No. 12-882

In the Supreme Court of the United States

VINCENT MAURICE SAPP, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying petitioner's request to expunge judicial records of his conviction for conspiracy when petitioner sought that relief solely on equitable grounds.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The order of the district court (Pet. App. 3a-7a) is not reported but is available at 2011 WL 2837913.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2012. On November 26, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 17, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1995, following a guilty plea in the United States District Court for the Northern District of California, petitioner was convicted of conspiracy to commit bank

robbery, in violation of 18 U.S.C. 371. Pet. App. 3a-4a. He was sentenced to six months in a halfway house, to be followed by five years of probation, and was ordered to pay restitution of $3895. *Ibid.*; see Gov't C.A. Mot. for Summ. Affirm. (Gov't C.A. Mot.) 3-4. In 2011, petitioner asked the district court to expunge records relating to his conviction. Pet. App. 3a. The district court denied the motion. *Id.* at 7a. The court of appeals summarily affirmed. *Id.* at 2a.

1. In 1995, petitioner and two associates drove to a bank in El Cerrito, California. Petitioner surveilled the bank and told the others that no security guard was present. He waited in the car while his associates went inside, brandished firearms, and robbed the bank. When they returned to the car with the money, he drove them away. He stopped the car when he realized they were being followed, and all three men tried to flee on foot. Gov't C.A. Mot. 3.

A grand jury in the United States District Court for the Northern District of California charged petitioner and his associates with conspiracy to commit bank robbery, in violation of 18 U.S.C. 371; armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d); and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). 4:95-cr-40068-SBA-3 Docket entry (Docket entry) (N.D. Cal. Apr. 27, 1995). Petitioner pleaded guilty to the conspiracy count and testified against one of the other defendants. Pet. App. 4a. The district court granted petitioner "a significant downward departure from the sentencing guidelines based on [his] substantial assistance to the government," sentencing him to only six months in a halfway house (as well as probation and a small amount of restitution). *Ibid.*; see Gov't C.A. Mot. 3-4.

2. In May 2011, under the original criminal case number, petitioner filed a letter in which he sought "to get the case that happened in 1995 removed from my records." Pet. App. 25a-26a. As grounds for that relief, petitioner stated that the "charge happened 16 years ago"; he had "not had any involvement[] with illegal activities" since then; he had become "a hard working man" with a family, having been employed as a truck driver for 11 years; he was "remorse[ful]" for his offense; and he had taken and passed a California state examination to practice in the real-estate industry, but had "been put on hold to obtain [his] license" to practice "due to these [1995] charges." *Ibid.*

The district court construed the letter as a motion to expunge records relating to the 1995 crime. Docket entry No. 179 (May 12, 2011). The government opposed the expungement request, arguing that the district court did not have jurisdiction to expunge records of petitioner's "valid conviction" on the "solely * * * equitable grounds" he had invoked and that petitioner had not in any event established the kind of "extraordinary circumstances" that warrant expungement. Docket entry No. 185, at 3-4 (June 14, 2011).[1]

At a hearing on the motion, petitioner appeared and made a personal plea for expungement. Petitioner gave the district court further details about his post-offense

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[1] The former Assistant United States Attorney who had prosecuted petitioner's case in 1995 wrote the district court a letter, in her "personal capacity," expressing her "support" for petitioner's request. Pet. App. 27a. Based on her recollection of petitioner's case and the information in his letter, she asserted that he "deserves a chance to accomplish his new goals in life." *Id.* at 27a-28a. She acknowledged, however, that a "presidential pardon" might be "the only way" for him to wipe the slate clean. *Id.* at 27a.

rehabilitation. Pet. App. 10a-20a. Also, after initially stating that he had "just recently received my real estate license," *id.* at 11a, he claimed that he was "trying to get this real estate license" but was "hinder[ed]" by the 1995 case, *id.* at 16; see *id.* at 20a ("I been waiting * * * since March. But, see, I know that the reason why they haven't said anything is because of this.").

The district court denied the expungement request, finding that it had no jurisdiction to grant it. Pet. App. 16a-19a; see *id.* at 3a, 6a-7a. The court stated that it would "certainly be inclined to" grant relief if it had authority to do so, observing that petitioner's 1995 offense "was out of the norm for [him]," that he had taken responsibility for it in pleading guilty and testifying against a coconspirator, and that he had "done a lot of productive things" in the years since the offense. *Id.* at 16a. But the court concluded that, under Ninth Circuit law, it lacked jurisdiction "to expunge the[] records" relating to petitioner's conviction because his motion was based on "equitable considerations." *Id.* at 19a.

