No. ____

IN THE

Supreme Court of the United States

IN RE PATRICIA J. HERRING (FORMERLY PATRICIA J. REYNOLDS), SUSAN BRAUNER, CATHERINE BRAUNER, JUDITH PALYA LOETHER, WILLIAM PALYA, AND ROBERT PALYA, AS LIVING HEIRS OF THE DECEASED ROBERT REYNOLDS, WILLIAM H. BRAUNER AND PHYLLIS BRAUNER, AND ALBERT H. PALYA AND ELIZABETH PALYA, AND AS THE RESPONDENTS OR HEIRS OF RESPONDENTS IN *UNITED STATES V. REYNOLDS*, 345 U.S. 1 (1953),

Petitioners.

PETITION FOR A WRIT OF ERROR *CORAM NOBIS* TO REMEDY FRAUD UPON THIS COURT

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Questions Presented

1. Where recently declassified documents show that the United States defrauded this Court in securing the Court's decision in *United States v. Reynolds,* 345 U.S. 1 (1953), should the Court issue a writ of error *coram nobis* pursuant to 28 U.S.C. § 1651, or exercise its inherent equitable powers, to vacate its decision and now affirm and reinstate the original judgments?

2. Where the government defrauded the Court and thereby deprived petitioners of the benefit of their judgments, should the Court award petitioners damages to compensate them for their loss pursuant to 28 U.S.C. § 1912 or pursuant to the Court's equitable powers as a sanction for the government's misconduct?

3. Where the government defrauded the Court and thereby deprived petitioners of the benefit of their judgments, should the Court award petitioners their attorneys fees and single or double costs pursuant to 28 U.S.C. § 1912, pursuant to 28 U.S.C. § 2412(b), or pursuant to the Court's equitable powers as a sanction for the government's misconduct?

Parties to the Proceedings

1. Petitioner Patricia J. Herring (formerly Patricia J. Reynolds) is the 75 year-old widow of the decedent Robert Reynolds. She was an original party to the proceedings before the United States District Court for the Eastern District of Pennsylvania in 1949-1951, the United States Court of Appeals for the Third Circuit in 1951, and the United States Supreme Court in 1952-1953 in *United States v. Reynolds,* 345 U.S. 1 (1953).

2. Petitioners Susan and Catherine Brauner are the children and living heirs of the decedent William H. Brauner and his wife, Phyllis Brauner. Phyllis Brauner, like Patricia Herring, was an original party to the proceedings in *United States v. Reynolds.* Phyllis Brauner died on December 23, 2000.

3. Petitioners Judith Palya Loether, William Palya and Robert Palya are the children and living heirs of the decedent Albert H. Palya and his wife, Elizabeth Palya. Elizabeth Palya, like Patricia Herring, was an original party to the proceedings in *United States v. Reynolds.* Elizabeth Palya died on October 3, 2000.

4. Respondent United States was an original party to the proceedings in *United States v. Reynolds.*

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Preliminary Statement

Three widows stood before this Court in 1952. Their husbands had died in the crash of an Air Force plane. The lower courts had awarded each of them compensation. But the United States was bent on overturning their judgments, and – to accomplish this – it committed a fraud not only upon the widows but upon this Court. As a result, what the widows had won was lost. One of the widows and the children of the other two now ask the Court to right this wrong.

At the heart of the case is a set of reports the Air Force prepared on the accident that killed the widows' husbands. The Air Force refused to produce these reports, even to the district judge for *in camera* review. The district court, therefore, ruled for the widows on liability, determined damages, and entered judgment. The Court of Appeals affirmed. Undeterred, the United States took the case to this Court and advanced a sweeping claim of executive privilege, contending that the reports contained "military secrets" so sensitive not even the district court should see them. It pointed to affidavits of two of the highest-ranking men in the Air Force in support of this plea. This Court took the government at its word, and reversed.

But, it turns out that the Air Force's affidavits were false. The Air Force recently declassified the accident reports. They include nothing approaching a "military secret." Indeed, they are no more than accounts of a flight that, due to the Air Force's negligence, went tragically awry. In telling the Court otherwise, the Air Force lied. In reliance upon that lie, the Court deprived the widows of their judgments. It is for this Court, through issuance of a writ of error *coram nobis* and in exercise of its inherent power to remedy fraud, to put things right.

