No. 22-___

IN THE
Supreme Court of the United States

BRETT C. KIMBERLIN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a petitioner must show he suffers from a "civil disability"—that is, a collateral consequence that causes a substantial and present harm, is specific to the criminal context, and arises solely from the erroneous conviction—before a court can grant a writ of error coram nobis, as the First, Second, Sixth, and Seventh Circuits have held, or whether a court may instead presume that every conviction has collateral consequences that provide adequate standing to seek relief, as the Fourth, Ninth, and Eleventh Circuits have held.

PARTIES TO THE PROCEEDING

Brett C. Kimberlin, petitioner on review, was the petitioner-appellant below.

United States of America, respondent on review, was the respondent-appellee below.

RELATED PROCEEDINGS

Counsel is not aware of any related proceedings according to Supreme Court Rule 14.1(b)(iii).

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Brett C. Kimberlin respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

INTRODUCTION

"The metes and bounds of the writ of coram nobis are poorly defined and the Supreme Court has not developed an easily readable roadmap for its issuance." *United States* v. *George*, 676 F.3d 249, 253 (1st Cir. 2012). The general outline of the right is clear: A writ of error coram nobis provides a way to collaterally attack a criminal conviction when the petitioner is no longer "in custody," and therefore cannot seek relief under 28 U.S.C. § 2255. *See Chaidez* v. *United States*, 568 U.S. 342, 345 n.1 (2013); *see also United States* v. *Morgan*, 346 U.S. 502, 505-511 (1954); *United States* v. *Mayer*, 235 U.S. 55, 67 (1914). But the Court has not "addressed the precise standards that lower

courts should use in deciding whether to issue" the writ. *Murray* v. *United States*, 704 F.3d 23, 29 (1st Cir. 2013).

In particular, the Court has not "spoken on the issue of whether proof of an ongoing civil disability is required in coram nobis cases, and courts that have considered the issue are divided." *Blanton* v. *United States*, 94 F.3d 227, 232 (6th Cir. 1996). Four circuits require a coram nobis petitioner to show that he suffers from a "civil disability"—that is, a collateral consequence that causes a substantial and ongoing harm, is specific to the criminal context, and arises solely from the erroneous conviction (like an enhanced sentence imposed in a later criminal case or a deportation order based on the conviction)—in order to reach the merits of the petitioner's claim. *See, e.g.*, *United States* v. *Delhorno*, 915 F.3d 449, 453 (7th Cir. 2019); *United States* v. *Castano*, 906 F.3d 458, 463 (6th Cir. 2018); *Kovacs* v. *United States*, 744 F.3d 44, 49 (2d Cir. 2014); *United States* v. *George*, 676 F.3d 249, 255-256 (1st Cir. 2012). Three circuits do not impose this requirement, acknowledging instead that all criminal convictions come with the potential for collateral consequences, and accepting the reputational harm of a criminal record as sufficient standing to reach the merits of the coram nobis claim. *See, e.g.*, *United States* v. *Lesane*, 40 F.4th 191, 203 (4th Cir. 2022); *United States* v. *Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020); *United States* v. *Peter*, 310 F.3d 709, 715-716 (11th Cir. 2002) (per curiam).

In the decision below, the Seventh Circuit applied the civil disability requirement to avoid reaching the merits of Brett Kimberlin's coram nobis petition. Kimberlin was wrongly convicted of serious crimes based on evidence obtained through hypnosis and the error-ridden practice of analyzing microscopic hair evidence, in a trial that also had "other substantial problems" that "raise[] real questions of prejudice." *United States* v. *Kimberlin*, 805 F.2d 210, 254-256 (7th Cir. 1986) (Cudahy, J., concurring). In his coram

nobis petition, Kimberlin cited civil disabilities that he suffers as a result of his federal convictions. But Kimberlin did not challenge earlier, unrelated federal convictions. The Seventh Circuit therefore concluded that "[b]ecause his remaining felony convictions mean that the civil disabilities that he protests will remain intact, the equitable relief of *coram nobis* is unavailable." Pet. App. 4a. The courts on the other side of the split do not apply the civil disability requirement and would have reached the merits of Kimberlin's petition. *See, e.g.*, *Lesane*, 40 F.4th at 204 (refusing to "endorse" the "government['s] suggest[ion]" that "because Lesane has a criminal record, it should not make any difference that one of his convictions is for a crime he did not commit").

As even the Solicitor General has acknowledged, this Court should intervene to address the clear, deep, and entrenched circuit split over the civil disability requirement. The Seventh Circuit's "restrictive view of the writ's availability is not shared by all circuits," yet that court has proclaimed its intention to "continue to adhere to [its] own precedents until the Supreme Court changes the law." *United States* v. *Craig*, 907 F.2d 653, 658-659 (7th Cir.), *amended*, 919 F.2d 57 (7th Cir. 1990). In the meantime, this Court's refusal to weigh in is inflicting real-world harm by preventing individuals from clearing their names simply because of geographic happenstance. As even the Seventh Circuit admits, "[e]ventually these disputes must be put to rest." *United States* v. *Bush*, 888 F.2d 1145, 1149 (7th Cir. 1989). The Court should grant certiorari and provide the guidance that the lower courts are asking for.

OPINIONS BELOW

The Seventh Circuit's opinion (Pet. App. 3a-8a) is not reported but is available at 2022 WL 59399. The Seventh Circuit's order denying rehearing (Pet. App. 1a-2a) is available at 2022 WL 709885. The District Court's final order

(Pet. App. 9a-15a) is available at 2021 WL 4025617. The District Court's initial order (Pet. App. 16a-26a) is available at 2020 WL 979850.

JURISDICTION

The Seventh Circuit entered judgment on January 6, 2022. Pet. App. 3a-8a. Petitioner timely sought rehearing, which was denied on March 9, 2022. Pet. App. 1a-2a. Pursuant to this Court's order of May 31, 2022, the deadline for filing a petition for certiorari was extended to August 6, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1651 provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT

A. Legal Background

Coram nobis has a long history as a remedy of last resort to correct errors and achieve justice, "tracing its roots to sixteenth century English common law." *George*, 676 F.3d at 253. "In American jurisprudence the precise contours of coram nobis have not been well defined," but "[i]n English practice the office of the writ was to foster respect for judicial rulings by enabling the same court where the action was commenced and where the judgment was rendered to avoid the rigid strictures of judgment finality by correcting technical errors." *United States* v. *Denedo*, 556 U.S. 904, 910 (2009) (internal quotation marks omitted).

