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

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

There can be no real dispute that the circuit courts apply inconsistent and mutually exclusive rules to determine whether a district court has jurisdiction to hear motions to expunge criminal records. In an attempt to obscure this conflict, the Government's Opposition ("Opp.") artificially constricts the issue to whether district courts can *grant* motions to expunge criminal records exclusively for equitable reasons. Opp. 11. That is not the Question Presented by this petition. This petition seeks review of the scope of ancillary jurisdiction in criminal cases and, specifically, the incompatible jurisdictional rules created by the circuit courts that govern whether a district court has jurisdiction to consider expungement motions.

Petitioner asks the Court to resolve the following question: "Does a federal district court's ancillary jurisdiction in criminal cases include the power to hear **motions to expunge criminal records**?" Pet. for Cert. ii (emphasis added). The Government responds to a subset of the Question Presented addressing only "whether courts may exercise ancillary jurisdiction to consider **purely equitable expungement requests** in light of *Kokkonen*." Opp. 11 (emphasis added). The Government attempts to limit the Question Presented to whether courts should *grant* expungement motions made for purely equitable reasons. In so doing, the Government makes the same error as many courts below and conflates the jurisdictional inquiry with a merits determination. It also erroneously equates this petition with earlier petitions for a writ of certiorari that did, in fact, ask this Court to determine whether

a district court could grant an expungement motion for purely equitable reasons.[1] Opp. 15. Because nearly every circuit court has a separate and distinct rule governing when a district court can hear an expungement motion, there can be no doubt that the circuit courts are split on this issue. Pet. for Cert. 9-13.

Moreover, the Government ignores the second reason for granting the petition, namely, that this Court has never ruled on the boundaries of the district court's ancillary jurisdiction in criminal cases. The Government argues that *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994) settles this issue but that begs the question. Far from defining the bounds of ancillary jurisdiction in criminal cases, this Court's decision in *Kokkonen* has been applied inconsistently, if at all. *Kokkonen* has been cited for the contradictory propositions that district courts both have and do not have ancillary jurisdiction to hear expungement motions. *Compare*

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[1] The prior petitions for a writ of certiorari identified by the Government presented a distinct and separate question: (a) *Mann v. United States* requested review of "whether the district court has jurisdiction to expunge an individual's criminal record on equitable grounds," *see* Pet. for Cert. No. 15-245, 2015 WL 5093222, at *i (2015); (b) *Coloian v. United States*, requested review of "whether a federal district court has inherent or ancillary jurisdiction to expunge judicial criminal records based on equitable considerations," Pet. for Cert. No. 07-72, 2007 WL 2070980 (2007), at *i; and (c) *Sapp v. United States*, requested review of "whether the district court erred in denying petitioner's request to expunge judicial records of his conviction for conspiracy when petitioner sought that relief solely on equitable grounds." Opp. to Pet. for Cert., No. 12-882, 2013 WL 1739666, at *i (2013).

United States v. Wahi, 850 F.3d 296 (7th Cir. 2017), *with United States v. Sumner*, 226 F.3d 1005 (9th Cir. 2000). Moreover, in the decision below, the Second Circuit questioned whether *Kokkonen* even applied to criminal cases, and then relied on it to create the internally incoherent rule that a district court has jurisdiction to hear motions to expunge arrest records but not records of conviction. Pet. App. 6a-9a. *Kokkonen* does not provide the curative guidance the Government claims.

The Second Circuit's decision below is the ideal vehicle to resolve the split of authority on this issue because it created a *sui generis* rule that reflects aspects of the different jurisdictional rules created by its sister circuits. The federal district courts' jurisdiction in criminal cases is an issue of national importance and absent this Court's intervention, its boundaries will remain unsettled and defendants and the Government will continually question and dispute its scope.

ARGUMENT

I. The Circuit Courts Apply Unique and Conflicting Jurisdictional Rules

The circuit courts apply inconsistent rules governing a district court's jurisdiction to hear expungement motions, including that the district courts always have jurisdiction to hear such motions and that the district courts never have jurisdiction to hear such motions. Pet. for Cert. 3. This remains true even after *United States v. Wahi*, 850 F.3d 296 (7th Cir. 2017), which overruled *United States v. Flowers*, 389 F.3d 737 (7th Cir. 2004), after the filing of this petition. *Wahi* addressed only whether

district courts can hear expungement motions made for equitable reasons and thus only deepens the circuits' divide over the jurisdictional rule.