Jurisdiction

This Court has jurisdiction over this Petition pursuant 28 U.S.C. § 1254(1), 28 U.S.C. § 1651(a), and the United States Constitution. The Court's jurisdiction is inherent in, ancillary to, and in aid of its original exercise of appellate jurisdiction in *United States v. Reynolds*, 345 U.S. 1 (1953).

Prior Opinions

This Court's decision in *United States v. Reynolds*, 345 U.S. 1 (1953), reversed a decision of the United States Court of Appeals for the Third Circuit, 192 F.2d 987 (3d Cir. 1951), which had affirmed a decision of the United States District Court for the Eastern District of Pennsylvania, 10 F.R.D. 468 (E.D. Pa. 1950). Two unreported decisions of the trial court regarding damages, dated February 20, 1951 (R. 29-33),[1] also are pertinent.

Statutes Involved

1. The All Writs Act, 28 U.S.C. § 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

2. Former 28 U.S.C. § 2411(b), Act of May 24, 1949, c. 139, § 120, 63 Stat. 106 (*repealed by* Act of April 2, 1982, P.L. 97-164, 97th Cong., 2d Sess., § 302(b), 96 Stat. 56), provided:

> (b) Except as otherwise provided in subsection (a) of this section, on all final judgments rendered against the United States in actions instituted under section

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1. Many documents relevant to this Petition are found in the original Transcript of Record in *United States v. Reynolds*, October Term, 1952, No. 21 (U.S. Supreme Court). The original Transcript of Record is cited herein as **"R.___."** Certain materials not previously before this Court in *United States v. Reynolds* and bearing on this Petition appear in the Appendix to this Petition, which is cited as **"App.___."**

1346 of this title [pertaining to claims under the Federal Tort Claims Act], interest shall be computed at the rate of 4 per centum per annum from the date of the judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment.

3. 28 U.S.C. § 1912 provides:

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

4. 28 U.S.C. § 2412(b) provides:

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Statement of Facts

On October 6, 1948, a United States Air Force B-29 Superfortress bomber crashed near Waycross, Georgia. Nine of the thirteen men on board were killed. Three of the deceased, Robert Reynolds, William H. Brauner and Albert H. Palya, were civilian engineers working for the Radio Corporation of America in Camden, New Jersey and the Franklin Institute of Technology in Philadelphia, Pennsylvania. They were assisting military personnel with electronic equipment that was being tested on the flight.

In 1949, the widows of Reynolds, Brauner and Palya filed suit against the United States in federal district court in Philadelphia. Their complaints under the Federal Tort Claims Act charged the Air Force with negligence in the conduct of the flight. Plaintiffs' cases stalled, however, when the Air Force refused to turn over its accident investigation reports, as well as several statements of surviving witnesses, which the Air Force claimed were "privileged."

When first called upon to defend this claim, the United States did not pretend that the accident reports and statements contained "state secrets or facts which might seriously harm the Government in its diplomatic relations, military operations or measures for national security." *Brauner v. United States*, 10 F.R.D. 468, 472 (E.D. Pa. 1950). Rather, the government insisted only that "proceedings of boards of investigation of the armed services should be privileged in order to allow the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper discipline." *Id.* The district court held no such privilege existed and ordered the Air Force to produce the materials.

It was in a motion for rehearing of that order that the United States first invoked "state secrets" protection. It supported this claim with two affidavits, a formal "Claim of Privilege" and accompanying affidavit signed by then Secretary of the Air Force, Thomas K. Finletter, and an affidavit by then Judge Advocate General of the Air Force, Major General Reginald C. Harmon. R. 21-28. Secretary Finletter stated that the accident reports and statements should not be produced because:

> the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force. The airplane likewise carried confidential equipment on board and any disclosure of its mission or information concerning its operation or performance would be prejudicial to

> this Department and would not be in the public interest.

R. 22. He then identified the documents as "reports of Boards of Investigation and statements of witnesses which are concerned with secret and confidential missions and equipment of the Air Force." R. 23. Major General Harmon swore that the "information and findings of the Accident Investigation Board and statements which have been demanded by the plaintiffs cannot be furnished without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." R. 27.

The district court, on rehearing, agreed to review the accident reports and witness statements *in camera* to assess the government's privilege assertions. It therefore ordered the government to produce these materials for the court's personal inspection in chambers on October 4, 1950. R. 28 (Amended Order re: Production of Documents, dated September 21, 1950).[2] The United States refused to comply with this order. On October 12, 1950, after the district court was satisfied that the government would not produce the documents even to the court *in camera*, the court entered an order deeming the Air Force's liability to the widows established. *See* R. 29 (Order dated October 12, 1950).

