criminal records, if at all.

This Court has never addressed the scope of ancillary jurisdiction in federal criminal cases. Without this Court's guidance, sentencing courts do not know whether they have the power to grant the remedy of expungement, and a criminal defendant's ability to obtain this remedy depends upon geography. The lower courts require clarity on whether *Kokkonen* controls criminal cases and, if it does, whether *Kokkonen* applies to expand or retract

jurisdiction to hear expungement motions. Because the Second Circuit's and the district court's decisions below examine the conflicting rules in the various circuit courts—while ultimately yielding a new, *sui generis* rule—this case presents an ideal vehicle for settling the question of ancillary jurisdiction in federal criminal cases.

STATEMENT OF THE CASE

I. THE DISTRICT COURT GRANTS PETITIONER'S MOTION TO EXPUNGE HER CRIMINAL RECORD

In 1997, Petitioner was a single mother struggling to support her four children on a monthly income of $783, well below her monthly expenses. *See* App., *infra,* 19a. Desperate for additional income to support her family, Petitioner agreed to act as a passenger in a fake car accident and permitted the fraudulent scheme's organizers to use her name to submit false insurance claims. *Id.* at 19a-21a. For her participation, Petitioner received $2,500. *Id.*

Petitioner was convicted of defrauding a health care benefit program, in violation of 18 U.S.C. § 1347. *Id.* at 21a. Because she was a minor participant in the scheme with no prior arrests or involvement with the criminal justice system, the district court sentenced Petitioner to five years' probation, ten months of home confinement, and ordered restitution in the amount of $46,701. *Id.* Petitioner completed her sentence without incident and made restitution payments of $25 per month. *Id.* at 3a. Since her conviction, Petitioner has not been arrested and has "by all accounts led an exemplary life." *Id.*

Because of her criminal record, however, Petitioner was repeatedly terminated from employment as a home health aide after her employer conducted a background check and learned of her past conviction. *Id.* at 5a, 25a. Determined to be gainfully employed, Petitioner requested assistance from her probation officer multiple times. *Id.* at 24a. After her probation officer was unable to help, Petitioner wrote a letter to the district court judge, expressing her strong desire to work and not to rely upon public assistance to support her four children. *Id.* at 3a. The district court construed her letter as a *pro se* motion to expunge her criminal record. *Id.*

The district court determined that it had jurisdiction to hear Petitioner's motion pursuant to *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994) and *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977). *Id.* at 28a-32a & n.16. The district court recognized the split of circuit court authority governing criminal ancillary jurisdiction after *Kokkonen* but reasoned that hearing motions for expungement of criminal records served both of *Kokkonen*'s purposes for ancillary jurisdiction. *First*, the expungement motion was factually "interdependent" with the criminal conviction because the "sole focus" of the expungement motion was "the record of the conviction that occurred in this case," and "the extensive factual record created while Doe was under this Court's supervision for five years." *Id.* at 29a-31a, n.16. *Second,* expungement was necessary to effectuate or vindicate the court's sentence because "few things could be more essential to 'the conduct of federal-court business' than the

appropriateness of expunging the public records that business creates." *Id.*

Having determined that it had jurisdiction to review Petitioner's motion, the district court examined the record of the case and the nearly one-thousand pages of Petitioner's probation file. *Id.* at 21a. The district court found that Petitioner's "criminal record has prevented her from working, paying taxes, and caring for her family, and it poses a constant threat to her ability to remain a law-abiding member of society. It has forced her to rely on public assistance when she has the desire and the ability to work." *Id.* at 36a.

Noting that "nearly two decades" had passed since Petitioner's "minor, nonviolent offense," the district court held that there "is no justification for continuing to impose this disability on her. I sentenced her to five years of probation supervision, not to a lifetime of unemployment." *Id.* at 36a. In other words, the district court exercised its equitable power to ensure that the ongoing disability created by Petitioner's criminal record did not render punishment "greater than necessary." 18 U.S.C. § 3553(a).

II. THE SECOND CIRCUIT VACATES THE DISTRICT COURT'S DECISION AND REMANDS FOR DISMISSAL FOR LACK OF JURISDICTION

On the government's appeal, the Second Circuit held that district courts lack jurisdiction to hear motions to expunge criminal convictions, vacating the district court's order. *Id.* at 2a. The Second Circuit acknowledged that Petitioner "deserve[d]" to have her criminal conviction expunged based on her

successful rehabilitation, but held that the district court lacked jurisdiction to hear Petitioner's motion and thus lacked the power to grant that justified relief. *Id.* at 12a-14a.

The Second Circuit reasoned that hearing motions to expunge criminal convictions does not serve either of *Kokkonen*'s twin purposes of ancillary jurisdiction. *Id.* at 6a-13a. Yet the Second Circuit expressed doubt that *Kokkonen* even applied in criminal cases. *Id.* & n.2. Moreover, the Second Circuit declined to abrogate its prior decision, *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977), which held that district courts possess ancillary jurisdiction to hear motions to expunge arrest records. *Id.* at 6a-9a.

The Second Circuit thus created a *sui generis* rule that district courts have jurisdiction to hear motions to expunge arrest records but not motions to expunge criminal convictions. Judge Livingston concurred, disagreeing with this internally incoherent rule and the majority's suggestion that *Kokkonen* did not also abrogate *Schnitzer*. *Id.* at 15a-16a (Livingston, J., concurring).

REASONS FOR GRANTING THE PETITION

This Court should grant the Petition under Supreme Court Rule 10(a) because the scope of a district court's ancillary jurisdiction in criminal cases is an important federal question that multiple circuit courts have decided in opposing manners. This Court should also grant the Petition pursuant to Supreme Court Rule 10(c) because this Court has never ruled on the boundaries of a district court's ancillary jurisdiction in criminal cases.

I. THIS COURT SHOULD DETERMINE THE SCOPE OF ANCILLARY JURISDICTION IN CRIMINAL CASES

A. The Circuit Courts Are Fractured, Applying Unique and Conflicting Jurisdictional Rules

The circuit courts have produced contradictory rules that provide little guidance as to the scope of the district courts' ancillary jurisdiction in criminal cases. The circuit courts do not agree on whether *Kokkonen* even controls the question of ancillary jurisdiction in criminal cases.

Kokkonen considered whether district courts have ancillary jurisdiction to enforce a settlement agreement after the district court dismisses the underlying case pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii). This Court ruled that dismissal pursuant to Rule 41 divested the district court of jurisdiction to hear any disputes related to the settlement agreement if: (a) the district court did not explicitly retain jurisdiction as a condition of dismissal and (b) the civil litigants did not request that the district court retain jurisdiction. *Kokkonen*, 511 U.S. at 381-82. If retention of jurisdiction to enforce the settlement agreement was not a condition of the federal court's dismissal of the lawsuit, disputes concerning the settlement agreement were nothing more than breach of contract claims that belonged in state court. *Id.* The Court recognized two "heads" of ancillary jurisdiction upon which previous cases had premised the exercise of ancillary jurisdiction: (a) the resolution of factually interdependent claims and (b) the need for a court "to function successfully, that is, to manage its

proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-80.

The circuit courts are split on whether *Kokkonen* applies to criminal cases.

1. The Circuit Courts That Do Not Apply *Kokkonen*

Several courts have declined to apply *Kokkonen* when determining the jurisdiction to hear motions to expunge criminal records. The Tenth Circuit has held 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). The Seventh Circuit has held that courts have such authority, but only to expunge records maintained by the judicial branch, not the executive branch. *United States v. Flowers*, 389 F.3d 737, 738-40 (7th Cir. 2004). The Fifth Circuit combines elements of both of these rules but with its own variation, holding that district courts have "supervisory powers" to expunge their own records, but that expungement of executive branch records may also be permitted where the movant shows "an affirmative rights violation." *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 697 & n.2 (5th Cir. 1997).

The D.C. Circuit has adopted several distinct rules in different cases. It recently held that courts have the power to expunge criminal records "for both violations of the Privacy Act and the Constitution." *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 787 F.3d 524, 534 (D.C. Cir. 2015). It has also previously held, in cases that have not been overruled, that courts

possess broader inherent power to expunge criminal records based on "the necessities of the particular case." *Livingston v. U.S. Dep't of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985); *see also Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974) ("The judicial remedy of expungement is inherent and is not dependent on express statutory provision, and it exists to vindicate substantial rights provided by statutes as well as by organic law.").

