No. 17-1153

In the
Supreme Court of the United States

SIERRA PACIFIC INDUSTRIES, INC., et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF FOREST OWNERS, CALIFORNIA FORESTRY ASSOCIATION, AND WASHINGTON FOREST PROTECTION ASSOCIATION FOR PETITIONERS

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QUESTION PRESENTED

After U.S. and California authorities jointly investigated the cause of a forest fire, Petitioners entered into a settlement agreement with the United States to resolve a billion-dollar federal claim. At the time, Petitioners believed that investigators had engaged in some misconduct. But during later proceedings in a related state-court action by state authorities, Petitioners learned of additional impropriety that confirmed their worst fears: the investigatory misconduct was so sweeping that the state-court judge terminated the action as "corrupt and tainted" and concluded that Petitioners could never have received a fair trial.

Petitioners moved to set aside the federal-court settlement under Federal Rule of Civil Procedure 60(d)(3) for "fraud on the court." After the chief district judge attempted to recuse all judges in the district—including Judge William Shubb—due to concerns over the appearance of partiality, Judge Shubb elected to hear the motion anyway, which he denied after concluding that the Rule 60(d)(3) motion could be supported *only* by evidence of fraud discovered post-settlement, and that the after-discovered evidence alone did not warrant relief. Within hours, Judge Shubb—already a social media "follower" of the federal prosecutors—"tweeted" the headline and a link to a news article falsely stating one petitioner was "still liable." The Ninth Circuit affirmed.

The questions presented are:

1. Whether a federal court adjudicating a motion under Federal Rule of Civil Procedure 60(d)(3) for "fraud on the court" may consider the totality of the evidence of fraud, including evidence that was known

at the time of judgment, or is instead strictly limited to considering only later-discovered evidence.

2. Whether a district court judge's impartiality might reasonably be questioned, thereby requiring recusal under 28 U.S.C. § 455(a), when he was originally recused from a proceeding, nonetheless elected to preside over the proceeding, followed the prosecution on social media, and then, just hours after denying relief to the opposing party, "tweeted" the headline and a link to a news article wrongly proclaiming that a party is "still liable."

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INTERESTS OF *AMICI CURIAE*[1]

The National Alliance of Forest Owners ("NAFO") is a national advocacy organization committed to advancing federal policies that support the long-term economic, social, and environmental benefits of sustainably managed forests. NAFO member companies own and manage more than 43 million acres of working forests—forests managed to provide a steady supply of timber. NAFO's membership also includes state and national associations representing tens of millions of additional acres.

The California Forestry Association ("Calforests") is a trade association whose members are producers of forest products, forest landowners, biomass power plant owners who generate electricity, and natural resource professionals committed to environmentally sound policies, responsible forestry, and sustainable use of natural resources. Calforests members process over 90% of the wood products manufactured in the State of California.

The Washington Forest Protection Association ("WFPA") is a trade association for private forestry in Washington State. WFPA seeks to advance forestry by establishing forest policies that encourage investment in forestland, protection of fish, water, and wildlife. WFPA represents about half of the privately owned forestland in Washington.

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[1] *Amici* certify that they provided counsel of record for Petitioners and Respondent timely notice of their intent to file this brief, see SUP. CT. R. 37.2(a), 37.4, and both parties consented. Pursuant to Rule 37.6, no party or counsel to a party authored or paid for the preparation or submission of this brief.

To function and have trust in the fairness of the forestry industry market, NAFO, Calforest, and WFPA members need confidence in state and federal forest managers, especially those who investigate and, if appropriate, bring enforcement actions against these organizations' members. The record below demonstrates that such integrity was so lacking that it compromised the market. The result threatens the resources NAFO, Calforest, and WFPA members provide that benefit American citizens.

NAFO, Calforest, and WFPA urge this Court to review and correct the decision below, which let stand a flawed investigation and prosecutorial fraud, particularly given the district court's use of social media in a manner that confirmed the chief district judge's concerns about a perception of bias.

INTRODUCTION

Petitioner Sierra Pacific contracted to harvest timber on a large parcel of forested land in California. The land had a market value of approximately $110 million. After a fire of unknown origin swept across the property, Sierra Pacific was sued for damages and fees in excess of $1 billion for allegedly causing the fire.

