

No. 16-876

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**

**BRIEF OF *AMICI CURIAE* COMMUNITY SERVICE
SOCIETY OF NEW YORK, NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION/ NEW YORK, AND TWENTY-
ONE OTHER PUBLIC INTEREST ORGANIZATIONS IN
SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are twenty-three nonprofit organizations based throughout the United States that work with and for individuals with a criminal conviction history as they pursue employment, education, and housing. *Amici* collectively have substantial knowledge as lawyers and advocates about the barriers faced by persons seeking post-conviction employment, and submit this brief to provide insight into the crippling impact of past conviction on a person's ability to find and maintain employment.

A list of the *amici* is included in the Appendix.

SUMMARY OF ARGUMENT

The Second Circuit erred in resolving a question of exceptional national importance. If upheld, the Second Circuit's decision will eliminate a critical avenue of relief for individuals with a criminal conviction history, whose employment opportunities are profoundly burdened by employers' growing reliance on criminal background checks, by legally

¹ Pursuant to Supreme Court Rule 37.6, counsel for amici represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity, other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice under Supreme Court Rule 37.2(a) of intent to file this brief was provided to counsel for petitioners and respondents, and both have consented in writing to the filing of this brief.

mandated barriers to the employment of individuals with a conviction history, and by rampant discrimination.

Job seekers with a conviction history—like petitioner Ms. Doe—often face insurmountable obstacles to obtaining and maintaining employment that, for many, become life-long challenges with profound economic and social consequences. The sentencing federal court is, in appropriate circumstances, the institution best positioned to offer those individuals relief and should be able to assert jurisdiction over an expungement petition.

ARGUMENT

I. THE COLLATERAL CONSEQUENCES OF CONVICTION ON EMPLOYMENT ARE PREVALENT, SUBSTANTIAL, AND UNJUSTIFIED.

Recent developments have magnified the negative impact a conviction can have on employment. First, pre-employment criminal background checks—once relatively rare—have become widely used as changes in technology and law have made access to records broader, simpler, and cheaper. Background check companies are now a growing business focused on facilitating employer access to conviction records. As a result, pre-employment background checks have become a near-ubiquitous part of the hiring process.

Second, the obstacles facing individuals with a conviction history are growing in number and

severity. A hodgepodge of state and federal laws imposes additional hurdles by effectively foreclosing certain professions and professional licensures. And anti-discrimination laws enacted to provide some relief to individuals with a conviction history are insufficient.

Public policy does not justify the barriers to employment facing persons with a conviction history. Studies show that conviction histories become less predictive of recidivism with the passage of time.

A. Employers Today Have Ready Access to Conviction Histories.

1. Conviction History Searches Are Increasingly Digitized and Have Become Easily Accessible to Employers.

As late as the 1990s, it would have been difficult, slow, and costly for an employer conducting a pre-employment background check to obtain a prospective employee's conviction history information. Before these records were digitized, an employer could only access them by sending "runners" to physically visit courts (sometimes in multiple jurisdictions) to manually search for and retrieve any hard copy records of arrest or conviction.² Today's technology—including the

² NAT'L CONSUMER LAW CTR., BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES 11 (2012) (hereinafter "BROKEN RECORDS"), <https://goo.gl/DOBKTH>.

digitization of court records and online searches—has made employers’ access to records far simpler and cheaper.

Background check companies generally no longer need to visit court clerks’ offices, as jurisdictions across the country frequently now provide electronic access to these records at low cost or even for free.³ At the federal level, the Public Access to Court Electronic Records system first became available on the Internet in 1998; before that, federal court records could only be accessed at specially-designated terminals in libraries and certain office buildings.⁴ Similarly, the FBI only began to digitize millions of criminal history files in 1992, and did not finish until 2014.⁵ Employers benefited from similar advances at the state and local level: By the end of 2014, forty-nine states, the District of Columbia, Guam, and Puerto Rico had digitized over 94% of the records contained in their collective state systems.⁶ Twenty-nine of these states, the District of Columbia, Guam, and Puerto Rico had fully

³ *Id.* at 9.

⁴ *Chronology of the Federal Judiciary’s Electronic Public Access (EPA) Program*, PACER.GOV, <https://goo.gl/X3MqnG> (last visited Feb. 6, 2017).

⁵ *FBI Files: CJIS Digitizes Millions of Files in Modernization Push*, FBI.GOV (Aug. 22, 2014), <https://goo.gl/xFOqTm>.

⁶ BUREAU OF JUST. STATISTICS, U.S. DEPT OF JUST., *SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2014*, at 2, (2015), <https://goo.gl/Rkp51K>.

automated their criminal history files.⁷ Some cities and municipalities have done likewise.⁸

2. Advances in Technology Have Contributed to the Growth of the Background Check Industry, which Further Facilitates Employer Access to Conviction Histories.