Thus, the Fifth, Seventh, Tenth, and D.C. Circuits have addressed ancillary jurisdiction since *Kokkonen* was decided, yet none have applied it. In addition, the Fourth and Eleventh Circuits have both broadly held that district courts possess ancillary jurisdiction to expunge criminal records, and have not revisited these holdings since *Kokkonen* was decided. *See United States v. Doe*, 747 F.2d 1358, 1359 (11th Cir. 1984); *Allen v. Webster*, 742 F.2d 153, 155 (4th Cir. 1984). After *Kokkonen*, the Fourth Circuit affirmed a district court's ruling that courts "have inherent equitable power to order the expungement of criminal records." *United States v. Masciandaro*, 648 F. Supp. 2d 779, 794 (E.D. Va. 2009), *aff'd*, 638 F.3d 458 (4th Cir. 2011) (internal quotations and citations omitted).

2. The Circuit Courts That Apply *Kokkonen*

The circuit courts that have applied *Kokkonen* have not done so in a uniform manner, creating a second set of conflicting and unsustainable rules. In *United States v. Sumner*, the Ninth Circuit held that "district courts possess ancillary jurisdiction to expunge criminal records," reasoning that such jurisdiction "flows out of the congressional grant of

jurisdiction to hear cases involving offenses against the United States pursuant to 18 U.S.C. § 3231." 226 F.3d 1005, 1014 (9th Cir. 2000). The court limited that ancillary jurisdiction to "expunging the record of an unlawful arrest or conviction, or to correcting a clerical error," and held that a district court lacks "the power to expunge a record of a valid arrest and conviction solely for equitable consideration." *Id.*

The Third and Eighth Circuits have adopted similar rules, applying *Kokkonen* to extend ancillary jurisdiction to criminal cases, but limiting the exercise of such jurisdiction to cases in which expungement will "preserve" the court's "ability to function successfully by enabling it to correct an injustice caused by an illegal or invalid criminal proceeding." *United States v. Meyer*, 439 F.3d 855, 861-62 (8th Cir. 2006); *accord United States v. Rowlands*, 451 F.3d 173, 177 (3d Cir. 2006) ("[W]e have jurisdiction over petitions for expungement in narrow circumstances: where the validity of the underlying criminal proceeding is challenged.").

The First and Sixth Circuits, on the other hand, have issued decisions that appear to bar *any* exercise of ancillary jurisdiction after the conclusion of a criminal proceeding based on *Kokkonen*. *See United States v. Lucido*, 612 F.3d 871, 875 (6th Cir. 2010); *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007). In *Lucido*, Judge Batchelder dissented from the majority decision because it overruled *United States v. Carey*, 602 F.3d 738 (6th Cir. 2010) which held that district courts have ancillary jurisdiction to hear motions to expunge criminal records and which was decided after *Kokkonen*. *Lucido*, 612 F.3d at 878-79 (Batchelder, J., dissenting).

Finally, the rule adopted by the Second Circuit in the decision below is *sui generis*. After questioning whether *Kokkonen* applied to criminal cases at all, the Second Circuit applied *Kokkonen* to hold that district courts lacked the jurisdiction to hear motions to expunge criminal convictions but did not abrogate its prior decision that district courts have ancillary jurisdiction to hear motions to expunge arrest records. App., *infra,* 6a-9a & n.2. The decision below provides yet another inconsistent rule advanced by the circuit courts.

B. This Court Has Never Addressed the Boundaries of Ancillary Jurisdiction in Criminal Cases

This Court has applied *Kokkonen* only twice. Both cases involved civil lawsuits. *See Syngenta Crop Prot., Inc. v. Henson,* 537 U.S. 28, 34 (2002); *Peacock v. Thomas*, 516 U.S. 349, 354-55 (1996). The Court has never applied *Kokkonen* to a criminal case. As the Second Circuit noted in the decision below, it is unclear whether *Kokkonen* applies at all in the criminal context. App., *infra,* 6a-9a & n.2. This Court has never addressed the scope of ancillary jurisdiction in criminal cases, or whether *Kokkonen* applies to extend or limit such jurisdiction. The conflict in the circuit courts is the direct result of this silence.

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

A. The District Courts' Ability to Expunge Criminal Records Is an Important National Question That Will Recur Absent This Court's Intervention

The district courts' power to hear expungement motions and order the remedy of expungement are matters of national importance. Nearly one-third of the American adult working age population has a criminal record—roughly the same percentage of the population that has a bachelor's degree. *See* Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, THE BRENNAN CENTER (Nov. 17, 2015), https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas. The collateral consequences of a criminal conviction amount to a kind of "civil death," permanently depriving individuals of fundamental rights and entitlements without regard for individual circumstances or rehabilitation. *United States v. Nesbeth*, No. 15-CR-18, 2016 WL 3022073, at *3 (E.D.N.Y. May 24, 2016) (internal citation omitted). As the Attorney General recently explained, these collateral consequences can turn any instance of "incarceration into what is effectively a life sentence." Attorney General Loretta E. Lynch Releases Roadmap to Reentry: The Justice Department's Vision to Reduce Recidivism through Federal Reentry Reforms (Apr. 25, 2016), *available at,* https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-national-reentry-week-event. Because sentencing courts are

unsure of their ability to limit the dramatic impact of collateral consequences in the appropriate circumstances, they are unable to consistently uphold their duty under 18 U.S.C. § 3553(a) to impose a sentence that is "sufficient but not greater than necessary" to serve the purposes of punishment.

The question presented will recur absent intervention from this Court. Collateral consequences are pervasive as over 650,000 individuals are released from prison each year. UNITED STATES DEPARTMENT OF JUSTICE, *Prisoners and Prisoner Re-Entry*, *available at,* https://www.justice.gov/archive/fbci/progmenu_reentry.html (last visited January 6, 2017). 87 percent of employers conduct background checks on potential or current employees. THE SENTENCING PROJECT, AMERICANS WITH CRIMINAL RECORDS 2 (2015), *available at,* http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf. As a result, rehabilitated defendants face unnecessary and, sometimes, insurmountable obstacles to securing and retaining employment. Left with no other choice, rehabilitated defendants will continue to file motions to expunge their criminal records. Until this Court settles the district courts' power to hear expungement motions, this question will recur and the circuit courts will continue to decide the question inconsistently.

B. The Systemic Error of Conflating Jurisdictional and Merits Analysis Deserves This Court's Attention

In the absence of guidance from this Court, many of the circuit courts' rules discussed *supra* have

improperly conflated jurisdictional rules with merits determinations. This Court has emphasized that "[c]larity . . . in matters of jurisdiction is especially important" because "[o]therwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *United States v. Sisson*, 399 U.S. 267, 307 (1970). Yet several circuit courts have held that district courts have ancillary jurisdiction to expunge *certain kinds* of arrest records or conviction records, but not other kinds. *See, supra,* Part I.A.1-2.

In the decision below, for example, the Second Circuit committed this error, creating a rule that eliminates jurisdiction to hear motions to expunge criminal convictions, while preserving jurisdiction to hear motions to expunge arrest records. Judge Livingston disagreed with this internal incoherence, which draws an unprincipled distinction between arrest records and conviction records. *See* App., *infra,* 15a-16a (Livingston, J., concurring). Similarly, the Third, Eighth, and Ninth Circuits have held that district courts have jurisdiction to hear motions to expunge arrest records and criminal convictions if those arrests or convictions were *invalid*, meaning that they are no longer valid or the validity of the underlying proceeding is being challenged. *See* Part I.A.1, *supra*. Accordingly, a court examining an expungement motion must determine the grounds for seeking expungement—and whether such grounds are meritorious—before determining whether it has jurisdiction to consider the motion.

Such rules predicating jurisdiction on the kind of criminal records or the ground for seeking

expungement improperly "wrap . . . a merits decision in jurisdictional garb." *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015). They subvert this Court's clear precedent that a federal court's jurisdiction cannot be predicated on a merits inquiry. *See Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) ("To ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast refers to a tribunal's power to hear the case. It presents a question quite separate from . . . whether the allegations the plaintiff makes entitle him to relief.") (internal quotations and citations omitted); *see also Bell v. Hood*, 327 U.S. 678, 682 (1946). Without intervention from this Court, the lower courts will continue to commit this error, violating the distinction this Court has repeatedly required, between jurisdiction and merits inquiries.

III. THE QUESTION IS CLEANLY PRESENTED BY THE DECISION BELOW

The Second Circuit's ruling in the decision below provides the ideal vehicle for settling the district courts' ancillary jurisdiction in criminal cases.[1] The majority opinion, the concurrence, and the district court's decision below represent three different views of the application of *Kokkonen* that mirror the split in circuit court authority: (a) *Kokkonen* applies to criminal cases and confers jurisdiction to hear expungement motions, depending on the type of record to be expunged. (b) *Kokkonen* eliminates the district courts' jurisdiction to hear expungement motions. (c) District courts have jurisdiction to hear all expungement motions. Thus, in reviewing the decision below, the Court will be able to fix the boundaries of criminal ancillary jurisdiction to hear expungement motions and also, more generally, clarify the correct meaning and application of *Kokkonen* to criminal cases, if any.

