19-379

No: 19-

In The

**Supreme Court of the United State**

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Alfred Lam; Paula Leiato, *et al.*,

*Petitioners-Plaintiffs,*

v.

City & County of San Francisco; *et al.*,
San Francisco Juvenile Probation Department,

*Respondent-Defendants,*



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

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Ninth Circuit Court No: 17-15208
U.S.D.C. No: 3:08-cv-04702 PJH
Northern District of California

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# PETITION FOR A WRIT OF CERTIORARI

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Alfred Lam, Paula Leiato
P.O. Box 16376,
San Francisco, CA 94116
(415) 992-0071
In Pro Per

## QUESTIONS PRESENTED

Petitioners, both Asian Pacific Americans, are working in San Francisco Juvenile Hall for many years. Due to continuous and on-going discrimination, harassment, intimidation, and retaliation, petitioners filed their current lawsuit [USDC No: cv08-04702] in October, 2008, in pro se. The district court denied petitioners requests to file amended complaints with additional allegations. The related case of [USDC No: cv10-04641] was filed in October, 2010. While the current case was dismissed by the district court in 2012, it was affirmed by the Ninth Circuit, and denied by this Court.

At that time, petitioners knew of some of respondents' conduct during the litigation process that they reasonably believe constituted misconduct. Petitioner filed a related case in October, 2010, [USDC No: cv10-04838] dismissed by the district court for having "no standing". During later proceedings in the related case [USDC No: cv10-04641] around 2015, petitioners learned of additional improprieties by respondents with conduct that confirmed the respondents' misconduct rose to a level constituting "fraud upon the court".

In 2016, petitioners then moved to set aside the federal court judgment under Federal Rule of Civil Procedure 60(d)(3) for "fraud on the court." The district court denied petitioners' "motion for reconsideration as untimely and meritless, but the district Court did acknowledge and stated that the only remaining ground for relief that is not expressly time-barred is Rule 60(d)(3), which reflects the court's inherent power to "set aside a judgment for fraud upon the court". The Ninth Circuit then affirmed.

The questions presented are:

1. Whether the Ninth Circuit's decision imposes an erroneous and unjustifiable standard for "Fraud Upon The Court"?

2. Whether granting the writ generates an issue of exceptional importance to "public interest"?

3. Whether a "public employee", as witnesses in this case a "California Sworn Peace Officer" intentionally provided false information including supplemental filings to the court rising to a level constituting "fraud upon the court"?

[Short answer consideration: see *Levander v. Prober (In re Levander),* 180 F.3d 1114, 1120 (9th Cir. 1999) (perjury committed by a single non-party witness was so detrimental to the entire bankruptcy proceeding that it was held to be fraud on the court)]

## PARTIES TO THE PROCEEDING

1) Alfred Lam, Paula Leiato,
*Petitioners-Plaintiffs,*

2) City & County of San Francisco, *ET AL.*
San Francisco Juvenile Probation Department,
*Respondent-Defendants,*

In addition to the party identified in the caption, respondent-defendants also include Dennis Doyle, individually and in his Official Capacity as Director of SF Juvenile Hall;, Timothy Diestel, individually and in his Official Capacity as Assistant Director of SF Juvenile Hall; John Radogno, Alfred Fleck, Charles Lewis, Wayne Williams, individually and in their Official Capacities as a "Supervisory Employee" of SF Juvenile Hall of San Francisco Juvenile Probation Department.

## RELATED CASES

1) Alfred Lam, Paula Leiato vs.
City & County of San Francisco, *ETAL.*
San Francisco Juvenile Probation Department;
No:16-15596 Ninth Circuit Court of Appeals,
currently pending a writ of certiorari.

2) Alfred Lam, Paula Leiato vs.
City & County of San Francisco, *ETAL.*
San Francisco Juvenile Probation Department;
No:16-16559 Ninth Circuit Court of Appeals,
currently pending a writ of certiorari.

