No. 16-876

IN THE

Supreme Court of the United States

JANE DOE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF *AMICUS CURIAE* COLLATERAL CONSEQUENCES RESOURCE CENTER IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Collateral Consequences Resource Center is a non-profit organization established in 2014 to promote public discussion of the collateral consequences of conviction, and the legal restrictions and social stigma that burden people with a criminal record long after their court-imposed sentence has been served. Through its website, the Center provides practice and advocacy resources for lawyers and others, and news and commentary about this dynamic area of the law. The Center has a particular interest in improving access to relief from collateral consequences for those convicted of crimes, and ensuring that courts have the ability to expunge or set aside convictions is one important way to guarantee access to such relief. Therefore, the Center has a strong interest in the subject matter of this litigation.[1]

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[1] Counsel of record for all parties received timely notice of the intent of *amicus curiae* to file this brief. Sup. Ct. R. 37.2(a). The letter of consent to the filing of this brief has been filed with the Clerk. Further, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to this brief's preparation or submission. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

The collateral consequences of criminal convictions have been called a "secret sentence" that consigns its subjects to "internal exile." Their impact on recidivism rates has been studied by social scientists and pronounced generally malign. *See infra* Sect. I. Their damaging effects on families and communities through loss of housing or other public assistance is well documented. *See id.* The negative impact of a criminal record in the workplace is particularly troublesome from a public policy perspective, since employment has been shown to be a key factor in reducing recidivism and ensuring positive public safety outcomes.

In recent years, some progress has been made by state and local governments implementing legal reforms to mitigate collateral consequences for state offenders. *See infra* Sect. II. Yet the tens of thousands [2] of individuals who are sentenced by federal courts each year have been largely overlooked, and are left with the underutilized presidential pardon power as the sole remedy for putting past convictions behind them. *See id.* The steady decline of pardon grants over the last three decades makes this fact particularly troublesome. In fact, President Obama granted only 6.2% of the pardon petitions he received over his two terms in office. *See infra* Sect. III. In the wake of this sharp decline in pardons, it is critical that individuals with federal convictions have a supplemental means for combating the collateral

[2] *See* United States Sent'g Comm'n, *Overview of Federal Criminal Cases Fiscal Year 2015* 1 (June 2016) (showing that over 71,000 individual federal offenders have been sentenced each year between 2006 and 2015).

consequences of criminal convictions. To that end, the federal system should follow the lead of many states and allow courts to expunge or set aside criminal convictions, thus ensuring that collateral consequences do not remain long after an offender's debt to society has been paid.

One option is for federal courts to expunge criminal convictions in particularly compelling circumstances where a conviction continues to bar an individual from opportunities and benefits long after their court-imposed sentence has expired. Many state courts already have the authority to expunge or set aside criminal convictions, and it is important for federal courts to have a similar authority where collateral consequences are particularly burdensome and unreasonable. In addition, the common law writ of audita querela may offer an alternative basis for granting relief from collateral consequences where there is a legal, or potentially equitable, objection to the continuing adverse effects of an otherwise valid judgment.

ARGUMENT

Jane Doe seeks certiorari on the question whether a federal district court's ancillary jurisdiction in criminal cases includes the power to hear motions to expunge criminal records. Pet. ii. *Amicus* believes that this is an important issue both in light of the split of authority in the circuit courts regarding the scope of ancillary jurisdiction in criminal cases, *id.* at 9-13, and because federal offenders need an option besides the rarely-granted presidential pardon to mitigate the collateral consequences of a criminal conviction.