"[I]n its modern iteration coram nobis is broader than its common-law predecessor." *Id.* at 911. Like habeas corpus, the writ of error coram nobis was originally confined to cases where the tribunal lacked jurisdiction or where other errors rendered the proceeding invalid. *See United States* v. *Sawyer*, 239 F.3d 31, 37 (1st Cir. 2001). Coram nobis was available to correct "errors in matters of fact which * * * were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment." *Mayer*, 235 U.S. at 68; *see also Carlisle* v. *United States*, 517 U.S. 416, 429 (1996). But the scope of coram nobis—like that of habeas corpus—has been expanded to provide a remedy for a variety of constitutional errors or otherwise unjust verdicts. *See Morgan*, 346 U.S. at 507-508. Coram nobis can now be used to remedy "fundamental errors" in addition to "technical" ones. *Denedo*, 556 U.S. at 911.

Moreover, "[u]nlike a writ of habeas corpus, a writ of coram nobis is issued once the petitioner is no longer in custody." *Sawyer*, 239 F.3d at 37. Coram nobis fills a narrow gap in federal criminal procedure. A convicted defendant "in custody" has a statutory right to petition to have a sentence or conviction vacated, set aside, or corrected. 28 U.S.C. § 2255. However, if the defendant has already served his sentence, there is no statutory basis to remedy the unlawful conviction. *See Chaidez* v. *United States*, 568 U.S. 342, 345 n.1 (2013). Recognizing this statutory gap, this Court held in *United States* v. *Morgan* that the common law writ of error coram nobis is available in such situations. *See Morgan*, 346 U.S. at 506-507.

The defendant in *Morgan* had previously pleaded guilty to a federal charge and was sentenced to a term of four years, which he served. 346 U.S. at 503-504. After his release from federal custody, he was convicted on a state

charge and given an enhanced sentence as a second offender. *Id.* at 504. He then petitioned for a writ of error coram nobis to set aside the federal conviction on the ground that he had not been given access to a lawyer, in violation of his constitutional rights. *Id.* This Court held that the district court had the power, pursuant to the All Writs Act, 28 U.S.C. § 1651(a), to consider and (if appropriate) grant the petition. *Morgan*, 346 U.S. at 506-07; *see also id*. at 512 ("As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that his conviction was invalid.").

Morgan thus confirmed that, even after a defendant's sentence has been fully served, "federal courts should act in doing justice if the record makes plain a right to relief." *Id*. at 505. As the Court explained: "Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." *Id*. at 512. "Continuation of litigation after final judgment" therefore "should be allowed through this extraordinary remedy," where "circumstances compel[] such action to achieve justice." *Id*. at 511.

B. Factual and Procedural Background

1. In February 1979, Petitioner Brett Kimberlin was charged with federal crimes related to eight explosions that occurred in Speedway, Indiana in September 1978. Pet. App. 4a; *see also United States* v. *Kimberlin*, 805 F.2d 210, 215-216 (7th Cir. 1986). Over the course of three trials in 1980 and 1981, Kimberlin was convicted of impersonating a federal official by wearing a uniform representing the Department of Defense, *see* 18 U.S.C. § 912; unlawfully possessing an official insignia of the Department of Defense and a Presidential seal, *see* 18 U.S.C. §§ 701, 713(a); being a felon in possession of explosives, *see* 18 U.S.C. § 842(i)(1); illegally transporting ammunition, *see* 18 U.S.C. § 922(g); possessing and manufacturing

destructive devices, *see* 26 U.S.C. § 5861(d), (f); 18 U.S.C. § 5871; and maliciously causing damage by means of explosives, *see* 18 U.S.C. § 844(f), (i). *United States* v. *Kimberlin*, 781 F.2d 1247, 1248 (7th Cir. 1985).

The case was heard three separate times by three different juries. The first jury could not reach a unanimous verdict on whether Kimberlin was guilty any charges related to explosives or ammunition. *Id.* at 1248-49. The jury did, however, convict Kimberlin of impersonating a federal official by wearing a uniform representing the Department of Defense and of unlawfully possessing official insignia of the Department of Defense. *Id*. at 1249. The evidence at trial showed that Kimberlin had worn a Department of Defense patch on his shirt while attempting to purchase, at a printing shop, copies of the presidential seal, stamps that said "Top Secret" and "U.S. Department of Defense," and other similar items. *Id*.; *see also* Pet. App. 59a, 94a. Kimberlin had purchased the uniform at an army surplus store, and had photocopied the presidential seal from the "World Book Encyclopedia." Pet. App. 134a; Decl. of Brett C. Kimberlin (hereinafter "Kimberlin Decl.") ¶ 13, *Kimberlin* v. *United* States¸ No. 1:18-cv-01141-TWP-MPB (S.D. Ind. Jan. 10, 2019), ECF No. 24-1.[1]

[1] Although Kimberlin was tried on both the explosives charges and the impersonation charges in the first trial, the only relationship between the two sets of charges is that the impersonation charges provided the basis for the government's search of a Chevrolet Impala that Kimberlin had driven, which produced evidence relevant to the explosives charges. *Kimberlin*, 805 F.2d at 228. An FBI agent "had been called to a printing establishment," where he "observed defendant wearing clothing with badges and insignia" that were "identical to that of the Security Police of the Defense Department," with "a facsimile of the Presidential Seal" in hand. *Id.* Because the agent had seen Kimberlin "drive the Impala into the parking lot," the agent obtained a warrant to search the car for "similar badges and documents." *Id*. "The ATF agents who knew that defendant was a suspect in the bombings and the FBI agents

Before the second trial, the district court granted Kimberlin's motion to sever the felon-in-possession charges from the remaining counts. *Kimberlin*, 781 F.2d at 1249. Kimberlin was then tried and convicted on those charges. *Id*. The evidence at trial showed that Kimberlin had previously been convicted of a felony. *Kimberlin*, 805 F.2d 220. The evidence also showed that, in the summer of 1975, years before the Speedway bombings, Kimberlin had been developing some land that he owned in rural Indiana. *Id*. Kimberlin hired an architect for that work, who then purchased explosives to use in the project. *Id.* One of Kimberlin's business associates testified that, also in the summer of 1975, Kimberlin asked him to help unload a truck. *Id*. "In the process defendant warned [the associate] about two cardboard boxes of explosives in the trunk. He said these were some the architect had purchased for him and that the caps were in the cab." *Id*.

