No. 17-1153

In the Supreme Court of the United States

SIERRA PACIFIC INDUSTRIES, INC., *et al.*,
Petitioners,

v.

UNITED STATES,
Respondent.

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

BRIEF OF THE ATTORNEYS GENERAL OF ARIZONA, LOUISIANA, MISSOURI, NEBRASKA, NEVADA, OKLAHOMA, TEXAS, UTAH, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The key question presented is:

1. Whether a 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 as well as later-discovered evidence, or is instead strictly limited to considering only later-discovered evidence in isolation.

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INTEREST OF *AMICI CURIAE*[1]

Amici are their respective states' chief law enforcement or chief legal officers and hold authority to file briefs on behalf of their offices.

Amici are public servants in the nation's justice system whose interest here is in preserving the fair administration of justice in civil and criminal enforcement actions. This interest is particularly salient for those amici who have an ongoing engagement with the United States Forest Service and the United States Department of Justice in connection with the investigation and processing of fire responses and claims arising on government land. As partners with these federal entities in this area, these amici have a manifest interest in ensuring that the public trusts the manner in which these investigations and enforcement actions are conducted.

More broadly, amici have an interest in ensuring public trust in *all* public investigations. And as some of the most frequent litigants in the nation, amici have an interest in ensuring the availability of Rule 60(d)(3) motions to undo fraudulently-obtained judgments, especially those procured against states and their citizens.

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[1] Pursuant to Rule 37.6, amici certify that no parties' counsel authored this brief and only amici or their offices made a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received notice of amici's intent to file at least ten days prior to this brief's due date and have given written consent.

Amici submit this brief to further these interests and draw attention to the extraordinary circumstances of this case and the threat the panel's decision presents to the fairness, integrity, and public reputation of the legal system.

SUMMARY OF ARGUMENT

Certiorari is warranted because the decisions below misapprehended important questions going to the legitimacy of our legal system. The conduct of government lawyers must be beyond reproach. Yet the District Court and the Ninth Circuit panel overlooked egregious misconduct in the course of misconstruing the appropriate scope of evidence reviewable in connection with a Rule 60(d)(3) motion.

It is well established that the duty of prosecutors is "to seek justice within the bounds of the law, not merely to convict." ABA Criminal Justice Standards for the Prosecution Function, Standard 3-1.2(b) (4th ed. 2015); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) (a prosecutor's interest is not to "win a case, but that justice shall be done"); *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993) ("Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers. … The prosecutor's job isn't just to win, but to win fairly, staying well within the rules."). And amici view these obligations as applying in both civil and criminal enforcement actions. *See Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (duty to do justice applies "with equal force to the government's civil lawyers").

The decisions below short-circuited the proper legal inquiry by denying (and affirming the denial of) a Rule

60(d)(3) motion with an insufficient inquiry into the totality of the record, while also rejecting the full reach of the special duties government lawyers have in enforcement actions. The government lawyers and investigators involved in civil litigation surrounding California's Moonlight Fire grossly abused their power and utterly failed to meet their obligations. Petitioners credibly allege serious misconduct by government agents, based on evidence and court findings from the state proceedings relating to the parties and subject matter now at issue. *See* Pet. App. 189. Indeed, the state trial court imposed ~$32 million in sanctions against the California Department of Forestry and Fire Protection for false testimony, misrepresentation of evidence, and "pervasive and systematic abuse ... all of which is an affront to this Court and the judicial process." Pet. App. 190.

The District Court's order on appeal eschewed any findings of fraud on the court—an incredible outcome given the circumstances, parties, obligations, and state court conclusions concerning prejudice and misconduct. The District Court's decision, combined with the Ninth Circuit panel's decision to ignore evidence of fraud known at the time of judgment (on a theory that Rule 60(d)(3) motions may only rely upon after-discovered fraud) endangers public confidence in our legal system. To protect the appearance of propriety of the legal system, such errors must be corrected by affirming that fraud on the court may include actions that became known both before and after judgment or settlement in government enforcement cases.

ARGUMENT

I. THE KEY QUESTION PRESENTED IS IMPORTANT AND AFFECTS FEDERAL PROCEEDINGS THAT RELATE TO THE LEGAL SYSTEM'S PROPRIETY

As set forth in the Petition, the Ninth Circuit erred by cabining Rule 60(d)(3) consideration to after-discovered evidence, an issue that is of great import to collective faith in the legal system. Contradicting the Ninth Circuit, other courts do not confine their review to fraud discovered after the entry of judgment. Pet. 27. Instead, the totality of the circumstances must be considered. Indeed, this Court, in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, conducted the fraud on the court inquiry by considering the "trail of fraud" under a totality of the circumstances analysis. 322 U.S. 238, 250 (1944), *overruled on other grounds by Standard Oil Co. of Cal. v. United State*s, 429 U.S. 17 (1976).

Here, the errors below warrant granting certiorari to protect the integrity and public reputation of the judicial system by affirming the appropriate standard that is to be applied to Rule 60(d)(3) fraud on the court claims. Rule 60(d)(3) codifies the general principle that federal courts always have the "inherent equity power to vacate judgments obtained by fraud." *United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir. 2011). And Petitioners have alleged that the government submitted falsified and fraudulent evidence, failed to disclose obviously relevant exculpatory evidence, and misrepresented key facts. Pet. 7-13. They also allege that the financial interest of one of the key investigators tainted the government's case. Pet. 12-13. These are serious allegations given the massive

potential penalty (~$800 million or more). But they are more than just allegations; they are supported by the findings of a state-court judge in a parallel, government-initiated action that resulted in a $32 million sanction award against government actors that were key to the present case.