The Third Circuit, for example, authorizes district courts to hear motions to expunge criminal records when there is an "allegation that the criminal proceedings were invalid or illegal." *United States v. Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001). It also did not foreclose jurisdiction when the expungement motion is based on a "Constitutional or statutory infirmity in the underlying criminal proceedings or on the basis of an unlawful arrest or conviction." *Id.* Similarly, the D.C. Circuit recently made clear that its "precedent does not foreclose" the "equitable relief of expungement of government records for violations of the Constitution." *Abdelfattah v. DHS*, 787 F.3d 524, 534 (D.C. Cir. 2015).

The Eighth Circuit applies a different, more permissive rule governing its district courts' jurisdiction to hear expungement motions. *United States v. Meyer* explained that district courts may have jurisdiction to hear motions to expunge criminal records in the case of illegal or invalid convictions and when authorized by the Constitution. 439 F.3d 855, 861-62 (8th Cir. 2006). The Eighth Circuit also created a broad catchall granting district courts' jurisdiction to hear expungement motions "in extraordinary cases to preserve its ability to function successfully by enabling it to correct an injustice caused by an illegal or invalid criminal proceeding." *Id.* at 861-62.

Other circuit courts have ruled that district courts *always* have jurisdiction to expunge criminal records. The Fifth Circuit, for example, has ruled

that district courts always have jurisdiction to hear motions to expunge criminal records held by the judicial branch because this authority derives from a district court's "supervisory powers." *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 697, 697 n.2, 698 n.6 (5th Cir. 1997) (explaining that a "modification of their own records is akin to a request to modify the judgment"). It further ruled, however, that it only has jurisdiction to hear motions to expunge criminal records held by the executive branch when petitioner shows that it has suffered an "affirmative rights violation." *Id.*

The Government asserts that this Court should not consider *Sealed Appellant* when assessing the circuit split because it argues that in the proceeding below, Petitioner waived her right to seek a remedy that only expunges her judicial records as opposed to expunging both her judicial and executive branch records. Opp. 13. But the fact that a circuit that Petitioner is not in has adopted a rule that does not apply to her case is immaterial to whether that rule conflicts with the rules of other circuits, and therefore indicates a split in authority. In any event, Petitioner did, in fact, seek the expungement of her judicial records as part of the remedy requested. Pet. App. 1a-2a.

The D.C. Circuit has also ruled that district courts have jurisdiction to hear and 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). While the Government is correct that *Livingston* and *Menard v. Saxbe,* 498 F.2d 1017, 1023 (D.C. Cir. 1974) predate *Kokkonen*, that does not render these decisions

inapplicable for consideration. Opp. 14. This is especially true because courts within the D.C. Circuit continue to rely upon *Livingston* and *Menard* when ruling that they have jurisdiction to hear expungement motions even after *Kokkonen*. *See, e.g., United States v. Evans*, 78 F. Supp. 3d 351, 352 (D.D.C. 2015) ("The judicial remedy of expungement is inherent and is not dependent on express statutory provision, and it exists to vindicate substantial rights provided by statute as well as by organic law.") (citing *Menard*); *United States v. Spinner*, 72 F. Supp. 3d 266, 268 (D.D.C. 2014); *United States v. Blackwell*, 45 F. Supp. 3d 123, 124 (D.D.C. 2014).

The Tenth Circuit, for its part, has held that district courts have inherent authority to hear and grant expungement motions. *Camfield v. City of Oklahoma* held that it is "well settled in this circuit that courts have inherent equitable authority to order the expungement of an arrest record or a conviction in rare or extreme instances." 248 F.3d 1214, 1234 (10th Cir. 2001).

The Government argues that *Camfield's* clear holding that district courts have "inherent equitable authority" to expunge criminal records should not be considered by this Court because the cases *Camfield* relied upon for support only involved expungement due to the consideration that the arrests were "unconstitutional, illegal, or obtained through government misconduct." Opp. 12. While the Government may wish to classify the Tenth Circuit's rule in a manner that lessens the extant circuit split, its attempt to shoehorn *Camfield* into a separate line of cases fails. As the Government notes, *Camfield* relied upon *United States v. Pinto*, 1 F.3d 1069 (10th

Cir. 1993). *Id.* *Pinto* makes clear that courts have the jurisdiction to hear and decide expungement motions for equitable reasons, including that the defendant was later found to be innocent. *Pinto*, 1 F.3d at 1070 ("any authority to order expungement must stem from the inherent equitable powers of the court"). Thus, contrary to the Government's argument, the Tenth Circuit applies yet another jurisdictional rule more permissive than those circuit courts that grant jurisdiction in the rare circumstance that the underlying conviction is invalidated because it stemmed from a civil rights violation. *See, e.g., United States v. Coloian*, 480 F.3d 47, 49 n.4 (1st Cir. 2007).

