No. 15-15799

In the
United States Court of Appeals for the Ninth Circuit

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*United States of America*,

*Plaintiff-Appellee*,

v.

*Sierra Pacific Industries, et al.*,

*Defendants-Appellees,*

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On Appeal from the United States District Court
for the Eastern District of California, Sacramento
Case No. 2:09-cv-02445-WBS-AC

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**BRIEF OF *AMICUS CURIAE* ATTORNEYS GENERAL FOR THE STATES OF ARIZONA, NEBRASKA, NEVADA, UTAH AND WISCONSIN IN SUPPORT OF APPLELLANTS AND IN SUPPORT OF REVERSAL**

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## STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

*Amici* State Attorneys General (the "AGs") are the chief legal officers and governmental lawyers in several states. The AGs have dedicated years of service to the justice system and have a continuing interest in preserving the fair and effective administration of justice in civil and criminal investigations, prosecutions, and enforcement actions. Significantly, as some of the Attorneys General signatories have an ongoing engagement with the United States Forest Service ("USFS") and the United States Department of Justice ("DOJ")—as partners in investigating and processing fire responses and claims on government land, both state and federal—they and the states they serve have an interest in ensuring that such investigations are carried out with the utmost integrity so that the public has unreserved confidence in the manner in which fire investigations and enforcement actions are processed.

The AGs acknowledge that the duty of prosecutors is "to seek justice within the bounds of the law," not merely to win a case or obtain a conviction. *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-1.2(c) (4th ed.

[1] The states of Arizona, Nebraska, Nevada, Utah and Wisconsin submit this brief pursuant to Federal Rule of Appellate Procedure 29(a). Fed. R. App. P. 29(a) ("The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court."). Though not required under Rule 29, *Amici States* here also address both their interests and the reasons why an amici brief is desirable and why the matters asserted are relevant to the disposition of the case. Finally, this brief conforms to the formal requirements of Federal Rule of Appellate Procedure 29(c), (d).

2015). This principle is as widely recognized as it is venerable. *See*, *e.g.*, *Freeport-McMoran Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992); *Hurd v. People*, 25 Mich. 404, 416 (1872) ("The prosecuting officer represents the public interest * * *. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success."); *Foute v. State*, 4 Tenn. (3 Hayw.) 98, 99 (1816) ("[The prosecutor] is * * * to * * * combine the public welfare and the [safety] of the citizens, preserving both, and not impairing either; he is to decline the use of individual passions, and individual malevolence, when he can not use them for the advantage of the public; he is to lay hold of them where public justice * * * requires it."). The AGs appreciate that seeking justice oftentimes creates challenging judgment calls for prosecutors, but they also understand that fundamental fairness and public confidence in our justice system relies on government lawyers scrupulously fulfilling their duty of candor.

In the AGs' view, these obligations apply equally in civil enforcement and criminal prosecutions. The public depends upon fundamental fairness of government lawyers as they pursue civil enforcement no less than when they prosecute crimes. "[T]he duty [of government lawyers] to see to it 'that justice shall be done,'' *Berger v. United States*, 295 U.S. at 88, thus requires a principled, integrity-laden approach to all aspects of government lawyering. *See*, *e.g.*, *Freeport–McMoran*, 962 F.2d at 47 (stating that the duty to do justice applies "with equal force to the government's civil lawyers"). Indeed, the American Bar Association's Model Code of Professional

Responsibility expressly holds a "government lawyer in a civil action or administrative proceeding" to higher standards than private lawyers, stating that government lawyers have "the responsibility to seek justice," and "should refrain from instituting or continuing litigation that is obviously unfair." A.B.A. Model Code of Professional Responsibility EC 7–14 (1981); *see also* Hon. Alex Kozinksi, *Preface: Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. (2015), viiii (noting "prosecutor's duty is to do justice, not merely to obtain a conviction" but concerned that "[t]here is reason to doubt that prosecutors comply with these obligations fully").