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[1] A previous case raising the issue of expungement that this Court declined to hear, *Mann v. United States*, No. 15-245, *cert. denied* Dec. 7, 2015, was an improper vehicle to consider the question presented for several reasons. In *Mann*, the expungement motion was denied in the first instance by the district court in an order barely exceeding one page that did not discuss *Kokkonen* and simply denied the expungement motion "because defendant's conviction is valid." Petition for Writ of Certiorari, *Mann v. United States*, No. 15-245 at 1. The Ninth Circuit summarily affirmed the district court's ruling in one sentence. *Id.* at 1a. *Mann* also preceded the full maturation of the split of authority in the circuit courts that this Petition presents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 9, 2017

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 11, 2016

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 15-1967-cr

JANE DOE, 14 MC 1412,

Petitioner-Appellee,

v.

UNITED STATES OF AMERICA,

Respondent-Appellant.

August Term, 2015
April 7, 2016, Argued
August 11, 2016, Decided

Before: POOLER, LIVINGSTON, and LOHIER, Circuit Judges. LIVINGSTON, Circuit Judge, concurring.

OPINION

LOHIER, *Circuit Judge*:

In this appeal we address whether a district court has ancillary jurisdiction to expunge all records of a valid conviction. The case arises from Jane Doe's health care

fraud conviction in 2001 after a jury trial in the United States District Court for the Eastern District of New York (Gleeson, *J.*). The District Court sentenced Doe principally to five years' probation. In 2014, seven years after her term of probation ended, Doe moved to have her record of conviction expunged because her conviction prevented her from getting or keeping a job as a home health aide. Relying on *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977) and *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994), the District Court held in a decision and order dated May 21, 2015 that it had ancillary jurisdiction to consider and grant Doe's motion. It then directed the Government to seal all hard copy records and to delete all electronic records of Doe's conviction. The Government appeals that decision as well as a related order.

We hold that the District Court lacked jurisdiction to consider Doe's motion to expunge records of a valid conviction. We therefore **VACATE** and **REMAND** with instructions to dismiss Doe's motion for lack of jurisdiction.

BACKGROUND

To resolve this appeal, we accept as true the following facts taken from the District Court's opinion and order granting Doe's expungement motion. *See Doe v. United States*, 110 F. Supp. 3d 448 (E.D.N.Y. 2015).

In 1997 Doe, a single mother with no prior criminal history, worked as a home health aide but struggled to pay her rent. *Id.* at 449-50. That year Doe decided to

join an automobile insurance fraud scheme in which she posed as a passenger in a staged car accident. As part of the scheme she feigned injury and recovered $2,500 from a civil claim related to the accident. *Id.* at 449-50. In 2001 a jury convicted Doe of "knowingly and willfully" participating in a "scheme . . . to defraud any health care benefit program" in violation of 18 U.S.C. § 1347. *Id.* at 450; 18 U.S.C. § 1347(a)(1). On March 25, 2002, the District Court imposed a sentence of five years' probation and ten months' home detention, as well as a restitution order of $46,701. *Doe*, 110 F. Supp. 3d at 450.

By 2008 Doe had completed her term of probation. But she could not keep a job in the health care field, the only field in which she sought work. Doe was sometimes hired as a home health worker by employers who did not initially ask whether she had been convicted of a crime. But she was fired when the employers eventually conducted a background check that revealed her conviction. *Id.* at 451-52.

On October 30, 2014, Doe filed a *pro se* motion asking the District Court to expunge her conviction "because of the undue hardship it has created for her in getting — and especially keeping — jobs." *Id.* at 448-49. Doe had by all accounts led an exemplary life since her conviction thirteen years earlier. *Id.* at 455.

Relying first on *Schnitzer*, 567 F.2d at 539, the District Court determined that it had ancillary jurisdiction to consider Doe's motion. *Doe*, 110 F. Supp. 3d at 454 & n.16; *see Schnitzer*, 567 F.2d at 538-39 (holding that "[a] court,

sitting in a criminal prosecution, has ancillary jurisdiction to issue protective orders regarding dissemination of arrest records," and that "expungement . . . usually is granted only in extreme circumstances" (quotation marks omitted)). In doing so, the District Court acknowledged that the Supreme Court in *Kokkonen* had "limited ancillary jurisdiction of collateral proceedings to instances where it is necessary '(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.'" 110 F. Supp. 3d at 454 n.16 (quoting *Kokkonen*, 511 U.S. at 379-80). But the District Court determined that Doe's motion satisfied both of these categories. *Id.*

First, the District Court explained, the motion's "sole focus is the record of the conviction that occurred in this case, and the exercise of discretion it calls for is informed by, *inter alia*, the facts underlying the conviction and sentence and the extensive factual record created while Doe was under this Court's supervision for five years." *Id.* Second, the court pointed out, "few things could be more essential to 'the conduct of federal court business' than the appropriateness of expunging the public records that business creates." *Id.* (quoting *Kokkonen*, 511 U.S. at 381).

The District Court also cited three reasons why the consequences of Doe's conviction were "extreme" enough to warrant expungement of her criminal record. First, Doe's offense of conviction "is distant in time and nature from [her] present life," and "[s]he has not even been re-

arrested, let alone convicted, in all th[e] years" since her conviction. *Id.* at 455 (quotation marks omitted). Second, Doe's "criminal record has had a dramatic adverse impact on her ability to work," as "[s]he has been terminated from half a dozen [home health aide] jobs because of the record of her conviction" — a difficulty that was "compounded" by the fact that Doe is over 50 years old and black. *Id.*; *see also id.* at 449, 452. Third, "[t]here was no specter at the time that she had used her training as a home health aide to help commit or cover up her crime," and "[t]here is no specter now that she poses a heightened risk to prospective employers in the health care field." *Id.* at 457.

For these reasons, the District Court granted Doe's motion and ordered "that the government's arrest and conviction records, and any other documents relating to this case, be placed in a separate storage facility, and that any electronic copies of these records or documents and references to them be deleted from the government's databases, electronic filing systems, and public record."[1] *Id.* at 458.

This appeal followed.

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1. Although Doe's petition was termed a motion to "expunge" her criminal conviction, we agree with Doe and certain *amici* that the term "expunge" does not accurately describe what the District Court ultimately ordered. In effect, the District Court ordered the records of Doe's conviction sealed rather than expunged or destroyed. Consistent with the parties' briefs, however, we use the term "expunge" or "expungement" to resolve the question presented.

Appendix A

DISCUSSION

"Federal courts . . . are courts of limited jurisdiction." *Wynn v. AC Rochester*, 273 F.3d 153, 157 (2d Cir. 2001). "Even where the parties are satisfied to present their disputes to the federal courts, the parties cannot confer subject matter jurisdiction where the Constitution and Congress have not." *Id.* We conclude that the District Court did not have jurisdiction over Doe's motion pursuant to 18 U.S.C. § 3231 because Doe's conviction was valid and the underlying criminal case had long since concluded.

Citing the Federal Rules of Criminal Procedure, Doe argues that federal courts broadly retain subject matter jurisdiction over criminal cases even after judgment has been entered. We agree that certain motions may be raised after the entry of judgment in criminal cases. We also recognize that the time limits for bringing those motions are often non-jurisdictional. But we are not persuaded that the District Court had subject matter jurisdiction to decide Doe's motion in this case. The relevant Rules of Criminal Procedure all provide for limited jurisdiction over specified types of post-judgment motions. *See, e.g.*, Fed. R. Crim. P. 35(b) (allowing motions to reduce a sentence based on substantial assistance to the government). None of these rules remotely suggests, however, that district courts retain jurisdiction over *any* type of motion years after a criminal case has concluded.

Nor are we persuaded that the District Court had ancillary jurisdiction to consider Doe's motion. "The boundaries of ancillary jurisdiction are not easily defined

and the cases addressing it are hardly a model of clarity," but "[a]t its heart, ancillary jurisdiction is aimed at enabling a court to administer justice *within the scope of its jurisdiction*." *Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir. 2006) (emphasis added) (quotation marks omitted). "Without the power to deal with issues ancillary or incidental to the main action, courts would be unable to effectively dispose of the principal case nor do complete justice in the premises." *Id.* (quotation marks omitted).

