No. 17-1153

In the Supreme Court of the United States

SIERRA PACIFIC INDUSTRIES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in declining to vacate the judgment based on a fraud-on-the court theory, when the bulk of the allegations of fraud were known to petitioners before settlement and the court determined that the three additional allegations neither amounted to fraud on the court nor significantly changed the picture from the evidence available before settlement.

2. Whether the district judge committed plain error because he did not *sua sponte* retroactively recuse himself based on his allegedly having followed an official U.S. Attorney's Office account on Twitter and used Twitter to "tweet" a news article that concerned the instant case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 862 F.3d 1157. The opinion of the district court (Pet. App. 35-99) is reported at 100 F. Supp. 3d 948.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2017. A petition for rehearing was denied on October 17, 2017 (Pet. App. 33-34). On December 13, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 14, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Moonlight Fire, which burned for over two weeks in 2007, destroyed 46,000 acres of the Plumas and

Lassen National Forests. More than 3000 firefighters were deployed to battle the blaze, and the U.S. Forest Service's costs exceeded $20 million for fire suppression alone. C.A. S.E.R. 180, 323, 521, 523.

The fire began on Labor Day. On that day, two employees of petitioner Howell's Forest Harvesting Company—J.W. Bush and Kelly Crismon—were working alone at a remote site in the forest, using bulldozers to drag logs to a landing as part of a timber harvest. C.A. S.E.R. 174, 360, 188, 355; Pet. App. 3; see C.A. S.E.R. 598 (Howell's admission that Bush and Crismon "were working on the timber project operating two bulldozers in the area where the fire ignited"). Howell's was performing that work as a contractor for petitioner Sierra Pacific Industries. Pet. App. 3. The National Weather Service had designated that day a "red flag warning day," because of extreme fire risks. C.A. S.E.R. 124-125, 525. As a result, Howell's had a policy requiring that employees take special precautions, including performing a ground inspection or "fire walk" immediately after shutting down bulldozer operations, and conducting a continuous "fire watch" for at least two hours after shutdown, before leaving the site. *Id.* at 171-173. State law also required a diligent fire inspection. See 14 Cal. Code Regs. tit. 14, § 938.8(a) (2017).

Bush and Crismon violated those policies by failing to conduct a fire walk inspection and leaving the site between fifteen and thirty minutes after shutting down their equipment. C.A. S.E.R. 343 (Sierra Pacific admission); see *id.* at 120-123, 173, 190-192, 228, 343; Pet. App. 3. Bush drove on to Howell's base camp, 20 to 30 minutes away, to get a soda and a cell phone, before returning. C.A. S.E.R. 191-193. When he tried to return

to the job site, however, he encountered a wave of heat and a 100-foot wall of smoke emanating from the area where Crismon had operated his bulldozer. *Id.* at 194-196. Bush fled the heat and smoke, and about ten minutes later, he encountered a fire engine on its way to the fire, which had been reported by the Forest Service's Red Rock Lookout, about ten miles away.

Forest Service fire investigators promptly began an investigation. Pet. App. 3-4. Dave Reynolds, a Fire Prevention Technician, interviewed Bush, who admitted his and Crismon's activities at the site, and also acknowledged that he had caused another fire earlier the same year by scraping rocks with the metal tracks of his bulldozer. C.A. S.E.R. 414. Reynolds then drove to the fire and located the broad area where it likely started, based on the "burn pattern" showing the path that the fire had traveled. Pet. App. 3-4; C.A. S.E.R. 376. The next morning, Reynolds and a state fire investigator followed "burn indicators" to an area they identified as the general origin area, where they saw evidence of bulldozer use, including fresh water bars and marks left by metal tracks. Pet. App. 4; C.A. S.E.R. 379-380; C.A. E.R. 847-849. By examining "microscale" burn indicators in that area, White and Reynolds were able to identify a specific origin area that was about ten feet by ten feet. C.A. E.R. 849.

Inside the specific origin area, the investigators identified six rocks with strike marks in line with trails left by bulldozer tracks. C.A. S.E.R. 383. They then got down on their hands and knees and swept a magnet to search for anything that could have ignited the fire in that area. *Id.* at 69-70, 383. The magnet yielded small metal fragments from around two rocks. *Id.* at 383-384. The fragments were shiny and blued, indicating that

they were fresh and had been "superheated." *Id.* at 364, 404. Testing later confirmed that the fragments matched the composition of metal tracks on Crismon's bulldozer, *id.* at 153, and had been hot enough to ignite ground fuels, *id.* at 154-156. No other potential ignition sources were found. *Id.* at 853.

Due to the magnitude of the fire, Forest Service Special Agent Diane Welton joined the investigation and independently examined burn indicators. Pet. App. 4; C.A. S.E.R. 265, 391. She confirmed that the investigators had correctly identified both the general origin area and the specific origin area. *Ibid.*

Based on the physical evidence, statements from Bush and Crismon, and interviews of about 20 others, fire investigators ruled out lightning, arson, smoking, and other alternative causes, and concluded that "[t]he only hypothesis that withstood testing was that the fire was caused by sparks and/or superheated metal resulting from strikes between Crismon's bulldozer and rocks." C.A. E.R. 853-855.

