

# 15-1967

United States Court of Appeals  
*for the*  
Second Circuit

**UNITED STATES**

*Respondent-Appellant,*

– v. –

**JANE DOE,**

*Petitioner-Appellee.*

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Appeal from the United States District Court  
For the Eastern District of New York

**Brief of The Association of the Bar of the City of New York  
as *Amicus Curiae* Supporting Petitioner-Appellee Jane Doe**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

## **CONSENT OF THE PARTIES**

All parties have consented to the filing of this amicus curiae brief by the Association of the Bar of the City of New York.

## **INTEREST OF AMICUS CURIAE**

The Association of the Bar of the City of New York (“The Association”) was founded in 1870 and has been dedicated to maintaining the highest ethical standards of the profession, promoting reform of the law, and providing service to the profession and the public.<sup>1</sup> With over 24,000 members, the Association is among the nation’s largest and oldest bar associations.

The Association has long been committed to the fair, efficient, and just administration of the criminal laws. The Association is interested in the reintegration of ex-offenders into the law-abiding, productive mainstream of society. Through its standing committees, the Association has issued numerous

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<sup>1</sup> Pursuant to Local Rule of Appellate Procedure 29.1(b), Amicus states that:

- (a) No party’s counsel authored any part of this brief in whole or in part;
- (b) No party’s counsel contributed money that was intended to fund preparing or submitting this brief; and
- (c) No person contributed money that was intended to fund preparing or submitting this brief.

letters, reports, and amicus curiae briefs on prisoner reentry and the collateral consequences of criminal convictions. The Association has consistently stressed the importance of employment for people with criminal records and the need to minimize obstacles to their employment.

### **SUMMARY OF ARGUMENT**

In an era when criminal records are more accessible than ever, District Courts need to be able to manage the impact of the criminal punishments they impose. For many people with criminal records, their punishment does not end when they have completed their terms of imprisonment or probation, or paid their fines. A criminal record can be a major obstacle to successful reentry into society and, in particular, getting and keeping a job. Furthermore, the burdens of having a criminal record fall heavily on African-Americans and Hispanics, whose involvement in the criminal justice system is disproportionately greater than their share of the population. These concerns are serious, because society as a whole benefits when people with criminal records—who already have paid their debt and are striving to be contributing members of their families and communities—are employed.

In extraordinary circumstances where a criminal record is a persistent obstacle to employment, it is reasonable for a court to exercise its discretion to shield that record from the public. A court's obligation to do justice extends

beyond the entry of judgment. Before imposing a sentence, a court is required to consider the statutory purposes of a sentence, one of which is to provide the defendant with opportunities for rehabilitation. When that court is presented with an application to expunge, therefore, it is reasonable for the court to consider whether the goals of sentencing are being served or undercut by ongoing public access to the case record. By shielding the petitioner's criminal record from the general public while allowing continued access to it for law enforcement purposes, the District Court here struck a reasonable balance between the needs of the individual and the interests of government.

## **ARGUMENT**

### **I. In Extraordinary Circumstances the Public Interest Requires District Courts to be Able to Expunge Convictions from the Public Record.**

#### **A. A person with a criminal record faces major obstacles to employment.**

For someone trying to start over after a criminal conviction, gainful employment is of fundamental importance. Unfortunately, though, “a conviction—even a very old conviction—is a substantial barrier to employment.”<sup>2</sup> To begin

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<sup>2</sup> *United States v. Stephenson*, ---F.Supp.3d ---, 2015 WL 5884810, at \*3 (E.D.N.Y. Oct. 7, 2015) (citing James B. Jacobs, *The Eternal Criminal Record* 275-300 (2015) (describing the many ways in which a criminal record impedes obtaining employment); Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Re-entry*, 151-85 (2005) (discussing employment challenges of released prisoners); Joan Petersilia, *When Prisoners Come Home*, 112-20 (2003) (discussing “employment barriers and workplace restrictions” facing released prisoners)).



with, a patchwork of statutory restrictions puts many public sector and regulated occupations off limits.<sup>3</sup> In New York State, for example, there are over 100 occupations that require some type of license or certification.<sup>4</sup> Many of the licensing statutes require “good moral character” or a similar standard that allows the licensing board to disqualify a person with a criminal record.<sup>5</sup> Nationwide, more than two-thirds of states allow licensing decisions to be made on an arrest record alone.<sup>6</sup> Although some of these licensing restrictions can be justified on public policy grounds, for example, to protect school children and other vulnerable populations, many restrictions can only be described as punitive.<sup>7</sup>

Narrowing the field to those jobs that are not subject to licensing or certification, a person with a criminal record faces more obstacles. Application

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<sup>3</sup> Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. Rev. L. & Soc. Change 585, 597 (2006) (noting that “[e]x-offenders are routinely excluded from many employment opportunities that require professional licenses”).