The court held a hearing on damages and awarded $65,000 to Mrs. Reynolds, $80,000 to Mrs. Brauner, and $80,000 to Mrs. Palya. R. 32-33 (Judgments dated February 27, 1951). In making these awards, the court specifically found that these amounts represented the full value of the

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2. The September 21, 1950 order directed production in chambers of "(a) The report and findings of the official investigation of the crash of defendant's B-29 type of aircraft near Waycross, Georgia on October 6, 1948. (b) The statement with reference to such crash of Captain Herbert W. Moore, 1279A. (c) The statement with reference to such crash of Staff Sergeant Walter J. Peny, AF 698025. (d) The statement with reference to such crash of Technical Sergeant Earl W. Murrhee, AF 14171471." R. 28

lives of the deceased, reduced to present value. *See* R. 29-32 (Opinions dated February 20, 1951).

On appeal, the Third Circuit accepted the Air Force's affidavits at face value, understanding them to assert that "the documents sought to be produced contain state secrets of a military character." *Reynolds v. United States*, 192 F.2d 987, 996-97 (3d Cir. 1951). The Court of Appeals agreed with the district court, however, that it was within the competence of the federal courts to review such claims of privilege *in camera* in order to evaluate their validity and proper scope, and therefore affirmed. *Id.*

The United States successfully petitioned for *certiorari*, 343 U.S. 918 (1952), and urged this Court to reverse the widows' judgments. In its petition and its briefs, the government advanced an even more expansive claim of privilege than it had in the courts below, insisting that the executive branch might lawfully withhold *any* document from judicial scrutiny if it deemed secrecy in the public interest. *United States v. Reynolds*, 345 U.S. 1, 6 (1953).

A majority of this Court, however, chose to rely on Secretary Finletter's and Major General Harmon's affidavits:

> Experience in the past war has made it common knowledge that air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests. On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. *Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic*

> *equipment which was the primary concern of the mission.*

345 U.S. at 10 (emphasis added). Indeed, the Secretary had attested that the documents "concerned ... secret and confidential missions and equipment of the Air Force," and that their disclosure "would be prejudicial to this Department." Similarly, the Judge Advocate General had sworn that furnishing the reports and witness statements would compromise "national security." *Id.* at 4-5; R. 22-23, 27. In the majority's view, these representations that the documents contained "military secrets" were sufficient to forestall disclosure even to the district judge, absent a more compelling necessity:

> [W]hen the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had then been made

345 U.S. at 10-11. On this basis, then, the Court reversed.[3]

After remand, the widows had little choice but to settle their cases with the government. On June 22, 1953, they received a total of $170,000, $55,000 less than the judgments the district court had originally entered. App. 2a-9a. The cases were dismissed. The widows had no clue that they and this Court had been defrauded.

In early 2000, Palya's daughter, Judith, learned through internet research that previously-classified Air Force documents regarding military aircraft accidents had been declassified and were now publicly available. Curious

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3. Chief Justice Vinson wrote for the majority. Justices Black, Frankfurter and Jackson dissented for the reasons given by the Court of Appeals. *Id.* at 12.

about the "secret mission" that had occupied her father on the day of his death, she ordered a copy of documents relating to her father's accident, including all of the documents the government had withheld in *United States v. Reynolds*. She soon saw what the government had fought so hard to keep her mother and a federal district judge from seeing.[4]

Contrary to the Air Force's sworn testimony, the accident reports and witnesses statements contain no military or national security secrets. The materials nowhere describe any part of the "secret mission" in which Reynolds, Brauner, and Palya were involved. They do not refer to any "newly developing electronic devices" or "secret electronic equipment" aboard the plane or elsewhere. They make no mention of anything that was or should have been "confidential." Indeed, they record nothing beyond the events surrounding the crash and the likely reasons for its occurrence, none of which had anything to do with the purported "secret mission" of the flight.

The Air Force presumably sought to protect these materials to avoid the embarrassment and public scrutiny their production would have generated.[5] The reports

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4. The documents Judith Palya Loether obtained included all of the materials identified in the district court's September 21, 1950 order. *See* fn. 2, *supra*. These documents are reproduced at App. 10a-68a.