In so ruling, the district court relied on *United States* v. *Sumner*, 226 F.3d 1005 (9th Cir. 2000), which concluded that—under this Court's decision in *Kokkonen* v. *Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994)—district courts have ancillary jurisdiction to expunge records "of an unlawful arrest or conviction" or to "correct[] a clerical error" but not to further "solely * * * equitable considerations." 226 F.3d at 1014. The *Sumner* court reasoned that equitable expungement would "usurp[] the powers that the framers of the Constitution allocated to Congress, the Executive, and the states." *Ibid.* In particular, it would interfere with States' "right to regulate employment within their borders" by setting "professional standards that are affect-

ed by criminal records," and would "nullif[y]" the federal statute requiring the Attorney General to collect and preserve such records. *Ibid.*; see *id.* at 1014 n.13 (citing 28 U.S.C. 534).

3. The court of appeals summarily affirmed in an unpublished, nonprecedential order. Pet. App. 1a-2a. The order stated that the district court "lacked ancillary jurisdiction to expunge" records relating to petitioner's conviction "[b]ecause [his] motion to expunge was based entirely on equitable grounds." *Id.* at 1a (citing *Sumner*).

ARGUMENT

Petitioner contends (Pet. 20-30) that the court of appeals erred in concluding that the district court lacked ancillary jurisdiction to expunge on solely equitable grounds any judicial records relating to his 1995 conspiracy conviction. He asserts that the courts of appeals are "sharply divided" on that jurisdictional question (Pet. 7-14). Contrary to petitioner's contention, however, any circuit conflict is not a live one. Moreover, petitioner would not be entitled to relief under the test applied in the circuits that he implicates in such a conflict. Accordingly, further review is not warranted.

1. Federal courts are courts of limited jurisdiction and "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Except in narrow areas, federal courts have no common-law power unrooted in a congressional grant of authority, see *Northwest Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 95-96 (1981), and cannot grant relief except to vindicate a right created by Congress, see *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001), a

treaty, see *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925), or the Constitution, see *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392-394 (1971).

Petitioner seeks expungement solely for equitable reasons, and no federal statute authorizes a district court to expunge criminal records under such circumstances. His claim for expungement of judicial records is therefore grounded on the district court's "ancillary jurisdiction" over claims and proceedings relating to the original criminal prosecution. Pet. 2, 5-7, 18-30.[2]

In *Kokkonen*, the leading case on the limits and purposes of ancillary jurisdiction, this Court held that federal courts do not have authority to enforce settlement agreements reached in cases that they have dismissed unless they have retained jurisdiction to do so or "there is some independent basis for federal jurisdiction." 511 U.S. at 382. In reaching that conclusion, the Court stated that ancillary jurisdiction has been exercised 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); see also *Peacock* v. *Thomas*, 516 U.S. 349, 354-355 (1996).

2. In light of circuit precedent intepreting *Kokkonen*, the court of appeals concluded in an unpublished summary affirmance that the district court lacked ancillary

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[2] Although petitioner's submission to the district court may have encompassed a request for expungement of *executive* records, see Pet. App. 25a (asking to "get this charge taken off of my records"); *id.* at 26a; 28 U.S.C. 534, petitioner now states (Pet. 12 n.1) that he "does not seek" that relief.

jurisdiction over petitioner's request to expunge his criminal records, which asserted purely equitable grounds. Pet. App. 1a-2a (citing *United States* v. *Sumner*, 226 F.3d 1005, 1010-1015 (9th Cir. 2000) (discussing *Kokkonen*)). Petitioner contends that several other courts of appeals have reached the opposite conclusion. Pet. 7-14 (citing, *inter alia*, *United States* v. *Flowers*, 389 F.3d 737, 739 (7th Cir. 2004); *Sealed Appellant* v. *Sealed Appellee*, 130 F.3d 695, 697 & n.2 (5th Cir. 1997) (*Sealed Appellant*), cert. denied, 523 U.S. 1077 (1998); *Livingston* v. *United States Dep't of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985); *Allen* v. *Webster*, 742 F.2d 153, 154-155 (4th Cir. 1984); *United States* v. *Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977), cert. denied, 435 U.S. 907 (1978); *United States* v. *Linn*, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836 (1975)).