I. The Collateral Consequences of a Criminal Conviction Are Often More Punitive and Long-Lasting than Court-Imposed Sanctions

In addition to the sentence imposed by the court, persons convicted of a crime face a wide variety of penalties and restrictions. These so-called "collateral consequences" affect a wide range of benefits and opportunities, and are frequently more punitive and long-lasting than court-imposed sanctions like a prison term or fine. Margaret Colgate Love, Jenny Roberts & Cecelia Klingele, *Collateral Consequences of Criminal Convictions: Law, Policy and Practice* 35-179 (2013) [hereinafter *Collateral Consequences*]. Collateral consequences may be imposed automatically by statute or administrative rule, or pursuant to policies that identify a criminal record as grounds for disqualification. They also take the form of socially-condoned discrimination facilitated by widespread background checks that are frequently authorized or required by law. While collateral consequences have been a familiar feature of the American justice system since colonial times, they have become more problematic in the past twenty years for three reasons: (1) they are more numerous and more severe; (2) they affect more people; and (3) they are harder to avoid or mitigate in part because criminal records are now more easily accessible. *Id.* at 4-7.

Some collateral consequences serve a legitimate public safety or regulatory purpose, such as keeping firearms out of the hands of violent offenders, protecting children or the elderly from persons with a history of abuse, or barring people convicted of theft or fraud from positions involving fiduciary

responsibility for public funds. But many are applied without regard to any relationship between crime and penalty. Moreover, some collateral consequences, such as ineligibility for occupational licenses or loss of public benefits, may have a significant impact on the offender's family and community as well.

Criminal conviction can also lead to eviction from public housing, threatening homelessness for entire households. *See Collateral Consequences*, at 64-67; *see also* Rue Landau, *Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter*, in *Every Door Closed: Barriers Facing Parents with Criminal Records*, Ctr. For Law & Soc. Policy & Comm. Legal Servs., Inc. 41-51 (2002), *available at* http://www.clasp.org/resources-and-publications/files/every_door_closed.pdf. In some states, conviction can also lead to exclusion from certain government assistance programs, such as housing, food, and utility subsidies available under the Temporary Assistance to Needy Families program (TANF) and the Supplemental Financial Assistance Program (SNAP). *See* Love et al., *Collateral Consequences*, at 67-68; *see also* The Sentencing Project, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits* (2015), *available at* http://sentencingproject.org/wp-content/uploads/ 2015/12/A-Lifetime-of-Punishment.pdf.

The collateral consequences of conviction are felt perhaps most acutely by those seeking employment, including those trained as professionals, as illustrated by the facts of this case. The negative impact of a criminal record in the workplace is particularly troublesome from a public policy

perspective, since employment has been shown to be a key factor in reducing recidivism and ensuring positive public safety outcomes. *See, e.g.*, Christy Visher, Sara Debus-Sherrill & Jennifer Yahner, The Urban Institute Justice Policy Ctr., *Employment after Prison: A Longitudinal Study of Releasees in Three States* (2008), *available at* http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf; Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 Am. Soc. Rev. 529 (2000). Despite recent efforts by state and local governments and some private employers to remove questions regarding conviction history from employment applications—so-called "ban the box" initiatives [3] —access to employment remains a challenge for those convicted of crimes due to the widespread availability of criminal records through the internet and private vendors. *See* Love et al., *Collateral Consequences*, at 281-82; *see also* Binyamin Appelbaum, *Out of Trouble; Out of Work*, N.Y. Times, Mar. 1, 2015, at BU1 ("The ready availability of criminal records databases has fueled the perception that it is irresponsible for employers to ignore available information."). As a result, more than 60 percent of formerly incarcerated individuals are unemployed one year after being released, and

[3] *See, e.g.*, Michelle Natividad Rodriguez & Beth Avery, National Employment Law Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies* (Dec. 1, 2016), *available at* http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/ (noting that as of December 2016, 24 states and 150 cities had adopted ban-the-box policies, but only nine states, the District of Columbia, and fourteen cities extend such policies to local private employers).

those who do find jobs take home 40 percent less pay annually. The Sentencing Project, *Americans With Criminal Records* 2 (2015), *available at* http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf.

These are just a few examples of the ways in which the collateral consequences of conviction often extend beyond the limits of a court-imposed sentence in both duration and scope, and frustrate rehabilitation and restoration of a productive life in the community. Indeed, years after a convicted individual has paid a fine or served a sentence their family and community may still suffer as a result of the conviction.

