

No. 19-169

IN THE
Supreme Court of the United States

JANE DOE,
Petitioner,

v.

IOWA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF IOWA

**BRIEF OF COLLATERAL CONSEQUENCES
RESOURCE CENTER AND INSTITUTE FOR
JUSTICE AS AMICI CURIAE IN SUPPORT OF
PETITIONER**

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INTERESTS OF AMICI CURIAE¹

The Collateral Consequences Resource Center (“CCRC”) is a non-profit organization established to promote public discussion of the legal restrictions and social stigma that burden individuals with a criminal record. CCRC is committed to expanding the availability and effectiveness of legal mechanisms to avoid or mitigate the collateral consequences of arrest or conviction. CCRC compiles and analyzes such mechanisms on its website, and it is currently directing a project to develop a model law limiting access to and use of non-conviction records.

The Institute for Justice (“IJ”) is a nonprofit public-interest law firm that litigates for greater judicial protection of individual rights. These include the right to earn an honest living and acquire and enjoy property, including when rights are adversely affected by a criminal record. IJ regularly brings challenges to unconstitutional systems of fines, fees, and forfeitures. This case thus falls squarely within IJ’s interests.

INTRODUCTION AND SUMMARY OF ARGUMENT

A criminal record oftentimes becomes a permanent barrier to economic liberty in the United States.

¹ The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Millions of Americans with such records have tremendous difficulty in finding jobs, housing, and applying for benefits, among other obstacles. Individuals who are eager to put their experience with the criminal justice system behind them find themselves hopelessly tethered to records that do not paint an accurate portrait of who they are.

Expungement, or sealing, of criminal records provides individuals with an opportunity to be shielded from undeserved collateral consequences and adverse treatment. And for individuals with arrests not resulting in a conviction, expungement is the only way to shed the undeserved weight of their arrest records. This is because relief mechanisms like executive pardons and judicial set-asides have no application in such situations.

But Jane Doe and others like her – individuals who were never convicted of a crime – cannot obtain expungement relief because they are required to pay outstanding court debts despite being too poor to do so. To deny expungement relief to persons with a non-conviction record simply because they are unable to pay a court fee is, in effect, to impose a punishment without a crime.

We agree with petitioner that denying her access to expungement because of her indigency violates the Equal Protection Clause. The poorest among us should be provided equal access to expungement relief, especially when these individuals are the ones often most harmed by not having their records expunged. We respectfully urge the Court to grant certiorari to resolve this important issue.

ARGUMENT

I. The Collateral Consequences Of Criminal Records Are Severe, Even For Non-Convictions.

Between 70 and 100 million adults in the U.S. have a criminal record, including felony convictions, misdemeanors, or arrests that do not result in conviction.² The collateral consequences of a criminal record can impose a series of lifelong barriers that obstruct full and successful participation in society—including barriers to voting, employment, education, professional and occupational licensing, housing, and receipt of public benefits.³ Many of these barriers apply even where an arrest reflects the full extent of

² U.S. Dep’t of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2014, 2015, at 2-3, <https://tinyurl.com/yz26o5e>; The Sentencing Project, Half in Ten, Community Legal Services, Americans with Criminal Records, 2015, at 1, <https://tinyurl.com/ya42m49g> (estimating that “100 million Americans have a criminal record”); Gary Fields and John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall Street Journal, Aug. 18, 2014, <https://tinyurl.com/yyc7pd65> (reporting that “the FBI currently has 77.7 million individuals on file in its master criminal database—or nearly one out of every three American adults”).

³ See generally Margaret Colgate Love, et al., *Collateral Consequences of Criminal Conviction: Law Policy and Practice*, Ch. 2 (West/NACDL 3d ed. 2019); see also Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 Marq. L. Rev. 233 (2018); Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy*, 10 Harv. L. & Pol’y Rev. 123, 132-33 (2016).

a person's interaction with the criminal justice system.⁴

Individuals who are convicted of crimes are all too often set up to fail even after having served their time or repaid their debts. Many who are released from prison are not given a legitimate chance to put their past behind them and end up on a path towards reincarceration. *See Doe v. Immigration & Customs Enft*, 2004 WL 1469464, at *6 (S.D.N.Y. June 29, 2004) (recognizing the harmful impact of arrest records and their tendency to threaten an individual's quality of life).