With that in mind, we turn briefly to *Schnitzer*, on which the District Court relied to decide that it had ancillary jurisdiction to grant Doe's motion. In *Schnitzer*, the defendant filed a motion to expunge his arrest record following an order of dismissal in his criminal case. After the district court denied his motion, the defendant argued on appeal that the district court lacked jurisdiction to decide his motion in the first place. We rejected the defendant's argument. We held that "[a] court, sitting in a criminal prosecution, has ancillary jurisdiction to issue protective orders regarding dissemination of arrest records." 567 F.2d at 538.

Although *Schnitzer* involved an arrest record, the District Court was not alone in thinking that it extends to records of a valid conviction. *See United States v. Mitchell*, 683 F. Supp. 2d 427, 430 n.10 (E.D. Va. 2010). But we think it is clear that *Schnitzer* applies only to *arrest* records after an order of dismissal. *See Schnitzer*, 567 F.2d at 538 (holding that "[a] court, sitting in a criminal prosecution, has ancillary jurisdiction to issue protective orders regarding dissemination of *arrest records*" (emphasis

added)); *id.* at 539 (noting that "[n]o federal statute provides for the expungement of an *arrest record*," but that "expungement lies within the equitable discretion of the court" (emphasis added)). Our reading is supported by the fact that *Schnitzer* itself relied on decisions that were confined to the expungement of arrest records following dismissal of a criminal case. *See Morrow v. District of Columbia*, 417 F.2d 728, 741, 135 U.S. App. D.C. 160 (D.C. Cir. 1969) (holding that the district court's exercise of ancillary jurisdiction over a motion to expunge arrest records was proper); *United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975) (same); *United States v. Rosen*, 343 F. Supp. 804, 806 (S.D.N.Y. 1972) (exercising jurisdiction over a motion to expunge arrest records); *United States v. Seasholtz*, 376 F. Supp. 1288, 1289 (N.D. Okla. 1974) (same). In *Morrow*, for example, the D.C. Circuit explained that "an order regarding dissemination of arrest records in a case dismissed by the court is reasonably necessary to give complete effect to the court's order of dismissal." 417 F.2d at 741. We therefore conclude that *Schnitzer* is confined to the expungement of arrest records following a district court's order of dismissal and as such does not resolve whether the District Court had ancillary jurisdiction to expunge records of a valid conviction in this case.[2]

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2. Although it is unnecessary for us to decide the issue today, we do not view the Supreme Court's decision in *Kokkonen* as necessarily abrogating *Schnitzer*. To the contrary, exercising ancillary jurisdiction to expunge (seal, delete) arrest records following a district court's order of dismissal appears to comport with *Kokkonen* (insofar as it applies to criminal cases) because it may serve to "effectuate [that] decree[]." *Kokkonen*, 511 U.S. at 380.

The District Court also cited *Kokkonen* in support of its decision to exercise ancillary jurisdiction over Doe's motion. In *Kokkonen*, the Supreme Court determined that a district court had improperly exercised ancillary jurisdiction to enforce a settlement agreement in a civil suit that it had previously closed without expressly retaining jurisdiction to enforce the agreement. As the District Court recognized, the Supreme Court instructed that ancillary jurisdiction may be exercised "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. Given the facts in *Kokkonen*, the Court held that enforcing a settlement agreement upon which the dismissal was predicated fell into neither category. The Court explained that "the facts underlying respondent's dismissed claim . . . and those underlying its claim for breach of settlement agreement have nothing to do with each other," and "the only order here was 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.

Relying on *Kokkonen*, Doe argues that the District Court's exercise of ancillary jurisdiction served to "vindicate its sentencing decree" issued in 2002. Appellee's Br. 27. The District Court phrased the same point slightly differently by characterizing its original decree as having "sentenced [Doe] to five years of probation supervision, not to a lifetime of unemployment." *Doe*, 110 F. Supp. 3d at 457.

We reject Doe's argument. The District Court's sentence had long ago concluded and its decrees long since expired by the time Doe filed her motion. Under those circumstances, expunging a record of conviction on equitable grounds is entirely unnecessary to "manage [a court's] proceedings, vindicate its authority, [or] effectuate its decrees." *Kokkonen*, 511 U.S. at 380. "Expungement of a criminal record solely on equitable grounds, such as to reward a defendant's rehabilitation and commendable post-conviction conduct, does not serve any of th[e] goals" identified in *Kokkonen's* second prong. *Sumner*, 226 F.3d at 1014; *see also United States v. Lucido*, 612 F.3d 871, 875 (6th Cir. 2010) (holding that a district court lacked jurisdiction to consider a motion to expunge records of a valid indictment and later acquittal because "[t]hese criminal cases have long since been resolved, and there is nothing left to manage, vindicate or effectuate").

Doe alternatively argues that the District Court's supervision of her criminal proceedings (including the sentence) and its subsequent handling of her motion to expunge her conviction on equitable grounds were "factually interdependent" under *Kokkonen*, 511 U.S. at 379. We agree that the District Court's review of Doe's motion may have depended in part on facts developed in her prior criminal proceeding. *See Doe*, 110 F. Supp. 3d at 454 n.16 ("[T]he exercise of discretion [that Doe's expungement motion] calls for is informed by, *inter alia*, the facts underlying the conviction and sentence and the extensive factual record created while Doe was under this Court's supervision for five years."). But we fail to see how these two analytically and temporally distinct proceedings can be described as "factually interdependent."

To the contrary, a motion to expunge records of a *valid* conviction on equitable grounds will ordinarily be premised on events that are unrelated to the sentencing and that transpire long after the conviction itself. For example, in this case the facts underlying the District Court's sentencing were clearly independent of the facts developed in Doe's motion filed years later. Conversely, the District Court granted Doe's motion based on facts and events (her repeated efforts to obtain employment) that transpired years *after* her sentencing and term of probation. *Id.* at 452, 456-57; see *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007) (holding that "[a]s in *Kokkonen*, the original claims brought before the district court in this [criminal] case have nothing to do with the equitable grounds upon which Coloian seeks the expungement of his criminal record"). And the collateral employment consequences Doe faces today arise from the very fact of her conviction, not from the District Court's sentencing proceedings or Doe's probationary term. For these reasons, we conclude that Doe's original sentencing and her motion to expunge are not "mutually dependent." Merriam-Webster Dictionary (3d ed.) (defining "interdependent").

Finally, we note that Congress has previously authorized district courts to expunge lawful convictions under certain limited circumstances not present in this case. *See* 18 U.S.C. § 3607(c) (upon the application of certain drug offenders who have been placed on prejudgment probation and were less than twenty-one years old at the time of the offense, "the court shall enter an expungement order" expunging all public "references

to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof"); 18 U.S.C. § 5021(b) (repealed 1984) (providing that after sentencing a youth offender to probation, a district court "may thereafter, in its discretion, unconditionally discharge such youth offender from probation . . . which discharge shall automatically set aside the conviction"). We think it significant (though not dispositive) that Congress failed to provide for jurisdiction under the circumstances that exist here.

In summary, we hold that the District Court's exercise of ancillary jurisdiction in this case served neither of the goals identified in *Kokkonen*. Our holding is in accord with that of every other sister Circuit to have addressed the issue since *Kokkonen*. *See United States v. Field*, 756 F.3d 911, 915-16 (6th Cir. 2014); *Lucido*, 612 F.3d at 875-76; *Coloian*, 480 F.3d at 52; *United States v. Meyer*, 439 F.3d 855, 859-60 (8th Cir. 2006); *United States v. Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001); *Sumner*, 226 F.3d at 1014-15.[3]

The unfortunate consequences of Doe's conviction compel us to offer a few additional observations. First, our holding that the District Court had no authority to expunge the records of a valid conviction in this case says nothing about Congress's ability to provide for jurisdiction in similar cases in the future. As described above,

3. At oral argument, Doe waived any argument in support of sealing only the judicial records of conviction in her case, rather than all available records retained by the Government. *See* Oral Arg. Tr. 20; *cf. Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141-42 (2d Cir. 2004).

Congress has done so in other contexts. It might consider doing so again for certain offenders who, like Doe, want and deserve to have their criminal convictions expunged after a period of successful rehabilitation. Second, only a few months ago (while this appeal was pending), the Attorney General of the United States recognized and aptly described the unfortunate lifelong toll that these convictions often impose on low-level criminal offenders:

> Too often, Americans who have paid their debt to society leave prison only to find that they continue to be punished for past mistakes. They might discover that they are ineligible for student loans, putting an education out of reach. They might struggle to get a driver's license, making employment difficult to find and sustain. Landlords might deny them housing because of their criminal records — an unfortunately common practice. They might even find that they are not allowed to vote based on misguided state laws that prevent returning citizens from taking part in civic life.