The irregularities the state trial court found are of such magnitude that they ought to have had material implication for the related federal proceedings and the settlement therein. But the District Court short-circuited the proper legal inquiry by denying that government lawyers had any special duties. Pet. App. 51 ("the court should not, as defendants argue, assess the conduct of the government through the lens of any heightened obligation"). Further, the District Court considered only some alleged instances of fraud, well short of the totality of the record. *See* Pet. App. 56. Then, the Ninth Circuit panel affirmed the denial of the Rule 60 motion, asserting "the government did not have a specific duty … beyond its standard discovery obligations." Pet. App. 22. The panel also refused to inquire into the totality of the record in assessing fraud. Pet. App. 16-17.

Review by the Court here would confirm the appropriate, totality-of-circumstances scope of review under Rule 60(d)(3) and help ward against procedural complicity in frauds on the court that threaten the propriety of our legal system.

II. THE COURT'S GUIDANCE IS NEEDED TO AFFIRM A PROPER JUDICIAL CHECK ON ABUSIVE GOVERNMENTAL NON-DISCLOSURE IN CIVIL ENFORCEMENT ACTIONS

Beyond confirming the range of evidence that can be considered to show fraud on the court for the purposes of Rule 60(d)(3), the Court should also grant certiorari to emphasize the duty government attorneys owe to upholding justice. The errors below are particularly troublesome because they form the basis for the courts excusing bad acts by government agents. "When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition." *United States v. Olsen*, 737 F.3d 625, 632 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc).

The public trust that amici bear requires that amici and the lawyers in their offices scrupulously adhere to their ethical duties whether engaged in a civil or criminal enforcement action. *See, e.g.*, *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d at 47 (duty to do justice applies "with equal force to the government's civil lawyers"); *Reid v. INS*, 949 F.2d 287, 288 (9th Cir. 1991) ("[c]ounsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation"). As recognized in *Freeport-McMoRan*, the American Bar Association's former Model Code of Professional Responsibility expressly held a "government lawyer in a civil action or administrative proceeding" to "the responsibility to seek justice," and said they "should refrain from instituting or continuing litigation that is

obviously unfair." ABA Model Code of Professional Responsibility EC 7–14 (1981); *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d at 47; *see also Silverman v. Ehrlich Beer Corp.*, 687 F. Supp. 67 (S.D.N.Y. 1987) ("the attorney representing the government must be held to a higher standard than that of the ordinary lawyer").

The potential for fraud does not disappear simply because the government demands civil, not criminal, relief. Edward L. Rubin, *Due Process and the Administrative State*, 72 Cal. L. Rev. 1044, 1047-48 (1984) ("it has always been clear that the [Due Process Clause] applied to the conduct of criminal and civil trials"). The duty to seek justice fairly applies in the civil enforcement context as well. Civil enforcement actions often seek remedies that are penal in nature. The government lawyer in such circumstances is accountable "to a *higher* standard of behavior." *United States v. Young*, 470 U.S. 1, 25-26 (1985) (Brennan, J., concurring in part) (emphasis original). For example, the ABA Code of Professional Responsibility states that a "government lawyer in a civil action … should not use his position to harass parties or to bring about unjust settlements or results." EC 7-14 (1980); *see also id.* (government lawyers have "an obligation to refrain from instituting or continuing litigation that is obviously unfair."). Nor should government attorneys be given the perverse incentive to seek harsh civil penalties rather than criminal penalties in order to be held to lower standards of conduct. Just as convictions are overturned when courts are misled (sometimes in even minor ways), so too should civil enforcement settlements be subject to vacatur, especially when procured through massive fraud. *See Giglio v. United*

States, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

And here the civil relief that was sought plainly implicated concerns going well beyond standard civil liability—the government demanded ~$800 million in this action against Sierra Pacific, W.M. Beaty, and also individuals. The potential damages (demanded based on apparent fraud) threatened each defendant with total financial devastation.

Such consequences require the highest standards of conduct by the government and proper scrutiny by the court. As one commentator has argued:

> It is clear that certain proceedings, even though statutorily or judicially labeled "civil," in reality exact punishments at least as severe as those authorized by the criminal law. Arguably, such proceedings should be treated as criminal proceedings for purposes of constitutional safeguards since, in the end, the punishment inflicted on the defendant is the functional equivalent of a criminal sanction.

Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L.J. 1325, 1350 (1991).

In this case though, the opinions below agreed that the presence of government lawyers in this alleged fraud had no implication given the civil context of the proceedings. *See* Pet. App. 22; *but cf. Brady*, 373 U.S. 83. The Court should take this opportunity to clarify the scope of government attorneys' duties in civil enforcement cases in the course of clarifying the

proper, totality-of-circumstances scope of review under Rule 60(d)(3). Whether in civil or criminal contexts, it should be made clear that, as one judge put it, "[t]he duties of a Government lawyer, and in fact of any lawyer, are threefold: (1) tell the truth; (2) do not mislead the Court; and (3) do not allow the Court to be misled." *Texas v. United States*, 2016 WL 3211803, at *7 (S.D. Tex. May 19, 2016) (citing Model Rules of Prof'l Conduct R. 3.3 cmts. 2 & 3 (2013)).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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