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## PETITION FOR WRIT OF CERTIORARI

This case poses two significant questions that go to the very heart of the integrity of our justice system. One is the traditional subculture of a "code of silence", which is deeply rooted within the law enforcement sector of the government employees included in petitioners' worksite, San Francisco Juvenile Hall, which was scheduled to close on December 31, 2021. The other is unique to our daily professional lives of major principle. Both merit this Court's review.

Throughout 2015 and 2016, during and after the discovery process of related case [USDC cv10-04641, 9th Circuit Court No: 16-15596], while those proceedings unfolded and eventually concluded, the full scope of the respondents' misconduct came to light and was then presented to the district court in the above related case, as well as, the current case in the district court by filing the "motion for reconsideration" pursuant to Federal Rule of Civil Procedure 60(d)(3) for "fraud upon the court".

Going forward with the evidence, the petitioners produced "after-discovered fraud" related evidence after judgment as follows, including but not limited to: (1) producing multiple false allegations of misconduct to force discipline upon and against Petitioners; (2) respondents' counsel permitting and even coaching witnesses to file false declarations to the court; (3) coaching respondents' witnesses to provide false testimony under oath via their deposition responses; (4) falsely blaming one petitioner for initiating an "excessive force and child abuse" incident in petitioners' worksite; (5) having multiple respondents' produced witnesses to falsely testify that there is no such thing as a "code of silence" (or Big Blue Wall)

inside San Francisco Juvenile Hall; (6) falsely representing to the court that there was no evidence implicating any individual misconduct of discrimination despite knowledge of substantial evidence to the contrary (i.e: first-hand knowledge of witnesses, employment histories, jobsite statistics, media and Internet articles etc.); and (7) actively condoning and concealing respondents' employee misconduct included discrimination against APA.

In light of the totality of circumstances involving fraud, petitioners moved to set aside the judgment under Rule 60(d)(3), alleging "fraud upon the court." Given the breadth and seriousness of the misconduct allegations leveled against multiple governmental employees (CA sworn peace officers), who purposefully provided declarations of false allegations against petitioners under oath via depositions though a court reporter, with Respondents' counsel present or filing them with the court. The district court primarily based its decision upon false or misleading documents or information by Respondents and failing to give proper weight to statutory presumptions and evidence by petitioners to the contrary in reaching the conclusion of summary judgment against petitioners resulting in a dismissal and assessment of costs against petitioners.

On appeal, the Ninth Circuit refused to examine whether the totality of circumstances and the evidence here amounted to fraud upon the court, even though petitioners had produced and filed close to one thousand (1000) pages of relevant undisputed documents of excerpts of record clearly identifying "after-discovered fraud upon the court" evidence after their judgment. This decision flatly contradicts this

Court's leading fraud-upon-the-court precedent – *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) – which makes it clear that Rule 60(d)(3) motions are not limited solely to after-discovered fraud. The Ninth Circuit's decision adds to the confusion in the lower courts about what constituted fraud upon the court, an issue this Court has not addressed since *Hazel-Atlas.* Under the Ninth Circuit's theory, litigants (including the government) may escape consequences for a fraud upon the court so long as the evidence of misconduct disclosed at the later-disclosed evidence of misconduct standing alone supports a finding of fraud – as is here, *post-judgment evidence supports such a finding.*

This case raises serious questions old and new that go to the heart of the guarantee of a fair trial and justice. The Ninth Circuit's decision was affirmed incorrectly in ways that conflict with this Court's precedents, as well as, undermine public policy and matters of public concern that granting the Petitioners' Certiorari is imperative and of paramount importance.

## OPINIONS BELOW

The opinion of the United States District Court was rendered on January 4, 2017. The 9th Circuit affirmed on March 18, 2019; Rehearing was denied on April 19, 2019.

## JURISDICTION

The Supreme Court has Article 3 Section 2 jurisdiction to review the decisions of the 9th Circuit and federal district court. The Ninth Circuit had jurisdiction pursuant to 28 USC 1291.

