No. 16-876

In the Supreme Court of the United States

JANE DOE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 833 F.3d 192. The memorandum and order of the district court (Pet. App. 17a-39a) is reported at 110 F. Supp. 3d 448.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2016. On October 27, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including January 9, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in 2001, petitioner was convicted of health care fraud, in violation of 18 U.S.C. 1347, and was sentenced to five years of probation and

ten months of home detention. Pet. App. 3a. In 2014, petitioner filed a motion to expunge her criminal record, and the United States District Court for the Eastern District of New York granted the motion. *Id.* at 17a-39a. The court of appeals vacated the district court's orders and remanded with instructions to dismiss. *Id.* at 1a-16a.

1. In 1997, petitioner joined an insurance fraud scheme in which she posed as a passenger in a staged car crash. Pet. App. 2a-3a. Petitioner rode in the car of a driver who intentionally caused the crash. *Id.* at 19a-20a. Following the staged collision, petitioner falsely claimed that she had been injured and represented that she had received medical services related to her injury. *Id.* at 20a. A civil claim was filed on petitioner's behalf, and petitioner received $2500 from settlement of that claim. *Id.* at 20a & n.1.

A grand jury indicted petitioner on health care fraud charges, and she proceeded to trial in 2001. During trial, the government presented evidence of the 1997 staged accident and also presented evidence, pursuant to Federal Rule of Evidence 404(b), that petitioner had been involved in additional staged accidents in November 1998, May 2000, and October 2000. Pet. App. 21a n.1. During those incidents, the passengers in petitioner's car were two of her minor children, and petitioner sought money judgments on behalf of herself and her children. *Ibid.*; Gov't C.A. Br. 4.

The jury convicted petitioner of knowingly and willfully participating in a scheme to defraud a health care benefit program, in violation of 18 U.S.C. 1347. Pet. App. 3a. The district court sentenced petitioner to five years of probation and ten months of home

detention and ordered petitioner to pay $46,701 in restitution. *Ibid.*

Petitioner's file with the Probation Office reflects that during the five years that petitioner was on probation, petitioner consistently sought employment but struggled to keep jobs. See Pet. App. 22a-25a; Gov't C.A. Br. 4-5. In 2003, she worked as a manager at a homeless shelter, but was terminated "apparently for reasons unrelated to her conviction." Pet. App. 22a. In March 2004, petitioner worked at a home for persons with mental disabilities, but quit the job because it became "too much for her [to] handle." Gov't C.A. Br. 5 (brackets in original) (quoting S.A. 40). She returned to that job shortly thereafter, but by September 2004, was back on public assistance for undisclosed reasons. *Ibid.*; Pet. App. 22a. Petitioner then worked as an aide at a home for the mentally ill for about seven months, but was terminated for reasons that are not clear from the record. Gov't C.A. Br. 5; Pet. App. 22a-23a. Petitioner told her Probation Officer around that time that many employers refused to hire her because background checks revealed her criminal conviction for health care fraud. Pet. App. 23a.

In December 2005, petitioner was hired by a home for the elderly as a home health aide. Gov't C.A. Br. 6. Petitioner left that job because her employer would not give her time off to see her doctor for a thyroid condition. Pet. App. 24a. Petitioner subsequently got a job with another health care agency. Two months later, the agency learned of petitioner's conviction for health care fraud and terminated her employment. *Ibid.* According to petitioner's Probation Office file, the agency's staff found a direct relationship between

petitioner's criminal offense, which included the submission of fraudulent medical claims, and her employment as an aide in the health care field. Gov't C.A. Br. 6 (citing S.A. 69). Petitioner's probation file reflects that she remained unemployed until her term of probation ended in March 2007. Pet. App. 25a.

2. In 2014, seven years after petitioner's term of probation had ended, petitioner 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." Pet. App. 17a; see *id.* at 2a. The court granted petitioner'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." *Id.* at 38a.

In reaching that decision, the district court determined that it had ancillary jurisdiction to consider petitioner's motion. Pet. App. 29a & n.16. The court acknowledged that this Court's decision in *Kokkonen* v. *Guardian Life Insurance Company*, 511 U.S. 375 (1994), had limited district courts' ancillary jurisdiction over collateral proceedings to instances in which jurisdiction 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.'" Pet. App. 29a n.16 (quoting *Kokkonen*, 511 U.S. at 379-380). But the district court determined that petitioner's motion satisfied both of

those requirements, because petitioner sought to expunge a conviction that the court had entered and the determination of the motion implicated the factual record developed while petitioner was under the court's supervision. *Id.* at 30a-31a n.16.