Attorney General Loretta E. Lynch Releases Roadmap to Reentry: The Justice Department's Vision to Reduce Recidivism through Federal Reentry Reforms (Apr. 25, 2016), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-national-reentry-week-event. "[T]oo often," the Attorney General said, "the way that our society treats Americans who have come into contact with the criminal justice system . . . turns too many terms of incarceration into what is effectively a life sentence." *Id.*

CONCLUSION

For the foregoing reasons, we **VACATE** the District Court's May 21 and 22, 2015 orders and **REMAND** with instructions to dismiss Doe's motion for lack of jurisdiction.

Appendix A

LIVINGSTON, *Circuit Judge*, concurring:

I concur fully in the majority opinion, with two exceptions. First, I do not join footnote two, addressing whether *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994), abrogated our decision in *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977). The majority implies, in dicta, that *Schnitzer*'s jurisdictional holding may have survived *Kokkonen*. The weight of authority from other circuits appears to the contrary.[1] Regardless

1. *See United States v. Lucido*, 612 F.3d 871, 875-76 (6th Cir. 2010) (holding that "federal courts lack ancillary jurisdiction to consider expungement motions directed to the executive branch," and in the process abrogating a prior Sixth Circuit precedent to the contrary on the basis that it "c[ould not] be reconciled with *Kokkonen*"); *United States v. Coloian*, 480 F.3d 47, 51-52 (1st Cir. 2007) (holding that federal jurisdiction does not "provide[] ancillary jurisdiction over equitable orders to expunge because such orders do not fit within *Kokkonen*'s purposes for ancillary jurisdiction," and distinguishing *Schnitzer* on the ground that it "predate[s] *Kokkonen* . . . which raises questions as to [its] continued viability"); *United States v. Meyer*, 439 F.3d 855, 859-860 (8th Cir. 2006) (though factually addressing only expungement of a conviction (rather than an arrest record), stating that "[i]n light of the Supreme Court's instruction narrowing the scope of ancillary jurisdiction in *Kokkonen* . . . , we are convinced that a district court does not have ancillary jurisdiction to expunge a criminal record based solely on equitable grounds"); *United States v. Dunegan*, 251 F.3d 477, 479-80 (3d Cir. 2001) (citing *Kokkonen* for the proposition that "in recent years [the Supreme Court] has held that ancillary jurisdiction is much more limited," and relying on *Kokkonen* to hold that "in the absence of any applicable statute enacted by Congress, or an allegation that the criminal proceedings were invalid or illegal, a District Court does not have the jurisdiction to expunge a criminal record, even when

of the proper resolution of this question, having found that *Schnitzer* is inapposite to this case, I would not further opine on its continued validity.

Second, I do not join the majority's discussion of the merits of affording courts jurisdiction to expunge criminal convictions, which begins on page 17. I am sympathetic to the concerns the majority raises in this dicta, but I note that there are other significant considerations — including the value of governmental and judicial transparency — that must also be assessed in the context of this policy debate. Having concluded that we lack jurisdiction to reach the merits of this case, I would not suggest to Congress how it might go about assessing and weighing these equities.

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ending in an acquittal"); *United States v. Sumner*, 226 F.3d 1005, 1015 (9th Cir. 2000) (relying on *Kokkonen* to hold "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"); *cf. Lucido*, 612 F.3d at 876 (listing cases, including *Schnitzer*, that hold that federal courts have jurisdiction to equitably expunge particular criminal records in at least some circumstances, but observing that such authority "comes from decisions that predate *Kokkonen* . . . or that never discuss or even cite [it]").

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED MAY 21, 2015

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

14-MC-1412 (JG)

JANE DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

May 21, 2015, Decided
May 21, 2015, Filed

MEMORANDUM AND ORDER

JOHN GLEESON, United States District Judge:

Jane Doe filed an application on October 30, 2014, asking me to expunge her thirteen-year old fraud conviction because of the undue hardship it has created for her in getting — and especially keeping — jobs. Doe gets hired to fill home health aide and similar positions only to be fired when her employers learn through subsequent background checks about her conviction. Since

the conviction was for health care fraud, it's hard to blame those employers for using the conviction as a proxy for Doe's unsuitability.

However, even if one believes, as I do, that employers are generally entitled to know about the past convictions of job applicants, and that their decisions based on those convictions are entitled to deference, there will nevertheless be cases in which all reasonable employers would conclude that the conviction is no longer a meaningful consideration in determining suitability for employment if only they had the time and the resources to conduct a thorough investigation of the applicant or employee.

I have conducted such an investigation, and this is one of those cases. In addition to presiding over the trial in Doe's case and her subsequent sentencing, I have reviewed every page of the extensive file that was created during her five years under probation supervision. I conclude that the public's interest in Doe being an employed, contributing member of society so far outweighs its interest in her conviction being a matter of public record that the motion is granted and her conviction is expunged.

FACTS

A. *Doe's Background and Crime*

Doe was born and raised in Port-au-Prince, Haiti. In 1983, at age 24, she came to New York in search of a better life. She became a naturalized citizen in 1989. By

1990 she had three children from a relationship with a taxi driver who in that year left the family to return to Haiti. Doe's mother had come from Haiti in 1988 to help with the children, but she died in 1995. Another relationship ended prior to the birth of Doe's fourth child in 1996.

Doe enrolled in a nursing assistant program and became a home health aide. By 1997, when she first became involved in the criminal conduct that gave rise to her conviction, Doe's children were ages 12, 10, 7, and 1. She was raising them by herself on her net monthly income of $783. They lived in a two-bedroom apartment on the first floor of a six-story building in the Jamaica section of Queens. The monthly rent exceeded Doe's take-home pay. After visiting the home as part of the presentence investigation, a probation officer reported that crack dealers and crack addicts frequented the entrance to the building and its lobby.

In those circumstances, Doe participated in 1997 in one of the automobile insurance fraud schemes that were ubiquitous in this district at the time. The schemes involved, among other criminal participants: corrupt physicians and other health care professionals at clinics; organizers of staged car "accidents" (who were usually principals of car service businesses); drivers of livery cars, who would deliberately cause minor collisions; and people like Doe, who would climb into the back seat of a car before the staged collisions. A car full of passengers would be deliberately driven into an innocent motorist's car at low speed, often when the latter car was stopped at a light. A police officer was summoned, producing a

police report, and the passengers would feign injuries. They were taken to a clinic, where they signed over their rights to no-fault insurance benefits to the clinic. The clinic would then bill the insurance companies for unnecessary (and usually unperformed) services, up to the $50,000 limit. The corrupt clinics would pay the car service operators for each "patient" they provided, the driver would get a fee (usually $500) for causing the "accident," and the passengers in the back of the car would sometimes get a small cash payment. In addition, the phony treatment files generated by the clinics for each of the (uninjured) passengers would sometimes become the basis of particularly audacious personal injury lawsuits. Specifically, the passengers would be referred to lawyers who would bring suits on their behalf against the innocent drivers of the other cars. Of course those suits were entirely meritless (a fact the lawyers sometimes were aware of, and sometimes not), but they could be settled for their nuisance value.

On August 1, 1997, Doe agreed to be involved in one of these staged accidents. She was one of the passengers in the back seat, and she falsely claimed that she was injured, assigned her no-fault insurance claim to a clinic, and represented that she had received medical services related to her fabricated injury. A civil claim was filed on her behalf, which was settled, and Doe received $2,500.[1]

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1. The presentence report (at ¶ 16) asserts that Doe received payments for fraudulent medical expenses totaling $31,201.80, but that money went to the clinic to which Doe had assigned her right to no-fault benefits, not to Doe herself. Thus, those funds were properly included in Doe's loss calculation under the Guidelines, but they do

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In 2001, Doe was found guilty after a jury trial of violating 18 U.S.C. § 1347 based on her role in the scheme. She was sentenced on March 25, 2002 to five years' probation, ten months of home detention, and a restitution order of $46,701. She had no prior criminal history, and she has not had any contact with the criminal justice system since her conviction.

B. *Doe's Employment Problems While on Probation and Afterward*

I have carefully reviewed the Probation Department's files on Jane Doe. They memorialize the five years she spent under supervision. The two files total almost 1,000 pages. They paint a portrait of a woman who (1) needs to work to support the four young children she was raising by herself at the time; (2) wants very much to work; (3) detests being on public assistance; and (4) poses no risk of financial harm to others. Along with the facts advanced in support of the instant motion, the probation files also show that during the 13 years since Doe was sentenced, her conviction has become an increasingly insurmountable barrier to her ability to work.