## RELEVANT FEDERAL RULES

Federal Rule of Civil Procedure 60 comes to play. Relief from a judgment or Order: Rule 60(b)(2) regarding newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); Rule 60(b)(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; and Rule 60(b)(6) any other reason that justifies relief; and Rule 60(d)(3) setting aside a judgment for fraud upon the court.

## STATEMENT OF THE CASE

### A. Background

#### 1. Introduction

Both petitioners, as a "civil rights litigants", most of the time in pro se representation, have been litigating since 2006 against their employers' (City & County of San Francisco) thru related state and federal agencies. The current case was filed in the district court in October, 2008. In October, 2010, due to the district court misapplying the limitations period of the statute of limitations of the on-going causes of action by petitioners, petitioners filed a related case [USDC No: cv10-04641], also currently filing a writ of certiorari to this Court. Throughout 2015 and 2016, during the trial process of the above related case of deposing respondents' produced witnesses and their declarations, petitioners found out through "newly discovered evidence" that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); also the fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by respondents was

applicable to this case, which would have permitted the district court to make the contrary decision they failed to make. This evidence; however, was presented to and overlooked by the district court and the 9th Circuit.

**2. Misconduct Perpetrated by Respondents (the City & County of San Francisco)**

In 2015, as Petitioners would eventually discover, the respondents' defense strategy to these actions was riddled with misconduct up to and including the entry of judgment in 2012, which rose to a level constituting "after-discovered evidence".

a. This misconduct started with the deposition process in the related case in 2015. The respondents' produced witnesses of the current case, who also produced the declarations to the court on 2011 before the summary judgment, denied they ever made the declarations consisting of false allegations against petitioners and fraudulent reports to support respondents' position.

b. Petitioners discovered respondents' counsels submitted falsified and fraudulent evidence, failed to disclose obviously relevant exculpatory evidence as required as part of their obligation under the initial disclosure requirements, and misrepresented key facts shining false light upon the petitioners.

c. Petitioners confirmed that from the depositions of respondents' produced witnesses, which indicated respondents filed false allegations of using inappropriate language against petitioner Leiato for retaliation of her "protected activities" in several occasions, which resulted in a twenty days suspension.

d. Petitioners confirmed that respondents' included their counsels of record concealed, tolerated and cover-up incidents from the judge of the district court regarding use of excessive force, child abuse and neglect, and sexual abuse incidents inside San Francisco Juvenile Hall (petitioner's worksite) based upon related case of [USDC No: cv10-04838] filed on 2010.

e. Petitioners discovered that Petitioner Lam's supervisor Radogno instructed Petitioner Lam to clean-up feces in detainee's room instead of trained professional, where such directive was way outside of Petitioner Lam's job description and forced upon Lam in an act of discrimination and harassment, instead of other non-APA employees.

f. During 2015-2016, Petitioners discovered based upon at least four (4) witnesses, who has first-hand knowledge and provided admissible written evidence to district court, which clearly indicates the "fraud upon the court" misconduct of respondents.

g. Finally, Petitioners discovered that the Respondent-Defendants' counsel knew and should have known those false and fraudulent documents and testimonies provided to the district court as material facts for their "motion of summary judgment" on 2012. The district court primarily used the above 'false and fraudulent" declarations and testimonies while purposely disregarding Appellants' declarations, testimonies, and evidence against Appellees to render a judgment in favor of Respondents-Defendants in 2012.

**B. District Court Proceedings**

Armed with significant confirmed evidence of all the respondents' misconduct, petitioners in December

29, 2016 moved to set aside the summary and final judgment of the current case under Rule 60(d)(3), alleging "fraud upon the court."

On or about January 4, 2017, the district court denied petitioners' "motion for reconsideration as being untimely and meritless, but the district court did acknowledge and state that the only remaining ground for relief that is not expressly time-barred is Rule 60(d)(3), which reflects the court's inherent power to "set aside a judgment for fraud on the court." Unfortunately, this inherent power was never utilized by the court.