The increased availability of conviction history information, coupled with the “growing obsession with background checking and commercial exploitation of arrest and conviction records,”⁹ has spurred the growth of the background check industry. Background check companies facilitate employer access to conviction history information and often market their services to employers by highlighting the volume of data captured by their search functionalities and purporting to predict trustworthiness or risk of workplace theft or violence.¹⁰ These developments have fundamentally

⁷ *Id.*

⁸ See BROKEN RECORDS, *supra* note 2, at 9-10.

⁹ NAT’L ASS’N OF CRIM. DEF. LAWYERS, COLLATERAL DAMAGE; AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME—A ROADMAP TO RESTORE RIGHTS AND STATUS AFTER ARREST OR CONVICTION 9 (2014), goo.gl/ma3KB7.

¹⁰ See, e.g., 4 Reasons to Run Pre-Employment Background Checks, ZIPRECRUITER (Sept. 2, 2015), <https://goo.gl/C7NQ10>; 3 Best Practices to Help Prevent Workplace Violence, HIRERIGHT (Aug. 16, 2012), <https://goo.gl/H5nNtL>; Why Do Background Checks: The Pros and Cons, A MATTER OF FACT: EMPLOYMENT (cont’d)

changed the hiring process. In August 2001, the Bureau of Justice Statistics observed “a considerable and growing public demand for . . . criminal justice information.”¹¹ Indeed, the use of background checks by American businesses grew by 20% just between 1998 and 2000.¹² This growth occurred even as hiring declined, because many private companies began requesting background checks on their current employees as well.¹³

Moreover, the willingness of courts and government agencies “to make their automated data available in bulk . . . has allowed commercial vendors to build private criminal justice information libraries containing millions of criminal justice records.”¹⁴ In 2005 these proprietary databases contained more than 160 million records from states

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BACKGROUND CHECKS (last visited Feb. 6, 2017), <https://goo.gl/d7BrwK>.

¹¹ BUREAU OF JUST. STAT., U.S. DEPT OF JUST., No. NCJ 187669, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY, AND CRIMINAL JUSTICE INFORMATION 36 (2001), goo.gl/6DAxZU.

¹² SEARCH: NAT’L CONSORTIUM FOR JUST. INFO. & STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 31 (2005) (hereinafter “SEARCH REPORT”), goo.gl/KZRUVH.

¹³ *Id.* at 32.

¹⁴ *Id.* at 29.

across the country,¹⁵ and the numbers have grown considerably since, with some companies now claiming to maintain more than 525 million criminal records from over a thousand sources.¹⁶ While these proprietary databases were initially “designed and marketed to serve narrow searches limited by county or State[,] [b]eginning in 2001 . . . commercial vendors began to roll out ‘nationwide’ products.”¹⁷ Employers, therefore, are now able to access and afford “50-state reports.”

Background check companies with proprietary databases are also able to run “instant” background check searches on behalf of employers.¹⁸ Some even

¹⁵ *Id.* at 29-30.

¹⁶ *See, e.g., Our Data Makes Us Different*, BACKGROUNDCHECKS.COM, <https://goo.gl/MAV6eW> (last visited Feb. 6, 2017); Similarly, Verified Credentials claims that its “National Criminal Database Search draws from over 525 million records from thousands of jurisdictions, including counties, department of corrections (DOC), administrative office of courts (AOC), and offender registries from all 50 states, plus Washington DC, Guam, and Puerto Rico.” *National Criminal Database Search*, VERIFIED CREDENTIALS, <https://goo.gl/kZ6WdE> (last visited Feb. 6, 2017).

¹⁷ SEARCH REPORT, *supra* note 12, at 10-11.

¹⁸ *See id.* at 11, 73.

permit employer clients to directly access criminal background checks via a computer interface.¹⁹

Employers not interested in a comprehensive or “professional” search sometimes do not even hire a third party: A simple name-based Google search can in many cases yield information about a person’s arrest and criminal conviction history.

As a result of heightened employer interest and ease of record access,²⁰ commercial background checking is now a growth industry. A 2016 trade report analyzing the U.S. background check services market valued the industry’s 2016 revenue at \$1.8 billion and its profits at \$264.4 million.²¹ It estimated that criminal record checks represented 41.7% of services the industry provided in 2016.²² Additional sources show that along with a few large industry players, there were “hundreds, perhaps even thousands, of regional and local companies” as early as 2005.²³ These smaller regional and local

¹⁹ See *Successful Integration, Our Technology: Criminal Data: County Criminal*, VICTIG SCREENING SOLUTIONS, <https://goo.gl/zQFEXy> (last visited Feb. 6, 2017).

²⁰ See *Pros and Cons*, *supra* note 10; see also *Why do Employers Do Background Checks?*, HIRERIGHT, <https://goo.gl/2gWyPv> (last visited Feb. 6, 2017).

²¹ Gavan Blau, BACKGROUND CHECK SERVICES IN THE US: MARKET RESEARCH REPORT 3 (IBISWorld Report No. OD6058, 2016).