Petitioner significantly overstates the tension among the courts of appeals, however. Almost all of the cases to which petitioner points "predate *Kokkonen* * * * , which raises questions as to their continued viability." *United States* v. *Coloian*, 480 F.3d 47, 52 (1st Cir.), cert. denied, 552 U.S. 948 (2007). Only two post-date that ruling on the scope of ancillary jurisdiction: the Fifth Circuit's decision in *Sealed Appellant* and the Seventh Circuit's decision in *Flowers*. But the jurisdictional discussion in both of those cases was based on pre-*Kokkonen* circuit precedent, and neither cited *Kokkonen* itself. See *Sealed Appellant*, 130 F.3d at 697-702; *Flowers*, 389 F.3d at 738-741. Accordingly, the "continued viability" of those two decisions is also questionable. *Coloian*, 480 F.3d at 52.

Neither *Sealed Appellant* nor *Flowers* paid close attention to the issue of ancillary jurisdiction to expunge judicial records. *Sealed Appellant* is about expunge-

ment of executive records, not judicial records, and the court of appeals specifically noted that the "portion of the petition" involving the latter "was not challenged in the district court and is not on appeal." *Sealed Appellant*, 130 F.3d at 697 n.2. The court's discussion of jurisdiction with respect to judicial records was therefore only a brief aside. *Id.* at 697. And *Flowers*—a case in which the parties do not appear to have made a jurisdictional argument to the court of appeals—simply cited a pre-*Kokkonen* Seventh Circuit decision and stated in a single sentence that "district courts do have jurisdiction to expunge records maintained by the judicial branch," without distinguishing between requests made on equitable grounds and those made for other reasons. *Flowers*, 389 F.3d at 738-739 (citing *United States* v. *Janik*, 10 F.3d 470, 472 (7th Cir. 1993)). Such "drive-by jurisdictional rulings" have little if any weight. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 511 (2006).

In contrast, four courts of appeals have addressed the jurisdictional question since *Kokkonen* was decided and have actually cited and analyzed this Court's decision. Each one of them has held that a district court lacks ancillary jurisdiction to expunge records in a criminal case on equitable grounds alone. See *Coloian*, 480 F.3d at 49-52; *United States* v. *Meyer*, 439 F.3d 855, 858-863 (8th Cir. 2006); *United States* v. *Dunegan*, 251 F.3d 477, 478-480 (3d Cir. 2001); *Sumner*, 226 F.3d at 1010-1015. When the Fifth and Seventh Circuits confront the issue directly and consider *Kokkonen*, they may well agree.

The clear trend in the circuits since this Court's decision in *Kokkonen* thus counsels against further review. Indeed, in the wake of *Kokkonen* this Court has denied several petitions raising the question presented here. See, *e.g.*, *Coloian* v. *United States*, 552 U.S. 948 (2007)

(No. 07-72); *Rowlands* v. *United States*, 549 U.S. 1032 (2006) (No. 06-501). The same result is warranted in this case.

2. Denial is also warranted because the courts that have ruled on the ancillary jurisdiction issue in light of *Kokkonen*, including the court below, have reached the correct result. Petitioner argues that *Kokkonen* is wholly irrelevant to a request for expungement of judicial records (Pet. 20-26) and that such a request satisfies the requirements for ancillary jurisdiction laid out in that decision in any event (Pet. 27-30). Those arguments lack merit.

As an initial matter, *Kokkonen* is relevant to analyzing the limits on district courts' ancillary jurisdiction in all contexts—not just in the particular factual context in which it was decided. The decision summarizes all of the circumstances in which this Court has found that ancillary jurisdiction was proper. See *Kokkonen*, 511 U.S. at 379-380; see also *Peacock*, 516 U.S. at 354 (applying *Kokkonen* and rejecting ancillary jurisdiction where case did not fall into either of the two categories *Kokkonen* described). And despite petitioner's attempt to characterize *Kokkonen* as a decision preoccupied with the division of labor between state and federal courts (Pet. 25), *Kokkonen* does not discuss that issue. Rather, it emphasizes the presumption "that a cause lies outside [federal courts'] limited jurisdiction" and the "burden" on the party asserting jurisdiction "of establishing the contrary." 511 U.S. at 377; see also *Peacock*, 516 U.S. at 359. Those considerations are just as applicable to jurisdiction over an expungement request as they are to jurisdiction over a settlement-related dispute.[3]

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[3] Moreover, petitioner's survey of cases from the 1800s (Pet. 21-22) adds nothing to the analysis. First, *Kokkonen* surveyed and relied on