Petitioners conducted their own origin-and-cause investigations. Those investigations, too, indicated that the fire started where Bush and Crismon had operated bulldozers. For instance, Gerald Quigley, who was employed by petitioners' logging co-op, determined that the fire started mid-slope in Howell's area of operations, "just above * * * where the Cats are parked." C.A. S.E.R. 91-96. Frank Holbrook, who investigated on behalf of Howell's insurer, concluded that the "fire originated next to a skid trail where a bulldozer had constructed erosion prevention waterbars earlier in the morning," and "dozer blades and track marks were found on several rocks in the area." *Id.* at 142-146. Walt

Ruble, the fire expert for petitioner W.M. Beaty & Associates, which managed the land on which the blaze began, testified that the government investigators may have gotten the fire's origin right. *Id.* at 2-3. None of them opined that the fire had a different cause.

2. The United States filed a civil suit against petitioners, seeking to recover the almost $800 million in damages and in firefighting costs due to the fire. Pet. App. 5; C.A. E.R. 886. The State of California, on behalf of the California Department of Forestry and Fire Protection (Cal Fire), also filed suit against petitioners in state court. Pet. App. 5. "Cal Fire and the California Attorney General's office took no part in the federal case, and the U.S. Attorney's office took no part in the state case." *Id.* at 5 n.1. However, federal and state prosecutors entered into an agreement—sometimes referred to as a "joint prosecution agreement" or "common-interest agreement"—that obligated each to protect the confidentiality of the other's privileged information while litigating their separate actions. C.A. S.E.R. 234-235, 552.

The parties in the federal case "engaged in extensive discovery and motion practice over the next three years." Pet. App. 5; see *id.* at 36 ("To say that this case was litigated aggressively and exhaustively by all parties would be an understatement."). The federal government produced more than 265,000 pages of documents; responded to more than 1000 requests for production; and answered 185 interrogatories and 660 requests for admissions. And during pretrial proceedings, 59 fact witnesses and 75 expert witnesses were deposed. C.A. S.E.R. 555-559.

Petitioners advised the district court that, based on documents that the government had produced in discovery, they intended to advance the theory that the government had engaged in an "unscientific and biased" investigation that sought to blame them for the Moonlight Fire, and had engaged in fraud and concealment to cover up deficiencies in the investigation. Pet. App. 61; see *id.* at 5. To make this claim, petitioners argued, among other things, that photographs and an early sketch "appeared to place the point of origin in a slightly different spot than the final [Forest Service] report"; that "an aerial video of the smoke plume * * * allegedly undermined the government's point-of-origin determination"; and that employees at the Forest Service's Red Rock Lookout Tower had engaged in misconduct, such as marijuana use. *Id.* at 6. Petitioners further argued "that the government had advanced a fraudulent Origin and Cause report based on these cover-ups; had misrepresented the investigator's interview with Howell employee J.W. Bush shortly after the fire had started; had misrepresented evidence regarding other forest fires started by Howell; [and] had proffered false testimony by the investigators regarding the origin of the fire." *Ibid.* And they argued that the government "had failed to adequately investigate arson as a possible cause of the fire, particularly in light of evidence that wood cutter Ryan Bauer had been using a chainsaw in the vicinity of the fire on the day it began." *Ibid.*

Petitioners obtained a ruling permitting them to advance their fraud-and-concealment defense at trial when the district court granted their *in limine* motion

to "introduce evidence that there was an attempt to conceal information from the public or the defense." Pet. App. 6; see *id.* at 61.

Nevertheless, three days before trial, petitioners elected to settle the federal suit. Pet. App. 7. In a written agreement filed with the court, petitioners agreed to pay a total of $55 million and to convey 22,500 acres of land for incorporation in the National Forest System. *Ibid.*; C.A. E.R. 765-776. The parties provided in the agreement that they

> understand and acknowledge that the facts and/or potential claims with respect to liability or damages regarding the above-captioned actions may be different from facts now believed to be true or claims now believed to be available ("Unknown Claims"). Each Party accepts and assumes the risks of such possible differences in facts and potential claims and agrees that this Settlement Agreement shall remain effective notwithstanding any such differences. . . . Accordingly, this Settlement Agreement, and the releases contained herein, shall remain in full force as a complete release of Unknown Claims notwithstanding the discovery or existence of additional or different claims or facts before or after the date of this Settlement Agreement.

Pet. App. 7-8. The district court dismissed the case based on the settlement agreement. *Id.* at 8.