²² *Id.*

²³ SEARCH REPORT, *supra* note 12, at 7.

background check companies have become commercially viable because the relevant data is easily accessible, and because they generally are not subject to licensing or registration requirements.²⁴ This means that, effectively, “[a]nyone with a computer, an Internet connection, and access to records can start a background screening business.”²⁵

3. Pre-Employment Criminal Background Checks Are Now Standard and Often Result in Denial of Employment.

In a dramatic shift in employer culture, pre-employment criminal background checking has become the national norm. In 2012, 86% of employers surveyed by the Society for Human Resource Management, the world’s largest human resources professional society, reported that they used criminal background checks for at least some of their positions,²⁶ compared to 51% in 1996.²⁷ The

²⁴ BROKEN RECORDS, *supra* note 2, at 8.

²⁵ *Id.*

²⁶ SOC’Y FOR HUMAN RES. MGMT. (SHRM), BACKGROUND CHECKING—THE USE OF CRIMINAL BACKGROUND CHECKS IN HIRING DECISIONS 2-3 (2012) (hereinafter “HIRING DECISIONS”), goo.gl/AW20lT (click “Download Full Report”); *see also* Nat’l Ass’n of Prof. Background Screeners, *Background Screening—Past, Present and Future*, goo.gl/CC8rzr (last visited Feb. 6, 2017).

²⁷ Joanna Glasner, *When Old Convictions Won’t Die*, WIRED (May 10, 2004), <https://goo.gl/Djz5Il>.

report also found that in 2012, nearly 70% of employers ran criminal background checks on all prospective employees regardless of the status or pay grade of the position.²⁸

Employers have used criminal record information to deny jobs even to low-level workers. For example, Harold²⁹—a client represented by *amicus* the Community Service Society of New York (“CSS”)—has several years of experience working in food preparation. He was excited when a grocery store offered him a part-time job in its food preparation department that would allow him to continue his undergraduate studies. After running a pre-employment background check, however, the store revoked Harold’s offer based on a single past drug-related conviction that involved no violence or harm to property.

Criminal background checks are widely and increasingly used in both the public and private sectors. While private employers rely on background check companies to obtain conviction history information, government agencies and approved government contractors obtain data directly from state repositories and/or the FBI through use of

²⁸ HIRING DECISIONS, *supra* note 26, at 3.

²⁹ The names of all clients represented by the Community Service Society of New York or by the Legal Action Center mentioned in this brief have been changed to protect client identities.

fingerprints.³⁰ The thirty states participating in the 1998 National Crime Prevention and Privacy Compact³¹ exchange conviction history data with one another and with the federal government for civil purposes (*i.e.* employment and licensing) free of charge.³² This compact contributed to a 41% increase in state requests for FBI records concerning job applicants between 1993 and 2002.³³ Increased government agency reliance on pre-employment background checks has made it difficult for job seekers with a conviction history to secure public or government-regulated employment. For example, Lawrence—also a CSS client—eagerly accepted a truck driver position with a food delivery company he had worked for in the past. Since Lawrence last worked at the company, however, it had become a contractor with a New York City agency. This meant that Lawrence was required to obtain

³⁰ NAT'L EMP'T LAW PROJECT, THE "WILD WEST" OF EMPLOYMENT BACKGROUND CHECKS 3-4 (2014) (hereinafter "WILD WEST"), goo.gl/gz4Js0.

³¹ MADELINE NEIGHLY & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 6 (2013) (hereinafter "WANTED"), goo.gl/aTTUWz; *see also* BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., NO. NCJ 200030, COMPENDIUM OF STATE PRIVACY AND SECURITY LEGISLATION: 2002 OVERVIEW at 13-14 (2003) (hereinafter "COMPENDIUM"), goo.gl/GEXz2U.

³² *The National Crime Prevention and Privacy Compact Act of 1998*, FBI.GOV (last visited Feb. 6, 2017), <https://goo.gl/xFS5Yd>.

³³ *See* COMPENDIUM, *supra* note 31, at 9.

fingerprint-based clearance from the agency before he could begin working. Despite the company's interest in hiring Lawrence, the agency denied him clearance on the basis of his conviction history, and the delivery company was forced to withdraw its job offer.

Another CSS client, Bradley, faced similar problems. Bradley has over 25 years of experience as a maintenance worker. At age 50, he was growing weary of moving between unreliable jobs, and was ecstatic when offered a position with a New York City agency, which would have provided him stable work, fair compensation, and benefits. But when Bradley disclosed his conviction history, the agency revoked its offer, despite the fact that his last conviction was eight years old, that all of his convictions were misdemeanors, and that none was directly related to maintenance worker job duties.

Use of FBI data for civil purposes increased in part due to the issuance of Homeland Security Presidential Directive 12 in 2004. In response to the September 11 attacks, this Directive expanded employment-related background check requirements, which for decades had been limited to government jobs, to include companies that contracted with the federal government.³⁴ FBI background checks were now mandated for all current and prospective federal employees with more than "intermittent" access to federally controlled

³⁴ WANTED, *supra* note 31, at 6.

properties, whether or not the position in question was safety-sensitive.³⁵

These policy changes prompted a 600% increase in the use of FBI data—comprised of records of both state and federal criminal justice involvement—for civil purposes from 2002 to 2012.³⁶ In 2012, a record 17 million FBI background checks were run for employment and licensing purposes.³⁷ In combination with changing employer norms, this dramatic increase in background checking has caused seismic shifts in the way employers incorporate criminal record information into their hiring processes, with profound consequences to Ms. Doe and to others similarly situated.

