No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After U.S. and California law enforcement authorities jointly investigated the cause of a forest fire, and U.S and California attorneys jointly prosecuted actions relying on the investigation's findings, petitioners entered into a settlement agreement with the United States to resolve a billion-dollar federal claim. At the time, petitioners knew of some government conduct during the investigation and prosecution they believed constituted misconduct. During later proceedings in the related state-court action, petitioners learned of additional impropriety that confirmed their worst fears: the 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 then 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 Judge of the District attempted to recuse all judges in the District—including Judge William Shubb—due to concerns over the appearance of partiality, Judge Shubb nevertheless elected to hear the motion, 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 of fraud alone did not warrant relief. Within hours of that decision, 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 in isolation.

2. Whether a district court judge's impartiality might reasonably be questioned, thereby requiring recusal under 28 U.S.C. §455(a), when he not only follows the prosecution on social media, but also, just hours after denying relief to the opposing party, "tweets" a headline and link to a news article concerning the proceedings pending before him.

PARTIES TO THE PROCEEDING

Petitioners are Sierra Pacific Industries, Inc.; W.M. Beaty and Associates, Inc.; Ann Mckeever Hatch, as trustee of the Hatch 1987 revocable trust; Richard L. Greene, as Trustee of the Hatch Irrevocable Trust; Brooks Walker, Jr., as Trustee of the Brooks Walker, Jr. Revocable Trust and the Della Walker Van Loben Sels Trust for the issue of Brooks Walker, Jr.; Brooks Walker III, individually and as trustee of the Clayton Brooks Danielsen, the Myles Walker Danielsen, and the Benjamin Walker Burlock trust, the Margaret Charlotte Burlock Trust; Leslie Walker, individually and as trustee of the Brooks Thomas Walker Trust, the Susie Kate Walker Trust and the Della Grace Walker trusts; Wellington Smith Henderson, Jr., as Trustee of the Henderson Revocable Trust; Elena D. Henderson; Mark W. Henderson, as Trustee of the Mark W. Henderson Revocable Trust; John C. Walker, individually and as trustee of the Della Walker Van Loben Sels trust for the issue of John C. Walker; James A. Henderson; Charles C. Henderson, as Trustee of the Charles C. and Kirsten Henderson Revocable Trust; Joan H. Henderson; Jennifer Walker, individually and as trustee of the Emma Walker Silverman Trust and the Max Walker Silverman Trust; Kirby Walker; Lindsey Walker, AKA Lindsey Walker-Silverman, individually and as trustee of the Reilly Hudson Keenan Madison Flanders Keenan Trust; and Eunice E. Howell, DBA Howell's Forest Harvesting Company, individually. Petitioners were defendants in the district court and defendants-appellants in the court of appeals.

Respondent is the United States. Respondent was plaintiff in the district court and plaintiff-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioner Sierra Pacific Industries, Inc., has no parent corporation. It has no publicly owned stock, and no publicly held company owns 10 percent or more of its stock.

Petitioner W.M. Beaty and Associates, Inc., has no parent corporation. It has no publicly owned stock, and no publicly held company owns 10 percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

This case poses two questions that go to the very heart of the integrity and impartiality of our justice system. One is as old as the Republic; the other is unique to our social-media age. Both merit this Court's review.

After U.S. and California authorities jointly investigated the cause of a 2007 forest fire that originated in the Sierra Nevada mountain range, they quickly blamed petitioners for starting it. Federal prosecutors brought a billion-dollar civil damages claim against petitioners in federal court, and state prosecutors pursued millions more in state court. Both prosecution teams cooperated extensively under a joint agreement, and together they produced a shocking series of prosecutorial abuses. Among other things, the government (1) produced a plainly fraudulent origin-and-cause report to blame petitioners for starting the fire; (2) permitted and even coached investigators to testify misleadingly about their investigation; (3) falsely assigned blame to one petitioner for starting other fires in the area to bolster the fraudulent origin-and-cause report; (4) falsely stated that one petitioner's employee admitted to starting the fire when the employee actually denied it; (5) falsely represented to the court that no evidence implicated another individual in the fire despite knowledge of substantial evidence to the contrary; (6) concealed federal employee misconduct at a lookout tower when the fire started; and (7) concealed that investigators had an improper financial incentive to assign blame to petitioners.

Knowing of only a subset of this misconduct and facing a billion-dollar civil suit brought in the name of the United States, petitioners reluctantly decided to settle the federal suit to avoid the possibility of crushing liability. But the lower stakes in the state-court action made a full defense feasible, and, as those proceedings unfolded, the full scope of the government's misconduct came to light and was confirmed by the state trial court. After a full review of the government's conduct, the state trial judge labeled the joint investigation and prosecution "corrupt and tainted," found that the misconduct "threatened the integrity of the judicial process," concluded that petitioners could not "ever have received … a fair trial," and imposed terminating sanctions, which a California appeals court recently upheld. App.140.

In light of the totality of the confirmed fraud, petitioners moved to set aside the federal settlement under Rule 60(d)(3), alleging "fraud on the court." Given the breadth and seriousness of the misconduct allegations leveled against the U.S. Attorney's Office with which the local federal bench interacts almost daily, the Chief Judge of the District initially recused all judges in the District to avoid the appearance of partiality and bias. Nonetheless, after that order was rescinded, Judge William Shubb elected not to recuse, heard the motion, and denied it. Within hours of his decision, Judge Shubb—already a Twitter "follower" of the prosecution—"tweeted" a headline and link to a news article proclaiming that one petitioner was "still liable," although the denial of the Rule 60 motion simply left in place a settlement with no admission of liability or wrongdoing.

On appeal, the Ninth Circuit refused to examine whether the totality of the evidence here amounted to fraud on the court because, in its view, Rule 60(d)(3) motions are reserved only for "after-discovered fraud," *i.e.*, fraud discovered after judgment. That decision flatly contradicts this Court's leading fraud-on-the-court precedent—*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944)—which makes 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 constitutes fraud on the court, an issue this Court has not addressed since *Hazel-Atlas*. And the decision defies common sense. Under the Ninth Circuit's theory, litigants (including the government) may escape the consequences for a fraud on the court so long as neither the evidence of misconduct disclosed at the time of judgment nor the later-disclosed evidence of misconduct standing alone supports a finding of fraud—*even if the pre-judgment and post-judgment evidence supports such a finding*. That divide-and-defraud analysis makes no sense generally, and even less sense when a party has settled a civil suit with the government. No party should be forced to suspect the worst of government prosecutors or be disabled from revisiting a fraudulently procured settlement entered as an alternative to a government effort to procure a billion-dollar damages award.