**C. Ninth Circuit Proceedings**

The Ninth Circuit affirmed the judgment. Nonetheless, the Ninth Circuit concluded that the district court properly determined that all of the twenty-two alleged questionable grounds for relief were untimely because their motion was filed more than four years after the entry of judgment. In reaching that conclusion, the court never properly considered whether the combination of the before-discovered and after-discovered fraud would have sufficed to reverse the judgment nor that spoliation of evidence by Respondents was apparent or refusal to provide initial and subsequent discovery requests to Petitioners were sufficient to constitute fraud upon the court. Thus, it is logical to assume this would have significantly changed the outcome of the case. Otherwise Respondents would not have taken such actions to hind, impede, and deceive the court.

On or about April 19, 2019, the Ninth Circuit denied petitioners timely petition for rehearing. This petition is as follows:

## REASONS FOR GRANTING WRIT

This Court concluded this question as much in *Hazel-Atlas*. But in the ensuing seven decades, confusion has crept into lower-court cases, as exemplified by the decision here limits the analysis to after-discovered evidence, which is very similar to the current case. For this, the Court needs to reestablish the commonsense approach of *Hazel-Atlas* and to restore public confidence in the fairness of federal proceedings which has become necessary. Therefore, this Court should grant the petition.

### I. The Ninth Circuit's Decision Imposes An Erroneous And Unjustifiable Standard For "Fraud Upon The Court"

The Ninth Circuit profoundly misinterpreted this Court's fraud-upon-the-court precedent by affirming the district court's judgment. In so doing, it established a rule that conflicts with this Court's precedent that not only gives a "free pass" to the Respondents' and their agents, including government employees as peace officers, but also a "free pass" to their counsel's extraordinary "zealous representation" via actions, behavior, and conduct raising to a level of misconduct in such cases. Unfortunately, this will improperly shield the offenders from scrutiny even with the most unsavory of litigants. Thus, this Court should grant certiorari to reject such guidance in an important area of law that lower courts have been struggling with for years now which has greatly and improperly affected its litigants.

### A. This Court's Precedent Does Not Limit "Fraud upon the Court" Exclusively to "After-Discovered Fraud."

Federal Rule of Civil Procedure 60 provides a number of grounds for reopening judgments, most of which are somewhat time-limited. However, any allegations of "fraud upon the court" are treated differently. As Rule 60(d)(3) explains, there is nothing in Rule 60 which "limit[s] a court's power to ...set aside a judgment for fraud upon the court."

"Almost all the principles that govern a claim of fraud upon the court are derivable from the *Hazel-Atlas* case." 11 Wright & Miller, *Federal Practice and Procedure* section 2870 (3d Ed.). In that case, *Hazel-Atlas* alleged fraud upon the court commencing in an action in Hartford's patent for a glass-making machine. *Hazel-Atlas*, 322 U.S. at 239. In support of Hartford's application for that patent, "certain officials and attorneys of Hartford determined to have published in a trade journal an article signed by an ostensibly disinterested expert" (William Clarke), championing Hartford's machine as "a remarkable advance in the art of fashioning glass." *Id.* Hartford received the patent in 1928 and sued Hazel-Atlas for infringement. *Id.* at 240-41.

It may be argued that even though such fraud may have existed pretrial, Appellants could have discovered the fraud "through due diligence" which would have discovered the fraud. Because of this, such fraud does "not disrupt the judicial process" and does not constitute fraud upon the court. However, with the instant case, this argument should fail because Appellees took every available step to preclude

Appellants from receiving both initial discovery requirements and subsequent requests for discovery. In such a circumstance, Appellants had no ability to and were actually prevented from using due diligence when discovery documents were not provided to them in a timely manner. This, in and of itself, does disrupt the judicial process and therefore does constitute fraud upon the court and should not be tolerated by this Court.

Furthermore, in *Sierra Pacific*, after discovered fraud would not be admissible because the parties were bound by a Settlement Agreement which precluded relief for after discovered fraud. Such an agreement has not been executed by the parties to the instant case. Therefore, after discovered evidence of fraud, as well as, pretrial fraud maybe used by a court under a totality of circumstances theory of recovery to provide Appellants relief due to Appellees' unconscionable actions, behavior, and conduct.