Unfortunately, these principles do not always animate each government lawyer's approach to litigation. This case is such an instance. The AGs' interest in the integrity of their offices—which is essential to serve the public—compels them to submit this *amici* brief. This is especially so since as Attorneys General in the western United States, the AGs have an ongoing interest in the proper investigation and enforcement actions with respect to wildfires. The propriety of such an investigation is in dire question here, as the record below overwhelmingly demonstrates breaches in government lawyers' duty of candor, including findings by a state court that amply justify a finding of fraud perpetrated on the district court below sufficient to warrant relief under Rule 60(d)(3). The AGs submit this *amici* brief to assist the Court in its review of the truly extraordinary circumstances this case presents.

## BACKGROUND

A short background places the AGs' concerns in context. On September 3, 2007, a fire ignited on private property near California national forests. That blaze came to be known as the Moonlight Fire. The next day USFS and Cal Fire initiated a joint investigation into its causes and that investigation ultimately led to this lawsuit, among others. (ER 463-64, 849-52, 864-65.)

Cal Fire investigator Joshua White and USFS investigator David Reynolds (who was later replaced by USFS Special Agent Diane Welton) jointly conducted and oversaw the investigation, the two agencies ultimately issuing a joint "Origin and Cause Investigation Report" ("OIR"). The OIR concluded that the fire started when the front blade or grouser plate of a bulldozer operated by an employee of defendant Howell's Forest Harvesting struck a rock. (ER 463-65.)

Approximately two years later, Cal Fire filed a civil action in California Superior Court; the same month, the United States Attorney for the Eastern District of California filed a second civil action seeking approximately $1 billion in damages on behalf of the United States. (ER 465-66, 467-68.) Both suits relied heavily and almost exclusively on the integrity of the joint OIR. The two suits named as defendants Sierra Pacific Industries; Eunice E. Howell doing business as Howell's Forest Harvesting; W.M. Beaty and Associates, and individual defendants, including landowners who owned interests in property where the fire purportedly began.

Defendants contended below, as they do before this Court, that throughout the pretrial stage of the litigation, the United States advanced a fraudulent origin-and-cause investigation report. They allege with support the following consequential irregularities that Defendants contend in their totality constitute fraud for purpose of Rule 60(d) review: that government lawyers (1) permitted their experts and investigators to testify falsely; (2) misrepresented the admission of one witness, J.W. Bush, that a bulldozer rock strike caused the fire; (3) proffered false testimony in opposition to the motion for summary judgment; (4) failed to take remedial action when it learned evidence—such as that derived from the air attack video—that undermined its causation theory; (5) created a false diagram regarding the fires movements; (6) misrepresented and withheld evidence and covered up misconduct of prosecutors and investigators; and (7) failed to disclose a significant financial interest which constituted an undisclosed interest in the litigation, known as the Wildland Fire Investigation Training and Equipment Fund (WiFITER), and affirmatively misrepresented the nature of the fund to the district court. WiFITER was an off-books fund set up by a small group within Cal Fire, for the benefit of Cal Fire fire investigators, to hold money recovered through settlements with parties allegedly responsible for reimbursing firefighting costs. A state superior court found that WiFITER created an improper financial incentive for the government's investigator and disclosed expert, *see Cal. Dept. of Forestry and Fire Protection v. Howell,* (Super. Ct. of

Cal. Feb. 4, 2014.) (ER 665-68, 670-72.); the fund has since been found unlawful by California's State Auditor, and has been dissolved. (ER 544-46, 550, 705.)

Approximately three years after the United States filed the federal action, and after losing a handful of key pre-trial motions, defendants entered into a settlement agreement with the United States. (ER 469-70, 765-76.) Under the terms of the settlement, Sierra Pacific Industries agreed to pay $47 million, Howell's Forest Harvesting agreed to pay $1 million, and the other defendants agreed to pay $7 million. Sierra Pacific also agreed to convey 22,500 acres of land to the United States. (ER 765-75.) After the settlement, on July 18, 2012, the district court dismissed the case with prejudice. (ER 776.)