5. The Air Force had become a separate branch of the armed services in September, 1947, and was still seeking to establish itself. The B-29, which had been one of the Army Air Force's most effective weapons in World War II, remained a part of its arsenal. But, the B-29 had long been plagued with technical and mechanical problems. One of the worst was the tendency of its engines to catch fire. Geoffrey Perret, *Winged Victory: The Army Air Forces in World War II*, 448 (Random House 1993). That problem had occupied Congressional committees as early as 1943. Wilbur H. Morrison, *Point of No Return: The Story of the 20th Air Force* 19 (Times Books 1979). *See also id.* at 180 (in wartime, the Air Force command understood that "the bulk of [B-29] losses were due to mechanical failures rather than Japanese resistance"); Curtis E. LeMay and Bill Yenne, *Superfortress: The B-29 and American Air Power* 61-64,

identify the main cause of the accident as the Air Force's failure to comply with Technical Orders 01-20EJ-177 and 01-20EJ-178, which mandated certain "changes to the exhaust manifold assemblies for the purpose of eliminating a definite fire hazard." App. 16a. These technical orders required the installation of heat deflector shields to avoid overheating; without them "[t]he aircraft is not considered to have been safe for flight." App. 22a. The reports reveal that heat deflector shields were not installed on this B-29 prior to flight. As a result, the No. 1 engine on the plane caught fire, the fire could not be contained, and the plane plummeted to the ground. App. 27a, 33a, 34a, 61a, 65a-67a.

This revelation directly contradicts the Air Force's sworn interrogatory responses, filed months prior to the parties' discovery battle:

> Q: 31. (a) Have any modifications been prescribed by defendant for the engines in its B-29 type aircraft to prevent overheating of the engines and/or to reduce the fire hazard in the engines? (b) If so, when were such modifications prescribed? (c) If so, had any such modifications been carried out on the engines of the particular B-29 type aircraft involved in the instant case? Give details.
>
> A: 31. No.

R. 11, 14 (Answers to Interrogatories filed January 5, 1950). Even before the fight over the accident reports, in other words, the government was not telling the truth

The reports and statements outline a number of other negligent acts that the Air Force sought to shield from view. They disclose, for instance, that none of the civilian engineers were briefed prior to the flight on emergency and aircraft evacuation procedures, as required by Air Force regulations. App. 19a, 22a, 33a. It also happens that the

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70-71, 78 (McGraw-Hill 1988) (describing mechanical and design problems with B-29s that impacted war operations).

aircraft commander, copilot and engineer had never flown together as a crew prior to the flight. App. 16a, 19a, 33a. Finally, when the fire broke out in the No. 1 engine, the pilot inadvertently "feathered" the No. 4 engine before the co-pilot attempted to correct his mistake. After the crash, the propellers of both the No. 1 and the No. 4 engines were found in feathered position, App. 19a-20a, 66a, evidencing that pilot error led to a second disabled engine in the final moments of flight.

Over the next two years, Judith Palya Loether located the Brauner sisters and Mrs. Herring and told them what she had found. Charles J. Biddle had represented the widows in their cases against the United States. They decided to contact his firm to complain about the government's deception.

Reasons for Granting the Petition

I. The Court Has Jurisdiction to Remedy the Government's Fraud in *United States v. Reynolds*.

Where a litigant defrauds a federal court, the court has the "inherent" power to act. "Equity will not lend itself to ... fraud and historically has relieved from it." *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946). Federal courts have, therefore, marshaled the "historic power of equity to set aside fraudulently begotten judgments," and to restore the parties to the position they would have enjoyed in the absence of the fraud. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 250 (1944).

This Court commands this power. Indeed, to hold the public trust and confidence that are the bedrock of its authority, this Court must have the power to root out and remedy abuses of its jurisdiction by those appearing before it:

> [T]ampering with the administration of justice ... involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in

> which fraud cannot complacently be tolerated consistently with the good order of society. ... The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas, 322 U.S. at 246.

Petitioners invoke the Court's inherent power to remedy fraud. They seek issuance of a writ of error *coram nobis,* an ancient writ preserved for this Court by the All Writs Act, 28 U.S.C § 1651(a) and suited to the challenges of this case. They also urge that the Court, concurrently or alternatively, exercise its equitable powers to accord them relief for the wrong the government did them and this Court.

A. This Court Has Jurisdiction to Issue a Writ of Error *Coram Nobis.*

The All Writs Act affords this Court a "residual source of authority" to issue any of the historic common law writs not otherwise covered by statute. *Carlisle v. United States*, 517 U.S. 416, 429 (1996). "Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)).