To make matters worse, the Ninth Circuit concluded that none of Judge Shubb's social media activities required recusal, even while acknowledging that "this case is a cautionary tale about the possible pitfalls of judges engaging in social media activity relating to pending cases." App.31. But a judge is

obligated to recuse himself when his "impartiality might reasonably be questioned," 28 U.S.C. §455(a), which necessarily requires consideration of the entire picture. Rather than conduct this holistic analysis, the Ninth Circuit instead addressed seriatim Judge Shubb's decision to follow the prosecutors on Twitter and his decision to tweet an (inaccurate) article about his own disposition—and without so much as acknowledging the Chief Judge's initial District-wide recusal. Under the totality of the circumstances, this case required more than a caution; it required recusal. This Court should not only reaffirm the proper, holistic interpretation of §455, but should also make clear that a party facing a billion-dollar government civil action should not have to face a federal judge "following" the local federal prosecutors or tweeting about his rulings. The technology may be new, but the principle is not: Concerns about impartiality are at their zenith when the citizen faces off against the prosecutor. Our system of separation of powers reassures the defendant that the facts that federal prosecutors and federal judges have the same employer and work in the same building will not cause any favoritism. Having the "impartial" federal judge "follow" only the federal prosecutors and "tweet" about his ruling favoring the prosecutors (via an inaccurate article, no less) is one social media trend our justice system cannot tolerate.

This case raises questions old and new that go to the heart of the guarantee of fair prosecutions and impartial justice. The Ninth Circuit's decision answers both questions incorrectly in ways that conflict with this Court's precedents and undermine public confidence. Certiorari is imperative.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 862 F.3d 1157 and reproduced at App.1-32. The district court's opinion is reported at 100 F. Supp. 3d 948 and reproduced at App.35-99.

JURISDICTION

The Ninth Circuit issued its opinion on July 13, 2017. The Ninth Circuit denied a petition for rehearing on October 17, 2017. On December 13, 2017, Justice Kennedy extended the time for filing a petition for a writ of certiorari to February 14, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of 28 U.S.C. §455 and Rule 60 are reproduced at App.310-11.

STATEMENT OF THE CASE

A. Background

1. The 2007 Moonlight Fire and the Federal and State Lawsuits

Petitioner Sierra Pacific Industries, Inc. ("Sierra Pacific") is a third-generation, family-owned forest products company. It owns or manages nearly 2 million acres of timberland, primarily in California. In 2007, Sierra Pacific had a contract to harvest timber on land in Northern California owned by the individual petitioners and managed by petitioner W.M. Beaty & Associates ("Beaty"), a small, family-run business. Sierra Pacific hired petitioner Eunice Howell's Forest Harvesting Company ("Howell"), an experienced, California-licensed timber operator, to conduct logging operations on the site, which was

located near the Plumas and Lassen National Forests. App.3; App.104.

A forest fire, later known as the "Moonlight Fire," broke out on this land on September 3, 2007. App.3. That morning, two Howell employees were operating bulldozers in the area and performing routine work installing "water bars," which are berms or mounds designed to prevent erosion. App.3; App.104. Their work lasted until approximately 12:45 p.m. SER.328.[1] Around that time, another individual, Ryan Bauer, was cutting firewood in the immediate area with an illegally altered chainsaw. App.147.

At 2:24 p.m., the U.S. Forest Service's ("Forest Service") Red Rock Lookout Tower spotted and reported the Moonlight Fire. App.147. Both the Forest Service and the California Department of Forestry and Fire Protection ("Cal Fire") responded to the call, but the fire persisted for more than two weeks, burning some 65,000 acres of land, including 45,000 acres of national forestland. App.3; App.190.

U.S. and California authorities jointly investigated the origin and cause of the fire, and they eventually issued an official Origin and Cause Investigation Report concluding that "one of the Howell bulldozers had caused the fire by striking a rock, which created a spark that ignited forest litter on the ground and eventually broke out into a fire that spread into the surrounding forest." App.5. Pointing to that determination, the United States in August 2009 filed a civil action in the Eastern District of

[1] "SER" refers to the Supplemental Excerpts of Record filed with the Ninth Circuit.

California against petitioners—Sierra Pacific, Howell, Beaty, and various landowners—seeking $800 million in damages and additional compensation for the resources spent fighting the fire. App.5. With interest and attorney fees, the claim totaled approximately $1 billion. ER.467-68.[2] That same month, the California Attorney General filed a state-court action against petitioners seeking over $8 million to cover firefighting and investigation costs. App.5.[3] Like the federal and state investigators, the federal and state prosecutors worked hand-in-hand: They entered into a joint prosecution agreement, and thus jointly prepared witnesses, hired the same consultants and experts, and coordinated deposition questions and defenses. App.5; App.35-37; App.216-17.

2. The Misconduct Perpetrated by U.S. and California Authorities

As petitioners would eventually discover, the federal-state investigation and prosecutions were riddled with misconduct.

a. The misconduct started with the investigation by the Forest Service and Cal Fire, which culminated in their joint origin-and-cause report. Accepted wildland-fire protocols for conducting origin-and-cause investigations are meticulous. As the government's origin-and-cause expert explained, misidentifying a fire's point of origin by mere feet can

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

[3] The Attorney General's suit was consolidated with five private suits also relying on the origin-and-cause report to claim damages. The total amount sought in the consolidated state suit was approximately $60 million. App.5.

make a "world of difference in terms of determining the correct cause." App.210. The origin of the Moonlight Fire, and thus its cause, was "one of the most critical aspects" of the subsequent litigation against petitioners—indeed, "the very basis upon which" those actions were brought. App.215; App.253.