Last, but not least, Petitioners maintain that the distinction between fraud and fraud on the court is, as one court stated, "merely compilations of words that do not clarify." *Toscano v. Comm'r, 441 F.2d 930, 933 (9th Cir.1971)*, and that in any event that Congress may not through the federal rules infringe upon the Court's intrinsic power to set aside or reverse judgments on equitable grounds, as doing so violates the separation of powers doctrine and because there is no grant of any such authority in the Constitution.

The totality of the 60(d) denial follows:
The only remaining ground for relief that is not expressly time-barred is Rule 60(d)(3), which reflects the court's inherent power to "set aside a judgment for

fraud on the court." Fed. R. Civ. P. 60(d)(3). However, this ground is to be distinguished from simple fraud by an opposing party. See *In re Levander, 180 F.3d 1114, 1119 (9th Cir. 1999)* ("[N]ot all fraud is fraud on the court."). True "fraud on the court" requires a showing by clear and convincing evidence of egregious misconduct that "does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *In re Intermagnetics America, Inc., 926 F.2d 912, 916 (9th Cir. 1991).* "Mere nondisclosure of evidence is typically not enough to constitute fraud on the court, and `perjury by a party or witness, by itself, is not normally fraud on the court'" *United States v. Estate of Stonehill, 660 F.3d 415, 444 (9th Cir. 2011)* The allegations in plaintiffs' motion, even if proven, amount to (alleged) perjury by a witness or nondisclosure of evidence by the defense. At most, this is ordinary fraud subject to Rule 60(b) and its one-year time limit, not fraud on the court.

The statement in *In re Intermagnetics America, Inc., 926 F.2d 912, 916 (9th Cir. 1991)* that true fraud on the court requires a showing by clear and convincing evidence of egregious misconduct that "does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication" is at odds with various other definitions of fraud on the court found in the case law. See, e.g., *U.S. v. Sierra Pacific Industries, (2015) 100 F.Supp.3d 948, 955* "[W]e have said that

[fraud on the court] may occur when the acts of a party prevent his adversary from fully and fairly presenting his case or defense" and *U.S. v. Estate of Stonehill (Ninth Circuit 2011) 660 F.3d 415 446,* "Non-disclosure by an officer of the court or perjury by or suborned by an officer of the court may amount to fraud on the court only if it was "so fundamental that it undermined the workings of the adversary process itself"; *Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir.1989)* (in determining whether fraud constitutes fraud on the court, the relevant inquiry is not whether fraudulent conduct "prejudiced the opposing party," but whether it " 'harm[ed]' the integrity of the judicial process"). In *Stonehill, supra at 444-45,* the court also stated: "Most fraud on the court cases involve a scheme by one party to hide a key fact from the court and the opposing party. For example, in *Levander* [*Levander v. Prober (In re Levander), 180 F.3d 1114 (9th Cir.1999)*] a corporate officer testified in a deposition that the corporation had not sold its assets, and a bankruptcy court subsequently entered a judgment against only the corporation. *Levander, 180 F.3d at 1116-17.* It turned out that the corporation had in fact transferred all of its assets to a related partnership. *Id.* We held that the false testimony constituted fraud on the court, and the bankruptcy court was allowed to amend its order to include the partnership as an additional party to the judgment. *Id. at 1122-23.*"

Other authorities acknowledge the indeterminacy of the concept; see *Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1085 (Fed.Cir.1993),* fraud on the court "remains a 'nebulous concept', and 11 Wright & Miller

§ 2870(2d ed.1987), "Perhaps the principal contribution of all [the] attempts to define 'fraud on the court' and to distinguish it from mere 'fraud' is as a reminder that there is a distinction.".