In addition, neither of the two types of ancillary jurisdiction identified in *Kokkonen* is applicable here. First, petitioner argues (Pet. 28-30) that presenting an expungement request to the court that adjudicated the relevant criminal matter "permit[s] disposition by a single court of claims that are, in varying respects and degrees, factually interdependent." *Kokkonen*, 511 U.S. at 379-380. But the test for expungement is centered on the ongoing adverse consequences to the petitioner, not the facts of petitioner's crime. See, *e.g.*, *Flowers*, 389 F.3d at 739-740; see also pp. 12-13, *infra*. Issues concerning the existence or extent of current harm to petitioner's reputation or employment prospects are unrelated to the question of guilt that was resolved in the underlying criminal prosecution. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 115 (1983) ("[E]xpunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty."); cf. *Kokkonen*, 511 U.S. at 380 (stating that the facts underlying a dismissed civil suit have "nothing to do with" the facts underlying any breach of a subsequent settlement agreement).

Second, petitioner contends (Pet. 27-28) that adjudicating expungement will "enable" a criminal court "to

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this Court's earlier decisions in setting forth only two "heads" of ancillary jurisdiction. See 511 U.S. at 379-380. Second, the cases that petitioner cites address a court's jurisdiction over subsequent actions that "challenge or impeach a prior court decree," Pet. 22—and an expungement request based on equitable grounds, which does not question the correctness of the prior criminal proceedings, does neither of those things. The Ninth Circuit recognizes ancillary jurisdiction over expungement requests that seek correction of an error or assert that the criminal proceedings were unlawful. See *Sumner*, 226 F.3d at 1014.

function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen*, 511 U.S. at 379-380. Expungement for equitable reasons, however, does none of those things. Because the criminal proceedings against petitioner were not unlawful in any way, expungement for equitable reasons would not further the district court's ability to "function successfully"—it already *has* functioned successfully in bringing the criminal case to a procedurally and substantively proper conclusion. *Ibid.* Maintaining records of such a criminal proceeding fully respects the district court's authority and its decrees by accurately documenting what took place; erasing them on purely equitable grounds, based on events that post-date the court's involvement with the defendant, does not.[4]

Of course, Congress could grant federal courts jurisdiction over requests to expunge judicial records of criminal proceedings on equitable grounds. But it has not done so. Accordingly, the court of appeals correctly held that the district court lacked the power to grant petitioner's expungement request. See, *e.g.*, *Sumner*, 226 F.3d at 1015 ("The power to expunge a record of a valid arrest and conviction on equitable grounds must be declared by Congress. The Constitution prohibits federal courts from expanding their own subject matter jurisdiction.").

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[4] Contrary to petitioner's suggestion (Pet. 27-28), that conclusion does not "conflate[] the jurisdictional and merits inquiries." It simply asks whether the relief petitioner seeks, if granted, would fall into the category of actions that a district court has power to undertake. In contrast, petitioner begs the question by framing the inquiry at the highest possible level of generality: "whether a court requires control over its own documents to function successfully and manage its proceedings." Pet. 28.

3. Review is also unwarranted for an independent reason: petitioner would not qualify for expungement under the test applied in any circuit he identifies (Pet. 7-12) as adopting a rule different from that applied by the Ninth Circuit. Indeed, those other circuits have denied expungement in factual circumstances strikingly similar to those presented here, on the ground that such circumstances are insufficiently "exceptional" to justify that extraordinary remedy.

In *Flowers*, for example, the Seventh Circuit overturned as an abuse of discretion a district court decision granting expungement to a convicted person who claimed that she might lose employment opportunities if her conviction remained on her record. Flowers was only 18 when the offense occurred, and her role was limited to driving others to and from the scene of the crime, after having been pressured by them to do so. See *Flowers*, 389 F.3d at 738, 740. She also subsequently expressed remorse, steered clear of any further criminal difficulties, obtained a college degree, worked as a firefighter, and took significant steps toward becoming a nurse. See *id.* at 738-739. The Seventh Circuit explained that expungement is appropriate only if "the dangers of unwarranted adverse consequences to the individual outweigh the public interest in maintenance of the records," and it emphasized that the test could not be met in the absence of "truly * * * extraordinary" consequences. *Id.* at 739 (citation omitted); see *id.* at 740 (noting agreement of other circuits as to that test). The court concluded that being "impeded in finding employment" was a typical and warranted consequence of a criminal conviction, and that Flowers therefore did not qualify for the remedy she sought. *Ibid.*