B. Individuals with a Conviction History Often Face Insurmountable Challenges in Obtaining and Keeping Employment.

Restrictions—sometimes irrational—on the employment of individuals with a conviction history, combined with widespread, invidious discrimination, result in formidable barriers to employment.

³⁵ *Id.*

³⁶ WILD WEST, *supra* note 30, at 4.

³⁷ *Id.*

1. Legislation Imposes Additional Barriers to Employment for Individuals with a Conviction History.

Over 26,000 state laws currently restrict the scope of employment for individuals with a conviction history.³⁸ This hodgepodge of laws has erected licensing requirements and other obstacles to obtaining and maintaining employment that persist long after an individual has completed his or her sentence.

These licensing or clearance restrictions often bear no apparent connection to safety or security concerns—sweeping in such jobs as bartender, barber, plumber, beautician, and athletic trainer.³⁹ At times, they seem to lack a rational basis: In New York, for instance, individuals with felony convictions may be barred from obtaining the license required in order to manufacture or distribute animal feed.⁴⁰ A license to operate as a food salvager

³⁸ See *National Inventory of Collateral Consequences of Conviction*, JUST. CTR., COUNCIL OF STATE GOV'TS, goo.gl/9x6mFy (select “Employment” from “Categories” menu for list of state laws) (last visited Feb. 7, 2017).

³⁹ Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 156 (1999); see also RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009-2014, at 24 (2014), goo.gl/QYOVYq; *National Inventory*, *supra* note 38.

⁴⁰ N.Y. AGRIC. & MKTS. LAW § 129(4)(d) (McKinney Supp. 2016).

in New York State may likewise be denied to an individual with a conviction history.⁴¹

Yet these restrictions place an outsized burden on individuals with a conviction history: The occupations foreclosed by licensing or clearance requirements include many low-wage jobs that require little experience or education—the very jobs more likely to be attainable by persons with a conviction history, who may lack higher education and a desirable employment history.⁴²

Consider Mark—a client of *amicus* Legal Action Center—who was employed by the New York City Department of Education as a teacher’s aide. Fifty-two years old, an active community member, and church trustee, he needed additional income in order to afford his escalating rent and to save for retirement. He applied and was accepted for a position as an aide at an organization that served developmentally disabled individuals, but was terminated when a background check revealed his previously-disclosed twenty-one-year-old conviction for attempted possession of a weapon—his only criminal conviction.

⁴¹ N.Y. AGRIC. & MKTS. LAW § 220 (McKinney Supp. 2016).

⁴² Many lack even a high school education. In 2004, approximately 36% of individuals incarcerated in state prisons had failed to complete high school, as compared to approximately 19% in the general population of the United States 16 years of age and over. LOIS M. DAVIS ET AL., RAND CORP., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION xv (2013).

Racially polarized conviction rates exacerbate the impact of these barriers. Today, more than 70 million adults in the United States—nearly one in three—have a criminal history of some kind,⁴³ compared to less than 35 million in 1995.⁴⁴ This drastic increase may be attributable to zero-tolerance policing practices that became widespread in the 1990s and continue to be used today.⁴⁵ Communities of color disproportionately bear the consequences of these policies.⁴⁶

⁴³ Jo Craven McGinty, *How Many Americans Have a Police Record? Probably More Than You Think*, WALL ST. J. (Aug. 7, 2015), goo.gl/ALvV9Z; *Ensuring People with Convictions Have a Fair Chance to Work*, NELP.ORG, <https://goo.gl/4CkHCn> (last Feb. 7, 2017); *see also* SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2014, *supra* note 6, at 2.

⁴⁴ *See* BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 1997, at 13 (1999), <https://goo.gl/BBE1qY>. This calculation was made by replicating the formula that NELP used to estimate the number of individuals with a criminal history in 2012. *See* ANASTASIA CHRISTMAN & MICHELLE NAVIDAD RODRIGUEZ, NAT'L EMP'T LAW PROJECT, RESEARCH SUPPORTS FAIR CHANCE POLICIES 1 & n.1 (2016) <https://goo.gl/vOkVMo>.

⁴⁵ Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), <https://goo.gl/kgrzzw>.