One Forest Service investigator and one Cal Fire investigator led the joint efforts. App.4. Under the established protocol, a white flag marks a fire's point of origin. App.210. On September 5, two days after the fire began, the investigators placed a white flag alongside a rock. App.212; App.4. The Cal Fire investigator took five photographs of the location, each showing the white flag, and the Forest Service investigator sketched the area on a piece of paper, marking the white-flag site as the "point of origin," before releasing the scene. App.211-15.

The official origin-and-cause report, however, identified two entirely different points of origin, designated E-2 and E-3, even though they were never marked with white flags. App.143-44; App.211-12. Furthermore, two additional photographs taken by the investigators before releasing the scene showed many other colored flags identifying certain burn indicators (backing, lateral, advancing, etc.), but no white flags other than the single white flag marking the rock, as described above. App.214. Despite totaling some 300 pages, the report never mentions the original point of origin marked by the white flag (or the five photographs and "point-of-origin" sketch showing the flag), let alone why that marking was erroneous and how it migrated to different points never marked by white flags. App.210; App.211-12;

SER.361-505 (report excerpts). Simply put, an unexplained "world of difference" separated the original point-of-origin determination from the conclusion reached in the origin-and-cause report.

The government attempted to obscure rather than explain this "critical" divide. App.253. Petitioners discovered, for example, that during a pre-deposition meeting with the lead Assistant U.S. Attorney, the Forest Service investigator admitted seeing the white flag in the photographs, but was directed by prosecutors to downplay its significance as a "non-issue." App.213; App.9. In keeping with that instruction, during his deposition, the federal investigator "denied knowing about the white flag, denied ever placing it, and testified that it looked like a 'chipped rock' to him." App.216; App.146. After being repeatedly pressed on the point, the investigator conceded that the white flag "was 'very likely … a flag [he] put down but … discounted … later.'" App.144 (alterations in original). The federal investigator was unable to explain why the five photographs showing the white flag were not included with the report. App.143-44.

Likewise, during his deposition, the Cal Fire investigator denied placing the white flag, denied that the very photographs he had taken showed the white flag, and "continued to feign ignorance" even after "admitting the existence of the white flag." App.212; App.144. When asked why he did not use white flags to mark the E-2 or E-3 origin points identified in the report, or take photographs intended to document those origin points (as opposed to other indicators), the investigator simply said, "I don't know." App.144;

App.212. The investigator "disavowed knowledge of" the federal investigator's sketch showing the origin point as the white-flag mark, rather than E-2 or E-3. App.145. The investigator could conveniently invoke a "lapse of memory" because he "destroyed his field notes prepared during his investigation." App.148-49.

b. Petitioners discovered aerial video footage that further "undermined the government's point-of-origin determination" in the origin-and-cause report. App.6. That video, which contained footage of the fire one-and-a-half hours after it started, revealed that the two points of origin identified in the origin-and-cause report were located in "unburnt areas outside of the smoke plume." App.78. Prosecutors learned of this video for the first time only after the publication of the origin-and-cause report, but they refused to correct the report or supplement written discovery responses or deposition testimony. ER.506-10.

c. Petitioners learned that the government had bolstered its conclusion that Howell was responsible for the fire by falsely asserting Howell's responsibility for two earlier fires in 2007 allegedly caused by Howell bulldozers striking rocks, as well as a fire that occurred just after the Moonlight fire. App.223. In particular, the origin-and-cause report highlighted one such fire (the Lyman Fire) to bolster its causation theory. App.149; App.224. But "the lead investigator of the Lyman Fire flatly contradicted" the conclusion about the Lyman Fire in the origin-and-cause report "by testifying that the cause of the Lyman Fire was undetermined." App.150.

d. Petitioners learned that the government advanced a fraudulent "confession" from a Howell

bulldozer operator. App.6. The Forest Service investigator interviewed the employee on the day the fire started and prepared a witness statement purporting to summarize their conversation. App.146. The interview was not recorded, but the statement "attributed the cause of the fire to a Caterpillar bulldozer's tracks scraping rock." App.146. One week later, on September 10, 2007, the Cal Fire investigator interviewed the same employee in a recorded interview. App.146. When asked "whether he *ever* believed [a bulldozer strike] to be the cause of the fire," the employee "flatly denied having that belief and denied having told anyone that a rock strike started the fire." App.146. Nonetheless, the investigator's written witness summary of the second interview reported that the employee "reiterated" that "the fire was caused by a bulldozer striking a rock," and the investigator incorporated that patently false summary into the origin-and-cause report. App.146-47. When the Cal Fire investigator was confronted with "the inconsistency between his summary and the transcript of the recorded interview," he offered "no explanation for the discrepancy." App.147.

e. Petitioners discovered that the government had concealed misconduct at the Forest Service's Red Rock Lookout Tower, where the fire was first spotted and reported. App.6. When the fire first began, the lookout tower was manned by a single employee. At approximately 2:00 p.m.—after the fire started, but 24 minutes before it was first reported—a second Forest Service employee, Karen Juska, arrived at the lookout tower, only to find the designated watchman "standing on the catwalk of the tower urinating on his bare feet." App.148; App.220. Juska also "spied a glass

marijuana pipe" inside the lookout tower, and when the watchman handed her a radio, she "smelled a heavy odor of marijuana on [his] hand and on the radio." App.148; App.220. Although plainly relevant to the question whether the Forest Service employee was properly performing his duties, none of this information was included in the written summaries of interviews conducted and prepared by Forest Service investigators; indeed, Juska was "instructed" by the federal investigator "not to speak of these issues" in her interview. App.148; App.220. Needless to say, the information did not feature in the origin-and-cause report.

f. Petitioners discovered that the government had papered over evidence implicating Ryan Bauer, who is believed to have been cutting firewood with an illegally modified chainsaw in the area where the fire began. App.9. The origin-and-cause report included a "summary" of an interview with Bauer, but it omitted Bauer's "unsolicited" and "demonstrably false alibi"—*viz.*, Bauer's claim that he was at his girlfriend's house "all day." App.147; App.220. Furthermore, petitioners learned that Bauer's father had attempted to inculpate Sierra Pacific by falsely accusing Sierra Pacific's counsel of offering a $2 million bribe to his son to accept blame for the fire. App.8-9. Despite these false efforts to deflect responsibility, federal prosecutors "represent[ed] to the court that there was not a 'shred' of evidence pointing to Bauer." App.9.