3. a. Twenty-seven months after the entry of judgment, petitioners moved for relief from the judgment under Federal Rule of Civil Procedure 60(d)(3). Pet. App. 8-9; see C.A. E.R. 605. Petitioners asserted that the judgment should be vacated because of "fraud on the court." Pet. App. 8. They relied on allegations of misrepresentations and misconduct they knew of prior

to settlement, as well as several instances of what they alleged constituted "newly-discovered fraud." *Ibid.* With respect to newly discovered fraud, petitioners alleged, first, that "Ryan Bauer's father, Edwin Bauer, had accused Sierra Pacific's legal counsel (apparently falsely) of offering him a bribe to say that his son started the fire." *Id.* at 8-9. Petitioners "alleged that the government knew of this false bribe accusation but fraudulently failed to disclose it, despite representing to the court that there was not a 'shred' of evidence pointing to Bauer." *Id.* at 9. Second, petitioners asserted "that they had learned that the government had instructed the fire investigators to lie about the significance of" a white flag placed in the general origin area of the fire, by telling fire investigators that the white flag "was a 'non-issue' during a meeting prior to the investigators' depositions." *Ibid.*[1] Third, petitioners

[1] The significance of the white flag's placement was the subject of extensive discovery and pretrial litigation, including many days of deposition testimony by at least six government employees and eight government experts. See C.A. E.R. 503; C.A. S.E.R. 240-241. Petitioners retained five experts of their own to testify about the same issues. C.A. S.E.R. 242. In short, when investigators examined the area where the fire began shortly after the blaze started, they "placed numbered markers and colored flags to mark certain fire indicators and other evidence." Pet. App. 4. During pretrial proceedings, petitioners argued that the government investigators' placement of a white flag reflected that they had identified that spot as the fire's specific point of origin. *Ibid.* But as eight origin-and-cause investigators explained in their depositions (including several investigators working for petitioners), although a white flag may be used to mark the origin of a fire, it is also commonly used to mark evidence or items of interest. See C.A. S.E.R. 6, 25-26, 40, 73-74, 150-151, 165-166, 182-183, 215-216. In any event, because the white

"cited a new report issued by the California State Auditor that some of the funds recovered in state wildfire cases were being put into an extra-legal account called the Wildland Fire Investigation Training and Equipment Fund ('WiFITER'), rather than into the state treasury." *Ibid.* They "alleged that the government had misrepresented the nature of the fund," and that one of California's investigators had "stood to benefit from the fund and that his improper financial incentives had tainted the entire wildfire investigation." *Ibid.*

Initially, the chief district judge recused the entire district from considering the motion, C.A. E.R. 605, but the chief judge then vacated that order, *id.* at 602, and the case was assigned to Senior District Judge William B. Shubb. *Id.* at 995.

b. The district court denied petitioners' motion after extensive briefing and argument. Pet. App. 35-99.

The district court explained that Rule 60(b) "enumerates six grounds under which a court may relieve a party from a final judgment," including "fraud * * * misrepresentation, or misconduct by an opposing party"—but that any such motion "must be made 'no more than a year after the entry of the judgment.'" Pet. App. 38 (citation omitted). Because petitioners had not filed a Rule 60(b) motion within that period, the court explained, the judgment could be vacated based only on the inherent judicial "equity power" to "set aside a judgment for fraud on the court." *Id.* at 38-39 (citations omitted). The court observed that vacatur on that

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flag was within the area where Bush and Crismon were using bulldozers to move logs on the day that the fire erupted, the government argued that petitioners' account of the white flag as indicating the specific point of origin of the fire would not aid the defense. See *id.* at 237-238, 339-341.

ground is warranted only for gross injustice that harms the integrity of the judicial process. *Id.* at 40-41.

The district court first concluded that petitioners could not satisfy this standard based on the allegations of fraud they presented—including the allegations of later-discovered fraud—in light of the express terms of the settlement agreement. Pet. App. 65-67. The court noted that petitioners "not only willingly settled the case in light of the facts they knew, but expressly acknowledged and accepted that the facts [might] be different from what they believed." *Id.* at 66. The court stated that "[a] grave miscarriage of justice cannot result from enforcing the clear and deliberate terms of a settlement agreement." *Id.* at 66.

The district court further determined that petitioners' claims would not meet the high threshold for fraud on the court without regard to their express waiver of such claims. The court observed that petitioners relied on eight "alleged instances of fraud" that petitioners knew of "prior to reaching a settlement." Pet. App. 55.[2] The court determined with respect to those instances that petitioners "possessed and understood the pur-

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[2] Those were allegations that the government advanced a fraudulent origin-and-cause investigation and allegedly allowed investigators to testify falsely about their work; the government misrepresented Bush's admission that a bulldozer rock strike caused the fire; the government proffered false testimony in opposition to petitioners' motion for summary judgment; the government failed to take remedial action after learning that an aerial video allegedly undermined its origin-and-cause theory; the government created false diagram and failed to correct false expert report; the government misrepresented evidence regarding other wildland fires; and the government covered up misconduct at the Red Rock Lookout Tower. Pet. App. 55.

ported significance of the very documents and testimony they now rely on in support of their motion before the court." *Id.* at 58. In addition, the court determined that "[f]or the eight allegations of fraud that [petitioners] knew of at the time of settlement, there can be no question that they had the opportunity to expose the alleged fraud at trial." *Id.* at 60; see *id.* at 60-61 (discussing *in limine* rulings). The court concluded that petitioners "made the calculated decision on the eve of trial to settle the case knowing everything that they now claim amounts to fraud on the court" with respect to these claims. *Id.* at 62. Accordingly, the court determined that petitioners could not establish based on those claims the "grave miscarriage of justice" required to obtain relief based on a fraud-on-the-court theory. *Ibid.* (citation omitted).