II. The Federal System Has Failed to Implement Legal Reforms to Mitigate Collateral Consequences

Given the perennial difficulty of rolling back collateral consequences in legislatures and regulating risk-averse employers, it has become a law reform priority to find a reliable way to avoid or mitigate the impact of a criminal record in appropriate cases or classes of cases. Over the years, many states have enacted laws giving courts authority to grant relief from collateral consequences, at the front end of the criminal case through diversion and deferred adjudication, or after completion of sentence through expungement, set-aside, or certificates of rehabilitation, variously denominated. *See* Love et al., *Collateral Consequences*, at 424-49. At a time when many employers are averse to taking a risk on some with a conviction, relief aimed at limiting access to the record has become a preferred form of

relief in many jurisdictions. *See* Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 Harv. L. & Pol. Rev. 361, 369-373 (2016) (outlining recent changes in state expungement laws). In others, judicial certificates of rehabilitation provide a more transparent form of relief.[4] For example, in New York, sentencing courts have been authorized since the 1970s to issue certificates lifting legal barriers and evidencing rehabilitation to first felony offenders not sentenced to prison.[5] Some states have also experimented with systemic relief by prohibiting discrimination based on criminal record, or otherwise limiting the use employers and others may make of criminal records.[6] *See* Love et al., *Collateral Consequences*, at 358-70.

The federal system has been largely left behind in the current wave of successful law reforms. While

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[4] *See* Eli Hager, *Forgiving v. Forgetting: For offenders seeking a new life, a new redemption tool*, The Marshall Project (Mar. 17, 2015), https://www.themarshallproject.org /2015/03/17/forgiving-vs-forgetting (describing recent state legislation authorizing judicial certificates of restoration of rights and rehabilitation).

[5] *See* Margaret Love, *NACDL Restoration of Rights Resource Project*, New York Profile, 5-7 (Jan. 2017), http://ccresourcecenter.org/state-restoration-profiles/new-york-restoration-of-rights-pardon-expungement-sealing/.

[6] In the 1970s, two federal courts of appeals held that criminal background checks were a proxy for unlawful discrimination based on race under Title VII of the Civil Rights Act of 1964. *See Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1298-99 (8th Cir. 1975); *Gregory v. Litton Systems*, 472 F.2d 631, 632 (9th Cir. 1972). However, Title VII's business necessity test has until recently proved an insurmountable hurdle for people with a criminal record seeking to challenge employers' exclusionary policies. *See* Love et al., *Collateral Consequences*, at 348-58.

federal courts for a time had authority to set aside certain minor youthful convictions, since 1984 they have had no statutory authority to relieve the lingering adverse effects of the lawful convictions they impose.[7] As discussed in the following section, the historical mechanism for restoring rights and status to federal offenders is a presidential pardon, relief that has become increasingly rare and increasingly random. *See* President Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 812, 835 (2017) (noting that historically the president's pardon power was "used frequently," but that by the time he came to office it had come to "operate[] like a lottery," quoting former U.S. Pardon Attorney Margaret Love) [hereinafter *The President's Role*].

III. There Are Few Alternatives to the Underutilized Presidential Pardon to Address the Collateral Consequences of a Federal Conviction, Thus Maintaining a Role for Federal Courts is Crucial

Given the devastating and long-lasting impact of collateral consequences, it is imperative that

[7] Federal courts do not even have statutory power to seal the record of a criminal case that did not result in conviction, a power enjoyed by all but a handful of state courts. *See* Margaret Colgate Love, *NACDL Restoration of Rights Resource Project*, Chart #4 (Dec. 2016), http://ccresourcecenter.org/wp-content/uploads/2016/03/Chart-4-Judicial-Expungment-Sealing-Set-aside.pdf (50-state survey of laws on expungement, sealing, and set-aside). The repeal of the Youth Corrections Act in 1984 left federal courts with only a sliver of authority under the so-called Federal First Offenders Act, 18 U.S.C. § 3607(c), to expunge youthful misdemeanor drug possession charges that did not result in conviction.

individuals convicted in the federal system have some redress. The historical avenue to relief—the presidential pardon—is now rarely granted, therefore a role for federal courts in relieving collateral consequences has become essential.