After settling the federal action, defendants continued to defend themselves in the state action. In state court, defendants were allowed discovery regarding misconduct by the federal and state investigators and prosecutors. After an in-depth evidentiary hearing, Plumas County Superior Court Judge Nichols dismissed the state court action and entered judgment for defendants, and ultimately also imposed terminating sanctions and a $32.4 million monetary sanction against Cal Fire.

Judge Nichols's decision traces a litany of investigatory and prosecutorial abuse: "the Court finds that Cal Fire has, among other things, engaged in the pervasive and systematic abuse of California's discovery rules in a misguided effort to prevail against these Defendants, all of which is an affront to this Court and the judicial process." (ER 662.). That court determined that: Cal Fire's conduct in initiating, maintaining,

and prosecuting the action was corrupt and tainted; Cal Fire had engaged in unacceptable conduct for the purpose of recovering money from defendants; and critical witnesses testified dishonestly, as well as compromised or fabricated reports.

Judge Nichols's order recited sanctionable behavior in several areas. The first included WiFITTER. Defendants learned that Cal Fire had failed to produce critical documents evidencing improper financial incentives on the part of the fire investigators after they happened on the discovery in a public audit. Many unproduced documents—which had already been ordered produced—related to WiFITER, a fund set up by a small group within Cal Fire, for Cal Fire investigators, that holds money recovered from settlements to reimburse firefighting costs and therefore creates a financial incentive for investigators to pursue parties with financial resources to provide cost recovery. Judge Nichol's concluded that the late-discovered WiFITER documents "belie Cal Fire's own representations to this Court that there was no evidence whatsoever that the WiFITER fund was improper," and "would have caused [the] Court to rule differently" on past motions if they had been produced as required. (ER 672-73.) In short, the court found an undisclosed financial interest of investigators in the outcome of the case. It is undisputed that Cal Fire, the government's joint prosecution partner and its attorneys, were in possession of and had concealed from Defendants these critical documents before and after the settlement in federal court.

The court also found that the lead Cal Fire investigator Mr. White failed to testify honestly and that federal prosecutors failed to disclose or correct Mr. White's dishonest deposition testimony. White was also an expert and witness in the federal action due to joint investigation agreements. The court specifically noted White contradicted testimony regarding the fire's origin, typically marked with a white flag, noting: "White testified that neither of [the investigators] ever placed any white flags to mark evidence of [the] points of origin ... Notwithstanding White's testimony, discovery revealed a number of photographs taken by White ... [and] White could not explain or was unwilling to explain the fact that there is a white flag in the center of each of these photos." (ER 675.) The court concluded that state counsel shared the blame for White's dishonesty: "Unfortunately, Cal Fire's lead counsel, officers of this Court, who should be 'operating under a heightened standard of neutrality,' greatly exacerbated the problem by failing to intercede and put a stop to what their witnesses were doing under oath." (ER 678.) From the totality of the record below, it appears that it is undisputed that the federal investigators also knew of White's false testimony, and in fact encouraged it, although defendants did not discover this subornation of perjury until after settlement and entry of judgment in the federal action.

Further, Judge Nichols found evidence that the joint federal and state report saddling defendants with liability for the fire had misrepresented the testimony of key witnesses linking defendants to the fire's origin: "[D]espite the fact that Bush [a

bulldozer operator a defendant] clearly stated during his September 10 interview that he never told anyone that rock strike started the fire, White's written interview summary, advanced into the Official Report" asserts that Bush made such a statement. (ER 679.) Again, federal prosecutors and investigators advanced this false report of confession through the OIR, and presented it to the district court through a false declaration in opposition to Defendants' motion for summary adjudication.

All three of these highlighted incidents are attributable to both federal and state investigators and prosecutors who did not disclose these facts before the federal court settlement.