At the third trial—which focused exclusively on the charges that Kimberlin possessed and manufactured destructive devices and caused damage by means of explosives—most of the evidence relied on by the prosecution was obtained through hypnosis. "[S]ix witnesses had been hypnotized" by local police officers "during the investigation of the bombings." *Id*. at 216. These hypnotized witnesses were store clerks at sports and electronics shops who testified that they saw Kimberlin purchase or possess lead balls, batteries, and timers. *Id.* at 221-223. The

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involved in his arrest on the insignia charges became aware of each other's interest" after the FBI agent obtained the Impala search warrant. *Id.* The "ATF agents were present when the search was made," and then sought their own search warrant based on the items that they saw in the trunk during the FBI's search. *Id.*

prosecution introduced recordings and transcripts of the hypnosis sessions into evidence. *Id* at 216.[2]

"The evidence excluding the testimony of the six hypnotized witnesses," was entirely "circumstantial." *Id.* at 219, 221. Much of that evidence focused on explosives, batteries, and timer parts that investigators found at each of the bombing sites. *Id.* at 219-220; 229-230. The explosives used in the bombings were the same make as explosives that the architect had purchased years earlier to use in construction on Kimberlin's property. *Id.* at 220. And investigators found traces of a chemical substance uniquely found in explosives, timers, batteries, lead shot, and lead balls in a car that Kimberlin did not own but had used in the weeks after the bombings. *Id*.

An expert witness also presented microscopic hair analysis evidence that compared Kimberlin's hair to hair found on an explosive recovered from one of the sites—a practice that the FBI has since acknowledged resulted in errors in upwards of 90% of cases.[3] The expert concluded that the hairs likely had a common origin, though he could not confirm they were a match. *United States* v. *Kimberlin*, No. 21-2714, 2022 WL 1553257, at *1 (7th Cir. May 17, 2022).

Finally, one witness who had not been hypnotized testified that he saw a man step out of a Mercedes and place a paper sack in a trash can at the site of the first explosion

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[2] Although Kimberlin moved to suppress that testimony as unreliable, his motion was denied. *Kimberlin*, 805 F.2d at 216. Instead, the court merely "told the jury not to attach greater weight or significance to testimony of witnesses who have undergone hypnosis than that given to the testimony of other witnesses, and that the jury may judge what effect, if any, the process of hypnosis had upon the witness' memory and ability to recall." *Id.* The Seventh Circuit affirmed that ruling on appeal. *Id.* at 219.

[3] *See* Press Release, Fed. Bureau of Investigation, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review (Apr. 20, 2015).

some time before the bomb went off. *Kimberlin*, 805 F.2d at 220-221. This witness identified the man with the paper sack as Kimberlin even though the witness saw him only through a rearview mirror. *Id.* The witness did not contact government agents to relay this information until approximately two and a half years after the event, well after the first trial and the significant publicity that had surrounded it. *Id.* at 220-21, 233. The witness admitted that he had seen Kimberlin's picture on television multiple times prior to contacting government agents about what he had seen. *Id.* at 233.

As Judge Cudahy observed when considering Kimberlin's direct appeal from his conviction on the explosives charges, "[t]here are other substantial problems" with Kimberlin's trial beyond the "very serious dangers of using hypnotically induced testimony" that "raise[] real questions of prejudice." *Id.* at 254-56 (Cudahy, J., concurring). The prosecution "show[ed] the jury mug shots of the defendant taken in connection with another charge." *Id*. at 256. "The jury also learned in one way or another about Kimberlin's connection with a variety of other 'bad acts' like possession of the uniform of a Defense Department security officer, participation in a drug conspiracy and possession of weapons." *Id*. Although "these matters, taken individually, may not be in themselves of crucial significance," "the cumulative impression on the jury raises real questions of prejudice." *Id*.

Other evidence that surfaced after trial also undermines the convictions. Brooke Appleby, the local police detective who had hypnotized the witnesses who testified at trial, and who testified himself as a government witness in the case, revealed that he had been investigating and periodically surveilling Kimberlin for years prior to the Speedway Bombings. Pet. App. 49a-50a. Over the years, Appleby had complied "a six to eight-inch" investigative file focused on Kimberlin containing "extensive details of that

surveillance." *Id.* at 50a. When Appleby was unable to make the case to bring other charges against Kimberlin, he instead gave the file to the federal agents investigating the Speedway Bombings. *Id*. That file—and Appleby's prior surveillance—was never disclosed to the defense. *Id*. at 51a. Moreover, Appleby was related to a juror, and neither Appleby nor the juror disclosed that relationship to the Court or the defense. *Id*. at 50a-51a.

Kimberlin was sentenced to an aggregate term of 51 years, six months, and 19 days imprisonment. *Kimberlin*, 675 F.2d at 867; *Kimberlin* v. *White*, 7 F.3d 527, 529 (6th Cir. 1993). Kimberlin served his sentences, and was released from imprisonment in 2001. Pet. App. 5a.

2. In 2018 and 2019, Kimberlin petitioned for a writ of coram nobis. Pet. App. 27a-39a, 40a-55a, 132a-135a, 138a-143a. Kimberlin asked the district court to vacate his convictions related to the Speedway Bombings for several reasons, including that later Supreme Court decisions undermined some of the convictions and that others were based on now discredited scientific and investigative methods.[4] Pet. App. 27a-39a, 40a-55a, 132a-135a, 138a-143a. First, Kimberlin asked the district court to vacate his convictions for receiving explosives as a previously convicted felon because the Government failed to prove that Kimberlin knew he had been convicted of a felony. Pet. App. 27a-39a; *see Rehaif* v. *United States*, 139 S. Ct. 2191 (2019). Second, Kimberlin asked the district court to vacate his convictions for impersonating a federal official and for illegally using the Presidential seal and a Department of Defense insignia because the act of wearing a government uniform can involve protected speech. Pet. App. 57a-

[4] Kimberlin initially proceeded before the District Court with the help of counsel. However, Kimberlin's counsel passed away relatively early on in the proceedings. Kimberlin proceeded pro se after that. Pet. App. 18a.