A. Use of the Presidential Pardon Power to Restore an Offender's Rights and Status Has Substantially Declined Over Time

Historically, the job of mitigating the impact of a criminal record in the federal justice system belonged to the executive through the pardon power. *See* U.S. CONST. art. II, § 2, cl. 1. A presidential pardon, if granted before conviction, "prevents . . . the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights." *Ex Parte Garland*, 71 U.S. 333, 380-81 (1866). Thus, a presidential pardon "relieves the offender of all punishments, penalties, and disabilities that flow directly from the conviction." *Effects of a Presidential Pardon*, 19 Op. Off. Legal Counsel 160, 161-64, 165-67 (1995). A presidential pardon does not "erase the conviction as a historical fact or justify the fiction that the pardoned individual did not engage in criminal conduct." *Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime*, 30 Op. Off. Legal Counsel 104, 104 (2006). However, in addition to removing both federal and state disabilities flowing from conviction, a pardon "signal[s] that an offender has been rehabilitated." Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 Fordham Urb. L.J. 1705, 1720 (2003).

Beginning with President Washington and through the Civil War, presidents granted clemency to a high percentage of those who requested it. Margaret Love, *The Twilight of the Pardon Power*, 100 J. Crim. L. & Criminology 1169, 1175-1178 (2010) [hereinafter *Twilight*]. In fact, President Lincoln famously entertained pardon petitioners at the White House and spent countless hours personally reviewing clemency petitions from Civil War soldiers and their families. *Id.* at 1177.

Until relatively recently presidents granted pardons regularly and systematically. Love, *Twilight*, at 1179-86; W.H. Humbert, *The Pardoning Power of the President* 125-26 (1941). Before 1910, a majority of pardons vacated judgments or commuted sentences. *See* Love, *Twilight*, at 1184-86 and n.65. After the enactment of a federal parole system in 1910, however, pardons were issued far more frequently "to restore rights to those who had served their sentences and spent a period of time in the free community." *Id.* at 1187-88.[8] Indeed, through the Carter administration, pardoning generally "remained a routine and relatively low-key activity of the presidency that took place largely unnoticed." *Id.* at 1192. Well into the 20th century, pardon petitions were granted at relatively high rates. *Id.* ("[T]he

[8] In 1958, President Eisenhower's pardon attorney noted that the pardon was by that time largely reserved for those who had served their sentence and sought "forgiveness for the purpose of restoring their good names, removing the stigma of conviction, or securing the restoration of such rights as may have been lost by virtue of the convictions." Love, *Twilight*, at 1191. Presidents Franklin Roosevelt, Truman, and Eisenhower issued a collective 6,000 post-sentence pardons, but collectively only 653 commutations.

percentage of pardon petitions acted on favorably by Presidents Kennedy, Johnson, Nixon, Ford, and Carter varied between 30% and 40%[.]").

Since 1980, presidential pardons have significantly decreased in number, even as demands on the power have increased. *See* U.S. Dep't of Justice, Office of the Pardon Attorney, Clemency Statistics, http://www.justice.gov/pardon/clemency-statistics (last updated Feb. 2, 2017) [hereinafter DOJ Clemency Statistics]; President Barack Obama, *The President's Role*, at 836 & n.134 (explaining that from 1990 to 2008, "the number of federal prosecutions rose dramatically as did (predictably) the number of clemency requests," yet "the number of clemency petitions granted continued to fall in absolute numbers as well as in percentage terms"); Love, *Twilight*, at 1193-1204. The emphasis on the "war on crime" together with the retributivist goals of the 1984 Sentencing Reform Act altered the political landscape such that exercise of the pardon power became a dangerous political gamble for the president. *Id.* at 1193-95. Indeed, President George H.W. Bush issued only 74 pardons on 731 requests in his one term in office (about a 10.1% grant rate), President Bill Clinton issued 396 pardons on 2,001 requests in eight years (about a 19.8% grant rate), and President George W. Bush issued just 189 pardons on 2,489 requests in eight years (about a 7.6% grant rate). *See* DOJ Clemency Statistics, https://www.justice.gov/pardon/clemency-statistics. Furthermore, despite frequently trumpeting the importance of presidential clemency powers, [9]