The district court then examined each of petitioners' contentions of later-discovered fraud in detail, Pet. App. 68-99, and determined that petitioners had "failed to identi[f]y even a single instance of fraud on the court, certainly none on the part of any attorney for the government," *id.* at 99. The district court found baseless petitioners' claim that the government suborned perjury when government attorneys met with forest service investigator Dave Reynolds in preparation for a deposition and stated that the subject of the white flag "was going to come up and [that the attorneys] saw it as a nonissue." *Id.* at 69 (citation omitted). The court found "no substance whatsoever" to petitioners' contention that these statements amounted to "'permission to provide false testimony'" that the white flag did not exist. *Ibid.* (citation omitted). The court found Reynolds did not falsely deny the existence of the white flag during his deposition; to the contrary, he admitted seeing

it when shown a magnified version of the photograph. *Id.* at 71. Further, the district court held that "the government never encouraged nor suborned perjury" in the relevant statements, and that petitioners' allegations "fail to amount to any type of fraud, let alone fraud on the court." *Id.* at 72.

The district court also rejected petitioners' claim that allegations regarding the State's WiFITER fund arising after the entry of the federal judgment supported vacating that judgment. Pet. App. 80-90. The court noted that petitioners had not even alleged that the United States possessed documents exposing alleged wrongdoing with the fund, *id.* at 87, or had any knowledge of allegedly perjured testimony by a former Cal Fire investigator, *id.* at 89-90. The court further held that even if the fund created a conflict of interest for Cal Fire employees, the mere existence of the fund did not "defile the court itself" and was not a fraud "perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner." *Id.* at 90 (citations omitted).

In addition, the district court rejected petitioners' contention that the government had committed fraud on the court because it had not informed petitioners that Ryan Bauer's father had allegedly claimed that petitioners had offered Ryan Bauer a bribe to admit he started the Moonlight Fire. Pet. App. 91-96. The court concluded that the government had not been obligated to disclose the allegation under civil discovery rules and that, had its personnel done so, "they could have just as easily been criticized for spreading a scandalous rumor in [an] attempt to intimidate" petitioners. *Id.* at 95. The court further determined that, in any event, a violation of disclosure obligations in civil cases can amount to

fraud on the court only if it is "so fundamental that it undermined the workings of the adversary process itself." *Ibid.* (citation omitted). The court concluded that the allegation here fell well short of that standard, because, among other reasons, it was "far from plausible that evidence of the alleged bribe would even have remotely changed the information available to the district court, let alone have been admissible." *Id.* at 96.

Finally, the district court determined that the state court's conclusion that "Cal Fire and its attorneys" committed misconduct did not indicate any misconduct by the federal government. Pet. App. 97. The court observed that the federal government was not a party in the state case, and "did not have the opportunity to argue or brief any of the issues before" the state court. *Ibid.* "More importantly," the court explained, the state court's "findings and criticisms were levied against Cal Fire and its counsel." *Ibid.* The district court explained that "[t]he only references [that the state court] ma[de]" in its orders "regarding any involvement of the federal government were about the pre-deposition meeting with [investigator] Reynolds." *Id.* at 98. It observed that "[t]his court has already determined that the allegations regarding the pre-deposition meeting with [investigator] Reynolds cannot amount to fraud on the court." *Ibid.* The court concluded that the sum of the allegations was not greater than its parts, and that petitioners' "motion is wholly devoid of any substance." *Id.* at 99.

4. On the day that the district court denied petitioners' Rule 60(d)(3) motion, the U.S. Attorney's Office for the Eastern District of California posted eight tweets about the case on its public, verified Twitter account (@EDCAnews). Pet. App. 11. A Twitter account

named "@Nostalgist1," which petitioners allege belongs to Senior District Judge Shubb, "follow[s]" @EDCAnews. *Ibid.* That evening, @Nostalgist1, which had previously "tweeted" other news articles regarding the litigation, "tweeted" the title of and link to an article about the case entitled "Sierra Pacific still liable for Moonlight Fire damages." *Ibid.*; see *id.* at 12 n.6.

5. Petitioners appealed. They challenged the district court's decision declining to vacate the judgment. They also argued for the first time that the district judge should have retroactively recused himself based on his alleged Twitter activity.

The court of appeals affirmed. Pet. App. 1-31. With respect to the denial of the motion to vacate the judgment, the court began by noting that vacatur of a final judgment based on fraud on the court is warranted only "to prevent a grave miscarriage of justice." *Id.* at 14 (quoting *United States* v. *Beggerly*, 524 U.S. 38, 47 (1998)); see *id.* at 13-15. The court observed that a litigant seeking to disturb a final judgment on this ground must rely on a fraud that was "not known at the time of settlement or entry of judgment." *Id.* at 15. That is so "because issues that are before the court or could potentially be brought before the court during the original proceedings 'could and should be exposed at trial.'" *Ibid.* (citations omitted). The court explained that *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944), is consistent with that principle because in *Hazel-Atlas*, the "key information" on which the fraud claim was based had been "revealed only after entry of judgment," even though some information indicating fraud had been known earlier. Pet. App. 16.