65a, 127a-130a, 133a-137a; *see United States* v. *Alvarez*, 567 U.S. 709, 715 (2012). And third, Kimberlin asked the district court to vacate his other bombing-related convictions because of the ineffective assistance of counsel that he received, and because of the faulty evidence on which those convictions were based, including testimony from hypnotized witnesses and microscopic hair evidence. Pet. App. 40a-55a, 70a-77a.

Kimberlin asserted that because of these convictions, he faces civil disabilities: among other things, he cannot serve on a jury, he cannot renew his pilot's license, and he cannot obtain federal grants for the non-profit organization that he leads. Pet. App. 5a. Kimberlin also described other ways in which his convictions have been harmful to him. He was denied a "secured car loan," despite his "perfect credit," "no debt," and the fact that he has "had the same job for more than 15 years." Kimberlin Decl. ¶ 1. His prior convictions also "forced the cancellation of a multi-year project" that Kimberlin had won with "the State Department." *Id.* ¶ 8. And he and his family "have suffered years of death threats, stalkers, and assaults" from people who believe he is "a fraudster and terrorist" because of his convictions. *Id.* ¶ 7.

The district court denied Kimberlin's coram nobis petition. Pet. App. 16a-26a. The district court reasoned that Kimberlin could obtain coram nobis relief only if *every single* felony conviction yielding the unwanted civil disabilities were removed, and Kimberlin did not challenge "a 1974 perjury conviction" or a "1979 conspiracy to distribute marijuana conviction." Pet. App. 13a. "[B]ecause he has been convicted of multiple felonies in separate trials," including the convictions that Kimberlin did not challenge in his coram nobis petition, "a successful challenge to any one conviction will not relieve him of these impediments." Pet. App. 20a. The district court reasoned that "[t]hose felony convictions" would still "interfere with his ability to sit on

a jury in Maryland state court, renew his pilot's license, and obtain government grants" even if all of the convictions Kimberlin had challenged were overturned. *Id.* Kimberlin filed a motion for reconsideration, which the district court denied in relevant part. Pet. App. 9a-15a.

The Seventh Circuit affirmed the denial of Kimberlin's coram nobis petition. Pet. App. 3a-8a. The panel briefly discussed Kimberlin's argument that his impersonation conviction could not stand under more recent Supreme Court precedent, but declined to address the merits of his other claims because "a coram nobis challenge that might eliminate some felony convictions but leaves intact others that yield the same civil disabilities does not warrant relief." Pet. App. 6a-7a. Like the district court, the panel reasoned that because Kimberlin did not challenge his earlier, unrelated "felony convictions for marijuana possession and perjury" and "does not contest the district court's conclusion that his ongoing civil disabilities will remain intact by virtue of these unchallenged convictions," "he cannot obtain the relief he seeks in his coram nobis petition." Pet. App. 7a.

The Seventh Circuit denied Kimberlin's timely petition for rehearing. Pet. App. 1a-2a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN CLEAR, ACKNOWLEDGED, AND ENTRENCHED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

This case implicates an entrenched circuit split on whether a "civil disability"—that is, a collateral consequence that causes substantial and ongoing harm, is specific to the criminal context, and arises solely from the erroneous conviction—is a necessary prerequisite to grant coram nobis relief. Four circuits, including the court below, hold that a petitioner must prove he suffers from a civil disability in order to receive relief. Three circuits, by

contrast, hold that a court may instead presume that any conviction has collateral consequences that provide adequate standing to seek relief. More than 30 years have elapsed since the courts first split from one another, *see Keane*, 852 F.2d 199; *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989), and although courts on both sides of the split have acknowledged the disagreement, *see, e.g.*, *Bush*, 888 F.2d at 1149; *Mandel*, 862 F.2d at 1075, none has indicated a willingness to switch sides. Only this Court's intervention can end the impasse.

A. The First, Second, Sixth, And Seventh Circuits Hold That A Coram Nobis Petitioner Must Show He Suffers From A Civil Disability To Prevail.

Four circuits hold that a court may not grant a writ of error coram nobis unless the petitioner can show that he suffers from a "civil disability. " *See, e.g.*, *United States* v. *Castano*, 906 F.3d 458, 463 (6th Cir. 2018); *Williams* v. *United States*, 858 F.3d 708, 715 (1st Cir. 2017); *Kovacs* v. *United States*, 744 F.3d 44, 49 (2d Cir. 2014); *United States* v. *Sloan*, 505 F.3d 685, 697 (7th Cir. 2007).

In these circuits, "more than the mere fact of a conviction is required" to meet the civil disability test. *George*, 676 F.3d at 256 n.2. Once the sentence has been served out, the fact of the conviction amounts to "an injury to reputation." *United States* v. *Waters*, 770 F.3d 1146, 1147 (6th Cir. 2014). And reputational harm—"a black mark"—"is not a civil disability." *Keane*, 852 F.2d at 204; *see also, e.g.*, *United States* v. *Nat'l Plastikwear Fashions, Inc.*, 368 F.2d 845, 846 (2d Cir. 1966) (per curiam) (The "desire to be rid of the stigma" of conviction is not enough.). Instead, a civil disability is a collateral consequence of conviction that "caus[es] a present harm" that is "more than incidental," *Craig*, 907 F.2d 658, is "unique to criminal convictions," *Keane*, 852 F.2d at 203, and arises solely as a result of the

challenged conviction, so that a "judicial declaration" that the challenged conviction was erroneous "will redress the injury," *Bush*, 888 F.2d 1150.

The Seventh Circuit traces this requirement back to *Morgan*, recalling that "Morgan himself was in prison, serving a sentence that had been augmented as a result of the earlier conviction," *Bush*, 888 F.2d at 1148. In describing the importance of the writ of coram nobis, the *Morgan* Court had stated that "[a]lthough the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." 346 U.S. at 512-513. "Combining this observation with the systemic interests supporting the finality of judgments" and the belief that § 2255's "'custody' requirement" "must be given force" in the coram nobis context, the Seventh Circuit reasons that "*coram nobis* is unavailable unless" a defendant is suffering from the specific type of burden that that court named a "civil disability." *Bush*, 888 F.2d at 1148.