[9] *See also, e.g.*, Jon Schuppe, *The Flip Side to Obama's Historic Clemency Push: A Stinginess with Pardons* (Jan. 17, 2017),

President Obama granted only 212 pardon petitions on 3,395 pardon requests during his two terms in office. *See id.* This 6.2% grant rate makes him the least generous pardoner in absolute terms of any full-term president since the Civil War, and most of his pardons were granted only in his final month in office. *See id.*[10]

In the federal system, receiving a pardon is currently "the only way for a federal offender to overcome the legal disabilities and stigma of conviction, since there is no authority for judicial expungement or sealing of a criminal record even for a first-time offender." Love, *Twilight*, at 1206. When granted, a presidential pardon plays "an important role in offender reentry and reintegration," especially given the "proliferation of collateral consequences and easy access to criminal history information[.]" *Id.* at 1205. Yet as the rate of presidential pardons granted continues to decline, the single option

(continued…)

http://www.nbcnews.com/news/us-news/flip-side-obama-s-clemency-push-stinginess-pardons-n707966 (noting infrequency with which President Obama granted pardons); *see also* Editorial Board, *Mr. Obama, Pick Up Your Pardon Pen*, N.Y. Times, Jan. 17, 2017, at A20; Sarah Wheaton, *Obama Flexes His Pardon Power*, Politico (Dec. 19, 2016), http://www.politico.com/story/2016/12/obama-pardon-prisoners-232830.

[10] *See also* Neil Eggleston, White House Blog, *President Obama Grants 153 Commutations and 78 Pardons to Individuals Deserving of a Second Chance*, White House (Dec. 19, 2016, 3:00pm), https://obamawhitehouse.archives.gov/blog/2016/12/19/president-obama-grants-153-commutations-and-78-pardons-individuals-deserving-second (noting that President Obama had granted only 70 pardons before December 19, 2016).

available to federal offenders to mitigate collateral consequences is becoming increasingly unavailable.

B. Expungement Is an Appropriate Form of Relief in Particularly Compelling Circumstances

It is little wonder that, faced with such a bleak and unforgiving landscape, federal offenders would look for relief to the courts that sentenced them. By the same token, it is not surprising that federal courts would be inclined to explore the extent of their power to deal with the ordinary injustice that has become part and parcel of a federal criminal prosecution, especially in light of the infrequency with which the pardon power has been used in recent years.

While recent district court cases demonstrate that courts will resort to expungement only in the rarest of circumstances, *see, e.g.*, *Doe v. United States*, 168 F. Supp. 3d 427, 441 (E.D.N.Y. 2016) (Gleeson, J.) (finding expungement unwarranted in light of the relevant circumstances); *Stephenson v. United States*, 139 F. Supp. 3d 566, 567-68, 571 (E.D.N.Y. 2015) (Dearie, J.) (same); *United States v. Gomelskaya*, Nos. 10-CR-460, 14-MC-1170, 2015 WL 4987838, at *2 (E.D.N.Y Aug. 18, 2015) (Johnson, J.) (same); *United States v. Schonsky*, No. 05-CR-00332, 2015 WL 2452550, at *1 (E.D.N.Y. May 21, 2015) (Gleeson, J.) (same), this remedy has been and must remain a legitimate aspect of the sentencing court's authority. It is particularly important for a court to have this power in extreme cases where its sentence has become a lifelong burden from which there is otherwise no escape.