⁴⁶ *Criminal Justice Facts*, SENTENCING PROJECT, goo.gl/DdlSGV (last visited Jan. 18, 2017) (“Today, people of color make up 37% of the U.S. population but 67% of the prison population.”); SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 5 (2015), <https://goo.gl/3ctmrA> (observing that
(*cont'd*)

2. Workplace Discrimination Is Rampant against Individuals with a Conviction History, and Remedies Are Limited.

A 1996 survey of more than 3,000 employers in four major metropolitan areas showed that a full two-thirds would not knowingly hire an individual with a conviction history.⁴⁷ As a result of this continuing pattern, in 2012 the Equal Employment Opportunity Commission issued updated employer guidance on the use of arrest and conviction information in employment decisions and cautioned that certain policies or practices could constitute racially disparate treatment or result in racially disparate impact in violation of Title VII of the Civil Rights Act of 1964.⁴⁸ But conviction history– based employment discrimination persists.

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“[b]lack men are nearly six times as likely to be incarcerated as white men” and that 2,724 of every 100,000 black men were imprisoned in 2014, as compared to 1,091 Latino men and 465 white men).

⁴⁷ See HARRY J. HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS EDUCATED WORKERS 58 (1996).

⁴⁸ See generally U.S. Equal Emp. Opportunity Comm’n, EEOC Enforcement Guidance No. 915.002, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), <https://goo.gl/IDy9ix>. Notwithstanding the EEOC’s Guidance on this issue, Title VII does not on its face protect persons with a conviction history. 42 U.S.C. § 2000e-2.

Recent studies confirm that Harold, Lawrence, Bradley, and Mark—and the additional individuals described below—are not isolated cases. In 2010, the National Employment Law Project surveyed approximately 2,500 job advertisements posted on Craigslist over a period of four months in five major metropolitan areas: the San Francisco Bay Area, Los Angeles, Chicago, New York City, and Atlanta.⁴⁹ Twelve percent of these ads “included the most overt and problematic type of screening criteria”: language requiring applicants to have “no arrests” or “clean” or “clear” arrest records.⁵⁰ Many other ads required no felony or misdemeanor convictions, or no convictions within a specified time frame.⁵¹ Another study, published by Princeton and Harvard researchers in 2009, showed that individuals with a conviction history remain nearly 50% less likely to receive a job callback or offer than their counterparts without a conviction history.⁵²

⁴⁹ See Michelle Natividad Rodriguez & Maurice Emsellem, Nat’l Emp. Law Project (NELP), *65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment*, at 13 & 30 n.60 (NELP Second Chance Labor Project Paper 2011), <https://goo.gl/U8n5dm>.

⁵⁰ *Id.* at 13-14 & 30 n.60.

⁵¹ *Id.* at 13-17; see also *HIRING DECISIONS*, *supra* note 26, at 2 (86% of members—mostly large employers—reported that they perform criminal background checks on some or all job candidates).

⁵² Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with* (cont’d)

Employers are sometimes so wary of hiring individuals with a conviction history that they will refuse to hire an applicant with a conviction history *even after* that applicant has been subjected to a rigorous background check by a government agency and granted clearance by that agency. For example, CSS client Sarah has a single non-violent conviction that she received at the age of twenty-one. After completing her sentence, Sarah decided to make up for her past by working with children and young adults from underserved communities, acting as a positive role model and teaching them how to make good life choices. Sarah excelled in this capacity with several different nonprofit organizations. Several years after her conviction, she was offered a position with an after-school program. Even though Sarah was granted clearance by the New York State agency overseeing the program, she was terminated from her job after one of the program's directors learned about her conviction, calling it a "red flag."

Alvin—another CSS client—faced a similar situation. Mere days before he was scheduled to begin work as a direct care provider at a nonprofit agency serving individuals with developmental disabilities, Alvin was informed that his offer was being revoked because he was not a "proper fit." Alvin confirmed with the New York State agency overseeing the nonprofit that the agency had immediately cleared him to work upon reviewing his

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Criminal Records, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009), goo.gl/JX1MfY.

conviction history. When Alvin inquired with the nonprofit, he was told that it had been their choice to revoke his offer, despite his clearance from the oversight agency, because they were concerned about his convictions, all of which were misdemeanors.

C. Public Policy Does Not Justify Employment Barriers for Individuals with a Conviction History.

Barriers to employment for individuals with a conviction history persist despite “redemption” and “desistence” studies indicating that an individual’s risk of recidivism shrinks dramatically with the passage of time.

Research shows that a conviction history quickly ceases to be predictive of risk.⁵³ Yet conviction histories continue to have a larger negative impact on an individual’s employment opportunities than other employment-related stigma, such as receipt of public assistance, unemployment and spotty work history.⁵⁴ And employers continue to impose blanket

⁵³ Megan C. Kurlycheck, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 80 (2007), <https://goo.gl/s7nC65>.