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not represent her gain from her offense. Rather, the trial record establishes that Doe received a $4,000 payment to settle her lawsuit, of which Doe got $2,500. Trial Tr. at 20, 950, 958. (In this respect the trial record contradicts the suggestion in paragraph 16 of the presentence report that Doe received $15,500 in settlement funds from that accident.) In addition, the government put on evidence at trial of uncharged and allegedly staged accidents involving Doe and two of her children on November 10, 1998, May 9, 2000, and October 23, 2000.

Early in her five-year probationary period, Doe got a job as a "house manager" at Agency One,[2] a homeless shelter for women with children. It was not fulltime work, but the combination of her wages from that job, her public assistance, and food stamps equaled approximately $1,300 per month. Doe was laid off from that job in July 2003, apparently for reasons unrelated to her conviction.

Doe actively began looking for other work, and in March 2004 she began working as a counselor at Agency Two, a home for families with children with mental disabilities. The probation officer noted on May 21, 2004 that Doe's supervisor was unaware of her conviction. Even with the job at Agency Two, Doe's total monthly income was less than $1,000. At that time her children were ages 17, 16, 13, and 7.

Despite her dire financial circumstances, Doe was intent on keeping up with her restitution obligation. I had ordered her to pay $25 per month. The October 2004 notes in the file state that she was actually two months *ahead* in her payments, explaining that "[t]hough she occasionally misses a payment, she doubles the payment the following month," and she apparently doubled her payment on two more occasions than she needed to.

By September 2004, for reasons not set forth in the file, Doe was back on public assistance. In December of that year she landed a part-time job as a relief counselor

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2. In an effort to preserve confidentiality, the agencies will not be referred to by their real names.

at Agency Three, a home for persons with mental illnesses and developmental disabilities. The job paid $10 per hour, but the hours were so low that Doe's total monthly income (including food stamps) hovered around $600 for three months. When her hours spiked in May 2005 she had the best month by far of the entire five years of probation, earning $2,248, and she promptly sent $740 of it to her three siblings in Haiti. In June and July her hours declined, as did her net income, to $1,008 and $1,120, respectively, and by August she was back on public assistance.[3]

A September 14, 2005 note states that Doe reported to her probation officer that she had just gotten a new job. But the job went away, and a two-page handwritten note from Doe to the officer explained what had happened:

> The problem right now. Any placed you fill any application for job you suposed to make fingerprint and background checked. For me, this is the problem. I've applied so many places to work. Everything is O.K. When people calling you for an interview, I fail because fingerprint and criminal background checked came back. People said I'm very sorry for you. I can't hired you because criminal background checked and fingerprint. I'm a patient woman I'm still going to looking for different placed or private duties to do . . . .[4]

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3. Again, the file does not reveal whether this was one of the jobs from which Doe was fired after her conviction was discovered.

4. The text of the note is reprinted here exactly as it was written. I note that English is not Doe's native language, and she

Doe kept looking for work and found it at Agency Four, a home for the elderly. The position was not only low-paying (Doe's monthly income for the five months she worked there never reached $1,000), but the employer would not allow Doe to take the time needed to see her doctor for a thyroid condition. As a result, she switched to Agency Five in May 2006. Agency Five is a home health care provider.

The move to Agency Five brought with it the risk of a fingerprint check, and that risk materialized two months later. Doe was fired on July 24, 2006, when her conviction came to light.

The probation officer's report covering July 2006 still has a yellow Post-It note stuck to it. On the note is the following plea from Doe:

> [C]an't you please talk to the judge about my situation, criminal record. If the judge can't release my problem one day I'm going to find work somewhere. I'm good hardworking woman, I'm single parent, have 4 childrens. I don't like welfare I like to work. I'm independence woman please explain to judge for me.

The report for August 2006 includes Doe's statement that "right now I'm not working because criminal record."

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learned English as her second language only after immigrating to the United States.

In October of that year, Doe reported in writing to her probation officer as follows: "When I'm looking for job the criminal background give me a problem. No job for me nowhere? Very sadness."

Doe's file reveals that she remained unemployed until her probation was terminated on March 24, 2007. Since then the pattern has continued. Specifically, Doe's conviction does not prevent her from getting jobs as a home health care worker, but it has consistently prevented her from keeping those jobs. She doesn't lie to her employers, who do not ask her if she has a criminal record at the hiring stage. However, after she gets jobs, record checks are performed by her employers or others acting on their behalf. Once they learn of Doe's conviction, she gets fired. This has happened to her half a dozen times.

The government does not dispute any of the foregoing facts. Rather, it contends in opposition to the motion that Doe's employment difficulties do not amount to the extreme circumstances necessary to warrant expungement.

DISCUSSION

A conviction for even a minor federal felony can have wide-ranging effects on, among other things, a defendant's employment, housing, and educational opportunities. Those effects sometimes "impose additional burdens on people who have served their sentences . . . without increasing public safety in essential ways."[5] And "research

5. Letter from Attorney General Eric Holder to State Governors (Apr. 18, 2011) ("Holder Letter"), *available at* http://csgjusticecenter.org/wp-content/uploads/2014/02/Reentry_Council_AG_Letter.pdf.

reveals that gainful employment and stable housing are key factors that enable people with criminal convictions to avoid future arrests and incarceration."[6] Simply put, the public safety is better served when people with criminal convictions are able to participate as productive members of society by working and paying taxes.

A criminal record poses an especially high barrier to employment. Nearly seventy percent of U.S. employers now perform some form of criminal background check on prospective employees.[7] A criminal record exacerbates the increased difficulty that older workers like Doe already face in the job market.[8] Those difficulties are further exacerbated by race. Doe is black, and studies show that her race is even more of an impediment to her employment prospects than her conviction.[9]

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6. *Id.* at 2.

7. *SHRM Survey Findings: Background Checking — The Use of Criminal Background Checks in Hiring Decisions*, Society for Human Resource Management (Jul. 19, 2012), *available at* http://www.shrm.org/research/surveyfindings/articles/pages/creditbackgroundchecks.aspx (follow "click here" link).

8. *See* Maria Heidkamp et al., NTAR Leadership Ctr., Dep't of Labor, *The Public Workforce System: Serving Older Job Seekers and the Disability Implications of an Aging Workforce* 6-9 (May 2012), *available at* http://www.dol.gov/odep/pdf/NTAR_Public_Workforce_System_Report_Final.pdf (discussing how older workers who lose a job have a more difficult time than their younger counterparts in reconnecting to the labor market).

9. *See* James B. Jacobs, *The Eternal Criminal Record* 279-80 (Harvard Univ. Press 2015) (discussing sociologists Richard D. Schwartz and Jerome Skolnick's study finding that a criminal

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The growing concern in recent years about the collateral consequences of criminal records has prompted various efforts to address how the criminal justice system can better balance its law enforcement goals with society's interest in the successful rehabilitation and reentry of individuals with criminal convictions.[10] For example, in 2011, Attorney General Eric Holder called on the states to review the more than 38,000 statutes and regulations that impose collateral consequences and to eliminate those that do nothing to increase public safety.[11] In 2014, Chief Judge Jonathan Lippman of the New York Court of Appeals proposed a measure that would allow nonviolent

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conviction produces "status degradation" with potentially permanent effects, and sociologist Devah Pager's more recent study finding that fictitious job applicants who were white with a criminal conviction were more likely to receive interest from employers than black applicants with *no* criminal conviction).

10. This concern stems from the rise in arrests and incarceration the last few decades that have left millions of people with a criminal record. An estimated 65 million Americans have a criminal record and thus face significant barriers to employment. *See* Michelle Natividad Rodriguez & Maurice Emsellman, Nat'l Employment Law Project, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment* 3 (Mar. 2011), *available at* https://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

11. Holder Letter at 2. The Department of Justice's National Institute of Justice ("NIJ") funded a comprehensive study of collateral consequences by the ABA Criminal Justice Section, and launched a website in September 2012 that inventories the more than 38,000 collateral consequences of criminal records in the country. *See* ABA National Inventory of Collateral Consequences of Conviction ("NICCC"), http://www.abacollateralconsequences.org/map/.

felons to have their records sealed if they avoid re-arrest for ten years and have no prior felony convictions.[12] Two bills that would create federal expungement authority for nonviolent offenses have been introduced in recent years, although neither advanced to a floor vote.[13] Delaware

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12. *See* Robert Gavin, *Lippman: Expunge Non-Violent Convictions* , Times Union, February 11, 2014, *available at* http://www.timesunion.com/local/article/Lippman-Expunge-non-violent-convictions-5223958.php#page-1; *see also* OCA 2014-98R, *available at* http://newyorksealinglaw.com/wp-content/uploads/2014/03/OCA_2014-98R.pdf (providing the language of the proposed bill). In 2014, New York Senators Michael F. Nozzilio and Joseph R. Lentol introduced a bill similar to Chief Judge Lippman's proposal. *See* NYS S9607 (May 12, 2014) & NYS S7926 (July 7, 2014). The purpose of the bill was to:

> . . . give certain past criminal offenders, i.e., nonviolent individuals whose criminal conduct was so far in the past as to make them statistically no more likely to commit future crime than any other person, a means by which to have their criminal record sealed from public view and thereby to relieve them of some of the economic and social stigma that generally attaches to criminal offenders even after their debts to the community have been paid.