That frightening monetary disparity would be enough to trouble any owner or harvester of forested property. But the record is actually more alarming—resulting in state-court findings that government lawyers breached their duty of candor—and is sufficient to justify a finding of fraud warranting relief under Rule 60(b)(3). The record also reflects the district court's use of social-media interactions with the prosecutors in a fashion that confirmed the chief district judge's concerns about the appearance of impartiality, see 28 U.S.C. § 455. These were concerns that caused the chief judge to declare, even before district-court proceedings began, that no judge in the district should handle this case.

Participants in any industry subject to investigation and enforcement actions would be rightfully anxious when a court finds that prosecutors and government officials acted unethically. And social media interactions with the same prosecutors by another court rase concern about impartiality. See generally Patricia M. Wald, 61-WTR LAW & CONTEMP. PROBS. 107 (1998) (describing benefits and challenges of closeness of the bench and government lawyers, and the possible appearances of bias and lack of impartiality due to such closeness); see also *id*. at 107–

08 (noting that judges' and government lawyers' "residence in two separate branches is designed, in part, to ensure that the courts function as the bulwark of citizens' liberties, standing fast against a potentially . . . overbearing government eager to encroach on citizens' legal rights. Indeed, one of the distinctive aspects of our American system of justice that reformers seek to export abroad is the court's independence not only from the executive and legislative branches in general but more specifically from the prosecutor who brings cases to the court on behalf of the state.").

Even giving all benefit of the doubt, it is difficult to justify two-way communications between a presiding judge and prosecutors through social media. At a time when politics via social media may seem ubiquitous in our country, the social-media interactions between judicial officers and prosecutors here confirmed the chief judge's pre-proceeding fear about creating the appearance of an impartial proceeding. And the full record damages the public's perception of both prosecutors and the court.

Fair investigation, enforcement, and judicial process in cases involving the forest industry are at the forefront of NAFO, Calforest, and WFPA's members' ability to make rational market decisions and provide Americans with valuable forest products. Accordingly, NAFO, Calforest, and WFPA respectfully request that the Court grant the petition and correct the extraordinary and egregious circumstances presented.

BACKGROUND

Petitioners fairly and accurately summarize the record of this case, a case that was of note to all who participate in the forest industry market. Pet. 5–19. Of special importance were the actions of Mr. Joshua White, a Cal Fire investigator who also served as a federal expert witness. App. 4a. Mr. White's participation was critical, because the initial federal investigator lacked the qualifications and authority to investigate a fire of this magnitude. Yet, as the state-court proceedings revealed, Mr. White had a serious conflict of interest. As the state trial-court judge found, "Cal Fire has, among other things, engaged in the pervasive and systematic abuse of California's discovery rules in a misguided effort to prevail against" Petitioners, and "Cal Fire's conduct has been egregious." App. 190a.

White worked in tandem with USFS investigator David Reynolds (who was later replaced by USFS Special Agent Diane Welton), and jointly conducted and directed the federal and state investigation. The two agencies issued a joint "Origin and Cause Investigation Report" ("OIR"). The OIR erroneously concluded that the fire started when the front blade or grouser plate of a bulldozer operated by an employee of defendant Howell's Forest Harvesting struck a rock and issued a spark. App. 5a.

Two years later, Cal Fire filed a civil action in California Superior Court. The same month, the United States Attorney for the Eastern District of California filed its own civil action, relying on much of the same evidence and witnesses, seeking roughly $1 billion in damages for the United States.

The state and federal suits relied almost exclusively on the integrity of the joint OIR. Both suits named defendants Sierra Pacific Industries, Eunice E. Howell d/b/a Howell's Forest Harvesting, W.M. Beaty and Associates, and individual defendants, including landowners who had interests in property near where the fire purportedly started.

Petitioners contended below, as before this Court, that throughout the pretrial stage of the litigation, the United States advanced a fraudulent OIR. They allege with ample evidentiary support the following irregularities that they contend, in their totality, constitute fraud for purposes of Rule 60(d) review, namely that government lawyers: (1) allowed their experts and investigators to testify falsely; (2) misrepresented the admission of one witness, J.W. Bush, that a bulldozer rock strike caused the fire; (3) proffered false testimony in opposition to the motion for summary judgment; (4) failed to take remedial action when they learned of evidence—such as that derived from the air attack video—that undermined its causation theory; (5) created a false diagram regarding the fire's movements; and (6) misrepresented and withheld evidence and covered up misconduct of prosecutors and investigators. Pet. 5–19.