The concept of fraud on the court, in dire need of clarification, nonetheless ought to apply to the case under consideration. During the litigation in federal court, Defendants' took extraordinary steps to impede discovery, producing no documents at all in response to requests for production or FOIA claims, in circumstances where spoliation appeared very likely. Defendants provided scores of 'I don't know' and 'I don't recall' responses at deposition, and settled out with a single Plaintiff without the knowledge or approval of other Plaintiffs. During the litigation Defendants' counsel requested and obtained work product from pro se Plaintiffs, taking unfair advantage of their pro se adversary's industry and efforts. Any such clarification should be guided by the history of FRCP 60, and the common law that it sought to codify. Plaintiffs provided additional evidence of fraud in their motion, providing evidence of further acts of discrimination and perjury. It is commonly observed that discrimination claims are difficult to prove, all the more so where defendants conceal evidence and misrepresent facts.

The Court could find the foregoing sufficient to prove fraud on the court regardless of the specific definition adopted, that any acceptable definition of fraud on the court must include the types of conduct identified. Or the Court could clarify the concept to enable the lower courts to distinguish fraud on the

court from other fraud for purposes of adjudicating FRCP 60(d) motions.

**FRCP 60(D) Fraud On The Court**

In *U.S. v. Beggerly 1998 524 U.S. 38*, 38-39, Justice Rehnquist stated,

"The original Rule 60(b) established a new system to govern requests to reopen judgments. Because it was unclear whether that Rule provided the exclusive means for obtaining post judgment relief, the Rule was amended in 1946 to clarify that nearly all of the old forms of obtaining relief from a judgment were abolished but that the "independent action" survived. However, this does not mean that the requirements for a meritorious independent action have been met here. Such actions should be available only to prevent a grave miscarriage of justice. [citation]"

As the Advisory Committee Notes to FRCP 60 make clear, the rule was intended to codify existing law, while simply precluding relief through the form of common law writs, instead "requiring the practice to be by motion or by independent action." While the statute itself uses the word 'abolish', the word should not be taken to mean, as per one definition, to completely do away with (something)"; https://www.merriam-webster.com/dictionary/abolish

The Committee "endeavored then to amend the rules to permit, either by motion or by independent action, *the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules*, and the amendment concludes with a provision abolishing the

use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action.'" FRCP 60, Notes of Advisory Committee on Rules—1946 Amendment.

"On the other hand, one of the purposes of the bill of review in equity was to afford relief on the ground of newly discovered evidence *long after* the entry of the judgment. Therefore, to permit relief by a motion *similar* to that heretofore obtained on bill of review, Rule 60(b) as amended permits an application for relief to be made by motion, on the ground of newly discovered evidence, within one year after judgment", FRCP 60, Notes of Advisory Committee on Rules—1946 Amendment (emphasis added)[1]. The pedigree of that power is described in *Hazel-Atlas Glass Co. v. Hartford-Empire Co (1944) 322 U.S. 238, 244*:

From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. [citations] This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need

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[1] FRCP 60, Notes of Advisory Committee on Rules—1946 Amendment also states "If these various amendments, including principally those to Rule 60(b), accomplish the purpose for which they are intended, the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice." Perhaps this should have read 'proscribe the practice'.

for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule."

The Notes also state, "With reference to the question whether, as the rules now exist, relief by coram nobis, bills of review, and so forth, is permissible, the generally accepted view is that the remedies are still available, although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery." As things stand, then, it appears that federal courts are asked to interpret a statute that codifies such ancient lore and mystery.

The Notes also state that, "under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. See Moore and Rogers, Federal Relief from Civil Judgments (1946) 55 Yale L.J. 623, 653–659; 3 Moore's Federal Practice (1938) 3267 et seq. And the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause [i.e., FRCP 60(d) Other Powers to Grant Relief.] As an illustration of this situation, [FRCP 60(d)] see *Hazel-Atlas Glass Co. v. Hartford Empire Co. (1944) 322 U.S. 238.*"

The statement arguably suggests that the effect of FRCP 60(d) is to codify 'established doctrine'--in this case judicial doctrine--freezing it in time, without the possibility of evolution ordinarily found in the common law. This would be problematic enough were established doctrine at all clear.

