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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

This Court has admonished that the "integrity of the judicial process" hinges on vigilantly policing fraud on the court and eliminating the appearance of judicial partiality. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-60 (1988). The decision below fell far short on both fronts. According to the Ninth Circuit (and now the government), a fraud on the court is shielded from scrutiny so long as the offending party partially reveals its misconduct before judgment and its later-disclosed misconduct fails to independently amount to fraud on the court. And in the view of the Ninth Circuit (and now the government), a federal judge need not recuse under 28 U.S.C. §455(a) when he engages in numerous activities that raise questions of partiality so long as each discrete activity does not cross the line. As an array of *amici* attest, those holdings are wrong and conflict with precedent from this Court, other courts, and common sense. The fact that the federal government endorses the Ninth Circuit's mistaken views only heightens the need for this Court's review.

While the government defends the Ninth Circuit's reasoning, it does so in part by claiming that the Ninth Circuit "did not hold that it was 'strictly limited to considering only later-discovered evidence in isolation.'" Opp.18-19. But that is irreconcilable with the Ninth Circuit's express statements to the contrary. Moreover, the government's revisionist interpretation—in which later-discovered evidence considered alone must significantly change the picture

before the sum total of fraud-on-the-court evidence may be considered—is just as mistaken and just as inconsistent with *Hazel-Atlas*. Given the high hurdle to showing fraud on the court and the higher costs if such fraud goes unremedied, there is simply no excuse for artificially constraining the judicial field of vision in assessing such claims. The fact that the federal government thinks otherwise is troubling, as is its view that it can invoke settlement terms procured in the shadow of a billion-dollar demand to deny a court its inherent equitable power to police fraud on the court.

The government likewise insists the Court should not review whether the sum total of Judge Shubb's social media activity required recusal under §455(a). But the government tellingly fails to cite *a single case* discussing §455(a), because none supports the notion that each source of perceived partiality should be analyzed in isolation. As all but the Ninth Circuit agree, §455(a) demands a holistic review of "*all the circumstances*" to determine whether a judge's impartiality might reasonably be questioned. *Sao Paulo State Federative Republic of Braz. v. Am. Tobacco Co*, 535 U.S. 229, 232 (2002). The totality of circumstances here creates an unmistakable appearance of partiality. The government's focus on plain-error review ignores that a judge's decision to "re-tweet" inaccurate and damaging news coverage of his own ruling will always arise post-judgment and will always be inappropriate, as is "following" the prosecutors while adjudicating a case about prosecutorial misconduct. The fact that the federal prosecutors see things differently is just one more reason that this Court's review is essential.

I. The Court Should Grant Certiorari To Decide Whether "Fraud On The Court" Is Limited To Fraud Discovered Post-Judgment.

A. *Hazel-Atlas* makes clear that litigants may prevail on Rule 60(d)(3) motions alleging fraud on the court when they possess some evidence of fraud pre-judgment, but learn the complete picture only after judgment. There, an alleged patent infringer first received word that the patentee had defrauded the court in 1929, but it nonetheless settled with the patentee in 1932. *Hazel-Atlas*, 322 U.S. at 241, 253. Only after receiving confirmatory proof of the fraud *nine years later* did it challenge the judgment. *Id.* at 243. Despite the existence of substantial evidence of fraud at the time of settlement and nearly a decade's passage, this Court held that the 1932 judgment should be "set aside" given the "indisputable proof" of what the pre-settlement evidence merely suggested. *Id.* at 243, 251. The Court reversed the court of appeals, which had ruled against the alleged infringer in significant part because "the fraud was not newly-discovered." *Id.* at 243.

In light of *Hazel-Atlas*, this case should have been straightforward. Petitioners knew of only some government misconduct at settlement and acquired indisputable proof of fraud on the court only belatedly, as a result of parallel state proceedings revealing some of the most egregious individual examples of fraud. *See, e.g.*, Cal Fire Retirees Br.11-12 (explaining that the "wrongful use" of the WiFITER fund "exemplifies

in a special way the fraud upon the district court").[1] Indeed, the entirety of the fraud was so unmistakable that the California courts imposed terminating sanctions after reviewing it *in toto*—decisions the government does not even acknowledge.[2] Despite the clear parallels to *Hazel-Atlas*, the Ninth Circuit essentially replicated the error of the *Hazel-Atlas* court of appeals by concluding that petitioners were not entitled to relief because the after-discovered evidence did not "rise to the level of fraud on the court." Pet.App.3. The Ninth Circuit's reasoning and result plainly conflict with *Hazel-Atlas*.