One of these auxiliary writs is the writ of error *coram nobis. Coram nobis* originated in English common law as a proceeding in the King's Bench to set aside a judgment of that court. It was employed "to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself." *United States v. Mayer*, 235 U.S. 55, 68 (1914). *See also*

United States v. Morgan, 346 U.S. 502, 506-12 (1954).[6] The writ is tailor-made for this case, where an error in a matter of fact – this Court's crediting as true government affidavits that were false – has undermined the validity and regularity of the Court's decision-making.

The jurisdictional question presented, however, is whether issuance of such a writ will be "in aid of the Court's appellate jurisdiction." S. Ct. R. 20(1); *see also* 28 U.S.C. § 1651(a). The answer is that the Court's power to issue a writ of error *coram nobis* is an incident of the Court's assumption of appellate jurisdiction in *United States v. Reynolds*. *Coram nobis* exists to correct a judgment that, it later turns out, is founded upon an error of fact. If the Court, after issuing an erroneous mandate, forfeits the power subsequently to make such corrections, the writ would no longer exist. But it does. *United States v. Morgan*, 346 U.S. at 507-08 (*coram nobis* is available "in both civil and criminal cases" and "without limitation of time for facts that affect the 'validity and regularity' of [a] judgment").[7] It

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6. The writ of error *coram nobis* was "so called, from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king, before the king himself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict, or interlocutory judgment: for error in fact is not the error of the judges, and reversing it is not reversing their own judgment. So, upon a judgment in the King's Bench, if there be error in the process, or through the default of the clerks, it may be reversed in the same court, by writ of error *coram nobis:* . . . ." *United States v. Morgan*, 346 U.S. at 508 n.9 (quoting 2 Tidd's Practice (4th Amer. ed.) 1136-37). *See also* J. Moore and E. Rodgers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623, 669 (1946). The literal meaning of *coram nobis* is "let the record remain before us." *Blake v. Florida*, 272 F. Supp. 557, 558 (S.D. Fla. 1967), *aff'd*, 395 F.2d 758 (5th Cir. 1968). The court that had issued a judgment would hold (in effect, revisit) the record to correct errors of fact in the record that had been material to its judgment.

7. Rule 60(b) of the Federal Rules of Civil Procedure abolishes the writ of *coram nobis* as a means of pursuing post-judgment relief in the district courts in civil cases. Rule 60(b) has no application to this Court. See Fed. R. Civ. P. 1 (limiting application of rules to district courts), 54(a) (defining

follows that, having accepted and exercised appellate jurisdiction in *United States v. Reynolds*, the Court has the authority to issue a writ of error coram nobis in aid of that jurisdiction.

B. This Court Has Ancillary or Equity Jurisdiction to Remedy A Litigant's Fraud.

Even if there were not a common law writ available to address the government's fraud, this Court would have the power to afford petitioners relief. This Court has the traditional power of a court of equity to set aside a fraudulently obtained judgment. *Hazel-Atlas*, 322 U.S. at 244. *See also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946); *Simon v. Navon*, 116 F.3d 1, 6 (1st Cir. 1997). This power derives from "firmly established... English practice long before the foundation of our Republic":

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the term "judgment," as used in Rule 60(b), to "any order *from which an appeal lies*" (emphasis added)). Nor does Rule 60(b) limit the power of any federal court to address a fraud on the court. Fed. R. Civ. P. 60(b) ("This rule does not limit the power of a court to entertain an independent action to . . . set aside a judgment for fraud on the court.").

At English common law, the writ of error *coram nobis* issued out of chancery, in a separate proceeding, like other writs. The "accepted American practice," however, at least in criminal cases, has been to bring a motion for the writ in the same case in which judgment and sentence were pronounced. *United States v. Morgan*, 346 U.S. at 505 n.4. Whether the instant petition for a writ of error *coram nobis* is one that should be brought, as at common law, in a separate proceeding or under the banner of the *Reynolds* case itself is a question on which the Court's decisions provide no help – for there has never been a situation quite like this, where this Court alone was successfully defrauded and, by its mandate, did injustice. What seems clear is that only this Court can undo what it has done and reinstate the judgments it reversed. *See* fn. 13, *infra*, and accompanying text. That being so, petitioners submit the ancient writ is properly sought here, under its own caption and docket number. *See also* S. Ct. R. 20(2). Alternatively, the Court may treat this petition as simply a petition or motion in equity to vacate the Court's decision in *Reynolds*, filed under the *Reynolds* caption at September Term, 1952, No. 21.

> Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices.