The First, Second, and Sixth Circuits have each adopted the Seventh Circuit's formulation of the "civil disability" test. *See, e.g.*, *Castano*, 906 F.3d at 463 (Sixth Circuit quoting the Seventh Circuit's description of a "qualifying civil disability" and holding that petitioners in the Sixth Circuit "must meet [that] test"); *George*, 676 F.3d at 256 & n.3 (First Circuit expressing doubt about the precise contours of the civil disability requirement, but citing and adopting the Seventh Circuit's views that "a conviction alone is not enough," the disability must be an "ongoing loss" and "it must be shown that the court's decree will eliminate the claimed collateral consequence and bring about the relief sought"); *United States* v. *Scanio*, No. 97-1584, 1998 WL 802060 (table), at *1 (2d Cir. Nov. 12, 1998) (Second Circuit citing the Seventh Circuit's *Bush* decision and denying coram nobis on the basis of the "requirement that the petitioner demonstrate continuing legal consequences from

his conviction" that are more than "mere desire to be rid of the stigma of conviction," are not "purely speculative") (internal quotation marks and citation omitted).

Very few collateral consequences meet the "civil disability" test. A criminal sentence that has been prolonged by a prior conviction is a civil disability. *See, e.g.*, *Nicks* v. *United States*, 955 F.2d 161, 167 (2d Cir. 1992); *Murray*, 704 F.3d at 28-29, 31; *Blanton*, 94 F.3d at 232; *Keane*, 852 F.2d at 203. As is a deportation order. *See, e.g.*, *Delhorno*, 915 F.3d at 453; *Kovacs*, 744 F.3d at 49; *Williams*, 858 F.3d at 715.

Many other hardships that most people would understand to be collateral consequences of conviction do *not* meet the "civil disability" test. For example, the loss of "the Second Amendment right to keep and bear arms" is not a civil "disability [that] support[s] granting the writ." *Scanio*, 1998 WL 802060, at *2. Nor is the loss of an occupational license. *See, e.g.*, *Craig*, 907 F.2d at 659 (holding that disbarment was not civil disability); *c.f. Fleming* v. *United States*, 146 F.3d 88, 91 (2d Cir. 1998) (citations "to prohibitions on the licensing of securities brokers" insufficient). Nor are financial penalties. *See, e.g.*, *George*, 676 F.3d at 256 n.3 (loss of pension benefits and healthcare coverage not a civil disability); *Sloan*, 505 F.3d at 697-698 (restitution order not a civil disability); *Craig*, 907 F.2d at 660 (removal from pension plan not a civil disability) *Keane*, 852 F.2d at 203 (criminal fine not a civil disability). Indeed, the civil disability requirement is so restrictive that the Sixth Circuit has opined that the civil disability requirement "poses an issue" for a defendant who has been convicted but not yet sentenced for the subsequent crime. *See Castano*, 906 F.3d at 463; *see also id.* at 463-464 (explaining that, although the prior "conviction he challenges has appeared in his current presentence investigation report, and it forms the basis for a recommendation of a two-level enhancement," "the sentencing judge has vast discretion to

consider Castano's past relevant conduct even if one of his 2006 convictions is vacated").

And where a petitioner challenges only some of his prior convictions through a coram nobis petition, courts applying the civil disability requirement will deny the petition because "a single felony conviction supports any civil disabilities and reputational injury [the defendant] may have to endure." *Keane*, 852 F.2d at 205; *see also, e.g.*, *United States* v. *Atkin*, 106 A.F.T.R.2d (RIA) (6th Cir. 2010) (similar).

B. The Fourth, Ninth, And Eleventh Circuits Hold That The Government Must Rebut A Presumption Of Continuing Consequences To Prevent The Court From Reaching The Merits Of A Coram Nobis Petition.

Three circuits, by contrast, hold that a court may instead presume that any conviction has collateral consequences that provide adequate standing to seek relief. *See, e.g.*, *United States* v. *Lesane*, 40 F.4th 191, 203-204 (4th Cir. 2022); *United States* v. *Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020); *United States* v. *Peter*, 310 F.3d 709, 715-716 (11th Cir. 2002) (per curiam).

The Ninth Circuit has "repeatedly reaffirmed the presumption that collateral consequences flow from any criminal conviction" based on the mootness principles developed in *Sibron* v. *New York*, 392 U.S. 40 (1968). *Hirabayashi* v. *United States*, 828 F.2d 591, 606 (9th Cir. 1987). In *Sibron*, this Court held that an appeal in a criminal case was not moot even though the petitioner had completely served his sentence, because the government could not show that there was "no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." 392 U.S. at 57. The Ninth Circuit applies the *Sibron* "no possibility" test in coram nobis cases, and requires the government rebut a presumption that civil

disabilities exist. *See, e.g.*, *Hirabayashi*, 828 F.2d at 606; *United States* v. *Walgren*, 885 F.2d 1417, 1421 (9th Cir. 1989). Thus, unless the government comes forward with its own evidence of the lack of adverse consequences, the coram nobis petitioner need only show those "adverse consequences from the conviction sufficient to satisfy Article III's case-and-controversy requirement." *Kroytor*, 977 F.3d at 961; *see also United States* v. *Riedl*, 496 F.3d 1003, 1006 (9th Cir. 2007) (collecting Ninth Circuit cases applying this test).

The Fourth Circuit takes the same approach, reasoning that "[c]onviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities." *Mandel*, 862 F.2d at 1075 n.12 (quoting *Parker* v. *Ellis*, 362 U.S. 574, 593-594 (1960) (Warren, C.J., dissenting)); *see also id.* at 1075 (granting coram nobis relief and noting that, without it, petitioners "would face the remainder of their lives branded as criminals"). These risks, which are "sufficiently adverse to satisfy Article III's case or controversy requirement," are the only "consequences flowing to the petitioner from his convictions" necessary for a court "to reach an ultimate decision on coram nobis relief." *Bereano* v. *United States*, 706 F.3d 568, 576 (4th Cir. 2013).