The district court offered several reasons why expungement of the records of petitioner's conviction was warranted. Pet. App. 32a-37a. First, the court wrote, petitioner's offense was "distant in time and nature from [her] present life," and petitioner "ha[d] not even been re-arrested, let alone convicted, in all th[e] years" since her conviction. *Id.* at 32a (first set of brackets in original). Second, the court wrote, petitioner'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 petitioner is over 50 years old and black. *Id.* at 33a; see *id.* at 18a, 26a. In addition, the court wrote, "[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 "no specter now that she poses a heightened risk to prospective employers in the health care field." *Id.* at 36a.

3. The court of appeals vacated the district court's orders and remanded with instructions to dismiss. Pet. App. 1a-14a.

a. The court of appeals concluded that the district court lacked jurisdiction to "expunge all records of a valid conviction." Pet. App. 1a; see *id.* at 1a-16a.[1] It

[1] The court of appeals noted that petitioner had expressly "waived any argument in support of sealing only the judicial rec-

held that petitioner's expungement claim did not fall within either of the categories of ancillary jurisdiction identified in *Kokkonen*. *Id*. at 9a-12a. The court rejected the argument that ancillary jurisdiction was appropriate "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 9a (quoting *Kokkonen*, 511 U.S. at 380). The court observed that, by the time petitioner filed her expungement motion, "[t]he District Court's sentence had long ago concluded and its decrees long since expired." *Id.* at 10a. The court of appeals therefore concluded that a court need not have authority to expunge all records of its valid convictions in order to be able to "manage [a court's] proceedings, vindicate its authority, [or] effectuate its decrees." *Ibid.* (brackets in original) (quoting *Kokkonen*, 511 U.S. at 380).

The court of appeals next concluded that the district court could not exercise ancillary jurisdiction over equitable expungement of petitioner's conviction records on the theory that petitioner's expungement motion was "factually interdependent" with petitioner's underlying criminal case. Pet. App. 10a (quoting *Kokkonen*, 511 U.S. at 379-380). The court of appeals wrote that petitioner's criminal case and the expungement proceedings that the district court sought to conduct were "analytically and temporally distinct proceedings." *Ibid.* It emphasized that "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." *Id*. at 11a. "For example,"

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ords of conviction in her case, rather than all available records retained by the Government." Pet. App. 12a n.3.

the court of appeals wrote, "in this case the facts underlying the District Court's sentencing were clearly independent of the facts developed in [petitioner's] motion filed years later." *Ibid.* And the district court, the court of appeals explained, had granted petitioner's expungement motion "based on facts and events (her repeated efforts to obtain employment) that transpired years *after* her sentencing and term of probation." *Ibid.* Under these circumstances, while "the District Court's review of [petitioner's] motion may have depended in part on facts developed in her prior criminal proceeding," the two cases could not be described as "interdependent." *Id.* at 10a-11a.

The court of appeals added that Congress had in fact given district courts jurisdiction "to expunge lawful convictions under certain limited circumstances," Pet App. 11a (citing 18 U.S.C. 3607(c)), but had "failed to provide for jurisdiction under the circumstances that exist here," *id.* at 12a. The court found it "significant (though not dispositive)" that Congress had not authorized jurisdiction over expungement motions except in limited circumstances. *Ibid.* If it wished to, the court noted, Congress could provide for jurisdiction for offenders like petitioner who "want and deserve to have their criminal convictions expunged after a period of successful rehabilitation." *Id.* at 12a-13a.

The court of appeals observed that its rejection of ancillary jurisdiction over equitable expungement motions was "in accord with that of every other sister Circuit to have addressed the issue since *Kokkonen*." Pet. App. 12a (citing *United States* v. *Field*, 756 F.3d 911, 915-916 (6th Cir. 2014); *United States* v. *Lucido*, 612 F.3d 871, 875-876 (6th Cir. 2010); *United States* v.