**Constitutional Authority Over Judicial Decision-Making**

Whatever the intention, FRCP 60 constitutes a significant departure from prior writ practices of the Supreme Court and federal courts, primarily in arbitrarily limiting the time in which comparable motions can be brought.

In *Wayman v. Southard (1825) 23 U.S. 1, 4,* the Court stated "Every Court has, like every other public political body, the power necessary and proper to provide for the orderly conduct of its business. This may be compared to the separate power which each house of Congress has to determine the rules of its proceedings, and to punish contempts.", *Wayman, supra at P. 15.*

The Court's power derives directly from Article III Section 1 and presumably involves all intrinsic powers of the courts as perceived at that time.

The historical ability of the federal courts to revise judgments was described in *Bronson v. Schulten (1881) 104 U.S. 410, 415* as follows:

"[T]hat after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court

which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered [citing cases]"

and adding,

"But to this general rule an exception has crept into practice in a large number of the State courts in *a class of cases not well defined,* and about which and about the limit of this exception these courts are much at variance. An attempt to reconcile them would be *entirely futile*", *Bronson, supra at 416(emphasis added).*

The conclusion is inescapable but that the current Court inherited an irreconcilable tangle of legal reasoning that should be re-conceptualized, identifying valid and invalid strands of reasoning. The current phrasing, 'fraud on the court', suggests the guilty party has a specific intention to defraud the court, for reasons that go beyond the instant litigation. That reading, however, may provide a natural interpretation of the phrase though it is contrary to many case law statements, and in any event involves no legal reasoning or constitutional justifications for revising judgments.

### B. The Decision Below Adds to The Confusion In The Lower Courts Over An Exceptional Important Question.

This Court's review of the issues presented is all the more imperative because the Ninth Circuit's holding is inconsistent with fraud upon the court standards offered by many other Courts of Appeal.

In the decades since *Hazel-Atlas*, the legal definition of fraud upon the court has confounded courts and commentators. *See, e.g., Fox ex rel. Fox v. Elk Run Coal Co.*, 739 F.3d 131, 136 (4th Cir. 2014) (observing "that fraud upon the court is a 'nebulous concept'"); *In re Golf 255, Inc.*, 652 F.3d 806, 809 (7th Cir. 2011) (noting that lower court's attempts to define fraud upon the court "do[n't] advance the ball very far"); *Landscape Props., Inc. v. Vogel*, 46 F.3d 1416, 1422 (8th Cir. 1995) (Fraud upon the court [is] not easily defined."); *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993) ("Fraud upon the court is a somewhat nebulous concept[.]"). As a result of this uncertainty, "[s]everal definitions" of fraud upon the court "have been attempted" by the lower courts. 11 Wright & Miller, *Federal Practice and Procedure* section 2870.

Many circuits have adopted standards of fraud upon the court that do not include any "after-discovered fraud" requirement. *See, e.g., Herring v. United States*, 424 F.3d 384, 390 (3d Cir.2005) (defining fraud upon the court as "(1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) that in fact deceives the court," and the underlying fraud must be "egregious conduct"); *Demjanjuk*, 10 F.3d at 348; *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). [It should be noted here that fraud, in and of itself, is a form of egregious conduct unpermitted by the Courts and a party using such methods in having a court render a judgment in their favor and assessing upon the opposing party the wrongdoers' costs is both unfathomable and unconscionable. The Court has the affirmative duty to

prevent such a substantial miscarriage of justice upon either party to its litigation.

Some circuits have suggested fraud upon the court typically involves after-discovered fraud, but not in cases (like this one) involving a "trail of fraud" throughout the litigation process, *Hazel-Atlas*, 322 U.S. at 250, where the before-discovered and after-discovered fraud together amount to fraud upon the court. *See, e.g., In re Golf*, 652 F.3d at 809; *Great Coastal Exp., Inc. v. Int'l Bhd. Of Teamsters*, 675 F.2d 1349, 1357 (4th Cir. 1982).