In addition, government lawyers did not disclose a significant financial interest which constituted an undisclosed interest in the litigation, known as the Wildland Fire Investigation Training and Equipment Fund ("WiFITER"). And they affirmatively misrepresented the nature of the fund to the district court.

WiFITER was an off-books fund set up by a small group within Cal Fire, for the benefit of Cal Fire fire investigators, to hold money recovered through settlements with parties allegedly responsible for reimbursing firefighting costs. Federal prosecutors were aware of this fund during the pendency of the federal action and never disclosed it. The state trial court found that WiFITER created an improper financial incentive for the government's investigator and disclosed expert, see *Cal. Dep't of Forestry & Fire Protection* v. *Howell*, (Super. Ct. of Cal. Feb. 4, 2014), App. 189a–279a. The fund has since been found unlawful by California's State Auditor, and has been dissolved. (ER 544–46, 550, 705.)[2] All these highlighted incidents are attributable to both federal and state investigators and prosecutors who did not disclose these facts before the federal court settlement.

Once Petitioners were aware of the magnitude of the undisclosed information, Petitioners filed a motion in the federal action under Federal Rule of Civil Procedure 60(d)(3) to vacate the previous settlement due to fraud on the court. Petitioners' motion relied on the same conduct that the state trial court noted in awarding sanctions, as well as additional instances of prosecutorial misconduct unique to the federal action.

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[2] "ER" refers to the Excerpts of Record filed with the Ninth Circuit.

The federal district court ordered the parties to brief the legal sufficiency of the evidence as alleged by Petitioners in their motion. Petitioners followed the district court's directive and argued the legal sufficiency of their allegations, but did not submit evidence. The government ignored the district court's directive, disputed Petitioners' allegations, and submitted evidence attempting to disprove them.

Ignoring its previous order, the district court relied on the evidence the government presented in its response brief. Unlike the careful and thorough state court judge who dismissed the case against defendants and ordered a $32 million sanction for the same conduct at issue here, the district court ruled in favor of the United States and denied defendants' motion.

The Ninth Circuit's opinion, considering instances of fraud in piecemeal fashion rather than under a totality-of-the-circumstances analysis, affirmed. And while the panel found the social-media interactions between the district court judge and the prosecutors to present a cautionary tale to other federal officials, it let the ruling stand, despite the appearance of impartiality evidenced in the district court's tweets and the digital high-fives the court received from the United States Attorney's Office for the Eastern District California.

With this background, NAFO, Calforest, and WFPA find Petitioners' description of the proceedings below not only accurate, but surprisingly, restrained.

SUMMARY OF ARGUMENT

NAFO, Calforest, and WFPA have the highest respect for government investigators, enforcement lawyers, and prosecutors. As participants in the forest industry, these associations' members are in frequent contact with these hard-working public servants. The vast majority of these public officers work tirelessly, ethically, and honestly for the public good, all too often with little recognition. NAFO, Calforest, and WFPA also have the utmost respect for all members of the judiciary, who work diligently to fairly adjudicate cases and controversies.

But as the unfortunate facts of this case show, lawyers, investigators, and, in very rare instances, even courts, sometimes lose their way. The rare cases where this happens have an outsized effect on the trust that industry participants must have to produce products on which the American people depend. The egregious facts in the record—particularly those that caused the state trial court to conclude that "the integrity of the Court and the judicial system" had been threatened, App. 190a—tend to undermine public confidence in our nation's judicial system.

Because of the high reputational costs of the transgressions that the record documents here, it is necessary for this Court to reverse and order a return of the settlement funds. Such action is necessary, not only to incentivize ethical compliance, but also to restore public trust in investigative processes, enforcement actions, and judicial decisions.

ARGUMENT

I. Confidence in regulatory fairness is essential to a vibrant and efficient forest industry.

Our nation has a proud history of forest management for the greater public good. This management "has its roots in the last quarter of the [Nineteenth] century and was directly related to three visionary men: Franklin B. Hough, Bernard E. Fernow, and Gifford Pinchot[,]" who first envisioned a renewable system of forest reserves.[3] NAFO, Calforest, and WFPA depend for their economic viability on this resource to serve the American people and deliver a sustainable supply of lumber for our nation's growth and infrastructure.