The government denies a square conflict between the decision below and *Hazel-Atlas* only by misdescribing the Ninth Circuit's reasoning. In the

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[1] The government's competing version of the facts is legally irrelevant, as the legal errors of the courts below prevented them from adjudicating the facts and thus this case arises in a posture where the truth of petitioners' allegations is "assum[ed]." Pet.App.9. But the state courts did adjudicate the facts and squarely rejected the government's distorted alternative narrative. Moreover, even the government's narrative cannot explain, *inter alia*, how it could have represented that there was not a "'shred' of evidence" implicating Ryan Bauer in starting the fire, even though (as petitioners learned only after judgment, but the government knew all along) Bauer's father concocted a demonstrably false story of an alleged Sierra Pacific bribe in an effort to deflect attention from his son's potential culpability. Pet.12.

[2] The federal government attempts to distance itself from the now-discredited state prosecution, Opp.5, but it does not and cannot dispute that federal and state authorities jointly investigated the Moonlight Fire and "jointly prepared witnesses, hired the same consultants and experts, and coordinated deposition questions and defenses," Pet.6-7.

government's view, the Ninth Circuit did not hold that courts are "'strictly limited to considering only later-discovered evidence in isolation.'" Opp.21. This argument blinks reality. The Ninth Circuit *repeatedly* announced and applied such a rule. The Ninth Circuit declared 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." Pet.App.15. It observed that fraud on the court is "reserved for material, intentional misrepresentations that could not have been discovered earlier." Pet.App.17. It held that petitioners could not establish fraud on the court because their allegations "do not constitute 'after-discovered fraud.'" Pet.App.17. And it summarized its ruling by declaring that "instances of alleged fraud known before" judgment "cannot justify relief." Pet.App.3. Against all these unambiguous statements, the government points to a single sentence in which the Ninth Circuit observed that the after-discovered fraud here did not "'significantly change the picture already drawn by the previously available evidence.'" Pet.App.25; Opp.17, 20-21, 23. But that observation is entirely consistent with the court's repeated insistence that the newly-discovered evidence alone must demonstrate the fraud on the court.

In all events, even the government's revisionist reading of the decision below is entirely inconsistent with *Hazel-Atlas* and common sense. Even if the Ninth Circuit's decision could be interpreted as requiring the newly-discovered evidence to "significantly change the picture" before the totality of the evidence of fraud can be considered, it would still conflict with *Hazel-Atlas*. There, this Court did not

consider the newly-discovered evidence in isolation to determine whether it satisfied some amorphous "significant-change-of-the-picture" standard and only then consider the totality of the evidence of fraud. Instead, this Court did what every court should do, which is look at the whole picture and all the evidence of fraud without any artificial division between after-acquired and pre-judgment evidence. To be sure, given finality interests, a reviewing court applies an appropriately high threshold to determine whether there has been a fraud on the court. But that makes artificially truncating the judicial field of vision even more problematic. The interests in preserving judicial integrity are no less weighty than the interests in preserving finality, and the costs of leaving fraud on the court unaddressed are enormous.

B. The government's attempt to downplay the lower-court conflict fares no better. Since this Court issued *Hazel-Atlas* over seventy years ago, the only point of agreement among the courts of appeals is that the concept of fraud on the court remains nebulous. *See* Pet.26-27. Several courts have offered definitions without any "after-discovered fraud" requirement. Other courts have taken a middle approach, suggesting that fraud on the court "ordinarily" involves after-discovered fraud, but declining to lay down a bright-line rule. And now the Ninth Circuit has staked out just such a bright-line rule, concluding that fraud on the court can be established "*only* where the fraud was not known at the time of settlement or entry of judgment." Pet.App.15 (emphasis added). The conflict among the courts of appeals is real, and the issue continues to generate uncertainty in the lower courts.