Hazel-Atlas, 322 U.S. at 248.[8]

Hazel-Atlas involved the question whether the Circuit Court of Appeals could, in the first instance, address and remedy a fraud that undermined one of its judgments, even though its mandate had issued and its term had expired. This Court held that it could. Although the law favors finality of judgments, and thus "courts of equity have been cautious in exercising their power over such judgments[,] ... where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,' they have wielded the power." *Id.* at 244-45 (citations omitted). Where the litigant's fraud was manifest, the Circuit Court "had both the duty and the power to vacate its own judgment and to

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8. In crafting Article III, the framers accorded this Court all of the powers of a court of equity precisely so that it would have the flexibility to meet the challenge of fraud:

> It has also been asked, what need of the word 'equity'? What equitable causes can grow out of the Constitution and laws of the United States? There is hardly a subject of litigation between individuals, which may not involve those ingredients of *fraud*... which would render the matter an object of equitable rather than of legal jurisdiction. . . . [I]t would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction.

The Federalist No. 80, at 240 (Alexander Hamilton) (Roy P. Fairfield ed., 1981).

give the District Court appropriate directions." *Id.* at 249-50.

The Supreme Court's reach, as a court of equity, is no less broad. It retains authority, ancillary to its jurisdiction to render a judgment, to correct that judgment when it finds that it is bottomed on a litigant's fraud. *Hazel-Atlas* teaches that this power is not to be hamstrung. It is the power to do what is just.

II. This Court's Decision in *United States v. Reynolds* Should Be Vacated and The District Court's Judgments Should Be Affirmed and Reinstated.

A. The Government Defrauded This Court.

A "fraud on the court" is a fraud designed not simply to cheat an opposing litigant, but to "corrupt the judicial process" or "subvert the integrity of the court." *Oxxford Clothes XX, Inc. v. Expeditors Int'l, Inc.*, 127 F.3d 574, 578 (7th Cir. 1997); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995) (citation omitted). It is marked by an "unconscionable plan or scheme which is designed to improperly influence the court in its decision," *Abatti v. Commissioner*, 859 F.2d 115, 118 (9th Cir. 1988), or by "egregious misconduct directed to the court itself." *Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998). Federal courts commonly insist on clear and convincing evidence of such a fraud. *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). Once such a fraud is made out, however, courts will grant relief, even in the absence of prejudice, because it is the court's decision-making process that has been assaulted. *Dixon v. Commissioner,* No. 00-70858, 2003 U.S. App. LEXIS 640, *11-12 (9th Cir. Jan. 17, 2003) (*citing Hazel-Atlas*, 322 U.S. at 247; *Pumphrey*, 62 F.3d at 1133).[9]

9. Common examples of "fraud on the court" include the "fabrication of evidence by counsel," *Greiner*, 152 F.3d at 789, and the "insert[ion of] bogus documents into the record." *Oxxford Clothes*, 127 F.3d at 578. But, "[b]ecause corrupt intent knows no stylistic boundaries, fraud on the

United States v. Reynolds stands exposed as a classic "fraud on the court," one that is most remarkable because it succeeded in tainting a decision of our nation's highest tribunal. The fraud is clearly established by the Air Force's recently declassified materials. Two high-ranking Air Force officials sacrificed their honor in the hope of achieving what they perceived as a greater good: a broad privilege to withhold documents bearing on military affairs from compelled disclosure.

The Air Force charted this course after the district court rejected its claim of a self-evaluative privilege and directed production of the accident reports and witness statements. No doubt, the Air Force was concerned about disruptions that discovery of evaluative materials of this sort might cause (its initial motion papers show this). It also surely feared that disclosure of these particular documents would undermine its defense of the case (it had already sworn falsely about the causes of the accident in its discovery responses), and might rekindle long-running debates about B-29 safety at a time when it was seeking to establish its credibility. For all of these reasons, the Air Force wanted the documents secret. When it found it could not protect them based on the truth, it determined to resort to the lie that they contained, and might compromise, "military secrets." If that lie did not convince the district court to rescind its order, the Air Force could always default and take an appeal from any ensuing judgment – with the lie as the foundation of an attempt to fashion a more favorable rule of privilege in the appellate courts.