Often those who are unable to re-establish themselves in society due to the collateral consequences of conviction find themselves drifting back into crime. In that regard, recidivism caused by these collateral consequences also imposes significant costs on our society as a whole. *See* Aaron Yelowitz & Christopher Bollinger, *Prison-To-Work: The Benefits of Intensive Job-Search Assistance for Former Inmates*, CENTER FOR STATE AND LOCAL LEADERSHIP CIVIC REPORT i (2015) (finding that as many as two-

⁴ *See, e.g.*, Anna Roberts, *Arrests as Guilt*, 70 Ala. L. Rev. 987 (2019); Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions*, 20 U. Pa. J. L. & Soc. Change 81 (2017); Jamie Gullen, *Why Clear a Record? The Life-Changing Impact of Expungement*, Community Legal Services of Philadelphia (Sept. 2018), <https://tinyurl.com/y3rbhm4h>; Eisha Jain, *Arrests as Regulation*, 67 Stan. L. Rev. 809, 821-844 (2015) (describing the use of arrest information by immigration authorities, social service agencies and schools, employers, and public housing officials, to identify individuals for monitoring or adverse action).

thirds of the 650,000 inmates released from prison in 2015 will be re-arrested within three years, and that the average cost of re-incarceration for each non-violent offender is \$231,000). Laws that erect barriers to employment thus risk perpetuating mass incarceration and depriving our society of tremendous human capital. See Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, PRISON POLICY INITIATIVE, July 2018 (concluding that at least 27% of all formerly incarcerated individuals are unemployed, which is roughly five times higher than the general population).

But even criminal charges that are dropped or otherwise end without a conviction – such as Jane Doe’s – can cause lifelong damage to the individuals affected. See *Commonwealth v. Malone*, 366 A.2d 584, 587-88 (Pa. Super. Ct. 1976) (noting the serious difficulties that may result from an arrest record, including economic loss, injury to reputation, and restricted opportunities for schooling, employment, or professional licenses). As Justice Sotomayor put it, “[e]ven if you are innocent, you will now join the 65 million Americans with an arrest record and experience the ‘civil death’ of discrimination[.]” *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (Sotomayor, J., dissenting).

In our criminal justice system, many individuals are arrested and released without charges. Others are charged but later have the charges dismissed. Some, like Jane Doe, are arrested and participate in a diversion program that results in their charges being dismissed. These individuals should not be denied access

to opportunities that would otherwise exist based merely on a brief encounter with law enforcement not resulting in a conviction. Forcing someone in these circumstances to shoulder the burden of a record – which all but guarantees future economic and social hardship – has the capacity to destroy lives and deprive entire communities of economic liberty. *See* Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out*, CENTER FOR AMERICAN PROGRESS, Dec. 2, 2014 (estimating that the cost of employment losses among people with criminal records is roughly \$65 billion annually). Our society doles out punishment (and the collateral consequences that stem from it) for convicted crimes, but the logic underlying that treatment simply falls apart when applied to the huge numbers of individuals who are caught up in the system but never convicted of any crimes at all.