g. Finally, petitioners discovered that the joint federal-state investigation was stained by illicit financial motivations. As the California State Auditor eventually reported in 2013, "funds recovered in state

wildfire cases were being put into an extra-legal account" known as the Wildland Fire Investigation Training and Equipment Fund ("WiFITER"). App.9. WiFITER "was allowing Cal Fire to illegally divert money from California's General Fund to the detriment of all Californians." App.258. It was also being used to extort *in terrorem* settlements: Before California prosecutors filed suit against petitioners in 2009, the Cal Fire investigator who had worked with federal authorities throughout the origin-and-cause investigation had demanded that petitioners send a $400,000 check to WiFITER—on top of a $7.7 million check to the state treasury—within 30 days to avoid prosecution. App.195. WiFITER obtained more than $3.6 million in such "settlements" before it was closed following the State Auditor's report. App.141.

3. The Federal Settlement and the State-Court Terminating Sanctions

In July 2012—with knowledge of only some of this misconduct, and after the district court had sided with the government on critical pre-trial rulings—petitioners settled with the United States to avert a potential billion-dollar judgment. App.7. Under the settlement agreement, petitioners paid the federal government $55 million and transferred 22,500 acres of land to it. App.7. Petitioners nonetheless "explicitly denie[d] … liability for the Moonlight Fire." ER.770.

The federal settlement did not resolve the related state-court action. App.8. While that action was pending, "several … instances of alleged misrepresentations and fraud" described above "came

to light" for the first time. App.8.[4] The entirety of the misconduct presented in the state-court action led the California trial court to conclude that "Cal Fire's actions initiating, maintaining, and prosecuting this action … are corrupt and tainted." App.140 (brackets omitted). From "false testimony, to pervasive false interrogatory responses, to spoliation of critical evidence," the abuses had "permeated nearly every single significant issue" in the case. App.140; App.235. Indeed, the government's misconduct—the worst the court had seen in forty-seven years, App.302—not only "impaired [petitioners'] rights, but was an "affront to" and "threatened the integrity of the judicial process." App.190; App.235 (quotation marks omitted). The court had "no reason to believe that [petitioners] can receive, or could ever have received, a fair trial." App.140; App.224. Finding the misconduct so "deliberate" and "egregious" that "any remedy short of dismissal" would be "inadequate," the court imposed the exceptionally rare remedy of terminating sanctions, dismissing Cal Fire's case against petitioners. App.235; App.304.[5]

Relying on this same evidence, a California appellate court affirmed the dismissal. App.104. As

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[4] These instances include the U.S. Attorney's instruction to the federal investigator to treat the white flag a "non-issue"; the false accusation by Bauer's father that Sierra Pacific offered Bauer a bribe to accept blame; and the full extent and illegal nature of the WiFITER fund.

[5] The trial court issued two orders addressing the misconduct and sanctions, one based on petitioners' proposed order and the other "in the Court's own voice." App.296. The district court deemed both entitled to equal weight, and both are reproduced in the appendix.

the court explained, "[i]n view of this cumulative evidence, we cannot find the trial court abused its discretion in imposing terminating sanctions based on its finding Cal Fire engaged in egregious and deliberate misconduct that made any other sanction inadequate to protect the judicial process and to ensure a fair trial." App.163. Among other things, the appellate court found that Cal Fire's use of the "false statement" purporting to blame the Moonlight Fire on the Howell employee and its presentation of the "false Lyman Fire report" amounted to "sanctionable conduct." App.154. The court further found that the Cal Fire investigator "provid[ed] untruthful or evasive deposition testimony regarding the white flag and destroy[ed] his field notes regarding the investigation." App.154. Moreover, "[t]here is … certainly evidence in the record to suggest that the existence of the WiFITER fund caused investigators to have a motive for bias in their investigation of wildfires." App.163.

B. District Court Proceedings

Armed with judicially-confirmed evidence of all of the government's misconduct, petitioners in October 2014 moved to set aside the federal settlement under Rule 60(d)(3), alleging "fraud on the court."

Soon after petitioners filed their motion, which alleged misconduct by the U.S. Attorney's Office with which judges in the Eastern District of California interact on a daily basis, the Chief Judge of the District preemptively recused all the District's judges on the ground that their impartiality "might reasonably be questioned." ER.607. In response, then-Chief Judge Kozinski directed the Chief Judge to

a circuit policy requiring each judge to consider recusal individually, which caused the Chief Judge to rescind his order. ER.604. Nonetheless, Judge Mueller, who had presided over the federal action until that point, recused herself under the judicial disqualification statute, 28 U.S.C. §455(a). App.10; ER.601. Judge Shubb elected not to recuse himself and proceeded to hear petitioners' motion. App.10.

Judge Shubb "ordered the parties to submit briefing on the 'threshold question' of 'whether, assuming the truth of the Defendants' allegations, each alleged act of misconduct separately or collectively constituted 'fraud on the court' within the meaning of Rule 60(d)(3)." App.9-10. Notwithstanding the limited scope of that order, the government submitted thousands of pages of evidence in an effort to rebuff petitioners' allegations on the merits. Petitioners sought leave to respond, but Judge Shubb never acted on that request and instead denied petitioners' motion.

In doing so, Judge Shubb explained that, in his view, this Court's leading fraud-on-the-court precedent, *Hazel-Atlas Co. v. Hartford-Empire Co.*, "contemplated relief only for 'after-discovered fraud.'" App.56. Consequently, any evidence of fraud petitioners knew of pre-settlement was irrelevant. App.56. As to the post-settlement evidence of fraud, Judge Shubb concluded that each discrete incident failed to amount to fraud on the court. App.99. Although petitioners "repeatedly argue[d] that fraud on the court can be found by considering the totality of the allegations," Judge Shubb rejected that notion, too, relying on the adage that "the whole can be no

greater than the sum of its parts." App.99. Judge Shubb dismissed petitioners' arguments as mere "bluster." App.99.