America's trees are the ultimate natural resource. Wood is a renewable and sustainable material that stores carbon—as living, growing trees in the forest, but also as lumber in our homes, wood in our kitchen tables, and more than 5,000 paper products used by consumers every day. The benefits of actively well-managed forests are critical for urban communities. Working forests filter almost 30% of our drinking water, provide habitat for 60% of our at-risk species, and sequester enough carbon to offset 10-15% of our industrial carbon emissions annually. Responsible forestry industry participants contribute to the greater American public welfare. The federal government recognizes this fact.

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[3] Gerard W. Williams, Ph.D., Historical Analyst, *The USDA Forest Service—The First Century*, FS-650, at 1 (United States Department of Agriculture, Forest Service, April 2005) (hereinafter "First Century").

As explained in a recent publication of the United States Forest Service ("USFS"),[4] "[t]he Forest Service grew out of [a] desire to protect and sustain America's forests for the greatest good for the greatest number in the long run. With this primary goal of sustainability, the new agency hired a generation of American-trained foresters, who brought their commitment to scientific forestry and what Samuel P. Hays has referred to as a 'deep sense of hope' that motivated all those 'at the turn of the century for whom science and technology were revealing visions of an abundant future' ***. These scientists based their optimism on the successful practice of forestry."[5]

The USFS acknowledges that regulatory fairness is essential to the economic stability and viability of the forest industry.[6] It also recognizes that wildfires are inevitable: "Wildfire risk to highly valued resources, critical infrastructure, and environmental quality generally is expected to continue to escalate as communities continue to expand into the wildlands; changing climate leads to increased temperature and varying precipitation patterns; and the complexity,

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[4] Diane M. Smith, Missoula Fire Sciences Laboratory & Rocky Mountain Research Station, *Sustainability and Wildland Fire: The Origins of Forest Service Wildland Fire Research*, FS-1085 (United States Department of Agriculture, Forest Service, May 2017).

[5] *Id*. at 3 (citation omitted).

[6] See generally Matthew Rollins, Carlos Rodriguez-Franco, Tara Haan & Susan Conard, *Research Development Wildland Fires Fuels Accomplishments and Outcomes*, FS-1086 (United States Department of Agriculture, Forest Service, May 2017).

frequency, size, and severity of wildfires increases."[7] USFS realizes that fire management is beneficial, necessary, and also costly, as fire suppression alone cost the Forest Service $1.7 billion in FY 2015 and in FY 2016 the $2.38 billion appropriated for fire suppression accounted for more than 42% of the USFS budget.[8] Given such high expense, it logically follows that fire-suppression efforts must be carried out with efficiency and integrity. NAFO, Calforest, and WFPA understand that with such fiscal pressures, the need for honesty in investigation is vital to ensure those monies are properly used. Given the high dollars involved, the situation here is of special concern to the forest industry, which depends on the integrity of USFS investigation and enforcement actions by the Department of Justice. The public interest and market sustainability of our precious forests is why the egregious facts of this case call for review.

II. Industry and the public deserve confidence that wildfires are investigated and prosecuted with honesty, which the state trial court found absent here.

NAFO, Calforest, and WFPA members depend on trustworthy investigation and enforcement actions by prosecutors to have confidence to invest in forestry-industry activity. Carefully determining the origin and cause of fires plays a key role in fire prevention and the protection of lives and property.

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[7] *Id.* at 1.

[8] *Id.* at 4.

Americans' confidence in the work performed by public servants like those employed by federal investigators, prosecutors, and their state partners Cal Fire and the California prosecutors, also is a crucial element to successful fire prevention and protection work of integrity. As the California trial court noted, "[p]ublic confidence in the integrity of the investigation and prosecution of governmental claims against its citizens must be scrupulously maintained." App. 263a. This is particularly true when "witnesses at issue are law enforcement officers who have access to the scene, are charged with gathering and documenting the evidence, and are responsible for determining who is to blame." App. 253a. "A fair prosecution and outcome in a proceeding brought in the name of the public is a matter of vital concern both for defendants and for the public, whose interests are represented by the government and to whom a duty is owed to ensure that the judicial process remains fair and untainted . . . ." App. 203a–04a (quoting *County of Santa Clara* v. *Superior Court*, 50 Cal. 4th 35, 57 (2010)).