Thus, when the government requested a rehearing in the district court, Secretary Finletter certified that the reports and statements the Air Force had compiled regarding the crash were "concerned with secret and

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NOTES *(Continued)*
court can take many forms," *Aoude*, 892 F.2d at 1118, and courts take each case on its facts. *See Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131, 137 (2d Cir. 1956).

confidential missions and equipment of the Air Force." R. 22-23. Major General Harmon similarly swore that the documents could not be disclosed "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." R. 27. We now know that these statements were false. The documents contained no such secrets. Their disclosure could not and would not have threatened any facet of secret military research, let alone our national security. Secretary Finletter and Major General Harmon knew or should have known that what they were telling the court was not true. They said what they said to further the Air Force's interests. In doing so, they either lied or acted in reckless disregard of whether what they were telling the courts was true or not. In either case, they and the Air Force committed fraud. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 192-93 (1976).

These falsehoods were not outcome-determinative in the lower courts. Those courts did not need to credit the Air Force's lie to reach the result they reached. But, in this Court, the Air Force's false testimony was pivotal. It established, to the majority's satisfaction, "that there [was] a reasonable danger that the compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." 345 U.S. at 10. Had the Air Force not fraudulently stated that the lower courts' rulings threatened a disclosure of "military secrets," the majority would plainly have affirmed the widows' judgments. Even at the height of Cold War hysteria, this Court was not prepared to accept the government's invitation to abdicate "[j]udicial control over the evidence in a case ... to the caprice of executive officers." *Id.* at 9-10.[10] Thus, the decision and result in *United States v. Reynolds*

10. The majority gave no shrift to any of the government's other grounds for withholding the documents. Indeed, it found that district court's initial order for production, entered prior to the Secretary's claim that the documents contained "military secrets," was "entirely proper."

turned on a fraud that, from its inception, was directed at the Court itself.

At the time, the Air Force must have calculated that its scheme entailed little risk. If the false affidavits convinced the district court to back down, the Air Force could continue its cover-up. If the district court did not back down, and the Air Force persisted in its noncompliance, the Air Force would suffer nothing beyond a compensatory damage award under the Tort Claims Act (an award it almost certainly would have to pay anyway if the documents were produced). It would have preserved a right of appeal, and an opportunity to test the reach of a privilege for "military secrets" and "national security" at a favorable time, in a sympathetic context, with the full backing of the Justice Department.[11]

Perhaps most important, whatever happened in the courts, *the Air Force would not have to disclose the documents*. If the appellate courts affirmed the district court, then the Air Force would pay the widows their judgment. If the appellate courts reversed, the Air Force would be vindicated in withholding the documents, and would settle the cases with the widows, who would have no practical means of continuing with the litigation.[12] Either

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NOTES *(Continued)*

345 U.S. at 10-11. The majority's decision to reverse the widows' judgments was based exclusively on the government's false claim.

11. There is no evidence in the recently declassified Air Force materials that any of the attorneys representing the United States in *Reynolds* were aware that the Finletter and Harmon affidavits were fraudulent. The government's trial lawyers told the district court that the Air Force had not disclosed the accident reports or the witness statements even to them. It undoubtedly would have raised eyebrows if the Air Force disclosed to an Assistant United States Attorney documents that it contended were so sensitive and confidential they could not be shown to a federal judge.

12. Following this Court's decision, the widows' choices were to proceed with discovery and trial without the benefit of the "privileged" documents or to accept a settlement. The widows believed the government had been negligent. But, as the district court recognized,

way, the documents and the fraud would remain hidden for so long as the materials could be classified – which would be a very, very long time. By then, the Air Force reasoned, most of the participants would be dead and it was unlikely anyone would care.

B. A Writ of Error *Coram Nobis* Should Issue.

1. This Case Presents Exceptional Circumstances.

The exceptional circumstances of this case warrant the issuance of a writ of error *coram nobis*. The writ was created to address situations in which there has been an error of fact, on a matter not previously in issue, which error undermines the validity and regularity of the legal proceeding itself. *See* fn. 6, *supra*, and accompanying text. In *United States v. Reynolds*, this Court erroneously credited as true – and based its decision upon – government affidavits that were fabricated for the specific purpose of influencing the Court's ruling and subverting justice. This is the stuff of *coram nobis*. *See United States v. Morgan*, 346 U.S. at 507-09, 512 (*coram nobis* available to correct "errors of the most fundamental character" affecting validity of court's judgment); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406, 1419-20 (N.D. Cal. 1984) (writs of error *coram nobis* issued to reverse convictions of Japanese-American interned during World War II, where documents previously suppressed under claim of executive privilege revealed that government's submissions concerning military necessity for petitioners' internment were deliberately false and misleading).