While district courts have traditionally been hesitant to find that adverse employment consequences rise to a level of hardship so as to warrant expungement, recently some courts have begun to acknowledge that adverse employment consequences present significant barriers to societal reentry that may warrant judicial relief for rehabilitated offenders. For example, in *Stephenson*, the district court acknowledged that

> there is now a great deal of solid evidence establishing that a criminal conviction often is a significant obstacle to employment, in some situations even creating the dire financial circumstances that, in turn, are strongly linked with recidivism.

139 F. Supp. 3d at 568-69. Though the court ultimately determined that the petitioner's particular circumstances did not warrant expungement, it noted that "[i]f an ex-offender's inability to find employment puts in jeopardy his or her reentry into society, I am hard pressed to imagine a circumstance more 'extreme.'" *Id.*; *see also, e.g.*, *United States v. Sapp*, No. CR 95-40068 SBA, 2011 WL 2837913, at *2 (N.D. Cal. July 18, 2011) (explaining that a "hold" placed on offender's real estate license after his many personal accomplishments since his sixteen-year-old conviction warranted expungement of his conviction on equitable grounds, but that the court lacked jurisdiction to grant such relief), *aff'd*, No. 11-10392 (9th Cir. Sept. 4, 2012), *cert. denied*, 133 S. Ct. 2389 (2013).

Law reformers past and present have recognized the essential and constructive institutional role

played by sentencing courts in mitigating the penalties and stigma associated with a criminal conviction in the interests of justice, and this role has long been recognized as appropriate in federal and state courts. When collateral penalties effectively make permanent the otherwise-limited sanctions imposed by the court, the court must have the power to end what it determines amounts to unjust punishment.

C. A Set-Aside Issued Pursuant to the All Writs Act Could Provide Federal Courts an Alternative Basis for Expungement

Although seldom used, the common law writ of audita querela provides a basis for courts to relieve the consequences of an otherwise valid judgment where "an important matter" concerning the continued enforcement of that judgment arises after its issuance. *See Black's Law Dictionary* 126 (10th ed. 2014) (quoting L.B. Curzon, *English Legal History* 103 (2d ed. 1979)). Introduced during the reign of Edward III (1327–1377), and preserved to U.S. federal courts through the 1789 All Writs Act, 28 U.S.C. § 1651(a), audita querela was originally used by judgment debtors against creditors "to obtain relief against the consequences of [a] judgment on account of some matter of defense or discharge arising since its rendition." *Black's Law Dictionary* 120 (5th ed. 1979). But federal and state courts have more recently recognized that the writ can provide relief in extraordinary cases outside of the judgment debtor setting, including where a criminal conviction gives rise to a subsequent injustice. *See, e.g.*, *United States v. Ghebreziabher*, 701 F. Supp. 115 (E.D. La. 1988) (vacating one of three misdemeanor convictions

by writ of audita querela to permit defendant to qualify for immigration amnesty); *United States v. Salgado*, 692 F. Supp. 1265 (E.D. Wash. 1988) (vacating decades-old conviction to enable non-citizen petitioner to qualify for Social Security benefits); *see also United States v. Grajeda-Perez*, 727 F. Supp. 1374 (E.D. Wash. 1989) (vacating conviction under All Writs Act after immigration authorities initiated deportation proceedings despite court's issuance of JRAD at sentencing); *United States v. Khalaf*, 116 F. Supp. 2d 210 (D. Mass. 1999) (vacating improperly-counseled conviction by writs of coram nobis and audita querela).

Audita querela stands apart from coram nobis, a common law writ that provides an avenue for the correction or vacation of a judgment where a fundamental error affects the validity and regularity of the proceedings. *United States v. Morgan*, 346 U.S. 502, 511 (1954); *Foont v. United States*, 93 F.3d 76, 78 (2d Cir. 1996). Coram nobis attacks "a judgment that was infirm, for reasons that later came to light, at the time it was rendered," while audita querela attacks "a judgment that was correct at the time rendered but which is rendered infirm by matters which arise after its rendition." *United States v. Reyes*, 945 F.2d 862, 863 n.1 (5th Cir. 1991).