According to the careful and detailed review provided by the California state court, the governmental corruption and taint at the heart of the joint state-federal Moonlight Fire investigation was "so pervasive that it would serve no purpose for the Court to recite it all." App. 304a. Notably for the federal proceedings, the corruption and taint only became fully evident in its manifold elements after settlement of the federal case brought against Petitioners, a settlement built on the later-uncovered corrupt and tainted investigation. Yet the settlement remains in effect, despite fraud on the federal courts.

The petition explains why this Court's review is necessary to resolve the conflict between the Ninth Circuit's decision below, and those of this Court and decisions of other courts of appeal that do not confine Federal Rule of Civil Procedure 60(d)(3) analysis to fraud discovered only after the proceedings at issue. Pet. 21–28. NAFO, Calforest, and WFPA agree that the decision below erroneously cabins Rule 60(d)(3) analysis such that it does not consider the totality of the circumstances of possible fraud on the court. In doing so, the Ninth Circuit erred, and its method represents a split in standards from this Court and other circuit courts of appeal.

Rule 60(d)(3) allows a judgment to be set aside "for fraud on the court" and codifies the general principle that federal courts always have the inherent equitable power to vacate judgments obtained by fraud. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44 (1991). Specifically, this Court, in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 243–44 (1944), *overruled on other grounds by Standard Oil of Cal.* v. *United States*, 429 U.S. 17 (1976), specified that the fraud-on-the-court inquiry must consider the "trail of fraud" under a totality-of-the-circumstances analysis. Under such analysis, reversal is warranted here. See also *id*. at 250; *Envtl. Def. Fund, Inc.* v. *Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971) (judicial review should confine and control government discretion, for "judicial review alone can correct only the most egregious abuses" and ensure that government process itself "will confine and control the exercise of discretion").

The record of investigatory and prosecutorial facts revealed here warrants reversal by this Court. They constitute a breach of duty of candor to the tribunal that under the circumstances is fraud under Rule 60(d)(3), contrary to the Ninth Circuit's ruling, which erroneously did not apply a totality-of-the-circumstances analysis..

As the state trial court found, the government failed to disclose relevant exculpatory evidence and misrepresented key facts, and the financial interest of Mr. White tainted the government's case. These are serious allegations given the massive potential penalty (over $1 billion). But here they are more than just allegations; they are actual findings by a state-court judge in a parallel state action resulting in a $32 million sanction award against the very persons against whom Petitioners complain here, as the prosecution and investigation of the Moonlight Fire was a joint federal and state endeavor.

In these unique circumstances, the district court's refusal to grant relief under Rule 60(d)(3) is clear error. This Court should grant the petition, reverse the Ninth Circuit's decision, and remand with orders to reverse the district court's Rule 60 order.

III. Because the federal settlement rests on a foundation of what the state trial court found was "corrupt and tainted" conduct, App. 303a, the industry is harmed due to uncertainty and distrust.

Cal Fire's conduct necessarily affected the federal government's case against Petitioners due to the joint state-federal nature of the Moonlight Fire investigation and prosecution and Mr. White's lead role in that investigation. To be sure, the California state courts provided some measure of justice to remedy the conduct that infected the Moonlight Fire proceedings. Those rulings comprise a stiff rebuke to both government investigators and their counsel. But the continued existence of the federal settlement also has continuing effects which are detrimental to the rule of law in general and the dispensation of justice in this case.

First, the continued existence of the federal settlement suggests to the public that Petitioners must have been responsible for the Moonlight Fire. Why else would Petitioners have settled the federal case and agreed to pay $55 million plus transfer 22,500 acres of valuable timberland to the federal government?

The public surely is unaware of the breathtakingly expansive damages sought by the federal government, which included "all damages to the National Forests as a result of the [Moonlight] fire," including at least $22 million in fire suppression costs, resources damages in excess of $118 million, $1.5 million in emergency rehabilitation costs, unspecified tens of millions (if not more) in interim environmental degradation costs, prejudgment interest, and a doubling of damages for all injuries to forest resources.