⁵⁴ SCOTT H. DECKER ET AL., FINAL REPORT TO NAT’L INST. OF JUST., NO. 2010-MU-MU-00042010, CRIMINAL STIGMA, RACE, GENDER, AND EMPLOYMENT: AN EXPANDED ASSESSMENT OF THE CONSEQUENCES OF IMPRISONMENT FOR EMPLOYMENT 51-62 (2010), <https://goo.gl/BQ4rcG>; *see also supra*, Part I.B.2.

bans on hiring individuals with a conviction history.⁵⁵

In combination with seemingly purposeless overregulation of employment opportunities, criminal records-based discrimination exacts devastating economic damage upon individuals, their families, and their communities. Society's failure to integrate individuals with a conviction history into the legitimate workforce also exacts costs on the national economy. The Center for Economic and Policy Research has estimated that in 2014 alone, the impediments to employment faced by individuals with previous incarceration or felony conviction led to an approximately 0.9% to 1.0% decrease in the overall employment rate, with an attendant GDP loss of between \$78 and \$87 billion.⁵⁶ The lower end of this estimated GDP loss is larger than the GDPs of nearly half of the world's nations.⁵⁷

⁵⁵ Rodriguez & Emsellem, *supra* note 49 at 13, 15 & 30 n.60.

⁵⁶ CHERRIE BUCKNOR & ALAN BARBER, *THE PRICE WE PAY: ECONOMIC COSTS OF BARRIERS TO EMPLOYMENT FOR FORMER PRISONERS AND PEOPLE CONVICTED OF FELONIES* 1 (Ctr. for Econ. & Pol'y Research, 2016), goo.gl/2eQ1QY; *see also* JOHN SCHMITT & KRIS WARNER, *EX-OFFENDERS AND THE LABOR MARKET* 14 (Ctr. for Econ. & Pol'y Research, 2010), goo.gl/WE68P0 (estimating a roughly 0.8-0.9% reduction in overall employment rate and \$57-\$65 billion in lost GDP using a similar analysis of 2008 data).

⁵⁷ *See GDP Per Capita, PPP (Current International \$)*, WORLD BANK, <https://goo.gl/l1g4ut> (last visited Feb. 7, 2017).

Keeping individuals out of the workforce also dramatically lowers their lifetime earnings, resulting in the loss of both income and sales tax revenue. While the sentences for a sizeable percentage of the individuals convicted of crimes do not include incarceration,⁵⁸ studies looking at the effects of incarceration are instructive. A 2011 study of formerly incarcerated persons in Philadelphia estimated that putting 100 individuals back to work after incarceration would increase their “total post-release lifetime earnings” by over \$55 million, increase their income tax contributions by \$1.9 million and boost sales tax revenues by \$770,000.⁵⁹ A separate study estimating the lifelong earnings gap between formerly incarcerated people and those who have never been incarcerated estimated that a man who has served a term of incarceration will have earned an average of \$179,000 less by age forty-eight than if he had never been incarcerated—*excluding* income lost while incarcerated—with a

⁵⁸ See, e.g., BUCKNOR & BARBER, *supra* note 56, at 2 n.8 (estimating that nationwide, 56% of individuals with felony convictions have not been incarcerated); N.Y. STATE, DIV. OF CRIM. JUST. SERVICES, 2011-2015 DISPOSITIONS OF ADULT ARRESTS: NEW YORK STATE (2016), <https://goo.gl/zcms> (showing that, in New York State, less than 9% of individuals convicted of misdemeanors and less than 23% of those convicted of felonies were sentenced to incarceration in 2015).

⁵⁹ See ECONOMY LEAGUE OF GREATER PHILADELPHIA, ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA 11-13 (2011), <https://goo.gl/dM5Lx7>.

commensurate decline in income taxes and consumer activity.⁶⁰ This most acutely affects people of color: As a percentage of all earnings for men in each group,⁶¹ this decrease in lifetime earnings amounted to a 2% reduction for white men, a 6% reduction for Hispanic men, and a 9% reduction for black men.⁶²

Depressed wages and earning potential create real hardships for job seekers with a conviction history. For example, Frances—a single parent and CSS client—has significant training and experience in the buildings trades. She apprenticed with and later was employed by a carpenters’ union, has held a position as a union trades recruitment speaker, and has earned a total of fifty-one credits toward an Associate’s Degree. After being convicted and incarcerated on assault charges stemming from a 2006 altercation in which she was not the instigator, Frances was desperate to support herself and her son after her release. She was repeatedly turned down for well-paid jobs in the building trades field, despite her qualifications. The only jobs she could

⁶⁰ *E.g.*, ECON. MOBILITY PROJECT & PUB. SAFETY PERFORMANCE PROJECT, PEW CHARITABLE TRUSTS, PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 12 (2010), <https://goo.gl/zNlvG8> (hereinafter “COLLATERAL COSTS”) (this equates to approximately \$197,000 in lost earnings in 2016 dollars).

⁶¹ Research on the collateral consequences facing women with a conviction history remains limited.

⁶² COLLATERAL COSTS, *supra* note 60, at 12.

find were office temp and call center jobs that paid minimum wage.