The Federal Rules of Civil Procedure abolished writs of coram nobis and audita querela in civil proceedings. *See* Fed. R. Civ. P. 60(e). However, in *Morgan*, the Supreme Court explicitly held that the abolition applied only to civil cases, leaving coram nobis available in criminal cases, with the power to grant such relief coming from the All Writs Act. 346 U.S. at 505 n.4, 506. And since the Court's ruling in

Morgan, federal courts have held that audita querela remains available for the same reasons[11] where it fills a "'gap[]' in the current systems of postconviction relief." *United States v. Valdez-Pacheco*, 237 F.3d 1077, 1079 (9th Cir. 2001) (per curiam); *see also Villafranco v. United States*, No. 2:05-CV-368BSJ, 2006 WL 1049114, at *3 (D. Utah Apr. 18, 2006) ("[T]he common law writs, such as coram nobis and audita querela are available to fill the interstices of the federal post conviction remedial framework." (quotations omitted)).

While there is a dispute about whether audita querela relief is available on purely equitable grounds,[12] such relief is available in situations where

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[11] *See, e.g.*, *United States v. LaPlante*, 57 F.3d 252, 253 (2d Cir. 1995) ("Though formally abolished in civil cases, the writs of error coram nobis and audita querela remain available in very limited circumstances with respect to criminal convictions." (internal citations omitted)); *United States v. Fonseca-Martinez*, 36 F.3d 62, 64 (9th Cir. 1994) (per curiam) ("Lower federal courts have held that . . . the Rule 60(b) amendments did not abolish audita querela insofar as it applied in criminal cases.").

[12] Most federal courts have addressed the scope of audita querela in recent years in cases involving the immigration consequences of conviction, and in this context, the courts of appeal have consistently held that the writ cannot provide relief on purely equitable grounds. *See, e.g.*, *Doe v. INS*, 120 F.3d 200 (9th Cir. 1997); *United States v. Johnson*, 962 F.2d 579 (7th Cir. 1992); *Reyes*, 945 F.2d at 866; *United States v. Holder*, 936 F.2d 1 (1st Cir. 1991); *United States v. Ayala*, 894 F.2d 425, 428 (D.C. Cir. 1990).

Considering the history of the writ, however, there is reason to doubt the correctness of the majority position. Indeed, early scholarly commentary supports the position that audita querela has equitable underpinnings. Both Holdsworth and Blackstone viewed audita querela as a writ of equitable nature. 1 William S. Holdsworth, *A History of English Law* 224 (3d ed. 1922)

there is a legal objection to the continued enforcement of a judgment. *See United States v. LaPlante*, 57 F.3d 252, 253 (2d Cir. 1995) ("Audita querela is probably available where there is a legal, as contrasted with an equitable, objection to a conviction."). Consistent with the historical usage of the writ, a legal (or constitutional) objection arising subsequent to and as a result of the conviction provides "some matter of defense or discharge," to justify "relief against the consequences of the judgment." *See Black's Law Dictionary* 120 (5th ed. 1979). Moreover, audita querela's distinction from coram nobis demonstrates that the legal objection can arise out of a consequence collateral to the conviction, though the conviction itself was valid at the time it was entered. On balance, audita querela relief may be appropriate where the totality of the

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(continued…)

(arguing that audita querela is of "essentially equitable character"); 3 William Blackstone, *Commentaries on the Laws of England* 406 (William D. Lewis ed. 1900) (describing audita querela as "in the nature of a bill in equity, to be relieved against the oppression of the plaintiff"). In line with the views of these scholars, there are a number of early state court cases supporting the proposition that audita querela relief can be issued on solely equitable grounds. *See, e.g.*, *Boynton v. Boynton*, 186 Mo. App. 713, 172 S.W. 1175, 1177 (1914) ("[T]he writ audita querela lies 'in the nature of a bill in equity.'" (quoting Blackstone, at 406)); *Bryant v. Johnson*, 24 Me. 304, 306 (1844) (noting that a writ of audita querela is "in the nature of a bill in equity, to be relieved against the oppression of the plaintiff" (quoting Blackstone, at 406)); *Lovejoy v. Webber*, 10 Mass. 101, 103 (1813) ("The remedy is said to be in the nature of a bill in equity.").