The government claims that these cases "do not address whether a litigant can seek post-judgment relief based on allegations of fraud known at the time of a settlement." Opp.24. But each of these courts attempted a comprehensive definition of fraud on the court, and the Ninth Circuit's unforgiving after-discovered fraud requirement is not an element in any of them. It thus defies reality to suggest that the Ninth Circuit's holding does not "implicate" any lower-court conflict. Opp.23.

C. The government's partial embrace of the Ninth Circuit's reasoning is troubling enough, but its alternative argument is worse. The government suggests that, even if courts should generally consider the totality of the evidence in evaluating fraud on the court, the government contracted around that defeault rule and shielded itself from that comprehensive inquiry here through the terms of its settlement agreement. That contention is as wrong as it is disturbing. The fraud on the court alleged here, as in *Hazel-Atlas*, occurred in the context of a judgment entered in light of a settlement. Using the terms of the underlying settlement to shield the fraud on the court in approving the settlement is the worst kind of bootstrapping. It is also flatly inconsistent with *Hazel-Atlas*, which re-opened a settlement based on fraud on the court. *See also United States v. Beggerly*, 524 U.S. 38, 39-41, 46-47 (1998) (considering on the merits respondent's 60(b) claim to vacate judgment following settlement).

More fundamentally, this effort to use settlement terms to constrain the judiciary's inherent authority to police fraud on the court is an alarming position for

federal prosecutors to embrace. Prosecutors have unique abilities to procure settlements and insist on terms. *See Ardestani v. INS*, 502 U.S. 129, 142 (1991) (noting that "the superior resources" of the federal government often "preclude private parties from challenging or defending against unreasonable governmental action"). This is a case in point. Federal prosecutors claimed nearly a billion dollars in damages and penalties, which left petitioners with little practical alternative to settling on the federal government's terms. Only because the state demands were relatively modest could petitioners afford to fight in state court and ultimately unveil the full story of prosecutorial overreaching. The notion that federal prosecutors can insist on terms that will truncate the judicial search for fraud (unless private parties pay more in settlement to preserve their ability to marshal all the evidence in the event of egregious prosecutorial misconduct) is profoundly troubling as a matter of both fundamental fairness and the separation of powers. The fact that the Justice Department squarely embraces that position only heightens the need for plenary review.

II. The Court Should Grant Certiorari To Establish Boundaries On Judicial Social Media Use.

Like the Ninth Circuit, the government apparently believes that federal judges may "follow" federal prosecutors on Twitter while adjudicating prosecutorial misconduct and "tweet" about their own rulings favoring those prosecutors—including inaccurate articles concerning those rulings—without raising even the appearance of judicial partiality. The

integrity of the judicial system and the public's confidence in the judiciary demands more.

A. The government contends that the decision below implicates no conflict and that the Ninth Circuit reached the correct bottom-line conclusion regarding Judge Shubb's social media activity. Opp.19, 26-29. But it is telling that the government does not cite any decisions of this Court or another court of appeals that address judicial recusal under 28 U.S.C. §455(a). In reality, the Ninth Circuit's siloed analysis of each element giving rise to an appearance of partiality is a complete outlier. Section 455(a) requires a holistic consideration of "*all the circumstances*" to determine whether a judge's impartiality might reasonably be questioned, and relevant facts may not be "disregard[ed]." *Sao Paulo*, 535 U.S. at 232-33. Every other court follows that same approach. *See* Pet.32-33.