Following the state court dismissal, subsequent disclosures about Cal Fire's illegal WiFITER account, and sanctions imposed by the state court, defendants filed a motion in the federal action under Federal Rule of Civil Procedure 60(d)(3) to vacate the previous settlement as a result of fraud on the court. Defendants' motion relied on essentially the same conduct that the superior court had relied upon in awarding sanctions, and additional instances of prosecutorial malfeasance unique to the federal action.

The district court then ordered the parties to brief the legal sufficiency of the evidence as alleged by defendants in their motion. (ER 572-74.) [Dist. Ct. Order, Dkt # 618 (November 24, 2014)] ("Focused briefing shall be submitted limited to: ... (2) addressing whether, assuming the truth of Sierra Pacific's allegations, each alleged act of misconduct separately or collectively constitutes 'fraud on the court,' within the

meaning of Rule 60(d)(3)") (emphasis added). Defendants argued the legal sufficiency of their allegations, but did not submitted evidence. (ER 428-571.) The government disputed defendants' allegations and, ingnoring the court's order, submitted voluminous evidence attempting to disprove them. (ER 298:5-10, 409-14, 421-27.)

The district court also ignored its own order and relied on evidence presented by the government in its response brief. (ER 26-27, 34-36, 42, 44.) Unlike Judge Nichols in the state action who dismissed the case against defendants and ordered a $32 million sanction for essentially the same conduct at issue here, the district court below ruled in favor of the United States and denied defendants' motion. (ER 63, 664, 634-659, 717-18.)

## INTRODUCTION

The government lawyers and investigators involved in civil litigation for California's Moonlight Fire entirely disregarded their duty to do justice in those parallel investigation and court proceedings.

*Amici* AGs here do not repeat the comprehensive account of the factual background of both the federal and state proceedings that led Appellants to seek the relief at issue before this Court. Defendants and other amicus curiae have amply covered most of the significant facts and procedural background. *See* Brief of Amicus Curiae Michael Dole and Tom Hoffman, Retirees of the California Department of Forestry and Fire Protection ("Br. of Retired Firefighters"), Case No. 15-15799, Dkt. 32-1, at 4-7; Defendant's Opening Brief ("App. Br."), Dkt. 47-1 at 5-36.

The salient point for this brief is that an extensive investigation and prosecution was presented almost simultaneously in state and federal courts, as both the USFS and Cal Fire looked for damages in state and federal court. The California Supreme Court appointed the California trial judge to carefully consider the claims at issue. The irregularities the court found are of such magnitude that they demand redress by this Court. The district court's order on appeal eschewed such findings—an incredible outcome in light of the extraordinary circumstances that occurred below. The district court's failure to grant relief under Rule 60(d)(3) in this case cries out for correction to preserve the sanctity of and respect due to the justice system.

The facts that inform this brief are as follows. Defendants credibly allege serious misconduct by the government's attorneys, based on evidence and court findings from a parallel state case. *See Cal. Dept. of Forestry and Fire Protection v. Howell* (Super. Ct. of Cal. Feb. 4, 2014) (ER 634-718.) The superior court imposed $32 million in sanctions against the California Department of Forestry and Fire Protection for false testimony, fabricated evidence, and "pervasive and systematic abuse . . . all of which is an affront to this Court and the judicial process." (ER 662.) But contrary to its own order about the nature of its Rule 60 inquiry—specifically that it would be limited only to the legal question presented—the court below resolved facts against the defendants based on the government's proffered evidence without allowing defendants an opportunity to prove their allegations, and short-circuited the proper legal inquiry by denying that the government had any special duties at all.

In particular, the district court held that the due process protections announced by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963) are absolutely inapplicable in civil cases, but most egregiously then never inquired further about the nature of the government's discovery and disclosure obligations in prosecuting a $1 billion civil action. In doing so, the district court disregarded the standards for Rule 60(d)(3) inquiry and—applying *Brady* standards in analytical *non sequitur*—disregarded what is readily apparent untruthfulness by government lawyers and agents. The court suggested that government attorneys may speak in open court with reckless indifference to the truth, and that reliance upon an investigator with a significant financial conflict of interest did not threaten the integrity of the government's case.