The court of appeals concluded that the district court had not abused its discretion in declining to vacate the

judgment in this case based on fraud on the court. As a threshold matter, it concluded that the district court did not abuse its discretion in denying that equitable relief based on the express terms of petitioners' settlement agreement. Pet. App. 18. The court explained that in the settlement agreement petitioners had expressly "bound themselves not to seek future relief, even for fraud on the court," and agreed to release any unknown claims, notwithstanding the possibility of discovering additional or different claims or facts. *Ibid.*

Even setting aside the agreement's terms, the court of appeals held that petitioners could not establish fraud on the court based on the grounds that they had advanced, either taken separately or in combination. Pet. App. 18-24 (considering claims individually); *id.* at 25 (considering claims in combination). The court observed that many of petitioners' claims did not support vacating the judgment because they were "discovered before settlement," petitioners had stated their intention "to raise the[m] * * * at trial," and the district court's *in limine* rulings permitted petitioners to do so. *Id.* at 17. The court of appeals concluded that "these allegations cannot be grounds for subsequent relief after [petitioners] voluntarily settled instead of going to trial." *Ibid.*

The court of appeals next reviewed each of the "three instances of alleged fraud or misrepresentation that [petitioners] did not discover until after settlement," and agreed with the district court that each did not constitute fraud on the court. Pet. App. 18-19. The court of appeals agreed that the government had not suborned perjury by telling a witness that the topic of the "white flag" was "likely to come up" but that the flag seemed to the attorney to be a "'non-issue.'" *Id.* at 20.

The court of appeals explained that the attorney's comment was "merely an opinion about the relative importance of an element of the case; it [wa]s not an instruction to commit perjury." *Ibid.* The court further noted that petitioners had known the substance of those comments before they settled the suit, and that the new account merely described the relevant meeting in "slightly different language." *Ibid.*

The court of appeals also upheld the district court's conclusion that there was no basis for overturning the verdict based on the claim that "the government failed to disclose Edwin Bauer's accusation that [petitioners'] legal counsel had offered him a bribe to say that his son started the fire." Pet. App. 21. It stated that "the government did not have a specific duty to disclose the false bribe information, beyond its standard discovery obligations," and a discovery violation or nondisclosure "does not rise to the level of fraud on the court." *Id.* at 22. The court also rejected petitioners' suggestion that the false bribe allegation was particularly probative, concluding that the allegation "do[es] not significantly change the story as presented to the district court prior to settlement, given that [petitioners] already possessed other circumstantial evidence of arson." *Id.* at 22-23 (citation omitted; first set of brackets in original).

The court of appeals likewise found no merit to petitioners' third allegation of after-discovered fraud: the claim that "the government committed fraud on the court by misrepresenting the true nature of Cal Fire's WiFITER fund." Pet. App. 23. The court explained that petitioners could not establish that the federal government committed fraud on the court based on the al-

legedly improper nature of that state fund because petitioners had not demonstrated that the federal government "knew about the fund's improprieties," or made intentional misrepresentations regarding its character. *Id.* at 24.

Significantly, the court of appeals also found that these three instances of post-settlement fraud did not significantly change the picture known to petitioners at the time they chose to settle the case. The court agreed with petitioners that a litigant could demonstrate fraud on the court based on a "long trail of small misrepresentations—none of which constitutes fraud on the court in isolation," but which could "paint a picture of intentional, material deception when viewed together." Pet. App. 25. But the court found petitioners could not establish fraud on the court even when "the instances of possible misinformation in this case" were taken together. *Ibid.* That was so, the court determined, because "almost all of the evidence of alleged fraud" was known to petitioners when they settled, and "[t]he three instances of alleged fraud that came to light after settlement, even when viewed together, do not 'significantly change the picture already drawn from previously available evidence.'" *Ibid.* (citation omitted).

Finally, the court of appeals rejected petitioners' recusal argument. Pet. App. 26-32. The court determined that plain-error review applied because petitioners could have raised their allegation of appearance of bias caused by Twitter use before the district court judge, given that the account in question had posted several news articles about the case while litigation was ongoing. *Id.* at 26; see *id.* at 12 n.6. The court determined that "under the plain error standard, the allegations" that the district judge had used a Twitter account

to "follow" the U.S. Attorney's Office and to post a link to the content and headline of a news account regarding the case "do not warrant retroactive recusal even if the judge is the owner of the account." *Id.* at 26. The court emphasized that "news organizations, celebrities, and even high-up government officials use Twitter as an official means of communication, with the message intended for wide audiences." *Id.* at 28. Accordingly, "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." *Ibid.* In addition, the court determined that tweets "containing only links to news articles, and coming from an account not publicly identifying a member of the judiciary," did not create an appearance of bias requiring recusal. *Id.* at 31. While "reiterat[ing] the importance of maintaining the appearance of propriety both on and off the bench," the court concluded that the alleged Twitter activity here did not create an appearance of bias warranting retroactive recusal under the plain-error standard. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 21-28) that their settlement of federal claims relating to the Moonlight Fire should be vacated based on fraud on the court. The court of appeals correctly rejected that contention after thoroughly considering each of petitioners' allegations. It determined that petitioners knew of virtually all of the allegations put forward in their motion to vacate the judgment when they settled the case. Although the district court had ruled petitioners could present that evidence at trial, the court of appeals determined that petitioners made an informed decision to settle the litigation instead. The court of appeals did not hold that it