The government does not engage with any of this contrary precedent, and as a result, it replicates the Ninth Circuit's errors. Just like the Ninth Circuit, the government disregards entirely that the Chief Judge of the Eastern District of California had *recused* Judge Shubb and his colleagues from hearing petitioners' Rule 60(d)(3) motion precisely *because of* appearance concerns arising from the local federal judges hearing serious charges against the U.S. Attorney's Office in a case of outsized local importance. *See* Pet.30. And just like the Ninth Circuit, the government addresses in isolation whether Judge Shubb's decision to "follow" the prosecutors on Twitter warranted recusal, and whether Judge Shubb's decision to "tweet" a news article falsely stating that petitioners were "still

liable" warranted recusal when standing alone. Opp.27-28.[3] But what the government fails to do (and what the Ninth Circuit should have done) is consider whether Judge Shubb's impartiality might reasonably be questioned when viewing the *totality of the circumstances together—i.e.*, (1) the Chief Judge's own assessment of appearance concerns; (2) Judge Shubb's decision to "follow" prosecutors on Twitter while adjudicating serious allegations of their prosecutorial misconduct; and (3) Judge Shubb's touting his ruling favoring those prosecutors on Twitter, in a "tweet" suggesting petitioners' liability. Pet.30-31. The answer to *that* question is not close, and this case clearly would have resulted in a §455(a) violation in any other court.[4]

The government suggests that plain-error review applies and makes this case a poor vehicle for review. Opp.27. But the government's argument ignores that every instance of judicial tweeting about a judge's own ruling will arise post-judgment and foreclose a

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[3] Indeed, the government literally *does not mention* the false and damaging nature of that article, characterizing Judge Shubb's conduct as "merely reposting a news article." Opp.28. But the falsity of the article, and Judge Shubb's knowledge that it wrongly ascribed liability to Sierra Pacific, reinforces the appearance problem.

[4] Seeking to downplay Judge Shubb's failure to recuse, the government argues that district courts "routinely adjudicate misconduct claims against frequent litigants in their district." Opp.27. But the government cites no case for that sweeping assertion, much less one where a district court has addressed the highly sensitive claim that the local U.S. Attorney's office has defrauded the court. The government's view was not shared by the Chief Judge, who plainly perceived an appearance of partiality.

contemporaneous objection. That is part and parcel of what makes such tweeting so improper and so threatening to the appearance of impartiality on which our judicial system depends. And because the tweeting here occurred after the judge not only refused to reopen the judgment, but refused even to grant petitioners a hearing on the underlying facts, petitioners raised the §455(a) question in the first available forum—the Ninth Circuit—so the plain-error standard does not apply. *See, e.g.*, *United States v. Middagh*, 594 F.3d 1291, 1295 (10th Cir. 2010).

Moreover, even if plain-error review did apply, the misconduct here would more than satisfy it. The errors here—in particular, following prosecutors while adjudicating prosecutorial misconduct and then tweeting an inaccurate and damaging article concerning the pro-prosecutor ruling—were "obvious" and affected the outcome of the proceedings. *Puckett v. United States*, 556 U.S. 129, 135 (2009). And, needless to say, Judge Shubb's inaccurate commentary on his own pro-government ruling seriously affects the "'integrity or public reputation of judicial proceedings.'" *Id.*; *see* Pet.31 (noting poll concluding by wide margin that Judge Shubb's conduct was "improper" and "judges shouldn't tweet about cases before them"). Indeed, the Ninth Circuit's felt need in this case to "caution[]" judges regarding their social media use, Pet.App.31, only underscores that Judge Shubb's behavior readily created an "appearance of impropriety," which is the whole ballgame in the §455(a) context, *Liljeberg*, 486 U.S. at 865.

B. The government urges denial of review because "questions surrounding social media use by judges would benefit from further development in the lower courts." Opp.28. But surely the government does not mean that more judges should tweet on more of their own rulings or follow more prosecutors while adjudicating prosecutorial misconduct. The usual admonition of further percolation may be beneficial for some issues, but it is badly misplaced here.

The bottom line is that the issues here are critically important. A remarkable array of state prosecutors, fire inspectors, and other *amici* recognize the decision below for what it is: a plain threat to public confidence in the fairness of our judicial system, especially when it comes to the difficult task of policing prosecutorial misconduct and fraud on the court. Courts should evaluate allegations of prosecutorial misconduct amounting to fraud on the court based on all the evidence and without "following" the prosecutors or "tweeting" about the results of the inquiry. That does not seem too much to ask. That the federal government thinks otherwise only makes the need for this Court's plenary review more acute.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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