Contrary to controlling and well-reasoned authorities, the district court refused to hold government lawyers accountable for abusing their discretion, power, and resources. The district court's decision frees government lawyers from their obligation to see "that justice shall be done," increasing the odds of future abuse. The decision below should therefore be reversed.

## ARGUMENT

### I. THE DISTRICT COURT DENIAL OF DEFENDANTS' 60(D)(3) MOTION SHOULD BE REVERSED AND THE CASE REMANDED

Federal Rule of Civil Procedure 60(d)(3) allows a judgment to be set aside "for fraud on the court" and 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); *see also* Defendants Op. Br. at 41-41; 45-48 (correctly outlining standard and observing the heightened scrutiny allegation of government fraud). Specifically, the Supreme Court, in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 243-44 (1944), *overruled on other grounds by Standard Oil of Cal. v. United State*, 429 U.S. 17 (1976), specified that the fraud on the court inquiry must consider the "trail of fraud" under a totality of the circumstances analysis. Under such analysis, reversal is warranted here. *See, e.g.*, *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971) (judicial review should confine and control government discretion for "judicial review alone can correct only the most egregious abuses" and ensure that government process itself "will confine and control the exercise of discretion").

The post-federal-settlement facts learned by Defendants and outlined above clearly call for reversal by this Court. They constitute a breach of duty of candor to the tribunal that under the circumstances is fraud within the meaning of Rule 60(d)(3). They also constitute a breach of rules of professional conduct by government lawyers.

Contrary to the district court's holding, government attorneys have special duties in *all* cases, not just criminal ones. *Freeport-McMoran Oil*, 962 F.2d at 47-48. Their higher responsibility to pursue the *truth*, not just to win, specifically includes a duty to speak with fidelity to the facts, and a bar on any financial conflicts of interest.

Appellants allege that the government failed to disclose obviously relevant exculpatory evidence and misrepresented key facts. They also allege that the financial

interest of one of the key investigators tainted the government's case. These are serious allegations given the massive potential penalty (over $1 billion). But they are more than just allegations; they are actual findings by a state-court judge in a parallel state action resulting in a $32 million sanction award against the very persons against whom Appellant complains here. In these unique circumstances, the district court's refusal to grant relief under Rule 60(d)(3) is clear error. This Court should reverse the district court's judgment.

## II. COURTS MUST CHECK CLEAR ABUSES OF DISCRETION BY GOVERNMENT LAWYERS

As the *Berger* Court explained, lawyers for the public are "the representative not of an ordinary party to a controversy, but of a sovereignty . . . [whose] interest in a . . . prosecution is not that it shall win a case, but that justice shall be done." 295 U.S. at 88. This Court in kind observed that: "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." *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993) (Kozinski, J.)

The district court below erred by holding that this important principle is limited to criminal cases. *Freeport-McMoran*, 962 F.2d at 47 ("'A government lawyer is the representative not of an ordinary party to a controversy . . . but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.'"). To be sure, "[t]he Supreme Court was speaking of government [criminal] prosecutors

in *Berger*," but no one "has suggested that the principle does not apply with equal force to the government's civil lawyers." *Id.* (internal citation omitted). This is in accordance with the commonplace principle that a government lawyer is accountable "to a higher standard of behavior." *United States v. Young*, 470 U.S. 1, 25-26 (1985) (Brennan, J., concurring).

Other federal courts have agreed that in *both* criminal and civil cases, the "dominant purpose" of holding the government "to a high standard of conduct in civil litigation" is "to assist the court in arriving at a just and true resolution." *United States v. Moss-America, Inc.*, 78 F.R.D. 214 (E.D. Wis. 1978) (civil case). This duty flows from the government attorney's special obligations. "The U.S. has a higher duty than an ordinary adversary. It is the representative of all of the people by the will of the people surviving on and expending the people's tax money and should be charged with a high standard of conduct in litigation, i.e., find the truth regardless of the consequences to the position of the U.S. as a party adversary." *United States v. Choctaw County Bd. of Educ.*, 310 F. Supp. 804, 810 (S.D. Ala. 1969) (civil case).