N.Y.S. Senate Introducer's Memorandum in Support of S7926 (July 7, 2014), *available at* http://public.leginfo.state.ny.us (search query: "Bill No.," "A09607," "2014," "Sponsor's Memo"); OCA 2014-98R.

13. In 2011, Rep. Charles B. Rangel introduced the Second Chance for Ex-Offenders Act of 2011, H.R. 2449, 112th Cong., and Rep. Steve Cohen introduced the Fresh Start Act of 2011, H.R. 2065, 112th Cong. Both bills provided for expungement of nonviolent offenses, whether misdemeanors or felonies, for first-time offenders. *See* Summaries for the Second Chance for Ex-Offenders Act of 2011,

Governor Jack Markell has used his pardon power in an effort to alleviate the stigma of criminal records and to help deserving individuals secure employment, signing almost 1,600 pardons, primarily for people convicted of minor offenses, in his six-plus years in office.[14] Thus, commendable systemic efforts to correct the long-lasting and often disproportionate consequences of criminal convictions are under way.

In the meantime, on a case-by-case basis, "expungement lies within the equitable discretion of the court[.]"[15] District courts in this and certain other circuits have ancillary jurisdiction over applications for orders expunging convictions.[16] A request for expungement is

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available at https://www.govtrack.us/congress/bills/112/hr2065/summary; H.R. 2449 — Fresh Start Act of 2011, *available at* https://www.congress.gov/bill/112th-congress/house-bill/2449.

14. Cris Barrish & Jonathan Starkey, *Dramatic Rise in Pardons in Delaware*, News Journal, April 25, 2015, available at http://www.delawareonline.com/story/news/local/2015/04/25/dramatic-rise-pardons-delaware/26374339/.

15. *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977), *cert. denied*, 435 U.S. 907, 98 S. Ct. 1456, 55 L. Ed. 2d 499 (1978).

16. *Id.* at 538 (citing cases). In 1994, the Supreme Court limited ancillary jurisdiction of collateral proceedings to instances where it is necessary "(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 v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379-80, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). Ancillary jurisdiction allows federal courts to hear "some matters (otherwise beyond

their competence) that are incidental to other matters properly before them." *Id.* at 378. The federal courts of appeals seem to agree that district courts have ancillary jurisdiction to expunge records of unlawful convictions or arrests. *See* 13 Charles Alan Wright et al., *Federal Practice & Procedure* § 3523.2 (3d ed. 2008). They disagree, however, with respect to whether district courts have ancillary jurisdiction where, as here, they are asked to expunge records of lawful convictions based on equitable considerations. *See id.* The Second, Fourth, Seventh, Tenth, and D.C. Circuits have held that district courts have subject matter jurisdiction over such applications. *Id.* (citing *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004); *Livingston v. U.S. Dep't of Justice*,759 F.2d 74, 78, 245 U.S. App. D.C. 54 (D.C. Cir. 1985); *Allen v. Webster*, 742 F.2d 153, 154-155 (4th Cir. 1984); *Schnitzer*, 567 F.2d at 539; *United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975)). The First, Third, Sixth, Eighth, and Ninth Circuits have held otherwise since *Kokkenen*. *See United States v. Lucido*, 612 F.3d 871, 875-76 (6th Cir. 2010); *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007) ; *United States v. Meyer*, 439 F.3d 855, 859-60 (8th Cir. 2006); *United States v. Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001); *United States v. Sumner*, 226 F.3d 1005, 1014-15 (9th Cir. 2000). District courts in the Fourth Circuit have also held that they lack ancillary jurisdiction to expunge records on equitable grounds despite the Circuit's holding in *Allen*, 742 F.2d 153. *See, e.g., United States v. Harris*, 847 F. Supp. 2d 828, 831-835 (D. Md. 2012); *United States v. Mitchell*, 683 F. Supp. 2d 427, 430 (E.D. Va. 2010).

The government has not challenged my jurisdiction to decide Doe's application, but that does not relieve me of my obligation to ensure that such jurisdiction exists. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). I conclude that it does. As mentioned above, *Kokkonen* acknowledged federal courts' ancillary jurisdiction over proceedings that "enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." 511 U.S. at 380. A claim of breach of contract — specifically, breach of an agreement that settled a prior federal suit — was held by the

"usually is granted only in extreme circumstances" after examining it "individually on its merits to determine the proper balancing of the equities."[17] Specifically, "the government's need to maintain arrest records must be balanced against the harm" that the records can cause citizens.[18]

Doe seeks the expungement of a valid conviction, not a suspect arrest, and I am acutely aware that "courts have rarely granted motions to expunge arrest records, let alone conviction records."[19] Nevertheless, courts have

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Court not to fall within that power. *Id.* at 380-81 ("The facts to be determined with regard to such alleged breaches of contract are quite separate from the facts to be determined in the principal suit, and automatic jurisdiction over such contracts is in no way essential to the conduct of federal-court business.").

An expungement proceeding is different in kind. Its sole focus is the record of the conviction that occurred in this case, and the exercise of discretion it calls for is informed by, *inter alia*, the facts underlying the conviction and sentence and the extensive factual record created while Doe was under this Court's supervision for five years. And few things could be more essential to "the conduct of federal-court business" than the appropriateness of expunging the public records that business creates.

17. *Schnitzer*, 567 F.2d at 539 & 540 (quotation and citation omitted).

18. *United States v. Doe*, No. 71-CR-892 (CBM), 2004 U.S. Dist. LEXIS 9082, 2004 WL 1124687, at *2 (S.D.N.Y. May 20, 2004) (quoting *Schnitzer*, 567 F.2d at 539).

19. *United States v. Sherman*, 782 F. Supp. 866, 868 (S.D.N.Y. 1991); *see also United States v. McFadzean*, No. 93-CV-25 (CSH), 1999 U.S. Dist. LEXIS 16971, 1999 WL 993641, at *3 (S.D.N.Y. Nov.

granted such requests even where the conviction is valid and no government misconduct was involved as long as sufficiently extraordinary circumstances are present.[20]

This case presents extraordinary circumstances sufficient to warrant expungement. First, Doe's offense of conviction "is distant in time and nature from [her] present life."[21] Doe committed the offense 17 years ago, was sentenced 13 years ago, and completed her five-year sentence of probation eight years ago. She has not even been re-arrested, let alone convicted, in all those years.

2, 1999) (expungement "is not commonly granted even in cases in which the defendant was acquitted of the charges, much less where the defendant has been convicted by a jury or pleaded guilty[.]").

Typically, arrest records have been expunged where there was government misconduct or the conviction was somehow invalid, such as: (1) mass arrests which made the determination of probable cause impossible; (2) arrests effectuated only to harass civil rights workers; (3) police misuse of the records resulting in prejudice to the defendant; and (4) the statute underlying the arrest was later declared unconstitutional. *Schnitzer*, 567 F.2d at 540 (citations omitted).

20. *United States v. Doe*, 935 F. Supp. 478, 480-81 (S.D.N.Y. 1996).

21. *See Doe*, 2004 U.S. Dist. LEXIS 9082, 2004 WL at *3 (thirty-year period since conviction weighs in favor of expunging record); *see also Doe*, 935 F. Supp. at 480 (amount of time elapsed since conviction and defendant's conduct during that period were factors counseling in favor of expungement)

Second, Doe has shown that her criminal record has had a dramatic adverse impact on her ability to work.[22] She has been terminated from half a dozen jobs because of the record of her conviction. These consequences are compounded in Doe's case by her age and her race. Indeed, given the well-established fact that recidivism rates decline as age increases,[23] Doe's age alone counsels in favor of expunging her conviction. That she has not engaged in any criminal activity since the conduct that brought her before me helps to prove that point; a long period of law-abiding conduct after a conviction lowers the risk of recidivism to the same level as someone who has never committed a crime.[24]

Doe was a minor participant in a nonviolent crime. As the Supreme Court has made clear, while prison terms are qualitatively more severe, Doe's five-year

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22. *See Doe*, 2004 U.S. Dist. LEXIS 9082, 2004 WL at *3; *Doe*, 935 F. Supp. at 480-81.