The collateral impact of an arrest record – particularly in the employment context – is not an abstract problem.⁵ The ubiquity of background checks enables virtually any employer to investigate the history of any job applicant. Indeed, almost 90% of all employers conduct them prior to hiring. *See Americans with Criminal Records*, THE SENTENCING PROJECT (2014). These checks often turn up arrest records regardless

⁵ *See, e.g.*, Ryan A. Hancock, *The Double Bind: Obstacles to Employment and Resources for Survivors of the Criminal Justice System*, 15 U. Pa. J.L. & Soc. Change 515, 515-16 (2012) (stating that individuals who come into contact with the criminal justice system are “marked for life,” regardless of the outcome of their case).

of whether those arrests resulted in convictions.⁶ Arrest records can shut the employment door for countless individuals, even if they have done nothing wrong and committed no crime. The phenomenon of discriminating on the basis of non-conviction unfairly condemns large cross-sections of the population while serving no countervailing purpose. While the precise number of arrests without convictions is difficult to discern, the sheer number of individuals with criminal records illustrates the potentially devastating effect these non-convictions can have.⁷

This Court recognized in *Schware* that “[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.” *Schware v. Bd. Of Bar Examiners of N.M.*, 353 U.S. 232, 241 (1957). The lower courts have made similar observations. *See, e.g., Utz v. Cullinane*, 520 F.2d 467, 478 (D.C. Cir. 1975) (“An arrest record, without more, is a fact which is absolutely irrelevant to the question of an individual’s guilt.”); *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006); *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 149-50 (5th Cir. 1991).

⁶ While the Fair Credit Reporting Act (“FCRA”) generally prohibits covered background checkers from disseminating information about arrests that are more than seven years old, *see* 15 U.S.C. § 1681c, that information is still likely available via online “people search” services that may not be subject to FCRA. *See* Alessandro Corda & Sarah E. Lageson, *Disordered Punishment: Workaround Technologies of Criminal Records Disclosure and The Rise of a New Penal Entrepreneurialism*, *The British Journal of Criminology*, <https://doi.org/10.1093/bjc/azz039>.

⁷ *See supra* note 2.

And as for the employment context in particular, the courts have noted that there is little connection between arrests and future work performance. The district court in *Gregory v. Linton Sys.*, 316 F. Supp. 401, 402-03 (C.D. Cal. 1970), *aff'd* 472 F.2d 631 (9th Cir. 1972), for example, determined that there was “no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees.” *Id.*

Rightly or wrongly, persons convicted of crimes face many hurdles when seeking employment after incarceration. But because arrests “happen[] to the innocent as well as the guilty,” the assumption of wrongdoing created by an arrest record alone is unjustified. *Michelson v. United States*, 335 U.S. 469, 482 (1948); *see Paul v. Davis*, 424 U.S. 693, 719 n.6 (1976) (“[E]ven if a person has been arrested on a constitutionally sufficient basis, that does not justify the State’s treating him as a criminal.”) (Brennan, J., dissenting).

II. Expungement Provides Relief From Collateral Consequences.

Collateral consequences are a direct result of having a criminal record, which results from almost any contact with the criminal justice system—including, as here, from cases of non-conviction where the charges have been dropped.

In an effort to mitigate some of those collateral consequences, most states, like Iowa, have created

statutory mechanisms to expunge or seal non-conviction records in prescribed circumstances.⁸ *See, e.g.*, Ind. Code § 35-38-9-1 (2019) (non-conviction records, and convictions vacated on appeal, may be expunged and sealed after one year); Conn. Gen. Stat. §§ 54-142a (2017) (permits “erasure” of criminal records where charges have been dismissed, or where person has been acquitted); Mo. Stat. § 610.105 (2006) (authorizes automatic “closure” of records in all cases disposed of favorably to the defendant). In most jurisdictions, to expunge a criminal record, an individual must first petition the relevant court. *See, e.g.*, Ky. Rev. Stat. § 431.076 (2019); Minn. Stat. § 609A.03 subd. 2 (2017); Ark. Code § 16-90-1409 (2014). The burden generally is on the individual to seek an expungement of his or her criminal records, as most state statutes do not provide for automatic expungement. *But see, e.g.*, N.Y. Crim. Proc. Law § 160.50 (sealing is automatic upon termination of the action in favor of a person – e.g., acquittal, dismissal, declined prosecution – unless the district attorney demonstrates upon motion or the court determines “that the interests of justice require otherwise . . .”).