circumstances make continued enforcement of the judgment, in whole or in part, unjust.[13]

IV. Clarity Is Needed Regarding Judicial Authority to Expunge or Set Aside Criminal Convictions

As Doe's petition for certiorari explains, the circuit courts do not agree on the proper scope of federal courts' ancillary jurisdiction in criminal cases. Pet. 9-13. Although the law in this area was not previously crystal clear, this Court's decision in *Kokkonen v. Guardian Life Insurance Co.* introduced a great deal of additional ambiguity because of circuit courts' divergent interpretations of *Kokkonen*. 511 U.S. 375 (1994).

In *Kokkonen*, this Court examined whether a federal court on one hand or a state court on the other should adjudicate a state law claim arising out of an alleged breach of a settlement agreement. *Id.* at 381-82. But circuit courts are confused and in conflict regarding whether *Kokkonen* applies to criminal cases, and those courts that do apply *Kokkonen* apply it inconsistently. Pet. 10-13. This erratic application of *Kokkonen* by circuit courts results in unequal access for rehabilitated federal offenders to a judicial remedy that would allow them

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[13] Once a judgment has been set aside in connection with the issuance of audita querela relief, an employer or licensor considering a petitioner's application for a job or a professional license would be guided in an exercise of discretion by the court's judgment that the conviction itself should no longer constitute a basis for adverse action in light of the petitioner's rehabilitation. *See* Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 Duke L.J. 477, 510-11 (1981).

to move past their convictions and fully reintegrate into society. For this reason, the conflict in the circuits demands a resolution.

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There appears to be an emerging consensus, one recognized by Members of Congress on both sides of the aisle, that "[t]he biggest impediment to civil rights and employment in our country is a criminal record." [14] As Senator Rand Paul recently noted:

> Our current system is broken and has trapped tens of thousands of young men and women in a cycle of poverty and incarceration. Many of these young people could escape this trap if criminal justice were reformed, if records were expunged after time served, and if non-violent crimes did not become a permanent blot preventing employment. [15]

Yet despite many successful state and local legal reforms to help alleviate the lasting impact of a criminal record, [16] federal offenders have been left with a single, largely inaccessible, presidential pardon option to obtain relief from a lifetime of disabling collateral consequences. This is woefully

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[14] *U.S. Senators Booker and Paul Introduce Legislation Calling for Criminal Justice Reform* (July 8, 2014), http://www.booker.senate.gov/?p=press_release&id=100.

[15] *Id.*

[16] Collateral Consequences Resource Center, *Round-Up of Second-Chance Legislation, 2013-2016* (Feb. 8, 2017), http://ccresourcecenter.org/2017/02/08/round-up-of-recent-second-chance-legislation-2013-2016/ (providing state-by-state overview of recent legal reforms to alleviate collateral consequences).

insufficient.[17] Instead, to ensure that federal offenders—like many state offenders—are able to fully reintegrate into society after their sentences are served, there must be a role for federal courts to expunge or set aside criminal convictions. Without a judicial supplement to the pardon power, in this age of ready access to criminal history information, any federal conviction will almost assuredly amount to a "life sentence."

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[17] In *The Federalist No. 74*, Alexander Hamilton explained the need for an unrestricted and robust pardon power in light of the severity of criminal laws:

> Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.

The Federalist No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Unfortunately, this vision has not been realized.

CONCLUSION

For the foregoing reasons, *amicus* supports Petitioner's petition for certiorari, and respectfully requests that the petition be granted.

Respectfully submitted,

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