The same Article III-based test applies in the Eleventh Circuit. *See, e.g.*, *Gonzalez* v. *United States*, 981 F.3d 845, 852 (11th Cir. 2020) ("The risk of removal is an adverse consequence of conviction sufficient to create an actual or imminent injury for a case or controversy under Article III."). Like the Ninth and Fourth Circuits, the Eleventh Circuit acknowledges that "it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." *Peter*, 310 F.3d at 715-716 (quoting *Spencer* v. *Kemna*, 523 U.S. 1, 12 (1998)).

Because these courts recognize that the reputational harm from a conviction is damaging enough for federal relief, coram nobis is available in these circuits even if the petitioner has other convictions that would remain intact. *See, e.g.*, *Lesane*, 40 F.4th at 204 (refusing to "endorse" the "government['s] suggest[ion]" that "because Lesane has a criminal record, it should not make any difference that one of his convictions is for a crime he did not commit"); *Walgren*, 885 F.2d at 1421-22 (assuming that conviction on one count is valid and granting coram nobis relief on two other counts).

This entrenched split warrants this Court's review.

II. THE SEVENTH CIRCUIT RESOLVED THE QUESTION INCORRECTLY.

The Seventh Circuit has transformed the statement in *Morgan* that "[s]ubsequent convictions may carry heavier penalties, civil rights may be affected" into a binding and narrow threshold "civil disability" requirement that few—if any—collateral consequences satisfy. That single line in that single opinion cannot bear the weight that the Seventh Circuit would place on it.

A. This Court Presumes The Existence Of Collateral Consequences That Justify The Court's Consideration Of A Collateral Attack On A Conviction.

Although this Court did not explicitly set out a standard in *Morgan* for standing to receive coram nobis relief, where, as here, "the defendant challenges his underlying conviction, this Court's cases have long presumed the existence of collateral consequences" that justify intervention. *United States* v. *Juvenile Male*, 564 U.S. 932, 936 (2011) (emphasis omitted).

That principle dates back at least to *Carafas* v. *LaVallee*, 391 U.S. 234 (1968), which this Court heard after a state prisoner, who had petitioned for a writ of habeas corpus,

had completed his term of incarceration and been discharged from parole. *Id.* at 236. The state argued the Court lacked jurisdiction to hear the petition because it was moot; the petitioner's release from custody and his subsequent completion of parole alleviated any injury caused by his unlawful confinement. *Id.* at 236-237. The Court rejected that argument, explaining that as a "consequence of his conviction, [the petitioner] cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; [and] he cannot serve as a juror." *Id.* at 237 (footnotes omitted). Because of these "disabilities or burdens," the Court held that the petitioner maintained "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Id.* (internal quotation marks and citation omitted).

In *Sibron v. New York*, 392 U.S. 40 (1968), a decision issued shortly after *Carafas*, this Court further explained that courts should presume a petitioner for collateral relief suffers from collateral consequences *even where the petitioner does not challenge all of his previous convictions*. The Court saw "no relevance in the fact that Sibron [was] a multiple offender" because it is "impossible * * * to say at what point the number of convictions on a man's record renders his reputation irredeemable." 392 U.S. at 56. It would be similarly "impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated." *Id.* Moreover, courts "cannot foretell what opportunities might present themselves in the future for the removal of other convictions from an individual's record," and should therefore err on the side of "eliminat[ing] the source of a potential legal disability" when a conviction is challenged. *Id.* at 56-57.

The Court has affirmed and re-affirmed the lesson of *Carafas* and *Sibron* that courts should decline "all inquiry

into the actual existence of specific collateral consequences" and "presum[e]" that there are collateral consequences associated with each conviction in a criminal judgment that permit courts to reach the merits of petitions for collateral relief. *Sibron*, 392 U.S. at 55. In *Evitts* v. *Lucey*, 469 U.S. 387 (1985), this Court held that a habeas corpus action was not moot even though the petitioner had been released from custody and Kentucky had restored his civil rights, because "some collateral consequences of his conviction remain, including the possibility that the conviction would be used to impeach testimony * * * in a future proceeding and the possibility that it would be used to subject him to persistent felony offender prosecution if he should go to trial * * * in the future." *Id*. at 391 n.4. And in *Juvenile Male*, this Court again explained that the "case or controversy" requirement "[i]n criminal cases * * * means that a defendant wishing to continue his appeals after the expiration of his sentence must suffer some 'continuing injury' or 'collateral consequence'" and "[w]hen the defendant challenges his underlying *conviction*, this Court's cases have long presumed the existence of collateral consequences." 564 U.S. at 936.

Morgan—the case in which this Court confirmed that the writ of coram nobis is available under the All Writs Act—is of a piece with those decisions. Indeed, the *Sibron* court cited and discussed *Morgan* in explaining why the completion of a sentence does not moot a criminal case. In the *Sibron* Court's view, "there was no indication that the recidivist increment would be removed from [Morgan's] state sentence upon invalidation of the federal conviction," and the *Morgan* Court did not "canvass[] the possible disabilities which might be imposed upon Morgan or allud[e] specifically to the recidivist sentence." *Sibron*, 392 U.S. at 54-55 (citing *Morgan*, 346 U.S. at 516 & 505 n.4 (Minton, J., dissenting)). Instead, "the Court chose to rest its holding that the case was not moot upon a broader view of the

matter," acknowledging that it is an "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." *Id.* at 55.

B. The Seventh Circuit's Contrary Conclusion Rests On A Misreading Of *Morgan*.

The Seventh Circuit has reasoned that a civil disability requirement is needed because the *Morgan* Court noted that the petitioner there suffered from a civil disability; to preserve the finality of criminal judgments, and as a substitute for the "custody" requirement of § 2255. *Bush*, 888 F.2d at 1148 (*Morgan* rationale); *Keane*, 852 F.2d at 202-204 (finality rationale); *Bush*, 888 F.2d at 1147-48 (custody substitute rationale). That reasoning is wrong at every turn.