Nor does the public likely appreciate that when Petitioners reluctantly entered into the federal settlement as they faced crippling potential damages that posed existential threats to them, they were unaware of the full record documenting how the Moonlight Fire investigation and prosecution proceeded.

Second, to the extent the public does know about the California state court's post-federal settlement findings of corrupt and tainted governmental conduct, the public surely is left to wonder why the federal government got away with a settlement that was based on the exact same conduct and had the effect of transferring substantial assets from private parties to federal coffers. In an era of damaging public cynicism about our federal government and government employee conduct, the notion that Petitioners were forced into a settlement before the full extent of the "corrupt and tainted" Moonlight Fire investigation and prosecution, App. 303a, was revealed fuels public cynicism.

When such conduct leads to termination of state-court proceedings without a similar outcome in the parallel federal court proceedings simply because the federal case settled before full discovery of the corruption, public suspicion of our federal government rightfully increases, with a concomitant decrease in confidence in our public officials. The rule of law should not be viewed as a game of beat the clock, but NAFO, Calforest, and WFPA fear that continued existence of the federal settlement produces just that effect.

The California trial court's finding that governmental actors played an active role in delaying discovery of the "corrupt and tainted" conduct in connection with the Moonlight Fire adds additional force to the above concerns. App. 303a. NAFO, Calforest, and WFPA did not learn of this conduct until after the state trial court's February 2014 rulings.

Similarly, Petitioners only uncovered the full extent of the evidence leading up to those rulings *after* the July 2012 federal settlement, as they prepared for trial in the combined state cases. And as the state trial court found, the investigators and prosecutors in the joint state-federal investigation and prosecution were far from hapless spectators to the ongoing drama that delayed discovery of the egregious conduct.

Because of the joint state-federal nature of the Moonlight Fire investigation and prosecution, the federal government was not a mere bystander. NAFO, Calforest, and WFPA' desire to remediate the harm to their interests and those of the public resulting from the continued existence of the federal Moonlight settlement causes them to support Petitioners' request for reversal of the district court's decision, which declined to set aside the federal settlement.

IV. The illegal use of the Wildland Fire Investigation Training and Equipment Fund, uncovered after the federal settlement, undermines confidence in fire investigations and prosecutions.

For NAFO, Calforest, and WFPA, the matter of Cal Fire's use of the WiFITER fund, and the fact that federal prosecutors continued to rely on Joshua White as an expert, exemplifies the fraud upon the district court in the federal case. NAFO, Calforest, and WFPA wonder why Cal Fire investigators were so intent on pursuing Petitioners. As it turned out, it had much to do with WiFITER after lead Cal Fire investigator Joshua White sent a letter to each of the then-defendants demanding that they pay a portion of the costs of fire suppression and investigation into the WiFITER fund rather than the General Fund. App. 195a n.5. But the prosecutors apparently had worked at every turn to keep Petitioners' counsel in the dark about WiFITER. App. 208a–09a.

Only in October 2013—more than a year after the federal settlement and quite by happenstance—did Petitioners learn some of the details regarding WiFITER due to the publication of the California Auditor's report 2013-107, titled "Accounts Outside the State's Centralized Treasury System." See http://www.auditor.ca.gov/pdfs/reports/2013-107.pdf. The report prominently featured Cal Fire's WiFITER account and concluded it was being used "in violation of California law." App. 196a. Subsequently, documents that were belatedly produced by Cal Fire in the consolidated state cases, App. 198a–200a, showed that Cal Fire officials had been replenishing the WiFITER

fund at the time of the Moonlight Fire and that they had worked to hide the fund's true nature. The WiFITER debacle, uncovered after the federal settlement, is a sufficient ground, standing independent of all the other evidence, to justify review of the Rule 60 issues in this case.