<sup>4</sup> New York State Department of Labor, Occupations Licensed or Certified By New York State, *available at*, <https://labor.ny.gov/stats/lstrain.shtm> (last visited May 28, 2015).

<sup>5</sup> N.Y. GEN. BUS. LAW § 434(b) (McKinney 2013); N.Y. EXEC. LAW § 435(2)(c)(1) (McKinney 2013).

<sup>6</sup> Alfred Blumstein & Kiminori Nakamura, Op-Ed., *Paying a Price, Long After the Crime*, N.Y. TIMES, Jan. 9, 2012, *available at* <http://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html>.

<sup>7</sup> Deborah Archer & Kele Williams, *Making America “The Land of Second Chances”*: Restoring Socioeconomic Rights for Ex-Offenders, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 532 (2005); Marliana Freisthler & Mark Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration, Employment, and Recidivism in Ohio*, 36 U. TOL. L. REV. 525, 543 (2005).

forms typically ask if the applicant has ever been convicted of a crime. If a person with a criminal record answers truthfully, often the application goes no further. In one prominent study, constructed to compare applicants who were alike in qualifications and experience (except that one in each pair had a criminal record), the applicants with criminal records received one-half to two-thirds fewer call-backs.<sup>8</sup> Even when a person with a criminal record is not required to reveal it in the application process, most employers conduct criminal background checks as a matter of course. A 2012 national survey showed that 69% of responding organizations conducted criminal background checks on all of their job candidates, and an additional 18% of organizations conducted criminal background checks on “select job candidates.” When a criminal record turns up, it frequently scuttles the application or prompts dismissal from the job (as in petitioner’s case). Disturbingly, 42% of the 2012 survey respondents did not allow candidates to explain their records before hiring decisions were made.<sup>9</sup>

The recent movement to forbid employers from asking about a criminal record until a conditional offer of employment has been made, *see* N.Y.C. Code § 8-107 (11a), often called “ban the box,” offers hope that some people with criminal

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<sup>8</sup> Devah Pager, *Marked: Race, Crime and Finding Work in an Era of Mass Incarceration*, 38 (Univ. Chi. Press ed., 2007).

<sup>9</sup> Society for Human Resource Management, *Background Checking—the Use of Criminal Background Checks in Hiring Decisions*, survey report, July 19, 2012, at <http://www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx>.

records will have a greater chance to compete for jobs on merit. However, such laws are not universal. And there are strong countervailing forces, including societal stigma of ex-offenders and employers' liability concerns. Some insurance companies refuse to cover employees who have felony records, adding even more pressure on employers.<sup>10</sup>

A disturbing effect of widespread criminal record checks is the perpetuation of racial disparities in the criminal justice system. At both the state and federal levels, African-Americans and Hispanics are over-represented among those arrested, convicted, and incarcerated for crimes.<sup>11</sup> Easily accessible criminal records follow job applicants for life. As a result, the employment prospects of many African-Americans and Hispanics are unfairly reduced. This effect exacerbates the underlying problem of racial bias in hiring decisions.<sup>12</sup>

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<sup>10</sup> Christopher Stafford, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism*, 13 Geo. J. on Poverty L. & Pol'y 261, 270 (2006) (discussing how tort laws and pressure from private insurers discourage the hiring of ex-offenders).

<sup>11</sup> See, e.g., Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, Human Rights, Vol. 37, No. 4 (Fall 2010); Jennifer Turner & Jamil Dakwar, *Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing*, submitted to the Inter-American Commission on Human Rights (Oct. 27, 2014), available at [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf).

<sup>12</sup> See James B. Jacobs, *The Eternal Criminal Record*, 279-80 (Harvard Univ. Press 2015) (discussing sociologists Richard D. Schwartz and Jerome Skolnick's study finding that a criminal conviction produces "status degradation" with potentially permanent effects, and sociologist Devah Pager's more recent study finding that fictitious job applicants who were white with a criminal conviction were more likely to receive interest from employers than black applicants with no criminal conviction).

**B. Society as a whole benefits when people with criminal records are employed.**

Gainful employment is a central feature of adult life. Work provides not only income, but also intangible benefits, such as self-esteem and status in the community.