23. *See e.g.*, U.S. Sentencing Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12 & Ex. 9 (May 2004), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf.

24. *See* Alfred Blumenstein & Kiminori Nakamura, Criminology Vol. 47, *Redemption in the Presence of Widespread Criminal Background Checks* Table 2 (May 2009), *available at* http://jrsa.org/webinars/presentations/cch_part2-criminology-2009.pdf (finding, for example, that the risk of recidivism for individuals who committed a burglary or robbery offense at age 20 drops to the same risk level of arrest in the general population 3.2 and 4.4 years, respectively, after the individual has remained crime free).

term of probation was serious punishment.[25] Moreover, intermediate sanctions, like the ten-month period of home detention with electronic monitoring I imposed upon Doe, can inflict meaningful additional punishment without risking the loss of a defendant's children to foster care. Anyone who is not persuaded that home detention is real punishment need only review the section of Doe's probation file that is devoted to the home confinement condition.[26]

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25. *Gall v. United States*, 552 U.S. 38, 48, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). Probationers are subject to myriad conditions of probation that significantly impair their freedom. They cannot leave their judicial district, move, or change jobs before notifying and getting permission from their probation officer or the court. *Id.* They have to report to their probation officers on a regular basis and submit to unannounced home visits. *Id.* They must not associate with anyone convicted of a felony and must refrain from excessive drinking. *Id.* The court can also impose a variety of "special conditions" that make everyday life extremely difficult to navigate. *Id.* And the violation of a condition can be grounds for more onerous modifications of the conditions of supervision or even revocation of supervision and the imposition of a term of incarceration up to two years.

26. The goal of home detention is to punish by ensuring the offender leaves the home only for pre-approved good reasons. Thus, for ten months, Doe needed the advance approval of her supervising officer every single time she wanted to leave her home. There were some permissions she could obtain in blanket form; for example, the file reflects that during periods of unemployment, she could be out of the home beginning at 7:30 A.M. to bring her children to school, but she had to be back in the home by 9:00 A.M. She was given permission to leave at 2:30 P.M. to pick them up.

All other trips outside the home needed to be applied for and approved separately. Trips to church and the grocery store

Appendix B

The government's main arguments against expungement are that Doe's circumstances are not sufficiently extreme and that it is entirely appropriate for employers in the health care field to have knowledge of her conviction of health care fraud.[27] As for the first

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had to be requested two days in advance. All the normal tasks of daily life required advanced planning and approval. On March 24, 2003, for example, Doe got permission to leave the house to take one of her daughters for braces. Another entry from the previous November memorializes the permission she received to leave the home to do her laundry.

In addition, Doe was required to complete a personal financial statement and execute authorization forms for credit checks, tax returns, education checks, and the disclosure of her medical record. There was no detail about her personal life for a five-year period that was not covered by the paperwork in her probation file. She was regularly subjected to drug tests. She was directed to submit a sample of her DNA for analysis and entry into the FBI database.

Another section of the probation file records the innumerable home and community contacts that are regular incidents of community supervision. Supervising probation officers came to her home regularly, always in pairs, and always unannounced.

In short, there is no sense in which expunging the record of Doe's conviction so that she can retain employment minimizes the punishment she faced for committing her crime.

27. The government correctly notes that courts have traditionally declined to expunge records based on adverse employment consequences alone. *See* Resp. Br. at 5 (citing *United States v. Barrow*, No. 06-CR-1084 (JFK), 2014 U.S. Dist. LEXIS 67818, 2014 WL 2011689, at *1 (S.D.N.Y. May 16, 2014); *Joefield v. United States*, No. 13-MC-367 (JBW), 2013 U.S. Dist. LEXIS 109514,

argument, there is a growing recognition that the adverse employment consequences of old convictions are excessive and counter-productive. Doe's criminal record has prevented her from working, paying taxes, and caring for her family, and it poses a constant threat to her ability to remain a law-abiding member of society. It has forced her to rely on public assistance when she has the desire and the ability to work. Nearly two decades have passed since her minor, nonviolent offense. There is no justification for continuing to impose this disability on her. I sentenced her to five years of probation supervision, not to a lifetime of unemployment.

The government's second argument, *i.e.*, that Doe's health care fraud conviction should not be expunged because she seeks employment in the health care field, has obvious superficial appeal. Indeed, if Doe's conviction had arisen out of her work as a home health aide, the outcome of this application might well have been different. But facts matter, and the facts here are that a young woman raising four children by herself on wages that did not even cover the rent availed herself of an opportunity to make $2,500 illegally. That the scheme offered to her resulted in health care fraud was essentially fortuitous. In her circumstances at the time, Doe would have participated in any scheme to make ends meet. There was no specter at the time that she had used her training as a home health aide to help commit or cover up her crime. There is no specter now that she poses a heightened risk to prospective employers in the health care field.

2013 WL 3972650, at *1 (E.D.N.Y. Aug. 5, 2013); *Oyebola v. United States*, No. 10-MC-425 (JG), 2010 U.S. Dist. LEXIS 72587 (E.D.N.Y. July 20, 2010)).

Finally, there is something random and senseless about the suggestion that Doe's ancient and minor offense should disqualify her from work as a home health aide. The patchwork quilt of collateral consequences mentioned above produces results that are so anomalous they border on the farcical. For example, a conviction for even a minor crime can result in disqualifying a person from being a barber in New York.[28] Yet last year the IRS recertified a tax preparer despite its knowledge of his recent felony conviction in my courtroom for preparing a fraudulent tax return for a major drug trafficker.[29] In that case, the United States Attorney urged me to allow the defendant to continue to work as a tax preparer without any notice to his clients of his recent conviction for being a fraudulent tax preparer. The government's assertion in this case that the public interest requires home health care agencies to know about Doe's minor criminal conduct in 1997 thus rings somewhat hollow.

CONCLUSION

Doe is one of 65 million Americans who have a criminal record and suffer the adverse consequences that result from such a record. Her case highlights the need to take a fresh look at policies that shut people out from the social, economic, and educational opportunities they desperately need in order to reenter society successfully.

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28. *See* N.Y.S. Dep't of State Div. of Licensing Law, Practice of Barbering License Law §432 (Nov. 2014), *available at* http://www.dos.ny.gov/licensing/lawbooks/barber.pdf.

29. The name and docket number of this case will be filed separately under seal so as not to make public the individual involved.

Appendix B

The seemingly automatic refusals by judges to expunge convictions when the inability to find employment is the "only" ground for the application have undervalued the critical role employment plays in re-entry. They are also increasingly out of step with public opinion. The so-called "ban the box" practice, in which job applications no longer ask the applicant whether he or she has been convicted of a crime, is becoming more prevalent.[30] There is an increasing awareness that continuing to marginalize people like Doe does much more harm than good to our communities.

Accordingly, Doe's application for an order expunging her conviction is granted. It is hereby ordered that the government's arrest and conviction records, and any other documents relating to this case, be placed in a separate storage facility, and that any electronic copies of these records or documents and references to them be deleted from the government's databases, electronic filing systems, and public record. Doe's real name is to be removed from any official index or public record. It is further ordered that the records are not to be opened other than in the course of a bona fide criminal investigation by

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30. Marianne Levine, *Koch Industries to Stop Asking About Job Candidates' Criminal History*, Politico.com (Apr. 27, 2015), http://www.politico.com/story/2015/04/koch-industries-brothers-criminal-history-job-applicants-ban-the-box-117382.html. In 2014, Delaware and Nebraska passed "ban the box" legislation for most state, city and county jobs. Jeffrey Stinson, *A Criminal Record May No Longer Be A Stumbling Block To Employment In Some Places*, Huffington Post (May 22, 2014), http://www.huffingtonpost.com/2014/05/22/criminal-record-employment_n_5372837.html. In doing so, they joined at least ten other states and the District of Columbia, which have passed similar legislation since 1998. *Id.*

law enforcement authorities and only when necessary for such an investigation. The government and any of its agents may not use these records for any other purpose, nor may their contents be disseminated to anyone, public or private, for any other purpose.

Finally with respect to the relief granted here, I welcome the input of the parties. My intention is clear: no inquiry of the federal or state government by a prospective employer should result in the disclosure of Doe's conviction. Effectuating that intent without unduly burdening those governments or impairing their legitimate law enforcement interests is not so clear, at least not to me. Thus I welcome any proposed modifications to the relief set forth above, and of course any such proposals by the government would not be regarded as a waiver of its opposition to my decision to expunge the conviction.

So ordered.

John Gleeson, U.S.D.J.
Dated: May 21, 2015
Brooklyn, New York