The Government argues that these cases should not be considered by this Court when assessing the extent of the jurisdictional circuit split. Opp. 14. These circuit court cases are absolutely relevant to the question of whether and when a district court has jurisdiction to hear an expungement motion and demonstrate that different circuits have different rules. The Government's strained attempt to quarantine unhelpful cases is most apparent here as it offers no reason why these circuit court decisions should not be recognized for what they are: circuit court jurisdictional rules that conflict with other circuit court jurisdictional rules governing when and if a district court has jurisdiction to hear expungement motions.

The First and Sixth Circuits appear to bar *any* exercise of ancillary jurisdiction to hear *any* motions to expunge criminal records, though the First Circuit may have left open the possibility. *Coloian*, 480 F.3d at 49 n.4 (explaining that "federal courts have upheld

the expungement of criminal records as a remedy for arrests or prosecutions that violate federal statutes or the constitution" but rejecting that as a possible basis for jurisdiction because defendant did not seek "expungement as a remedy for the violation of his statutory or constitutional rights"); *United States v. Lucido*, 612 F.3d 871, 875 (6th Cir. 2010). The Ninth Circuit, meanwhile, has ruled that district courts have jurisdiction to hear all expungement motions, but lack the power to grant such motions for purely equitable reasons. *United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000).

Finally, in the decision below, the Second Circuit adopted the *sui generis* rule that district courts have ancillary jurisdiction to expunge arrest records, but lack jurisdiction to expunge records of conviction. *See* Pet. App. 6a-9a. Contrary to the Government's argument, the welter of circuit court rules sows confusion among litigants and demands resolution by this Court.

II. The Government Conflates the Split of Authority Concerning the Jurisdictional Rule with the Separate Merits Determination

In arguing that there is no circuit split on the jurisdictional rules governing whether district courts can hear expungement motions, the Government conflates a merits determination—whether courts should expunge criminal records on purely equitable grounds—with the underlying and variable jurisdictional rules. This confusion is perhaps understandable, as many of the circuit courts, themselves, make this error. For example, as noted *supra*, 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 later invalidated. Pet. 16. Accordingly, a court must first determine the grounds for expungement and if those grounds are meritorious *before* determining if that court has jurisdiction to hear the motion. *Id.*

These rules improperly "wrap" a "merits decision in jurisdictional garb." *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015). This Court has repeatedly corrected such errors, making it clear that the jurisdictional determination must precede the merits determination: "a federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007). *See also Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 93-95 (1998) (rejecting the doctrine of hypothetical jurisdiction and requiring that a district court determine its jurisdiction before reaching the merits); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946) ("For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.").

The jurisdictional rule advanced by the Government and by numerous circuit courts requires the district court first to assess and determine the merits of the expungement motion and then to assess jurisdiction—an improper practice not permitted by this Court.

III. The Government Ignores the National Importance of the Question Presented

The Government's Opposition does not anywhere respond to the argument that this petition presents matters of national importance, specifically, (1) the boundaries of ancillary jurisdiction in criminal cases, which this Court has never explained; and (2) the ability for a defendant to obtain expungement of criminal records, an issue of deep significance to courts, policymakers, and citizens alike.

As to the first issue, the Government simply assumes that *Kokkonen* resolves it. But that is belied by the confusion in the circuit courts concerning the application of *Kokkonen* to criminal cases. The Government does not comment on the second issue, though it impacts every federal district court in this country and millions of people who have reentered society and successfully rehabilitated themselves, yet continue to be burdened by the disability of a criminal record. "A focus on reentry reduces recidivism, it increases public safety, it boosts local economies, it is efficient, and it is smart." Preet Bharara, Remarks at NYU School of Law, Apr. 7, 2017. Though the Government may not see the need to address this matter of national importance, this Court should.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

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