was "strictly limited to considering only later-discovered evidence in isolation," Pet. ii, but rather concluded that petitioners were not entitled to relief because the alleged later-discovered conduct here neither constituted fraud on the court nor meaningfully changed the overall picture known to petitioners at settlement. Pet. App. 25. Petitioners also contend (Pet. 28-35) that the district judge should have *sua sponte* retroactively recused himself based on social media activity. The court of appeals correctly rejected that claim under plain-error review. Neither of petitioners' claims implicates any conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. a. The courts below appropriately declined to vacate petitioners' settlement based on fraud on the court. The bar for vacatur under that equitable doctrine is high. Rule 60(b) authorizes a party to move for relief from a final judgment based on "fraud * * * misrepresentation, or misconduct by an opposing party" but requires that any such motion be filed within one year of the final judgment. Fed. R. Civ. P. 60(b)(3) and (c)(1); see *United States* v. *Beggerly*, 524 U.S. 38, 42-45 (1998). Afterward, courts retain the authority to vacate judgments based on their equitable power to set aside a judgment for fraud on the court. That equitable relief is available "only to prevent a grave miscarriage of justice," *Beggerly*, 524 U.S. at 47, "where enforcement of the judgment is manifestly unconscionable," *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244-245 (1944) (citation and internal quotation marks omitted), based on the types of errors that "affect[] the very integrity of the judicial process itself," James Wm.

Moore et al., *Moore's Federal Practice* § 60.81[1][b][v] (3d ed. 2018).

The court of appeals correctly determined that petitioners did not meet this high standard both in light of the specific terms of their settlement agreement, see pp. 25-26, *infra*, and because petitioners could not show fraud on the court even without regard to the settlement terms. Pet. App. 25. In particular, the courts below correctly determined that petitioners could not establish the requisite miscarriage of justice from the settlement by pointing to claims that they knew of at the time of settlement but declined to litigate through a trial—even though they possessed the relevant evidence to support the claims and had been expressly authorized to present the claims as a trial defense. *Id.* at 17; see *id.* at 58, 60 (determining that petitioners not only knew of most of the fraud claims they raised at the time of settlement, but also "possessed and understood the purported significance of the very documents and testimony they now rely on in support of their motion before the court" and had been given "the opportunity to expose the alleged fraud at trial"). The "deep-rooted policy in favor of the repose of judgments," *Hazel-Atlas*, 322 U.S. at 244, is not compatible with a rule under which litigants who settle their claims can undo the judgment years afterward based on information known to them at the time of settlement.

The court of appeals also appropriately concluded that petitioners' three claims of after-discovered fraud did not change the calculus. It determined that none of the three later-discovered claims constituted fraud on the court—and petitioners do not contest the court's analysis. The court then further determined that the three later-discovered claims did not "significantly

change the picture already drawn by previously available evidence" known to petitioners when they settled—a determination that petitioners again do not dispute. Pet. App. 25 (citation omitted). Finally, the court concluded that since the allegations based on later-discovered evidence were not allegations of fraud on the court and did not significantly change the picture from the evidence known to petitioners at the time of settlement, petitioners were not entitled to vacate their settlement agreement. *Ibid.*

Petitioners misread the decision below in arguing that the court of appeals held that it was "strictly limited to considering only later-discovered evidence in isolation" when deciding whether to vacate the judgment based on fraud on the court. Pet. ii; see Pet. 19 (asserting that the decision below "confines a Rule 60 motion to the later-discovered pieces of the mosaic"). The court of appeals reasoned that a litigant cannot simply raise a claim that it was aware of "at the time of settlement or entry of judgment"—a situation that it contrasted with cases in which "crucial information" was not known at the time the case was resolved. Pet. App. 15. But the court of appeals went on to make clear that a litigant may claim fraud on the court when later-discovered evidence materially enhances a pre-existing fraud allegation. See *id.* at 25 (finding that petitioner was not entitled to relief based on fraud on the court because later-discovered evidence did not "significantly change the picture already drawn by previously available evidence") (citation omitted). And the court of appeals agreed 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." *Ibid.* The

court of appeals thus expressly considered the relationship between after-discovered evidence and the facts known at the time of settlement in declining to vacate the judgment.

b. Petitioners err in contending (Pet. 21-26) that the court of appeals' decision conflicts with *Hazel-Atlas*, in which this Court determined that a judgment should be vacated based on fraud on the court. The respondent in *Hazel-Atlas* undertook a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." 322 U.S. at 245-246. To bolster its patent application, an attorney for respondent wrote and published an article—which he falsely represented was written by an independent expert—extolling respondent's innovation. *Id.* at 240-241. Respondent used the article to obtain its patent and later to convince the court of appeals to rule in respondent's favor in litigation against Hazel-Atlas for infringing the patent. *Id.* at 240-242. When conclusive and admissible proof of this fraud emerged during later litigation, *id.* at 243, this Court determined that Hazel-Atlas was entitled to vacatur of the judgment. It explained that although Hazel-Atlas had heard a "hearsay story" that a lawyer for respondent "was the true author of the spurious publication" during the initial patent-infringement litigation, Hazel-Atlas did not have any admissible evidence to support that claim at that earlier stage. *Id.* at 241.