The other courts of appeals that petitioner claims would have entertained his expungement request have reached similar results on similar reasoning. See, *e.g.*, *Sealed Appellant*, 130 F.3d at 701-702 (reversing order expunging executive records because defendant's "claim[] that he is having a hard time getting a job in law enforcement" was not "an adequate showing of harm"); *Allen*, 742 F.2d at 154-155 (affirming denial of expungement where defendant wanted to ensure that "truthful information" about his arrest "was not considered in connection with * * * his job application," which was not an "extreme circumstance[]") (citation omitted); *Schnitzer*, 567 F.2d at 540 (affirming denial of expungement because fact that defendant, upon entering religious profession, "may be asked to explain the circumstances surrounding his arrest" was not an "extreme circumstance[]" akin to having been arrested under "a statute later declared unconstitutional" or having suffered "misuse" of his records); *Linn*, 513 F.2d at 926 (affirming denial of expungement where acquitted defendant claimed that records of his lawful arrest "could be used to attack his character and reputation * * * as an attorney-at-law") (internal quotation marks omitted).[5]

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[5] Those decisions, and the district court decisions that rely on them, also demonstrate the more general principle that courts virtually never grant expungement to a person who has actually been convicted of a crime (rather than simply arrested or charged) when the conviction has not been thrown into question. See Gov't C.A. Mot. 12 n.3; *Livingston*, 759 F.2d at 79; *United States* v. *Morelli*, No. 91 Crim. 639, 1999 WL 459784, at *2 (S.D.N.Y. June 30, 1999); see also, *e.g.*, *United States* v. *Sahadeo*, No. 94 Cr. 3, 2011 WL 5828339 (S.D.N.Y. Nov. 17, 2011) (granting expungement to person whose criminal case had terminated with a nolle prosequi), cited in Pet. 14-15; *United States* v. *Doe*, 935 F. Supp. 478, 480 (S.D.N.Y. 1996) (granting

Had petitioner's case been heard in one of those other circuits, then, the result would have been the same. That is not surprising in light of the quotidian nature of petitioner's situation—that is, difficulty moving from his current employment into a position that involves disclosure of his prior felony under state licensing requirements. If relief were available in such circumstances, expungement would become routine rather than reserved for truly extraordinary cases. See, *e.g.*, *Flowers*, 389 F.3d at 739-740 (stating that "if employment problems resulting from a criminal record were 'sufficient to outweigh the government's interest in maintaining criminal records, expunction would no longer be the narrow, extraordinary exception, but a generally available remedy'") (quoting *United States* v. *Smith*, 940 F.2d 395, 396 (9th Cir. 1991) (per curiam)).

Moreover, petitioner's showing of adverse consequences is particularly weak. Petitioner was gainfully employed as a truck driver, and the record does not reflect whether he ultimately failed to obtain a real-estate license or whether any such failure was actually related to his criminal record. See Pet. App. 12a, 25a; compare *id.* at 11a ("I just recently received my real estate license") with *id.* at 16a ("I'm trying to get this real estate license"), 20a ("I been waiting * * * since March. But, see, I know that the reason why they haven't said anything is because of this."); see also, *e.g.*, California Dep't of Real Estate, *Answers to Frequently Asked Questions (FAQs) About "Background" Reviews and Screenings, and Policies, Procedures and Statutory Requirements in Connection with the Issuance and*

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expungement to person whose conviction had been set aside under special statutory provision intended to free youthful offenders of taint on their records), cited in Pet. 13, 15 n.2.

Discipline of Licenses, http://www.dre.ca.gov/files/pdf/faqs/FAQ-RERAPS.pdf (last visited Apr. 19, 2013) (explaining that prior conviction is not automatic bar to obtaining California real estate license). And expungement of judicial records apparently would not have aided him in any event, since executive records of the conviction would remain in place, see 28 U.S.C. 534, and since petitioner would be required to disclose even an expunged conviction to California real-estate authorities, see California Dep't of Real Estate, *Help Avoid DENIAL of Your License Application* (2012), http://www.dre.ca.gov/Licensees/AvoidDenial.html (explaining that in California a real estate license applicant must disclose prior conviction on application "whether or not the conviction against you was dismissed or expunged or if you have been pardoned") (emphasis omitted).

The district court in this case did suggest that it would have granted relief had it not been bound by the Ninth Circuit's decision in *Sumner*. See Pet. App. 6a-7a (stating that petitioner's "positive accomplishments" would be "worthy of granting his request for expungement if equitable reasons were cognizable"); *id.* at 19a. But given the district court's awareness that it lacked jurisdiction, it did not consider the decisions that define *which* equitable circumstances warrant expungement. Had the court reached the merits, it could not properly have awarded petitioner any relief. See *Flowers*, 389 F.3d at 739-740 (reversing district court order granting expungement); *Sealed Appellant*, 130 F.3d at 701-702 (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2013