The meaning and effect of expungement, however, vary greatly by state.⁹ Generally, expungement aims to restore individuals with

⁸ *See* Restoration of Rights Project, 50-State Comparison Judicial Expungement, Sealing, and Set-aside (July 2019), <https://tinyurl.com/y6og3jt4> (fifty-state survey of state expungement laws).

⁹ By definition, expungement means simply “[t]o remove from a record, list, or book; to erase or destroy.” Black’s Law Dictionary (11th ed. 2019).

criminal records to their former legal status.¹⁰ *See, e.g., State v. N.W.*, 747 A.2d 819, 823 (N.J. Super. Ct. App. Div. 2000) (noting that the purpose of state’s expungement statute is to provide an offender with a “second chance”); Ark. Code Ann. § 16-90-1417 (2019) (restoring the “privileges and rights” of an individual whose record has been sealed and directing that the sealed record “shall not affect any of his or her civil rights or liberties”). But notably, a criminal record is almost never completely expunged and often remains available for purposes authorized by statute or court order. *See, e.g., Ark. Code Ann. § 16-90-1416* (2019); N.H. Rev. Stat. § 651:5 (X)(c).

Like most states, Iowa does not have a general expungement statute, but it does provide for the expungement of records in certain circumstances. In 2015, the Iowa Legislature passed Iowa Code § 901C.2, which provides, in relevant part:

¹⁰ Some state statutes use the term “sealing” to refer to the expungement process. *See, e.g., Ark. Code Ann. § 16-90-1417* (addressing the legal effect of sealing an individual’s criminal record); Minn. Stat. § 609A.01 (2019) (stating that remedy available for expungement of criminal records is “limited to a court order sealing the records and prohibiting the disclosure of their existence or their opening except under court order or statutory authority”); Cal. Penal Code § 851.91 (2019) (describing sealing procedure for arrests not resulting in a conviction). While the term “seal” is generally understood to make records confidential, the extent of sealing varies: in some states sealed records may be closed only to private parties, in others public employers and licensing boards may also be denied access, and in still others, sealed records are not necessarily available to law enforcement without a court order. *See supra* note 8.

the court shall enter an order expunging the record of such criminal case if the court finds that the defendant has established . . . (1) The criminal case contains one or more criminal charges in which acquittal was entered for all criminal charges, or in which all criminal charges were otherwise dismissed.

Iowa Code § 901C.2(1)(a)(1) (2017); *see also State v. Doe*, 903 N.W.2d 347, 350 (Iowa 2017).

The expungement process is triggered by an application filed by the defendant, the prosecutor, or the court, and the statute sets out four conditions that must be met before expungement can be granted: (1) a judgment of acquittal must be entered or the charges must be dismissed; (2) all court costs and other fees must be paid; (3) 180 days has expired since the acquittal or dismissal; and (4) the acquittal cannot be premised upon a finding of insanity, nor can the defendant have been found incompetent. *See Iowa Code § 901C.2*. If expungement is granted, such records become exempt from public access but remain available to the defendant and to certain governmental agencies. *See Iowa Code § 901C.3*.

In Jane Doe's case, she must first pay back attorney fees for her court-appointed counsel before she can obtain expungement. Jane Doe remains indigent, however, and is unable to pay those fees. Thus, despite meeting all of the other statutory requirements for obtaining relief, *see Iowa Code § 901C.2(a)(2)*, Jane's petition remains on hold until such time as she can pay back the requisite sum.

III. Indigency Should Not Preclude Access To Expungement Relief.

As Jane Doe’s case shows, the collateral consequences of arrest records are especially harsh on the most vulnerable—indigent persons who are struggling to pay off their court debts.