Petitioners assert (Pet. 21-26) that the decision below conflicts with *Hazel-Atlas* because *Hazel-Atlas* vacated a judgment against a litigant even though the litigant had information suggesting fraud when it entered into a settlement agreement on damages. But the court of appeals expressly acknowledged that a litigant may

obtain vacatur under the circumstances in *Hazel-Atlas*—when the "key information" establishing fraud on the court was "revealed only after entry of judgment," even if some information indicating fraud was known earlier. Pet. App. 16. It declined to vacate the judgment here after determining that this was not such a case in at least two respects: because the alleged misconduct of which petitioners obtained evidence after judgment simply did not constitute fraud on the court and because the later-discovered grounds did not "significantly change the picture already drawn by previously available evidence." *Id.* at 25 (citation omitted).

c. The court of appeals' decision does not implicate any conflict among the courts of appeals. The cases finding fraud on the court appear to uniformly involve later-discovered frauds.[3] Petitioners identify no decision vacating a judgment due to fraud on the court based on evidence known at the time of judgment to the litigant seeking vacatur, or based on a combination of such evidence and later-discovered evidence that did not amount to fraud on the court and did not significantly alter the picture from the earlier-known allegations.

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[3] See, *e.g.*, *Hazel-Atlas*, *supra*; *In re Levander*, 180 F.3d 1114, 1117-1120 (9th Cir. 1999) (finding fraud on the court where the fraud could not reasonably have been uncovered before judgment); *Pumphrey* v. *K.W. Thompson Tool Co.*, 62 F.3d 1128, 1130 (9th Cir. 1995) (noting that movant did not discover fraud until after judgment), cert. denied, 516 U.S. 1158 (1996); *Wildcat Enters.* v. *Weber*, 322 F.R.D. 306, 310-311 (N.D. Ill. 2017) (finding fraud on the court where movants learned of the fraud years after judgment, the court and the parties had no reason to suspect collusion and the fraud could not reasonably have been discovered at the time, and the district court would not have ruled as it did had the later-discovered information been known at the time).

Petitioners suggest (Pet. 26-28) that certiorari is warranted because several courts of appeals have described fraud on the court as a "nebulous" concept. Pet. 26 (citation omitted). But none of those decisions suggests any confusion regarding whether a litigant can obtain vacatur based on evidence known to the litigant when the litigant elected to settle a case, or based on old evidence combined with new facts that do not substantially alter the picture before the court. See *Fox ex rel. Fox* v. *Elk Run Coal Co.*, 739 F.3d 131, 136 (4th Cir. 2014); *In re Golf 255, Inc.*, 652 F.3d 806, 809 (7th Cir. 2011); *Landscape Props., Inc.* v. *Vogel*, 46 F.3d 1416, 1422 (8th Cir.), cert. denied, 516 U.S. 823 (1995); *Demjanjuk* v. *Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993), cert. denied, 513 U.S. 914 (1994). Petitioner next asserts (Pet. 27) that several decisions have held that there is no "after-discovered fraud" requirement for fraud-on-the-court claims. To the contrary, the cases petitioners cite do not address whether a litigant can seek post-judgment relief based on allegations of fraud known at the time of a settlement. See *Herring* v. *United States*, 424 F.3d 384, 390 (3d Cir. 2005), cert. denied, 547 U.S. 1123 (2006); *Demjanjuk*, 10 F.3d at 348; cf. *Aoude* v. *Mobil Oil Corp.*, 892 F.2d 1115, 1118-1121 (1st Cir. 1989) (addressing fraud as a basis for dismissing a pending action, not as a basis for overturning a final judgment).

In re Golf 255, supra, and *Great Coastal Express, Inc.* v. *International Brotherhood of Teamsters*, 675 F.2d 1349, 1357 (4th Cir. 1982), cert. denied, 459 U.S. 1128 (1983), likewise do not conflict with the decision below. Both of those cases rejected claims of fraud on the court, determining that the misconduct alleged in the

cases was not in the narrow category of grievous wrongdoing that constitutes fraud on the court—without adopting any holding concerning frauds discovered before entry of judgment. *In re Golf 255*, 652 F.3d at 810-811; *Great Coastal*, 675 F.2d at 1356-1357. Neither holds that a litigant may obtain relief based on alleged fraud known at the time of settlement, coupled with additional allegations that neither constitute fraud on the court nor substantially alter the picture created by the earlier allegations.