The justifications for holding government lawyers to a heightened duty apply equally in civil cases. The sheer scope of government resources necessitates the government exercise caution in the way it wields its authority. *See Wardius v. Oregon*, 412 U.S. 470, 475-76 n.9 (1973) (noting, in a criminal case, that the government possesses "greater financial and staff resources with which to investigate and scientifically analyze evidence"). The government often also has superior

investigatory tools. *See*, *e.g.*, *id.* (observing that the prosecutor often "begins his investigation shortly after" a potential offense has taken place, "when physical evidence is more likely to be found and when witnesses are more apt to remember events") (citation omitted). These significant advantages apply in civil cases no less than in criminal prosecutions.

These heightened standards are reflected not only in case law but also in various sources outlining the professional and ethical obligations of government attorneys. For example, the A.B.A. 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.* (observing that a government lawyer "has an obligation to refrain from instituting or continuing litigation that is obviously unfair"); 5 C.F.R. § 2635.101(b)(5), (8), (14). Proper judicial review ought to also effectively check improper government overreach in civil or criminal enforcement. *See*, *e.g.*, *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946) ("Private rights are protected [from government power] by access to the courts"); Alt and Lessen, *Political and Judicial Checks on Corruption: Evidence from American State Governments*, 20 J. Econ. & Pol. 33, 57 (2008) (judicial review can check government corruption).

The district court ruled that government attorneys in a civil case are no different from counsel for any other civil litigant in part because "[i]n contrast to a criminal case where there is a potential loss of liberty, a civil action such as this is

strictly about money. Except that the government happens to be the plaintiff, this case is no different from any other civil case in which one party pursues recovery of damages allegedly caused by the other party." (ER 11.) The district court's holding is error. The higher standard applied to government lawyers involves in this instance constitutes fraud under Rule 60, and 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 clause applied to the conduct of criminal and civil trials") (citations omitted). The government's *$1 billion* demand was against not only Sierra Pacific and W.M. Beaty but also against individuals. The potential damages (demanded based on dishonest testimony) threatened each defendant with financial devastation.

Such consequences require the highest standards of conduct by the government and proper review scrutiny by the court. This conclusion is especially cogent when the governmental remedy would be the same in the civil or criminal context, as it was here. In fact, as some commentators have 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. This idea is appealingly straightforward and, sometimes, equitably compelling. If a contractor who has filed false claims against the government can be assessed thousands of dollars in civil fines, why should the proceeding be any different from a criminal prosecution for the same misdeeds that carries the same monetary penalty.

Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Distinction*, 42 HASTINGS L.J. 1325, 1351 (1991).

Protections against fraud before the tribunal limit not only the government's ability to constrain liberty, but also its ability to seize property. Contrary to the district court's suggestion (ER 11), the deprivation of private property by the government is not some "lesser" right than the deprivation of a private citizen's freedom, and requires the same protections. *See*, *e.g.*, *Kaley v. United States*, 134 S. Ct. 1090, 1099 n.7 (2014) ("We simply see no reason to treat a grand jury's probable cause determination as conclusive for all other purposes (including in some circumstances, locking up the defendant), but not for the one [deprivation of property] at issue here").

Here, defendants alleged that the government advanced a fraudulent origin-and-cause investigation. Government lawyers also permitted experts and investigators to testify falsely; they misrepresented the admission of J.W. Bush that a bulldozer rock strike caused the fire; they proffered false testimony in opposition to the motion for summary judgment; they failed to take remedial action when they learned evidence such as that derived from the air attack video that undermined its causation theory; they relied on a false diagram; and they ignored that the WiFITER account created an improper financial incentive. Certainly, this Court need not find a due process violation of constitutional dimensions to provide the relief requested under FRCP

60(d); as described, the fraud alleged and demonstrated in this case alone warrants such relief as the judicial deterrent undergirding Rule 60's policy. (ER 20–21, 45.)