The irony of Iowa’s expungement law could not be clearer: a law that removes a hurdle to employment and economic security cannot be invoked by indigent individuals until outstanding costs and fees are paid to the state, effectively defeating the very purpose of providing expungement relief in the first place.¹¹

Some jurisdictions have attempted to address the issue of equitable and fair access to expungement relief for individuals who are unable to meet the financial obligations of court costs but are otherwise eligible to have their records expunged. Illinois’ expungement statute, for example, has been amended recently to explicitly provide a safety valve for indigent individuals who may not be able to pay court-imposed fees:

¹¹ Although they examined conviction records not at issue in this case, Professors Sonja B. Starr and J.J. Prescott recently released an empirical study of a state expungement law, finding that recipients experienced a “sharp upturn” in wages and employment. They also had extremely low subsequent crime rates, comparing favorably to the general population. See J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, Harv. L. Rev. 133, forthcoming (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353620.

Notwithstanding any other provision of law, the court shall not deny a petition for sealing under this Section because the petitioner has not satisfied an outstanding legal financial obligation established, imposed, or originated by a court, law enforcement agency, or a municipal, State, county, or other unit of local government, including, but not limited to, any cost, assessment, fine, or fee.

20 Ill. Comp. Stat. 2630/5.2(c)(1).¹²

Notably, the Illinois statute was also amended to provide for a pilot program waiving court fees in certain counties “if the records sought to be expunged or sealed were arrests resulting in release without charging or arrests or charges not initiated by arrest resulting in acquittal, dismissal, or conviction when the conviction was reversed or vacated.” 20 Ill. Comp. Stat. 2630/5.2(c)(1.5). Thus, the Illinois legislature

¹² The statute does require restitution to be paid, however, unless the restitution order was changed to a civil judgment: “An outstanding legal financial obligation does not include any court ordered restitution to a victim under Section 5-5-6 of the Unified Code of Corrections, unless the restitution has been converted to a civil judgment. Nothing in this subparagraph (C) waives, rescinds, or abrogates a legal financial obligation or otherwise eliminates or affects the right of the holder of any financial obligation to pursue collection under applicable federal, State, or local law. Nothing in this subparagraph (C) waives, rescinds, or abrogates a legal financial obligation or otherwise eliminates or affects the right of the holder of any financial obligation to pursue collection under applicable federal, State, or local law.” 20 Ill. Comp. Stat. 2630/5.2(c)(1).

recognized the need for equal access to expungement for the indigent and for those not convicted of crimes.

Jane Doe cannot afford to pay her court-appointed lawyer fees. But if she had been able to retain a private attorney – whether or not she still owed fees – she would be eligible for expungement relief under Iowa law. If Jane Doe was a resident of Illinois, she would be eligible for relief because Illinois does not preclude relief based on her indigency.

We agree with petitioner that Iowa’s expungement statute violates the Equal Protection Clause by denying expungement to individuals who have not been convicted of any offense simply because they are too poor to pay off their court debts. *See* Pet. at 7-12. Iowa law essentially denies access to expungement relief based on one’s socioeconomic status.¹³

But more than that, these circumstances demonstrate how the Iowa expungement scheme makes little sense. The statute’s very purpose is to alleviate the collateral consequences of an arrest record. One of the biggest hurdles for individuals with arrest records is finding stable employment and

¹³ Although not at issue in this case, the Court recently stated that “the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties.” *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019). And “[e]ven absent a political motive, fines may be employed ‘in a measure out of accord with the penal goals of retribution and deterrence,’ for ‘fines are a source of revenue,’ while other forms of punishment ‘cost a State money.’” *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991)).

economic security. If a person like Jane Doe cannot pay the fees associated with obtaining expungement, how can she ultimately secure stable employment that could help her overcome indigency? As currently applied, the Iowa statute provides relief only to individuals who can afford to pay their court costs and fees. Moreover, for individuals like Jane Doe whose criminal record consists of an arrest but not a conviction, expungement is the only remedy available, because executive pardon and judicial relief mechanisms like set-aside and restoration of rights (and other “forgiving” remedies) apply only to convictions. Expungement is, therefore, the only way that Jane Doe can put her interaction with the criminal justice system behind her.

This Court should grant certiorari and hold that one’s inability to pay court fees may not restrict access to statutorily-created expungement rights.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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