The Ninth Circuit, however, has now blazed a new trail, holding clearly and unequivocally that a finding of "fraud upon the court ... is available only where the fraud was not known at the time of settlement or entry of judgment," *regardless* of whether a litigant can be said to have committed fraud upon the court when considering the combination of misconduct known before judgment and the misconduct discovered or confirmed only after judgment.

The courts of appeals have struggled to define "fraud upon the court" is unsurprising. This Court has not materially addressed the doctrine since its decision in *Hazel-Atlas* over seventy years ago. But precisely because "the power to vacate a judgment for fraud upon the court is so great," it is "important to know what kind of conduct falls into this category." See 11 Wright & Miller, *Federal Practice and Procedure* section 2870.

Uncertainty in the lower courts on this important yet unsettled issue is reason enough for proper review.

Where the Ninth Circuit has muddled the one aspect of the doctrine that should have been crystal-clear from the facts and holding of *Hazel-Atlas* is yet another reason for proper review. But the far more important and compelling reason to grant review is that the decision below undermines the integrity of the judicial system by allowing fraud upon the fraud to go un-remedied if the mosaic of the fraud emerges gradually and continuously, rather than coming to light entirely post-judgment. The Ninth Circuit's rule makes no real sense and consistency which needlessly casts doubt on the integrity of the judicial system in the circumstances where preserving judicial integrity is vital.

## II. Whether granting the writ generates an issue of exceptional importance to "public interest."

This Court's decision will generate a needed resolution to an issue of exceptional importance to be addressed by the general public regarding speaking-up or providing information even though it happened some period of time before, about matters of high public importance and interest, including public officials committing crimes such as child abuse and neglect, and sexual abuse; sexual harassment., etc., and their employers' toleration, condoning, and covering-up of such crimes.

The recent "me too" movement in Hollywood and in areas through-out the nation; sexual harassment and assault in the military; church allegation of sexual abuse; sexual abuse inside the nationwide detention facilities; Bill Crosby's sexual battery conviction; the "black lives matter" movement,

and the now approaching chapter of overturning *ROE v. Wade* in the abortion arena are all areas which will be severely impacted by this decision. This Court has the discretion to encourage citizens to seek relief or justice, regardless of unrealistic lapses of time that would bar their right to provide relevant information about matters of public importance, interest, and concern. Thus, this great Court should now review this case.

## III. Whether a "public employee", as witnesses in this case a "California Sworn Peace Officer" intentionally provided false information included supplement filings to the court rising to a level constituting "fraud upon the court."

The Appellees' produced witnesses, who were CA Peace Officer, just like "police officers" or "deputy sheriffs", were the "gate keeper" of the judicial or court proceedings, colluded with their counsels to provide the "false and fraudulent" documents and testimonies to the court reporters and purposely have the Courts overlook Appellants' statutory presumptions, declarations, testimonies, and evidence in opposition to the MSJ. This inconsistency resulted in the district court primarily and improperly basing Appellees' false and misleading testimonies to reach a summary judgment in favor of Appellees.

Certainly where inclusion of false and misleading evidence are used in order to deceive the Court in rendering a decision on their behalf would constitute fraud upon the court, than purposely and willing failure to disclose evidence supporting the opponent's position would have the same detrimental effect...an effect that would not have been realized "but for" the

wrongdoer committing fraud upon the court in the first place. Such conduct cannot and should not be tolerated by the Courts.

## CONCLUSION

Therefore, this Court should grant the petition for certiorari based upon the aforementioned reasons and circumstances.

Dated: August 27, 2019.

Respectfully submitted,

ALFRED LAM, PAULA LEIATO
P.O. Box 16376,
San Francisco, CA 94116
(415) 992-0071
In Pro Per

SUPREME COURT OF THE
UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543–0001

I declare under penalty of perjury that the foregoing is true and correct.

August 27, 2019

/"s"/ Alfred Lam, Paula Leiato

ALFRED LAM, PAULA LEIATO