Coloian, 480 F.3d 47, 52 (1st Cir.), cert. denied, 552 U.S. 948 (2007); *United States* v. *Meyer*, 439 F.3d 855, 859-860 (8th Cir. 2006); *United States* v. *Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001); *United States* v. *Sumner*, 226 F.3d 1005, 1014-1015 (9th Cir. 2000)).

b. In a concurring opinion, Judge Livingston "concur[red] fully in the majority opinion, with two exceptions." Pet. App. 15a; see *id.* at 15a-16a. First, she stated that she did not join a portion of the opinion that "implie[d], in dicta," that *Kokkonen* may not have abrogated an earlier court of appeals decision recognizing ancillary jurisdiction to expunge arrest records. *Id.* at 15a (discussing *United States* v. *Schnitzer*, 567 F.2d 536 (2d Cir. 1977), cert. denied, 435 U.S. 907 (1978)). Second, she stated that she did not join the statements in which the majority discussed "the merits of affording courts jurisdiction to expunge criminal convictions," stating that she "would not suggest to Congress how it might go about assessing and weighing" the underlying equities. *Id.* at 16a.

ARGUMENT

Petitioner contends (Pet. 8-17) that the court of appeals erred in concluding that the district court lacked ancillary jurisdiction to expunge all government records of petitioner's health care fraud conviction on purely equitable grounds. The court of appeals correctly found no ancillary jurisdiction to address such a claim, and its decision does not conflict with any decision of this Court or another court of appeals. This Court has repeatedly denied petitions for writs of certiorari raising claims like petitioner's, and the same result is warranted in this case.

1. Federal courts are courts of limited jurisdiction. They "possess only that power authorized by Consti-

tution and statute, * * * which is not to be expanded by judicial decree." *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Nevertheless, "the doctrine of ancillary jurisdiction * * * recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them." *Id.* at 378. In *Kokkonen*, this Court explained that its cases had sanctioned ancillary jurisdiction in only two contexts: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 379-380 (citations omitted).

Adhering to those limits, this Court concluded in *Kokkonen* that a district court did not possess "inherent power" to consider a particular type of claim—a lawsuit to enforce a settlement agreement that had been entered before the district court—because the claim was outside those traditional categories of ancillary jurisdiction. 511 U.S. at 377, 380 (citation omitted). The district court did not have ancillary jurisdiction on the theory that the initial lawsuit and breach-of-settlement suit were factually interdependent, the court explained, because the facts underlying the initial lawsuit and the breach-of-settlement claim were distinct. *Id.* at 380. And the Court concluded that the district court did not have ancillary jurisdiction over the breach-of-settlement suit on the theory that such jurisdiction was necessary to effectuate the court's decree in the parties' original case, because that initial decree simply ordered "that the suit be dismissed." *Ibid.* That disposition, the Court wrote, "is in no way

flouted or imperiled by the alleged breach of the settlement agreement." *Id.* at 380-381.

Under the principles set forth in *Kokkonen*, the district court lacked jurisdiction to consider petitioner's motion to expunge her indisputably valid conviction on purely equitable grounds. While federal statutes authorize courts to expunge certain types of convictions under specified circumstances, no statute authorizes expungement of convictions such as petitioner's on purely equitable grounds. See *United States* v. *Lucido*, 612 F.3d 871, 874 (6th Cir. 2010) (compiling federal statutes). Nor are equitable expungement actions within the categories of ancillary jurisdiction set out in *Kokkonen*. Because "a motion to expunge records of a *valid* conviction on equitable grounds will ordinarily be premised on events that are unrelated to the sentencing," that occur long after the criminal case is closed, and that do not call into question the validity of the underlying judgment, such expungement motions are not "factually interdependent" with the underlying criminal case. Pet. App. 10a-11a; see *Lucido*, 612 F.3d at 875; *United States* v. *Coloian*, 480 F.3d 47, 50, 52 (1st Cir.), cert. denied, 552 U.S. 948 (2007); *United States* v. *Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000). And because "[t]he existence and availability" of accurate records of criminal proceedings "do not frustrate or defeat" a court's ability to conduct criminal proceedings or effectuate the resulting judgments, *Coloian*, 480 F.3d at 52, the power to expunge convictions is not a necessary adjunct to courts' underlying power to conduct trials. See *ibid.* ("[T]he power asked for here is quite remote from what courts *require* in order to perform their functions.") (quoting *Kokkonen*, 511 U.S. at 380).