II. THE JUDICIARY CAN PLAY AN IMPORTANT ROLE IN ADVANCING REFORMS RELATED TO COLLATERAL CONSEQUENCES OF CONVICTION.

A. Courts Can and Should Play a Role in Addressing the Collateral Consequences of Conviction.

Courts can—and should—play a role in ameliorating the drastic employment consequences of criminal convictions, including by expunging records of those convictions in appropriate cases. The courts’ power to mitigate the severe and persistent collateral consequences of convictions is well established. Most recently, this Court held in *Padilla v. Kentucky*⁶³ that immigration-related consequences of some convictions are so severe that individuals facing them may be entitled to post-conviction relief if they have not been properly counseled.⁶⁴ In his concurring opinion, Justice Alito noted the reality and significance of employment-related collateral consequences by analogizing them to the immigration-related consequences, observing that one of the “serious” consequences of a criminal conviction is that “[it] may also severely damage a defendant’s reputation and thus impair the

⁶³ 559 U.S. 356 (2010).

⁶⁴ *Id.* at 374-75.

defendant's ability to obtain future employment or business opportunities.”⁶⁵

Ms. Doe's case is an appropriate vehicle for identifying circumstances for appropriate judicial consideration of an expungement petition. Judge Gleeson correctly held that these petitions can be substantially interdependent with sentencing determinations, and that the capacity of the sentencing court to adjudicate subsequent expungement petitions “enable[s] a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.”⁶⁶

Allowing ancillary jurisdiction in these circumstances need not unduly burden the federal courts. Federal courts are well equipped to evaluate such petitions with care.⁶⁷

B. Existing Non-Judicial Recourse Fails to Ameliorate the Collateral Consequences of Conviction Histories on Employment.

In an effort to mitigate the lifelong burdens of conviction histories, some states and localities have adopted “ban the box” laws and regulations, which prohibit employers from asking about conviction history or conducting a background check prior to a

⁶⁵ *Id.* at 376.

⁶⁶ *Doe v. United States*, 110 F. Supp. 3d 448, 455, n.16 (E.D.N.Y. 2015), *vacated*, 833 F.3d 192 (2d Cir. 2016).

⁶⁷ *E.g. id.*

specified point in the hiring process, which in some cases is prior to making a conditional offer of employment.⁶⁸ But these laws have limited reach: Of the twenty-five states that have adopted them, only nine have extended them to cover private employers.⁶⁹

Even in the states and localities where “ban the box” laws apply, they generally do not protect the applicant against criminal record-based job denial after the point where an employer is permitted to inquire, and in the limited instances where they do, the laws prohibit only those employment denials made *solely* on the basis of an applicant’s conviction history.⁷⁰ In other words, prospective employers are not prohibited from considering conviction history among other factors.⁷¹ Therefore, even in “ban the box” jurisdictions, there is no protection for individuals where conviction history was only part of the reason for job or license denial.

Overall, the effect of reform initiatives has been limited and uneven, and unlikely to eliminate employer prejudice against individuals with a conviction history. Significant barriers to gaining

⁶⁸ See MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT’L EMP. L. PROJECT, BAN THE BOX—FAIR CHANCE GUIDE 1 (2016), <https://goo.gl/ELveKx>.

⁶⁹ *Id.*

⁷⁰ SUBRAMANIAN ET AL., *supra* note 39, at 35.

⁷¹ *Id.*

lawful employment remain. The judiciary can and should play an important role in ameliorating them.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

List of Amici Curiae

- A NEW WAY OF LIFE RE-ENTRY PROJECT is a nonprofit organization in Los Angeles, California, that provides housing to women returning from incarceration and legal services to people with past convictions. Its legal work focuses on removing the barriers that individuals with prior criminal convictions face when trying to access employment, housing, and voting rights.
- CABRINI GREEN LEGAL AID (“CGLA”) has provided legal representation to the Chicagoland community since 1973 and each year serves over 7,000 people who are impacted by the criminal justice system. CGLA represents clients in all forms of criminal records relief—including expungement, sealing, and certificates and waivers—and sees firsthand the barriers its clients face to obtain employment, housing, and educational opportunities.
- The CENTER FOR COMMUNITY ALTERNATIVES (“CCA”) is a nonprofit community-based criminal justice organization that promotes reintegrative justice and reduced reliance on incarceration through advocacy, public policy development, and the services it provides. For the past thirty years, CCA has provided reentry services to hundreds of men and women with

a criminal record and is very familiar with the barriers to reintegration they face.

- For 175 years the COMMUNITY SERVICE SOCIETY OF NEW YORK (“CSS”) has led the fight against poverty in New York City. Addressing root causes of poverty necessarily includes addressing the challenges of reentry: CSS litigates on behalf of persons who suffer labor market discrimination because of their convictions, and its Next Door Project provides direct “rap sheet”-related services for more than 700 people per year, in the process tackling conviction-based barriers to employment, housing and civic participation.
- The Clean Slate Practice of EAST BAY COMMUNITY LAW CENTER provides free legal services to 1,200 clients each year who have criminal records and are now seeking to reenter their communities as full and contributing members. Its clients face daunting barriers to employment and housing, sometimes as a result of decades-old convictions, and often despite their hard-won success in rehabilitation.
- GEORGIA JUSTICE PROJECT (“GJP”) has assisted thousands of low-income individuals with expunging, sealing, and correcting their criminal records and provides trainings and materials on criminal records-related issues around the state. GJP also advocates for policy changes that would reduce legal

barriers to reentry and has been a critical force in recent reform measures in Georgia.