After Judge Shubb denied petitioners' motion, the U.S. Attorney's Office posted a flurry of "tweets" touting the ruling. App.11. As petitioners would later discover, Judge Shubb "followed" the U.S. Attorney's Office on Twitter and thus received those tweets. App.11. But Judge Shubb also initiated his own tweets. Soon after the federal prosecutors repeatedly praised his ruling—and mere hours after denying relief to petitioners—Judge Shubb tweeted the headline of a newspaper article stating "Sierra Pacific still liable for Moonlight Fire damages," along with a link to the article. App.11. In reality, neither Sierra Pacific nor any other petitioner has ever been held "liable" for the Moonlight Fire, much less paid any "damages." Instead, petitioners entered a settlement that expressly denied liability, and then failed in their effort to have the settlement set aside under Rule 60. While that is subtlety that might be lost on an editor seeking a pithy headline, it was not lost on Judge Shubb in tweeting it.

C. Ninth Circuit Proceedings

The Ninth Circuit affirmed. The Ninth Circuit agreed with Judge Shubb that "instances of alleged fraud known before settlement cannot justify relief" under Rule 60(d)(3). App.3. In its view, "relief for fraud on the court is available *only* where the fraud was not known at the time of settlement or entry of judgment." App.15 (emphasis added). It continued, "a finding of fraud on the court is reserved for material, intentional misrepresentations that could not have

been discovered earlier, even through due diligence." App.17. This Court's decision in *Hazel-Atlas* "does not undermine" that conclusion, the court explained, because "*Hazel-Atlas* specifically stated that relief is available for 'after-discovered fraud.'" App.16-17.

Moving to the evidence of after-discovered fraud, the Ninth Circuit disagreed with Judge Shubb's "assertion that 'the whole can be no greater than the sum of its parts,'" and instead concluded that "a long trail of small misrepresentations—none of which constitutes fraud on the court in isolation—could theoretically paint a picture of intentional, material deception when viewed together." App.25. Nonetheless, the Ninth Circuit concluded that the totality of the *after-discovered* fraud here did not warrant Rule 60(d)(3) relief. App.25. In reaching that conclusion, the court never considered whether the combination of the before-discovered and after-discovered fraud would have sufficed.

The Ninth Circuit then concluded that recusal of Judge Shubb was not warranted. The court recognized that a judge's recusal is mandatory "in any proceeding in which his impartiality might reasonably be questioned," and the test "is 'an objective test based on public perception.'" App.27 (quoting 28 U.S.C. §455(a)). The court nonetheless found that the individual "instances of alleged conduct in this case" created "no appearance of bias." App.31. The court labeled this case "a cautionary tale about the possible pitfalls of judges engaging in social media activity relating to pending cases." App.31. Nevertheless, "without more, the fact that an account holder 'follows' another Twitter user does not evidence a personal

relationship and certainly not one that, without more, would require recusal." App.28. Furthermore, the court held, "tweeting the link to an allegedly erroneous news article" does not require recusal, as Judge Shubb "expressed no opinion on the case or on the linked news article" in doing so. App.29-30. The court never considered whether the following and tweeting together required recusal and never mentioned the Chief Judge's earlier determination that the impartiality of all judges in the District, including Judge Shubb, could reasonably have been questioned.

REASONS FOR GRANTING THE PETITION

Two wrongs do not make a right. But in the Ninth Circuit, a whole series of wrongs are not an adequate basis for overturning a settlement fraudulently procured by prosecutors, as long as half the misconduct was known pre-settlement and the post-settlement half standing alone is deemed insufficient to constitute fraud on the court. That makes no sense. A defendant facing a demand by government prosecutors approaching a billion dollars, and already possessing evidence suggesting some government misconduct, should not be forced to assume the absolute worst. And if later developments reveal that the government misconduct ran deeper still, no principle of law or logic confines a Rule 60 motion to the later-discovered pieces of the mosaic. This Court concluded as much in *Hazel-Atlas*. But in the ensuing seven decades, confusion has crept into lower-court cases, as exemplified by the decision here that limits the analysis to after-discovered evidence. That ruling is contrary to precedent and common sense,

undermines public confidence in the judicial system, and merits this Court's review.

But while the possibility of fraud on the court is as old as the courts themselves, the decision below also undermines public confidence in the judiciary in an entirely new-fangled way. It would seem obvious that a federal judge should not be tweeting about the results of proceedings in his or her courtroom. It would seem equally obvious that a federal judge considering sensitive allegations of misconduct about the same U.S. Attorney's Office that appears before him almost daily should not be following the prosecutor's office. Whatever such social media interactions say about actual partiality, they pose an obvious risk of the appearance of partiality that demands recusal under §455(a). That is especially so in a case where the District's Chief Judge had *already* determined that the public could reasonably question the impartiality of the District's judges in evaluating alleged misconduct by the local U.S. Attorney's Office.

The combined adverse effect of the rulings below on the integrity of the judicial system is devastating. Any defendant facing the full force of the federal government demanding a billion dollars will suspect some wrongdoing and overreaching by prosecutors. Any defendant alleging misconduct by federal prosecutors who share an office building and paymaster with the federal judges will suspect that it may not get a fair shake. But when the defendant is told that only later-discovered evidence will be considered under Rule 60 and that the judge's decisions to follow the prosecutors and to tweet misleading reportage about his own ruling does not

create even an appearance of impropriety, the defendant can be excused for losing faith in the fairness of the system. Even before the decisions below, the government's egregious behavior regarding the Moonlight Fire had already garnered substantial criticism. *See, e.g.*, Editorial, *Prosecutors Burn Down the Law*, Wall St. J. (Jan. 2, 2015), http://on.wsj.com/2CMRi4C; Kathleen Parker, Opinion, *A Wildfire of Corruption*, Wash. Post (Dec. 16, 2014), http://wapo.st/2qz8TXY. That the district court and Ninth Circuit have now given a pass to that misconduct underscores the need for this Court to reestablish the commonsense rule of *Hazel-Atlas* and to restore public confidence in the fairness of federal judicial proceedings. It should grant the petition.

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

The Ninth Circuit profoundly misinterpreted this Court's fraud-on-the-court precedent. In so doing, it established a rule that conflicts with this Court's precedent and not only gives a pass to the government's extraordinary misconduct in this case, but will shield from scrutiny even the most unsavory of litigants. This Court should grant certiorari to reject that decision and to provide guidance in an important area of law that the lower courts have been struggling with for years.