d. In any event, petitioners' case would be an unsuitable vehicle for addressing the circumstances under which a litigant may obtain relief based on allegations of fraud known to the litigant before judgment, because the courts below each expressly determined that petitioners also were not entitled to that equitable relief in light of the terms of their settlement agreement. As the courts below observed, after having alleged throughout pretrial litigation that the government engaged in "fraud and concealment," Pet. App. 6, petitioners agreed to settle the litigation and release all claims. In their agreement resolving the case, petitioners expressly acknowledged "that the facts and/or potential claims with respect to liability or damages regarding the above-captioned actions may be different from facts now believed to be true or claims now believed to be available." *Id.* at 7 (citation omitted). Petitioners then "accept[ed] and assume[d] the risks of such possible differences in facts and potential claims and agree[d] that this Settlement Agreement shall remain effective notwithstanding any such differences." *Ibid.* (citation omitted). And they agreed that the settlement should "remain in full force * * * notwithstanding the discovery or existence of additional or different claims or facts

before or after the date of this Settlement Agreement." *Id.* at 8. The court of appeals correctly determined that the district court did not abuse its discretion in denying petitioners the extraordinary equitable relief of vacating a two-year-old judgment based on fraud on the court when petitioners had entered into a settlement agreement containing a detailed, express waiver of such claims.

Petitioners relegate to a footnote their discussion of this independent ground for denying vacatur. Pet. 26 n.6. They assert no conflict between this holding and any decision of this Court or any lower court. And they address its merits only cursorily, asserting that the district court's determination was an abuse of discretion because "[a] federal court possesses 'inherent power . . . to investigate whether a judgment was obtained by fraud'" such that "no litigant can disclaim fraud on the court through a settlement agreement." *Ibid.* (citation omitted). But petitioners fail to offer any explanation of how *the court* was defrauded when it entered judgment based solely on the settlement agreement here. Petitioners do not allege that the agreement contained any misrepresentations; to the contrary, the sophisticated parties stipulated that their agreement to dismiss the case did not reflect agreement on liability and further stipulated that the true facts and claims might be different from those that the parties believed to be true at settlement. Pet. App. 7-8.

2. No further review is warranted of the court of appeals' determination that the district judge did not commit plain error by failing to *sua sponte* recuse himself. Under the judicial disqualification statute, a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

28 U.S.C. 455(a). Petitioners raised no objection to the district judge's failure to recuse himself before that court, and, accordingly, as the court of appeals held (in a determination that petitioners do not dispute), plain error review applies to the district judge's failure to *sua sponte* recuse himself.

Petitioners have not put forward grounds that—taken individually or together—establish the requisite plain error. Petitioners first rely on the fact that they alleged fraud by the U.S. Attorney's Office that is in the district where the district judge sits, and that "shares a building with the court and appears before Eastern District judges on a daily basis." Pet. 30. But petitioners cite no authority for the proposition that district court judges should not hear fraud-on-the-court claims when those claims concern a U.S. Attorney's Office or another frequent litigant in the district in question. To the contrary, district courts routinely adjudicate misconduct claims against frequent litigants in their districts, and it is common practice for fraud-on-the-court claims to be decided by the court that was allegedly deceived. See *Hazel-Atlas*, 322 U.S. at 248-249.

Petitioners likewise have not established error, let alone plain error, from the district judge's allegedly following the public Twitter account of the U.S. Attorney's Office. As the court of appeals explained, the U.S. Attorney's Office's public tweets are "news items released to the general public, intended for wide distribution to an anonymous public audience." Pet. App. 29. A district court's "following" such an account does not generate an appearance of bias any more than watching the office's press conferences on television or reading about the office's activities in the newspaper. Petitioners cite no authority for the proposition that "following" these

public news dispatches using Twitter generates an appearance of bias. And the American Bar Association, which authors the Model Code of Judicial Conduct, has advised that closer electronic media connections—such as judges and litigants identifying each other as "friends" on Facebook—do not ordinarily require disclosure, much less recusal. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462, *Judge's Use of Electronic Social Networking Media* (2013).

Nor did the district judge plainly err in failing to *sua sponte* retroactively recuse himself based on his alleged "tweeting" of "the title and link to a publicly available news article about the case in a local newspaper, without any further commentary." Pet. App. 29. The court of appeals correctly determined that merely reposting a news article, while "express[ing] no opinion on the case or on the linked news articles," does not amount to commenting on the merits of a pending matter, *id.* at 30, and that, even if tweets "containing only links to news articles, and coming from an account not publicly identifying a member of the judiciary," were seen as a form of public commentary, they would not qualify as the sort of commentary "creat[ing] an appearance of bias such that recusal is warranted under [Section] 455(a)," *id.* at 31. At a minimum, it was not plain error for the district judge to fail to recuse himself based on posting a link to a news article after a case concluded.

Petitioner does not identify any conflict on that topic, or even other decisions that have addressed when a judge's social media use requires recusal under Section 455(a). Under these circumstances, the questions surrounding social media use by judges would benefit from further development in the lower courts before any intervention by this Court. Moreover, this case would be

an inappropriate vehicle for taking up the subject because the case's plain-error posture would make it unnecessary for this Court to decide the appropriate bounds of judicial social media use in order to reject petitioners' plain-error challenge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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