The court below abandoned its analysis regarding the sufficiency of defendant's allegations. Rather, against its own order, district court acknowledged much of the government's evidence and almost singularly focused on the fact that the defendants had settled while supposedly knowing some of the government's fraudulent conduct. Defendants' allegations in the district court regarding the investigators' and prosecutors' failure to disclose exculpatory evidence, correct material misstatements, and avoid conflicts of interest relate to actual findings of fraud and dishonesty that Rule 60(d)(3) required the district court to meaningfully consider. The district court's failure to do is error that warrants reversal.

## III. THE FRAUD PROHIBITION IN RULE 60 IMPOSES SPECIFIC DUTIES ON GOVERNMENT LAWYERS, EVEN IN CIVIL CASES

The government's duty of candor entails a duty to disclose adverse evidence, avoid reckless disregard for the truth, and prohibits financial conflicts of interest. The district court's rejection of these obligations and its blindness to the fraud and miscoduct here was error under any meaningful Rule 60 analysis.

### A. The United States Should Be Subject to Sanctions in this case for Withholding Exculpatory Evidence.

The district court's failure to recognize that the government lawyer's heightened duties apply in civil cases led it to treat serious instances of misconduct as trivial. In particular, the district court neglected the necessary inquiry regarding the

government prosecutors' conduct by merely concluding that *Brady v. Maryland* does not apply in civil actions, and therefore that the court need not be concerned with the government's withholding of discoverable adverse evidence. Under a Rule 60(d)(3) inquiry, the district court engaged in analytical *non sequitur*, as *Brady* is not the touchstone, nor should it be, for the application on the rule here.

The question for Rule 60(d)(3) analysis is not whether the conduct of government lawyers violates *Brady*; the question rather is whether lawyers misrepresent facts constituting fraud that compromises the due administration of justice. That is what the apparently intentional misrepresentations are here. *Amici* AGs here merely point out that *Brady*'s application has no legal significance in the Rule 60 analysis in this case; the district court was still required to hold the government to a higher standard of conduct—if refraining from misrepresentation is a "higher" standard—and its failure to do so was erroneous.

**B. Government Lawyers Should Act with Regard for the Truth.**

Appellants argued below that at the very least the government prosecutors acted with extreme reckless disregard for the truth sufficient to entitle defendants to Rule 60(d)(3) relief. Courts have granted relief where prosecutors clearly acted recklessly or willfully. *E.g.*, *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993). In *Demjanjuk*, the Sixth Circuit found that the government's reckless disregard for the truth amounted to fraud on the court entitling the defendant to relief. *Id.* at 348–49 (reckless disregard of the truth by the government is sufficient to demonstrate fraud

on the court). Citing *Demjanjuk* this Court itself has also found recklessness by government prosecutors to constitute misconduct sufficient to warrant judicial relief. *Wang v. Reno*, 81 F.3d 808, 819 (9th Cir. 1996).

Extremely reckless or willful disregard of the truth is inconsistent with a government attorney's duty to the court and to the judicial process. *Demjanjuk*, 10 F.3d at 348–49; *Gen. Med., P.C. v. Horizon/CMS Health Care Corp.*, 475 Fed. App'x 65, 71–72 (6th Cir. 2012) (allowing recklessness to suffice for fraud on the court); *Herring v. United States*, 424 F.3d 384, 386 n.1 (3d Cir. 2005) (acknowledging the Sixth Circuit's position that recklessness is sufficient but requiring proof of an "intentional fraud"). The facts here show at least reckless and likely willful misrepresentations, warranting the relief sought. Courts expect that federal lawyers will provide a "more candid picture of the facts and the legal principles governing the case." *Williams v. Sullivan*, 779 F. Supp. 471, 472 (W.D. Mo. 1991) ("a special duty [is] imposed on government lawyer[]s to 'seek justice and develop a full and fair record'"); *see also* James E. Moliterno, *The Federal Government Lawyer's Duty to Breach of Confidentiality*, 14 Temp. Pol. & Civ. Rts. L. Rev. 633, 639 (2006). Because the record demonstrates government lawyers thwarting the development of a full and fair record in the interest of seeking justice, Rule 60(d)(3)'s sanctions should apply against the government in full force.