First, the *Morgan* Court's discussion of collateral consequences is most naturally read as referring to the presumption that convictions have collateral consequences instead of requiring a finding of a collateral consequence in each case. *See Hirabayashi*, 828 F.2d at 606 (citing *Sibron*, 392 U.S. at 37); *see also supra* at 19-22. To read it otherwise would upend the long-standing principle that reputational harm—including the stigma of a wrongful criminal conviction—is cognizable in federal court. The civil-disabilities test arises in part from the idea that reputational harm alone is insufficient standing. *See, e.g., Keane*, 852 F.2d at 204 ("A strong emotional interest is not enough to produce an Article III case or controversy."). But "conventional standing doctrine and common-law defamation are two well-established areas of law that already recognize reputational harm as real, weighty, and deserving of legal redress." David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 B.Y.U. L. Rev. 1277, 1310 (2009); *see also, e.g.*, *Meese* v. *Keene*, 481 U.S. 465, 472-477 (1987) (discussing reputational harm in context of standing).

Second, other features of the coram nobis case law adequately preserve the finality requirement. The Court was "careful in *Morgan* to limit the availability of the writ to 'extraordinary' cases presenting circumstances compelling its use 'to achieve justice'" "[t]o confine the use of coram nobis so that finality is not at risk in a great number of cases." *Denedo*, 556 U.S. at 911 (quoting *Morgan*, 346 U.S. at 511); *see also Morgan*, 346 U.S. at 509 n.15 (explaining that alleged error must have "rendered the proceeding itself irregular and invalid"). Lower courts generally interpret this requirement to mean that coram nobis is available only if (1) new facts have emerged showing a fundamental error in the underlying conviction; *see, e.g.*, *Kandiel* v. *United States*, 964 F.2d 794, 797 n.1 (8th Cir. 1992); *United States* v. *Miles*, 553 F. App'x 846, 848 (10th Cir. 2014); or (2) after the final disposition of the case, the Supreme Court substantively narrowed the interpretation of the relevant criminal statute so as to decriminalize the actions for which the defendant was convicted, *see, e.g.*, *Peter*, 310 F.3d at 715; *Mandel*, 862 F.2d at 1072-74. Very few petitioners can meet these requirements. The requirement that a petitioner show a "fundamental error" therefore adequately protects the finality of criminal convictions.

Third, as the Fourth Circuit has pointed out, *see Mathis* v. *United States*, 369 F.2d 43, 46-47 (4th Cir. 1966), the *Morgan* Court specifically rejected the argument that § 2255's "in custody" provision should be given effect in the coram nobis context, *see Morgan*, 346 U.S. at 510 ("The contention is made that § 2255[,] * * * should be construed to cover the entire field of remedies in the nature of coram nobis in federal courts. We see no compelling reason to reach that conclusion."). As the *Morgan* Court explained, Congress did not intend to restrict other post-conviction remedies by enacting § 2255. "[T]he purpose of 2255 was 'to meet practical difficulties' in the administration of federal habeas corpus jurisdiction," not to "'impinge upon prisoners'

rights or collateral attack upon their convictions,'" such that other common law remedies like coram nobis would be affected by § 2255's enactment. *Id.* at 511 (quoting *United States* v. *Hayman*, 342 U.S. 205, 219 (1952)).

III. AS THE UNITED STATES AND THE COURTS OF APPEALS HAVE ACKNOWLEDGED, THE QUESTION PRESENTED IS WORTHY OF THIS COURT'S REVIEW.

A. The United States Has Sought Certiorari On This Question Presented, And Has Never Disavowed Its Position That The Question Is Cert-Worthy.

The United States has repeatedly sought certiorari on this question presented. The United States filed a petition for certiorari from a Fourth Circuit decision in 1989, explaining that "there is considerable confusion in the courts of appeals with respect to the proper standard for granting coram nobis relief." Pet. for Cert., *United States* v. *Mandel*, No. 88-1759, 1989 WL 1174213, at *6 (U.S. Apr. 28, 1989). That same term, the United States acquiesced in a petition for certiorari from a Seventh Circuit decision, which asked "[w]hether petitioner is entitled to a writ of error coram nobis" when "petitioner suffers no current civil disability as a result of his conviction." Br. for the United States, *Keane* v. *United States*, No. 88-1178. "Given the acknowledged conflicts as to what sort of lingering consequences a litigant must demonstrate to obtain coram nobis review," the United States "believe[s] that review is warranted." *Id.*

The United States has never disavowed its position that the question presented is cert-worthy. Instead, the government has merely waived its opportunity to respond or focused on vehicle problems with other petitions presenting this issue. *See, e.g.*, Br. for the United States in Opp'n, *Tanner* v. *United States*, No. 93-1324, 1994 WL 16100398, at *6 (U.S. Apr. 1994) (acknowledging "a conflict on how to determine whether a conviction had the kind of continuing consequences that would justify coram nobis relief"); Br.

for the United States in Opp'n, *Craig* v. *United States*, No. 90-1320, 1991 WL 11177847, at *7 (U.S. Apr. 22, 1991) (noting that the United States had twice "urged the Court to resolve the conflict on this issue" but the Court "denied certiorari in both cases") (citations omitted); *see also, e.g.*, Waiver, *Harkonen* v. *United States*, No. 18-417 (Oct. 10, 2018); Docket, *Atkin* v. *United States*, No. 09-1441 (June 3, 2010) (noting United States' waiver of right to respond).

Since this Court declined to take up the question presented on the United States' request, the United States has continued to advocate for undecided circuits to adopt the Seventh Circuit's civil disabilities test. At times, the United States has acknowledged the contrary authority from the Ninth, Fourth, and Eleventh Circuits. *See, e.g.*, Br. for Appellee United States, *United States* v. *Biondi*, No. 14-1889, 2014 WL 3571869, at *19-20 (3d Cir. July 10, 2014); Br. for the United States, *United States* v. *Sonneberg*, No. 01-2067, 2002 WL 32391245, at *31 (3d Cir. Sept. 11, 2002). At other times, it has not. *See, e.g.*, Br. for the United States, *United States* v. *Banks*, No. 18-1165, 2018 WL 2090003, at *14 (3d Cir. Apr. 26, 2018); Br. for the United States, *United States* v. *Glinsey*, No. 08-60697, 2009 WL 4901435 (5th Cir. Apr. 8, 2009); Br. for the United States, *United States* v. *Castro*, No. 92-2909, 1993 WL 13121939, at *11 (5th Cir. July 9, 1993).