Numerous studies confirm what intuition suggests: that people who find employment after a conviction are more likely to comply with the terms of their probation or parole and less likely to be arrested again.<sup>13</sup> Those who are not able to find employment sometimes resort to illegal means to make ends meet.

Meanwhile, those who are conscientiously law-abiding in the wake of their conviction, but unable to find work because of it, may be forced to draw on some form of public assistance to get by (as Ms. Doe did).

The importance of work to public safety and economic empowerment has led many states, counties, and cities to bar employment discrimination on the basis

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<sup>13</sup> See, e.g., Jeremy Travis, Amy L. Solomon & Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* 31 (2001); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 *Crime & Just.* 1, 17 (2001); Christopher Uggen, *Work As a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 *Am. Soc. Rev.* 529, 542-43 (2000); Miles D. Harer, *Recidivism Among Federal Prisoners Released in 1987* 4-5 (1994) available at [http://www.bop.gov/news/research\\_projects/published\\_reports/recidivism/oreprrecid87.pdf](http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf); Theodore G. Chiricos, *Rates of Crime and Unemployment: An Analysis of Aggregate Research Evidence*, 34 *Soc. Probs.* 187, 202 (1987).

of criminal records.<sup>14</sup> When New York passed its anti-discrimination provision in 1976, Governor Hugh Carey declared, “The great expense and time involved in successfully prosecuting and incarcerating the criminal offender is largely wasted if upon the individual’s return to society his willingness to assume a law-abiding and productive role is frustrated by senseless discrimination.”<sup>15</sup>

Although the stigmatization of people with criminal records is apparently based on the notion that the past is prologue, there is a striking lack of evidence that people with criminal records pose any greater risk in the workplace than people without. On the contrary, some studies suggest that there is no meaningful difference between those with criminal records and those without, both in their job performance and in their likelihood of being arrested for a crime.<sup>16</sup>

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<sup>14</sup> See National Employment Law Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, Dec. 1, 2015, available at <http://nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>.

<sup>15</sup> Governor’s Approval Mem. Bill Jacket, L. 1976, ch. 931, 1976 McKinney’s Session Laws of N.Y., at 2459. See also *Acosta v. New York City Dep’t of Education*, 16 N.Y.3d 309, 320 (N.Y. 2011) (“Barring discrimination against those who have paid their debt to society and facilitating their efforts to obtain gainful employment benefits the community as a whole”).

<sup>16</sup> See Brent W. Roberts, et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 *Journal of Applied Psychology* 1427, 1430 (2007); Alfred Blumstein & Kiminori Nakamura, “Redemption” in an Era of Widespread Criminal Background Checks, *National Institute of Justice Journal*, Issue No. 263 (June 2009) at 12-13; Alfred Blumstein & Kiminori Nakamura, “Redemption” in the Presence of Widespread Criminal Background Checks, *Criminology*, Volume 47, Issue 2: 327–357 (May 2009); Megan Kurleychek, Robert Brame & Shawn Bushway, *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Recidivism?* *Criminology and Public Policy*, Vol. 5. No.3 (2006).

Difficulty securing employment is a serious problem for the tens of millions of Americans who have criminal records.<sup>17</sup> No economy can afford the loss of such a large swath of the working-age population. Even more troubling, a recent study estimates that nearly half of all children in the United States have a parent with a record of arrest or conviction for a crime.<sup>18</sup> These children face a heightened risk of family instability and economic insecurity that could alter the trajectory of their lives.

Whatever the contours of the public policy response to the proliferation of criminal records, a United States District Court should have the power to shield a person's criminal record in "extreme circumstances" where the criminal record is a persistent obstacle to employment and self-sufficiency.

**C. Judge Gleeson correctly recognized that a criminal court's obligation extends beyond the entry of judgment.**

Even before a sentence is imposed, the federal courts are required to consider the importance of the defendant finding gainful employment. The District

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<sup>17</sup> See Bureau of Justice Statistics, *Survey of State Criminal History Information Systems*, 2012, a Criminal Justice Information Policy Report, (January 2014) at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>.

<sup>18</sup> Rebecca Vallas, et al., *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children: a Two-Generation Approach*, Center for American Progress (December 2015) at <https://cdn.americanprogress.org/wpcontent/uploads/2015/12/09060720/CriminalRecords-report2.pdf>.

Court is mandated, under 18 U.S.C. §3553(a), to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2,” including “the need to provide the defendant with needed educational or *vocational* training, medical care, or other correctional treatment in the most effective manner” [emphasis added].<sup>19</sup> In sentencing a person to probation, rather than incarceration, a court provides that person with the opportunity to re-engage in society. Parole and probation authorities across the United States, state and federal, recognize the anchoring effect of a steady job and accordingly make employment a top priority for people under their supervision.<sup>20</sup> But the fact of a criminal conviction puts a significant barrier in the way, as the record amply demonstrates in Ms. Doe’s case.