### C. The State's Financial Interest in the Outcome of the Investigation Tainted the Joint State-Federal Investigation and Violates Rule 60.

Mr. White—a disclosed expert for the United States—had an improper financial incentive in the case as a result of WiFITER. Although Appellants were generally aware of WiFITER at the time of the federal settlement, as described in their opening brief, they discovered after settlement with the United States and after dismissal of the Cal Fire state action the existence WiFITER documents concealed by Cal Fire and its attorneys. These documents demonstrated that Cal Fire was motivated to target affluent defendants to keep WiFITER from "running in the red," that they were looking for their next "high % recovery," and that Mr. White, the lead Moonlight Fire investigator, was a direct beneficiary of funds from that account and participated in managing it. (ER 547-549.) Put simply, Mr. White enriched himself and Cal Fire by ensuring a recovery from Appellants and this was never disclosed to the tribunal.

Mr. White was the author of the origin-and-cause report relied upon by the United States in this case and his personal interest in WiFITER was never voluntarily disclosed by federal prosecutors before or after settlement and entry of judgment in the district court below. The government's reliance without disclosure on an investigator with a contingent financial interest in the outcome of the litigation is fraud for 60(d)(3) purposes.

"[I]injecting a personal interest, financial or otherwise into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raises serious constitutional questions" applicable to both civil and criminal actions. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *cf. People ex. rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 746 (1987) (Noting under California ethical rules: "When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function.").

It is of no legal relevance that Mr. White was an investigator because at a bare minimum, Cal Fire's lawyers, who were the federal prosecutors' joint prosecution partners, knew about and were actively concealing key WiFITER documents evidencing Mr. White's direct financial interest and should have disclosed it; under the circumstances the legal principle is the same—a government prosecutor's duty of impartiality applies likewise to government agents such as investigators. *See* California Rule of Professional Conduct, Rule 7-107(C) (testifying experts prohibited from having a contingent interest in the outcome of the action in which they are testifying). Mr. White stood to benefit directly and indirectly from any recovery in the state action. The evidence, support, and opinions for the federal government's and the state's cases were largely the same due to the joint investigation, and necessarily tainted all of Mr. White's reports and opinions. The federal government of necessity

had to rely on these reports to maintain a case for Appellant's liability. In fact, in awarding sanctions against Cal Fire, the superior court observed that Cal Fire falsely represented that there was "'zero' evidence WiFITER was a corrupt scheme or that it had any impact on the investigations." (ER 687.) In the state proceedings, the court found that there had been affirmative misrepresentations that affected the case and that the fund likely created a conflict of interest. As the federal government of necessity had to rely on the same evidence and testimony to maintain liability in the federal action, the same result obtains: an omission constituting fraud on the court.

In short, it is plainly improper and a violation of Rule 60 for the government to rely on an investigator who maintained a substantial financial interest in the outcome. Consequently, this Court should reverse the district court due to its inadequate Rule 60 analysis.

## CONCLUSION

Whatever else prosecutors' ethical duties are—or should be—to the Court, they do not include apparent intentional misrepresentation. The district court's failure to properly analyze under Rule 60(d)(3) defendants' allegations of fraud and misconduct by the government prosecutors is error, and this Court should reverse.

Respectfully submitted this 13th day of November 2015.

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## CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C)(ii) that:

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I hereby certify that on November 13, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Pursuant to Federal Rule of Appellate Procedure 29(c), Ninth Circuit Rules 28-1(d) and 32-1, I hereby certify that the hard copy of this brief is identical to the version submitted electronically to the Court via CM/ECF.

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