2. This case does not conflict with the rule applied in any other court of appeals. Every court of appeals to consider whether courts may exercise ancillary jurisdiction to consider purely equitable expungement requests in light of *Kokkonen* has found that *Kokkonen* forecloses jurisdiction over such claims. See *Sumner*, 226 F.3d at 1014; *Coloian*, 480 F.3d at 52; *United States* v. *Dunegan*, 251 F.3d 477, 479-480 (3d Cir. 2001); *Lucido*, 612 F.3d at 874-875; *United States* v. *Field*, 756 F.3d 911, 916 (6th Cir. 2014); *United States* v. *Wahi*, 850 F.3d 296 (7th Cir. 2017); *United States* v. *Meyer*, 439 F.3d 855, 859-860 (8th Cir. 2006). In addition, the Tenth Circuit has relied on its own precedent concerning courts' inherent equitable powers to reach the same result. *Tokoph* v. *United States*, 774 F.3d 1300, 1305 (2014).

No decision identified by petitioner reflects an ongoing conflict concerning these principles. Petitioner first suggests (Pet. 10) that the decision below conflicts with the approach of the Tenth Circuit. But as noted above, *Tokoph* found that courts lack jurisdiction over claims like those at issue here. 774 F.3d at 1301 (affirming a district court's "conclu[sion] that it had no jurisdiction" to grant a request for expungement on purely equitable grounds). The court in *Tokoph* found "no statutory or constitutional provision * * * to support the jurisdiction of a federal court" over such a claim. *Id.* at 1305. And it rejected the defendant's contention that the district court had "inherent equitable jurisdiction" to consider the claim. *Ibid.*

Petitioner asserts a conflict (Pet. 10) in light of the pre-*Tokoph* decision in *Camfield* v. *City of Oklahoma City*, 248 F.3d 1214 (10th Cir. 2001). But any intracir-

cuit disagreement between *Tokoph* and *Camfield* would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). And *Camfield* does not support jurisdiction to expunge valid convictions on purely equitable grounds in any event. That case stated in dictum that prior decisions "settled in this circuit that courts have inherent equitable authority to order the expungement of an arrest record or a conviction in rare or extreme instances," 248 F.3d at 1234 (citing *United States* v. *Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993), and *United States* v. *Linn*, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836 (1975)). But the cited cases establish that the "rare or extreme instances" in which that court treated expungement as within a court's "inherent equitable powers" involve convictions that were "somehow invalidated, such as by a finding that [they were] unconstitutional, illegal, or obtained through government misconduct." *Pinto*, 1 F.3d at 1070; see *Linn*, 513 F.2d at 927-928. In contrast, *Pinto* explained that a court is "without power to expunge" a conviction when "there is no allegation that the conviction was in any way improper." 1 F.3d at 1070; accord *Tokoph*, 774 F.3d at 1305.

Petitioner next invokes (Pet. 10) the Seventh Circuit's decision in *United States* v. *Flowers*, 389 F.3d 737, 738-740 (2004), overruled by *Wahi*, *supra*. But after the petition for a writ of certiorari in this case was filed, the Seventh Circuit overruled *Flowers*, which the court of appeals concluded had "overlook[ed]" this "Court's decision in *Kokkonen*." *Wahi*, 850 F.3d at 302. Applying *Kokkonen*, the Seventh Circuit held that "the district court's ancillary jurisdiction does not stretch so far as to permit the asser-

tion of jurisdiction over a petition to expunge the judicial record in a criminal case on purely equitable grounds." *Ibid.* The court observed that "five of [its] sister circuits" had also "read *Kokkonen* to preclude the assertion of ancillary jurisdiction over a request to expunge judicial records on purely equitable grounds," and that "[n]o circuit has rejected this understanding of *Kokkonen*." *Id.* at 303.