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

1. Federal Rule of Civil Procedure 60 provides a number of grounds for reopening judgments, most of

which are time-limited. Allegations of "fraud on the court" are different. As Rule 60(d)(3) explains, nothing in Rule 60 "limit[s] a court's power to … set aside a judgment for fraud on the court."

"Almost all of the principles that govern a claim of fraud on the court are derivable from the Hazel-Atlas case." 11 Wright & Miller, *Federal Practice and Procedure* §2870 (3d ed.). In that case, Hazel-Atlas—alleging fraud on the court—commenced an action in 1941 to set aside a 1932 judgment for infringing 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.

As is particularly relevant here, "[a]t the time of the trial in the District Court in 1929," Hazel's attorneys "received information that both Clarke and one of Hartford's lawyers" had "previously admitted that the Hartford lawyer was the true author of the spurious publication." *Id.* at 241. Hazel-Atlas did *not*, however, raise the issue before the district court, which ruled in favor of Hazel-Atlas. Hartford appealed to the Third Circuit and, urging reversal, invoked the fraudulent publication signed by Clarke. *Id.* The Third Circuit, relying on that article, reversed and ordered the district court to enter an order of patent validity and infringement. *Id.* Even then,

Hazel did *not* alert the Third Circuit to the evidence of fraud of which it had learned; instead, it entered into a settlement agreement with Hartford regarding damages. *Id.* at 243.

In 1939, the United States brought an antitrust action against Hartford, which exposed and confirmed the full story of Hartford's involvement in the fraudulent publication. *Id.* Now armed with the complete set of established facts, Hazel-Atlas filed a petition in the Third Circuit to set aside that court's judgment and the district court's subsequent order. *Id.* at 239. The Third Circuit denied relief, holding, among other things, that "the fraud was not newly-discovered." *Id.* at 243.

This Court reversed. The Court acknowledged that "[f]ederal courts … long ago established the general rule that they would not alter or set aside their judgments." *Id.* at 244. But "[f]rom the beginning there has existed … 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." *Id.* This rule "was firmly established in English practice … to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule." *Id.*

Applying these principles, the Court concluded that the judgment against Hazel-Atlas could not stand, as the record offered troubling evidence of a "planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Id.* at 245. That "Hazel did not exercise the

highest degree of diligence" in bringing the fraud to the court's attention made no difference, for Hartford inflicted injury not just against a "single litigant" but rather committed a "wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Id.* at 246; *cf. id.* at 264 (Roberts, J., dissenting) (noting that "Hazel's counsel knew the facts with regard to the Clarke article and knew the names of witnesses who could prove those facts" even before the settlement, but "[a]fter due deliberation, it was decided not to offer proof on the subject"). At bottom, the Court reasoned, "it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants." 322 U.S. at 246; *see also United States v. Beggerly*, 524 U.S. 38, 47 (1998) (citing *Hazel-Atlas* and concluding courts must intervene "to prevent a grave miscarriage of justice").

2. The Ninth Circuit's decision is irreconcilable with *Hazel-Atlas*. The Ninth Circuit concluded that "relief for fraud on the court is available *only* where the fraud was not known at the time of settlement or entry of judgment," and it reached that result because "the Court's opinion in *Hazel-Atlas* specifically stated that relief is available for 'after-discovered fraud.'" App.16 (emphasis added). It would be difficult to misread *Hazel-Atlas* more profoundly. To be sure, after-discovered fraud provides *one* "instance[]" where a court may recognize fraud on the court, *Hazel-Atlas*, 322 U.S. at 244, but this Court could not have been clearer that relief for fraud on the court is *not* strictly and exclusively limited to after-discovered fraud. As the *Hazel-Atlas* Court explained, there are multiple

"*circumstances*" that amount to fraud on the court, "*one of which* is after-discovered fraud." *Id.* (emphases added). But as the very facts of *Hazel-Atlas* confirm, fraud on the court can exist in circumstances where a party *already* has some evidence that fraud occurred before judgment, but discovers or confirms *all* the evidence of fraud only afterwards. Indeed, the fact that the opposing party successfully conceals the full scope of its misconduct until after judgment hardly lessens the threat to "the integrity of the judicial process." *Id.* at 246.

The Ninth Circuit's decision is inconsistent with common sense as well as *Hazel-Atlas*. The Ninth Circuit itself acknowledged that "a long trail of small misrepresentations—none of which constitutes fraud on the court in isolation—could … paint a picture" of fraud on the court. App.25. The court's actual holding, however, effectively guts this rhetoric. Under the Ninth Circuit's view, litigants (including federal prosecutors) can now get away with a "long trail of small representations" that amounts to fraud on the court so long as only some of the fraud is revealed before judgment, while the remainder is successfully kept under wraps until after entry of judgment. Remarkably, *even if the totality of the before-discovered fraud and after-discovered fraud amounts to fraud on the court*, the fraudulent judgment may remain in force. That "grave miscarriage of justice" is precisely what occurred in this case, *Beggerly*, 524 U.S. at 47, and the Ninth Circuit's blessing of it in the

face of *Hazel-Atlas* readily warrants this Court's intervention.[6]

B. The Decision Below Adds To The Confusion In The Lower Courts Over An Exceptionally Important Question.

This Court's review is all the more imperative because the Ninth Circuit's holding is inconsistent with fraud-on-the-court standards offered by other courts of appeals.

In the decades since *Hazel-Atlas*, the legal definition of fraud on 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 on the court is a 'nebulous concept'"); *In re Golf 255, Inc.*, 652 F.3d 806, 809 (7th Cir. 2011) (noting that lower courts' attempts to define fraud on the court "do[n't] advance the ball very far"); *Landscape Props., Inc. v. Vogel*, 46 F.3d 1416, 1422 (8th Cir. 1995) ("Fraud on the court [is] not easily defined."); *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352

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[6] In reviewing the terms of the settlement agreement, the Ninth Circuit stated that "it appears that [petitioners] bound themselves not to seek future relief, even for fraud on the court." App.18. But even putting aside the propriety of federal prosecutors seeking to insulate their fraud on the court from any judicial review, the gambit cannot succeed. A federal court possesses "inherent power … to investigate whether a judgment was obtained by fraud," *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946), and therefore no litigant can disclaim fraud on the court through a settlement agreement. *See Hazel-Atlas*, 322 U.S. at 246. Not surprisingly, the Ninth Circuit proceeded to address the evidence of after-discovered fraud notwithstanding its passing suggestion that the terms of the settlement purported to bar relief. App.18.