Because a court is required to consider the purposes in 18 U.S.C. §3553(a)(2) before imposing a sentence, it is reasonable for that court, when presented with an application for expungement, to consider whether those purposes are being served or undercut by ongoing public access to the case record. Where

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<sup>19</sup> 18 U.S.C. §3553(a)(2)(D).

<sup>20</sup> See Joan Petersilia, *Probation in the United States, Perspectives*, American Probation and Parole Association (1998) available at [http://www.appanet.org/eweb/Resources/PPPSW\\_2013/docs/sp98pers30.pdf](http://www.appanet.org/eweb/Resources/PPPSW_2013/docs/sp98pers30.pdf) (discussing the history and development of probation programs in the United States); Joan Petersilia, *Parole and Prisoner Reentry in the United States, Perspectives*, American Probation and Parole Association (2000) available at [http://www.appanet.org/eweb/Resources/PPPSW\\_2015/.../su00appa32.pdf](http://www.appanet.org/eweb/Resources/PPPSW_2015/.../su00appa32.pdf) (discussing the history and development of parole programs in the United States).

the public availability of the conviction undercuts these statutory purposes, it is proper for the court to exercise its power in an effort to serve these purposes.

Here the court thoroughly reviewed the case file—including nearly 1,000 pages of petitioner’s probation file—and determined that the public record of her conviction had caused her to lose jobs repeatedly.<sup>21</sup> The court reasonably perceived a conflict between the purposes the sentence was intended to serve and the actual, ongoing, unjust effects of that sentence. Getting to the heart of the problem, the court stated, “I sentenced her to five years of probation supervision, not to a lifetime of unemployment.”<sup>22</sup>

**II. In “extraordinary circumstances,” a District Court retains discretion to shield a criminal record from the public while keeping it accessible for law enforcement.**

Although the petition at issue here was properly termed an application for an order expunging a criminal conviction, the word “expunge” does not accurately describe what the District Court actually ordered. To expunge is to erase or destroy.<sup>23</sup> Rather than order erasure or destruction, the District Court ordered that the government’s records of petitioner’s arrest and conviction, and any other

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<sup>21</sup> *United States v. Doe*, ---F.Supp.3d---, 2015 WL 2452613 (E.D.N.Y. May 21, 2015).

<sup>22</sup> *Id.*

<sup>23</sup> Black’s Law Dictionary, Seventh Abridged Edition, Bryan A. Garner, Ed. (2000).



documents related to the case, be placed in a separate storage facility and that any electronic copies of these records be deleted from the government's databases, electronic filing systems, and public record.<sup>24</sup> Further, the court ordered that petitioner's real name be removed from any index or public record, and that the records not be opened, except in connection with a bona fide criminal investigation by law enforcement authorities.<sup>25</sup>

As a remedy for the petitioner's job instability, the District Court's order effectively sealed her conviction. The decision balanced the interest of the individual in getting and keeping a job against the interest of the government in maintaining records for its ongoing law enforcement needs. This approach was consistent with the federal court's mandate to consider the unique circumstances of each defendant.

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<sup>24</sup> *Doe*, 2015 WL 2452613 at \*6.

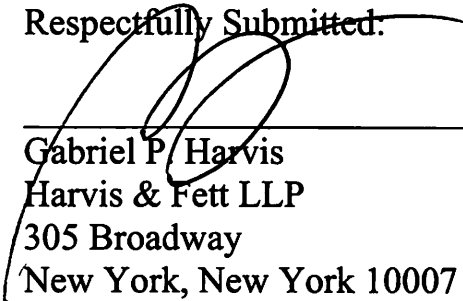
<sup>25</sup> *Id.*

## CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that this Court should affirm the District Court's order.

Dated: December 23, 2015

Respectfully Submitted:



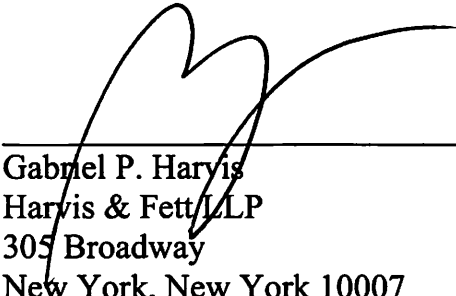
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**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,886 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Microsoft Word Times New Roman, 14-pt. font.



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