V. This Court should grant review and discourage two-way communications between courts and prosecutors.

Before the Rule 60 proceedings began, the chief judge of the United States District Court for the Eastern District of California presciently said that no federal judge in the district could handle the proceedings because of the court's relationship to the local prosecutors. Specifically, based on the "facts alleged in the [Rule 60] Motion and accompanying Declarations and Exhibits, the impartiality of the District and Magistrate Judges in the Eastern District might reasonably be questioned." No. 2:09-cv-02445, R.603 (Order of Recusal). Unfortunately, pursuant to Ninth Circuit policy, such an order could not issue unless the judge originally assigned to the case would issue her or his own recusal order, so the district-wide recusal order was vacated. See No. 2:09-cv-02445, R. 605 (Order vacating Order of Recusal). The judge who was reassigned the case did not recuse, and the subsequent two-way social-media communications that took place between that judge and the prosecutors more than justified the chief judge's original concerns.

While addressing possible pitfalls and the appearance of impropriety when a judge decides to use social media, a recent commentator noted the obvious but sometimes ignored danger of apparent bias or lack of impartiality: "postings can be taken out of context[.]" Benjamin P. Cooper, *Judges and Social Media: "Friends" with Costs and Benefits*, 22 No. 3 Prof. Law. 26, 28 (2014). The danger of lost context is part of the virtual terrain and the actual hazard of such activity.

> This risk of unexpected dissemination is heightened by the fact that social media postings are prone to be read in a misleading light. As the ABA opinion cautions: '[R]elations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted or relayed incorrectly.' The speaker may mean something as a joke, but in the virtual world, the audience may not understand the speaker's meaning.

Id. (quoting ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462, at 2 (2013)).

Elaborating on the problem, the author again notes the obvious: "Others can comment on the user's page." *Id*. And the obvious consequence: "If the judge's 'friends' make inappropriate comments on the judge's page, other viewers may regard the existence of those comments on the judge's page as the judge's endorsement of those comments." *Id*. This is precisely what happened here, as the district court's social-media communications about the case received digital "high-fives" from government lawyers.

On review, the Ninth Circuit's analysis did not adequately consider context or the totality of the circumstances. Consequently, the panel gave the district court a pass. The Ninth Circuit considered this case at best "a cautionary tale about the possible pitfalls of judges engaging in social media activity relating to pending cases." App. 33. The Ninth Circuit further reasoned that a judge following the tweets of the prosecutors in a hotly contested live controversy concerning fraud on the court also, in itself, did not require recusal. App. 30a.

In a case on which the Ninth Circuit relied, a member of this Court, then an advocate, plainly admitted when he had no argument to defend an extreme case of apparent bias in a case where a district court judge's impartiality could easily be questioned: "'On behalf of the government, I have no brief to defend the District Judge's decision to discuss this case publicly while it was pending on appeal.'" *United States* v. *Microsoft Corp.*, 253 F.3d 34, 108 (D.C. Cir. 2001) (quoting transcript). While the Ninth Circuit used the indefensible actions of the district court in *Microsoft* as the floor rather than the ceiling for its standard regarding disqualification, App. 30a, for the reasons described below, NAFO, Calforest, and WFPA would merely echo this statement from 17 years ago.

Judge Learned Hand spoke of "this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire. . . ." LEARNED HAND, THE SPIRIT OF LIBERTY 132–33 (2d ed. 1953). Judges are obligated to resist this passion, at least when giving into it for a moment would constitute a

circumstance when that jurist's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

To reiterate, the district court came to this case—to hear the Rule 60(d)(3) motion at issue—after the chief judge had already concluded that no judge in the district could hear the motion without an appearance of impartiality. The district court chose to hear and decide the motion anyway after the original judge assigned to the case followed the chief judge's court-wide recommendation and recused. While the case was pending before him in the district court, "followed" the Twitter account associated with the United States Attorney's Office for the Eastern District of California, thus establishing a two-way communication line between the court and the prosecutors over social media.

Petitioners have correctly set forth the applicable standards and many of the central concerns regarding the appearance of bias and lack of impartiality that resulted. Pet. 28–35. As participants in the industry under investigation, NAFO, Calforest, and WFPA are concerned that public trust and confidence in the judicial process are seriously compromised or destroyed by public perceptions of partiality in judicial proceedings.

The Court should use this opportunity to clarify and educate the judiciary, the bar, and the public regarding the kinds of conduct that might compromise the appearance of impartiality. And if this Court finds that the conduct in this case even arguably comes close to the line, it should review this case to consider what standards apply to ascertain bias given the realities of judicial participation in public media. The Court

should further delineate the proper remedy for when a jurist's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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