- GREATER BOSTON LEGAL SERVICES is a nonprofit legal services program serving the greater Boston area. It provides civil legal assistance, including legal representation in criminal record sealing cases aimed at reducing barriers to jobs, housing and other opportunities for economic stability.
- LATINOJUSTICE PRLDEF is a national nonprofit civil rights legal defense fund that advocates for and defends the constitutional rights of all Latinos. The organization supports the petition for review and reversal of the Second Circuit decision to ensure that Latinos are not further impacted by discriminatory law enforcement and sentencing policies that prevent them from securing employment, higher education and reentry into society.
- The LEGAL ACTION CENTER (“LAC”) is a nonprofit organization that fights discrimination against individuals with a criminal record, history of addiction, and/or HIV/AIDS. LAC helps thousands of New York residents with a criminal record overcome legal barriers to accessing jobs, housing, and other services.
- The LEGAL AID BUREAU of Buffalo has represented indigent clients throughout western New York since 1912. The Bureau’s

Reentry Project works with individuals who are unable to obtain employment, housing, or educational opportunities as a result of past or pending criminal law charges.

- LEGAL SERVICES NYC (“LSNYC”) is the largest provider of free civil legal services in the country. LSNYC provides representation to individuals whose criminal records create barriers to economic independence and success, including low-income individuals who face criminal background-related employment discrimination.
- MFY LEGAL SERVICES, INC. (“MFY”) provides civil legal assistance to more than 20,000 low-income, disenfranchised, or disabled New Yorkers each year through community education, partnerships, policy advocacy, and impact litigation. Through the Workplace Justice Project, MFY represents individuals with a criminal record with the goal of fighting discrimination and removing barriers to employment and occupational licensing.
- The NATIONAL EMPLOYMENT LAW PROJECT (“NELP”) is a nonprofit research and advocacy organization that promotes the employment rights of low-wage and unemployed workers. NELP’s priorities include reducing barriers to employment for people with arrest and conviction records.

- The NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/NEW YORK (“NELA/NY”) is the New York affiliate of the National Employment Lawyers Association (“NELA”), the national bar association dedicated to the vindication of individual employees’ rights. The work of NELA/NY includes advocating on behalf of clients with a criminal record who have been unlawfully denied employment on that basis; NELA/NY has filed numerous amicus briefs in the Second Circuit, the New York State Court of Appeals, and other courts deciding important questions of employment law.
- The NEIGHBORHOOD DEFENDER SERVICE OF HARLEM (“NDS”) was founded in 1990 to represent residents of Northern Manhattan facing charges in New York County criminal courts. NDS has a significant interest in the debilitating consequences of criminal convictions on their clients ability to secure and maintain employment.
- The OHIO JUSTICE & POLICY CENTER represents people marginalized by the criminal justice system and works for local, state, and national smart-on-crime reform. The Center supports expanding the freedoms of people with a criminal record in order to allow them to be fully contributing members of their communities.

- OPEN HANDS LEGAL SERVICES (“OHLS”) offers free legal services directly to community members at partner non-profit organizations in New York City. OHLS works to address the barriers a criminal record erects by, for example, cancelling carceral debt and repairing RAP sheets.
- SAFER FOUNDATION is one of the nation’s largest nonprofit providers of services designed exclusively for people with a criminal record. Safer focuses on helping people with a record secure and maintain employment because employment offers the best chance at successful re-entry.
- The SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW (“Shriver Center”) provides national leadership to promote justice, improve the lives and opportunities of people with low incomes, and advance racial justice. The Shriver Center’s Housing Justice and Community Justice units work to ameliorate the collateral consequences of criminal histories, including the serious effects a criminal conviction can have on employment, housing, and education.
- THE BRONX DEFENDERS (“BxD”) is a nonprofit provider of innovative, holistic, client-centered criminal defense, family defense, civil legal services, and social work support to indigent people in the Bronx. Through its Civil Action Practice, BxD represents thousands of clients each year in a

wide range of cases addressing the “collateral consequences” of involvement in the criminal justice system, with a particular focus on housing and employment matters.

- THE FORTUNE SOCIETY is a nonprofit organization that supports successful reentry from incarceration and promotes alternatives to incarceration. Fortune’s David Rothenberg Center for Public Policy advocates for a fairer criminal justice system, promotes effective program models and works to change counterproductive laws and policies that create barriers to successful community reentry for persons involved in the criminal justice system.
- THE LEGAL AID SOCIETY (“the Society”) represents low-income New Yorkers involved in the criminal justice system in nearly 215,000 criminal matters annually. The Society’s Civil Practice helps individuals to gain meaningful employment, many of whom are subjected to discrimination because of past contact with the criminal justice system.
- YOUTH REPRESENT is a nonprofit organization whose mission is to ensure that young people affected by the criminal or juvenile justice system are afforded every opportunity to reclaim lives of dignity, self-fulfillment, and engagement in their communities.