(6th Cir. 1993) ("Fraud on the court is a somewhat nebulous concept[.]"). As a result of this uncertainty, "[s]everal definitions" of fraud on the court "have been attempted" by the lower courts. 11 Wright & Miller, *Federal Practice & Procedure* §2870.

Many circuits have adopted standards of fraud on 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 on 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).

Some circuits have suggested fraud on the court typically involves after-discovered fraud, but not in cases (like this one) involving a "trail of fraud," *Hazel-Atlas*, 322 U.S. at 250, where the before-discovered and after-discovered fraud together amount to fraud on 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 on 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 on the court when considering the combination of misconduct known before judgment and the misconduct discovered or confirmed only after judgment. App.15 (emphasis added).

That the courts of appeals have struggled to define "fraud on 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 on the court is so great," it is "important to know what kind of conduct falls into this category." *See* 11 Wright & Miller, *Federal Practice & Procedure* §2870. Uncertainty in the lower courts on this important yet unsettled issue is reason enough for review. That 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 another. But the far most important reason to grant review is that the decision below undermines the integrity of the judicial system by allowing fraud on the court to go unremedied if the mosaic of the fraud emerges gradually, rather than coming to light entirely post-judgment. The Ninth Circuit's rule makes no sense and needlessly casts doubt on the integrity of the judicial system in the circumstances where preserving integrity is vital.

II. The Ninth Circuit's Decision Concluding That There Is Not Even An Appearance Of Impropriety With A Judge Tweeting About The Results Of His Own Proceedings And "Following" Prosecutors Cannot Stand.

This Court should also grant certiorari to review the Ninth Circuit's conclusion that Judge Shubb's recusal was not warranted. Some issues concerning the propriety of judicial use of social media are complicated. The issues here should not be. No judge should be tweeting about his or her own judicial

rulings, let alone tweeting misleading articles about them. And, in a case involving sensitive allegations of prosecutorial misconduct, no judge should be "following" the prosecutors. That is especially so here, where the difficulty of having an Eastern District of California judge preside over misconduct allegations concerning the District's U.S. Attorney's Office caused the Chief Judge of the District and the previous judge on the case to conclude that recusal was appropriate. Whether or not such actions reflect actual partiality, they plainly reflect an appearance of impropriety. The Ninth Circuit, while expressing misgivings, disagreed. Only this Court can correct this miscarriage and make clear that basic norms of judicial conduct still apply in the age of social media.

A. The Ninth Circuit's Decision Is Wrong and Inconsistent With Precedent From This Court And Other Circuits.

The judicial disqualification statute provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a). Congress adopted this standard in 1974 "to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted Code of Judicial Conduct, Canon 3C." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n.7 (1988); *see also* Code of Conduct for United States Judges, Canon 3C(1) (2014) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."). As this Court has explained, "[t]he very purpose of §455(a) is to promote confidence in the

judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 486 U.S. at 865 (citing S. Rep. No. 93-419, at 5 (1973); H.R. Rep. No. 93-1453, at 5 (1974)). Accordingly, it does not matter whether a judge has *actual* prejudice or bias against a party. *Id.* at 860; 13D Wright & Miller, *Federal Practice & Procedure*, §3549. Rather, the question is whether "the public might reasonably believe" the judge was partial or biased. *Liljeberg*, 486 U.S. at 860. In conducting that inquiry, "*all the circumstances*" must be taken into account. *Sao Paulo State Federative Republic of Braz. v. Am. Tobacco Co*, 535 U.S. 229, 232 (2002).

Applying those principles to the undisputed facts here should have made this an easy case. The Chief Judge of the Eastern District of California preemptively recused every judge in the District—Judge Shubb included—from hearing petitioners' Rule 60(d)(3) motion precisely because "the impartiality of the District and Magistrate Judges in the Eastern District might reasonably be questioned." ER.607. That concern was well-taken: petitioners' motion alleged that the same U.S. Attorney's Office that shares a building with the court and appears before Eastern District judges on a daily basis had committed a fraud upon the court in one of the District's highest-profile cases. Any reasonable observer, including the Chief Judge, would question whether judges who interact daily with federal prosecutors could fairly adjudicate petitioners' allegations that those same prosecutors had defrauded the court. To be sure, the Chief Judge rescinded his recusal order, but not because his concerns about the public's perception of partiality were misplaced or vanished. Rather, Ninth

Circuit rules require each judge to consider for himself or herself whether to recuse. Other judges did just that, starting with the judge who presided over the pretrial proceedings and settlement, and would presumptively hear the Rule 60 motion.

Judge Shubb, however, not only elected to hear petitioners' claim against the federal prosecutors; he added insult to injury by following on Twitter the very same U.S. Attorney's Office whose conduct he was assessing. Then, crossing yet another red line, a few hours after ruling for the government, Judge Shubb tweeted a highly inaccurate article about his own ruling proclaiming Sierra Pacific "still liable." When the Chief Judge of the District perceives a reasonable basis for questioning the impartiality of every judge in the District based on the judges' close and continual contact with the U.S. Attorney's Office, it would seem that a judge actually following the prosecutor's office online poses a particularly acute risk of perceived partiality. To then take the wholly improper step of tweeting an inaccurate article exaggerating the prosecutor's victory in his own courtroom really removes the matter from doubt. There can be no serious dispute that the judge's "impartiality might reasonably be questioned" by reasonable members of the general public. *Liljeberg*, 486 U.S. at 859-60. Indeed, many members of the public have, in fact, questioned Judge Shubb's behavior. *See, e.g.*, David Lat, *A Federal Judge and his Twitter Account: A Cautionary Tale*, Above the Law (Nov. 18, 2015), http://bit.ly/2CG8Hri (noting that 84% of 1,544 online poll responders considered Judge Shubb's conduct "improper" and that "judges shouldn't tweet about cases before them").