B. The Courts Of Appeals Have Repeatedly Asked For This Court's Guidance On This Question Presented.

Over the 30 years that the split has persisted, multiple courts of appeals have acknowledged the split and asked for this Court's intervention. As the Seventh Circuit said in 1989, the Seventh Circuit's earlier decision in "*Keane* recognized that the courts of appeals disagreed about several aspects of coram nobis practice," and "[s]ince then the

courts' paths have diverged farther." *Bush*, 888 F.2d 1148. "Eventually these disputes must be put to rest." *Id.* at 1149.

More recently, the First Circuit noted that "[t]he metes and bounds of the writ of coram nobis are poorly defined and the Supreme Court has not developed an easily readable roadmap for its issuance." *George*, 676 F.3d at 253. Indeed, the court explained that "[t]he dispute over the collateral consequences requirement is emblematic of a more general lack of jurisprudential uniformity." *Id.* at 254; *see also id.* ("Beyond * * * generalities, the case law has been uneven."). "The Supreme Court has not yet addressed the precise standards that lower courts should use in deciding whether to issue writs of error coram nobis; it has simply emphasized the importance of restraint in issuing them." *Murray*, 704 F.3d at 29.

Other courts have joined the chorus of confusion, including those who have not yet taken a side in the split. *See, e.g.*, *United States* v. *Newman*, 805 F.3d 1143, 1146 (D.C. Cir. 2015) (D.C. Circuit noting only that "courts have articulated several factors that may bear on the propriety of granting such relief"); *Blanton*, 94 F.3d at 232 (Sixth Circuit, prior to joining the long side of the split, stating that "the Supreme Court" has not "spoken on the issue of whether proof of an ongoing civil disability is required in coram nobis cases, and courts that have considered the issue are divided"); *United States* v. *Osser*, 864 F.2d 1056, 1060 (3d Cir. 1988) (Third Circuit "admit[ting] to some uncertainty" about when a petitioner can make "the requisite showing of collateral consequences"); *Stewart* v. *United States*, 446 F.2d 42, 43-44 (8th Cir. 1971) (Eighth Circuit holding that "Stewart must demonstrate that he is suffering from present adverse consequences in order to be entitled to that remedy," without explaining what consequences would meet that test) (citations omitted); *compare United States v. Dyer*, 136 F.3d 417, 429-30 & n. 33 (5th Cir. 1998) (Fifth Circuit stating that "collateral

consequences almost inevitably flow from criminal convictions, but * * * 'th[is] fact alone is not enough to justify issuance of an extraordinary writ of coram nobis.' ") *with United States v. Marcello*, 876 F.2d 1147 (5th Cir. 1989) (granting the writ without identifying any collateral consequences suffered by the petitioner).

C. The Question Presented Is Important.

In the meantime, the circuit split continues to inflict real-world harm. As explained above, *supra* at 4-6, coram nobis has been used to remedy a wide range of errors in criminal proceedings "under circumstances compelling such action to achieve justice." *Morgan*, 346 U.S. at 511. Thus, the Court has "found that a writ of coram nobis can issue to redress a fundamental error." *Denedo*, 556 U.S. at 911. In *Morgan*, for example, the Court held that coram nobis was available to review a claim of deprivation of counsel in violation of the Sixth Amendment. 346 U.S. at 512-513. Coram nobis has also been used to examine claims of insanity, *id.* at 510, that the government coerced witnesses to commit perjury, *id.*, ineffective assistance of counsel, *Denedo*, 556 U.S. at 907, and actual innocence, *see, e.g.*, *Lesane*, 40 F.4th 198.

A petitioner who has served his sentence maintains a strong interest in avoiding the collateral consequences of a wrongful conviction. Subsequent convictions may carry harsher penalties, *Morgan*, 346 U.S. at 512-513; a non-citizen may face deportation, *Denedo*, 556 U.S. at 907-908; and the petitioner may be deprived of his civil rights, such as the ability to serve on a jury, vote, or hold office, *Fiswick* v. *United States*, 329 U.S. 211, 222 n.10 (1946). A criminal record may also prohibit the petitioner from obtaining employment, occupational or professional licensing, or housing. There is no legitimate reason to impose these serious burdens on a person who was wrongly convicted. Indeed, doing so only undermines public confidence in the judicial system.

IV. THIS CASE IS A GOOD VEHICLE TO RESOLVE THE QUESTION PRESENTED.

There is a clear, deep, and longstanding circuit split acknowledged by the court below. And that split is determinative here: the Seventh Circuit declined to reach the merits of Kimberlin's coram nobis petition because his unchallenged convictions are an independent cause of his civil disabilities. *See* Pet. App. 6a-7a. A court on the other side of the split, in contrast, would have followed this Court's instructions in *Sibron* and reached the merits of Kimberlin's claim. *See, e.g.*, *Lesane*, 40 F.4th 191, 203-204; *Walgren*, 885 F.2d at 1421-22. Whether a petitioner has the opportunity to obtain adjudication of his claim that he was wrongfully convicted should not be a matter of geography.

The Seventh Circuit, moreover, has developed the most clearly defined version of the civil disability requirement. And although other circuits have indicated some confusion about the precise contours of their court's precedents, *see, e.g.*, *Murray*, 704 F.3d at 29 n.6; *Osser*, 864 F.2d at 1060; the Seventh Circuit has expressed no such doubt. That is not surprising, given that Judge Easterbrook has authored the court's opinion in nearly every decision concerning coram nobis—and served on the panel in the decision below—and has offered lengthy explanations of his reasoning. *See, e.g.*, *Keane*, 852 F.2d at 203; *Bush*, 888 F.2d at 1148-51; *see also* Pet. App. 3a-8a.

The fundamental errors in Kimberlin's prosecution warrant review. On direct appeal, the Seventh Circuit noted that evidence in the case was entirely "circumstantial," *Kimberlin*, 805 F.2d at 221, and described in detail the jury's reliance on testimony that witnesses recalled only under hypnosis by a detective who had been investigating Kimberlin for years, *id.* at 216-224; *see* Pet. App. 49a-50a. There were several other procedural irregularities,

including the use of microscopic hair evidence (a practice that the Justice Department has now disavowed), *see* Pet. App. 119a-124a, and an undisclosed familial relationship between a juror and a member of the prosecution, *see* Pet. App. 50a. Kimberlin cannot recover the roughly 20 years that he spent incarcerated for crimes that he did not commit, but he should have the right to recover his good name.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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