Petitioner next asserts (Pet. 10) a conflict with the Fifth Circuit's decision in *Sealed Appellant* v. *Sealed Appellee*, 130 F.3d 695 (1997), cert. denied, 523 U.S. 1077 (1998), but she is again mistaken. *Sealed Appellant* concerned whether a district court had power to expunge Executive Branch records on equitable grounds. *Id.* at 697 & n.2. The court of appeals held that courts lacked jurisdiction over such claims. *Id.* at 697. Petitioner relies on *Sealed Appellant* for the proposition that courts do have jurisdiction to expunge *judicial* records on purely equitable grounds. See Pet. 10. But petitioner expressly "waived any argument in support of sealing only the judicial records of conviction in her case," Pet. App. 12a n.3, making this case an inappropriate vehicle for considering any expungement power specific to judicial records. And in any event, the discussion of judicial records in *Sealed Appellant* was dicta, because the court expressly noted that the "portion of the petition" for expungement involving judicial records "was not challenged in the district court and is not on appeal." 130 F.3d at 697 n.2. Moreover, because the Fifth Circuit did not address the impact of *Kokkonen* on the jurisdictional analysis, its dicta are not properly described as "declin[ing] to apply *Kokkonen*." Pet. 10; *Coloian*, 480 F.3d at 52 (noting that the failure of a post-

Kokkonen decision concerning ancillary jurisdiction to address *Kokkonen* "raises questions as to [its] continued viability").

Petitioner also suggests (Pet. 10-11) a conflict between the decision below and decisions of the D.C. Circuit, but that court's decisions do not aid petitioner. *Abdelfattah* v. *United States Department of Homeland Security*, 787 F.3d 524 (2015), did not consider jurisdiction over requests for expungement on purely equitable grounds, but instead "recognized a plaintiff may request expungement of agency records for both violations of the Privacy Act and the Constitution." *Id.* at 534. And as petitioner acknowledges (Pet. 11), *Livingston* v. *United States Department of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985) and *Menard* v. *Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974), predate this Court's clarification of the scope of ancillary jurisdiction in *Kokkonen*. They therefore do not demonstrate that any conflict persists in the wake of *Kokkonen*'s guidance.

For the same reason, petitioner errs in suggesting (Pet. 11) that the decision below conflicts with decisions of the Fourth and Eleventh Circuits. See *ibid.* (citing *United States* v. *Doe*, 747 F.2d 1358, 1359 (11th Cir. 1984) (per curiam); *Allen* v. *Webster*, 742 F.2d 153, 155 (4th Cir. 1984)). Those decisions predate *Kokkonen*. And petitioner errs in suggesting (*ibid.*) that the Fourth Circuit has recognized jurisdiction over equitable expungement requests since. Petitioner relies on (*ibid.*) a district court decision that stated several years ago—without acknowledging *Kokkonen*—that courts have "equitable power to order the expungement of criminal records" in "extreme and compelling circumstances, such as when necessary to

remedy the denial of an individual's constitutional rights, or when the government concedes the defendant's innocence"—before going on to deny the defendant's request for expungement. *United States* v. *Masciandaro*, 648 F. Supp. 2d 779, 794 (E.D. Va. 2009) (citations omitted). But petitioner is mistaken in suggesting that the Fourth Circuit affirmed that conclusion. The Fourth Circuit did not pass on the expungement aspect of that district court decision, because the defendant did not raise any expungement issue on appeal, instead raising only constitutional and statutory challenges to his firearms conviction. See *United States* v. *Masciandaro*, 638 F.3d 458, 460, cert. denied, 565 U.S. 1058 (2011). Accordingly, no decision of the Fourth Circuit demonstrates an ongoing conflict concerning equitable expungement.[2]

3. This Court has repeatedly denied review of appellate decisions holding that courts lack jurisdiction to consider equitable expungement requests. See *Mann* v. *United States*, 136 S. Ct. 585 (2015) (No. 15-245); *Sapp* v. *United States*, 133 S. Ct. 2389 (2013) (No. 12-882); *Coloian* v. *United States*, 552 U.S. 948 (2007) (No. 07-72). Since the denial of review in those cases, the circuit consensus on this jurisdictional point has become even more robust. See Pet. App. 1a-16a; *Wahi*, 850 F.3d at 298.

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[2] Since *Masciandaro*, several district courts in the Fourth Circuit have concluded that *Kokkonen* has effectively overruled the pre-*Kokkonen* circuit precedent indicating that courts may consider equitable expungement motions. See, *e.g.*, *United States* v. *Harris*, 847 F. Supp. 2d 828, 835 (D. Md. 2012); *United States* v. *Mitchell*, 683 F. Supp. 2d 427, 432 (E.D. Va. 2010).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2017