In the decision below, the Ninth Circuit never mentioned the Chief Judge's recusal order or its implications, and it proceeded to examine seriatim whether Judge Shubb's decision to "'follow[]' … the U.S. Attorney's office on Twitter," App.27, and his decision to "tweet[] the link to an allegedly erroneous news article" independently required recusal, App.29. In the Ninth Circuit's view, "without more, the fact that an account holder 'follows' another Twitter user does not evidence a personal relationship and certainly not one that, without more, would require recusal." App.28. Nor, in its view, did Judge Shubb's tweeting "create an appearance of bias such that recusal is warranted under §455(a)." App.31. But the Ninth Circuit ignored that the following of the prosecutor's office was in the context of a case that was all about the office's misconduct, and that the close and continual relationship between the office and the Court was such that at least one reasonable observer—namely, the Chief Judge—thought there was an appearance issue. And as to the tweeting of the article with the false reportage, the Ninth Circuit ignored that there is no legitimate basis for any federal judge to tweet about the decisions in the proceedings he or she supervises—much less to cherry-pick certain articles over others. And, above all, the Ninth Circuit failed to consider that neither of these misuses of social media occurred "without more," and that their combined effect rendered this case one in which reasonable observers not only could, but did, question the appearance of impartiality.

The Ninth Circuit's siloed approach is exactly what this Court repudiated in *Sao Paulo*, which cautioned that courts may not "disregard" relevant

facts or refuse to examine "all the circumstances." 535 U.S. at 232-33 (emphasis omitted). Other courts of appeals follow that holistic approach. *See, e.g.*, *United States v. Ciavarella*, 716 F.3d 705, 724 (3d Cir. 2013) ("We must consider whether recusal is warranted considering the totality of the circumstances involved in the proceedings."); *SEC v. Razmilovic*, 738 F.3d 14, 29 (2d Cir. 2013) (same); *In re United States*, 572 F.3d 301, 312 (7th Cir. 2009) (same); *United States v. Bremers*, 195 F.3d 221, 227 (5th Cir. 1999) (same); *United States v. Ritter*, 540 F.2d 459, 464 (10th Cir. 1976) (same). And with good reason, as the Ninth Circuit's constricted view leads to strange results Congress never could have intended. According to the reasoning adopted below, a federal judge may engage in a series of activities that, when viewed *in toto*, lead to a reasonable belief the judge may be biased or partial, just so long as each *individual* activity does not require recusal. That stands §455(a) on its head. As this Court has already concluded, the entire purpose of §455(a) is to "broaden the grounds for judicial disqualification," *Liljeberg*, 486 U.S. at 858 n.7, and to "promote confidence in the judiciary by avoiding even the appearance of impropriety," *id.* at 865. The Ninth Circuit has accomplished just the opposite.

B. This Court Should Establish Boundaries On Judicial Social Media Use Now.

The need for clear lines that protect the integrity of the judicial system in the social media age could not be clearer. Even apart from Judge Shubb, judges around the country are using social media at an increasing rate. *See, e.g.*, Ross Todd, *Tweeting From*

the Bench, The Recorder (July 14, 2017), http://bit.ly/2EmzfOW (discussing various "judicial Twitter users"); John Council, *The Social Media Justice*, Texas Lawyer (Oct. 3, 2016), http://bit.ly/2qGKNuu (recounting now-Fifth Circuit Judge Willett's social media activity). While one can reasonably celebrate or regret that reality, it underscores the need to highlight certain lines that cannot be crossed.

The Ninth Circuit concluded that Judge Shubb's decision to "re-tweet" the article falsely proclaiming Sierra Pacific "still liable" did *not* cross the line under §455(a) because "the judge expressed no opinion on the case or on the linked news articles." App.30. By that reasoning, however, Judge Shubb would have had no obligation to recuse himself if he followed petitioners on Twitter (but not the federal prosecutors) and then posted the Wall Street Journal and Washington Post pieces critical of the government's conduct in this case.

At bottom, when a federal judge uses social media to post material related to a pending case, a reasonable person could rationally conclude that the judge is biased—especially when that material wrongly asserts the culpability of the party the judge is not following online. *Cf.* ABA Formal Opinion 462 (Feb. 21, 2013) (noting that a judge's social media activities "ha[ve] the potential to compromise or appear to compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary"). Much of the judicial system is premised on avoiding ex parte contacts, exposure to extraneous material, and undue commentary about pending matters. Jurors are

routinely admonished not to discuss proceedings and deliberations even with their closest family members. *See* Model Civil Jury Instruction 1.15. Sharing even anodyne observations about the case on the Internet is plainly off-limits, and much more is reasonably expected of a judge.

Moreover, when judicial commentary is undertaken in a manner that could be reasonably construed as favorable to the government, the concerns are magnified. Members of the public understand that prosecutors and judges are both officers of the federal government, but they expect that each will remain in the appropriate sphere—a division that is guaranteed by fundamental separation-of-powers principles.

The solution is obvious: Judges should not be tweeting or posting about their pending cases—particularly when one of the parties is the government, and even more particularly when the pending case involves allegations of government misconduct. The Ninth Circuit labeled this "a cautionary tale," but since it stopped short of requiring recusal, it is not clear how this disquieting tale will do anything other than undermine public confidence in the impartial administration of justice. The Ninth Circuit having given the green light to this conduct, only this Court can restore a few simple rules in the social media age. Not following the prosecutor in cases about prosecutorial misconduct and not tweeting about the court's own decision is not too much to ask from a judicial officer.

* * *

Federal and state authorities worked hand-in-hand in investigating and prosecuting petitioners for a forest fire they did not start. The state courts have concluded that those efforts were "corrupt and tainted" and constituted an "affront to" the "judicial process." The federal courts have refused to examine the issue in its entirety, preferring instead to subdivide fraud-on-the-court into pre- and post-settlement episodes and subdividing social media missteps into following the prosecutors and tweeting about results. That should not be the last word from the federal judiciary on a case that, when considered as a whole, undermines public confidence in prosecutorial and judicial fairness.

CONCLUSION

The Court should grant the petition for certiorari.

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