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they had "no knowledge of why the accident happened" – "much of the evidence of what occurred was destroyed" in the crash itself. *Brauner*, 10 F.R.D. at 470-71. Faced with blanket denials of liability and false discovery responses, they had little way to prove their case. Thus, they accepted settlements which, at 75 cents on the dollar, appeared generous.

2. The Petition Is Timely.

It is no objection that this petition comes fifty years after the government's fraud and this Court's decision. The writ of error *coram nobis* is available "without limitation of time," *United States v. Morgan,* 346 U.S. at 507, and is not subject to statutory or equitable time bars. *Strode v. Stafford Justices,* 1 Brock. 162, 23 F. Cas. 236 (C.C.D. Va. 1810) (Marshall, C.J.) (disregarding a five-year statute of limitations and granting *coram nobis* relief fourteen years after judgment). *See also James v. United States,* 459 U.S. 1044, 1046-47 (1982); *Hirabayashi,* 828 F.2d at 605; *United States v. Cariola,* 323 F.2d 180, 183 (3d Cir. 1963) (no merit to government's position that *coram nobis* relief barred because petitioner waited 24 years to pursue it); *Moon v. United States,* 272 F.2d 530, 531 (D.C. Cir. 1959); *United States v. Liska,* 409 F. Supp. 1405, 1407 (E.D. Wis. 1976) (laches is no defense to petition for writ of *coram nobis*).

The government, moreover, has no cause to complain of delay. The government concealed its fraud for decades, holding the accident reports and witness statements as "classified materials" until the 1990's, even though they contained no secrets and had no conceivable further utility. Indeed, that was the Air Force's purpose in classifying them – to bury them so deep and so long that no one would find them. When petitioners discovered them in 2000 and 2001, and appreciated their significance, they sought counsel and they acted. They have not, by their conduct, prejudiced the government one whit.

3. Only This Court Can Afford Petitioners Adequate Relief.

Petitioners cannot secure adequate relief in any other form from any other court. *See* S. Ct. R. 20(1). Although the government practiced its fraud in three courts, it succeeded only here. It is this Court's fraudulently begotten decision in 1953 that binds petitioners. Only this Court can correct its error and undo what it has done. *See Hazel-Atlas,* 322 U.S.

at 248 (bill of review to rectify fraudulent judgment properly addressed in first instance to appellate court where both appellate court and district court defrauded); *Camp v. Bennett,* 16 Wend. 48, 51 (N.Y. 1836) (declining jurisdiction over petition for writ of *coram nobis* where error of fact actually occurred before United States Supreme Court).[13]

4. The Widows' Judgments Should Be Affirmed and Reinstated.

Where fraud is practiced on a court, the appropriate remedy is to place the parties "in the same position as though [the] corruption had been exposed at the original trial." *Hazel-Atlas,* 322 U.S. at 250; *United States v. Bishop,* 774 F.2d 771, 774 (7th Cir. 1985). In this case, this means that this Court's decision in *United States v. Reynolds* should be vacated, and the judgments originally entered in the widows' favor should be affirmed and reinstated.

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13. Rule 60(b) provides procedures for pursuing relief from a district court judgment in the federal district court. Petitioners, however, do not seek relief from a district court judgment. Rather, they seek reinstatement of a district court judgment that the United States Supreme Court was fraudulently induced to reverse. That is relief only this Court can provide. Any proceedings initiated in the district court would call upon the district judge somehow to vacate this Court's 1953 decision and ensuing mandate and deem the district court's prior judgments affirmed. This appears rather far beyond the powers of a district judge, even in Philadelphia. *Compare Standard Oil Co. of California v. United States,* 429 U.S. 17 (1976) (where Supreme Court has affirmed district court judgment, district court need not await Supreme Court withdrawal of mandate to consider post-judgment relief).

An action premised upon *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), also does not afford petitioners an adequate remedy. A *Bivens* action based upon the government's fraud (presumptively a violation of petitioners' fifth amendment rights) would face numerous hurdles, not the least of which is the absence of a viable defendant. Finletter and Harmon each died years ago; other perpetrators are unknown and, very likely, similarly unavailable. A *Bivens* action, moreover, cannot fix what the government broke when it defrauded this Court, namely, the integrity of this Court's decision-making.

Had the Air Force not lied about the contents of the accident reports and witness statements, *United States v. Reynolds* might never have commanded this Court's attention. More to the immediate point, the majority's decision makes plain that, but for the Air Force's fraudulent representations, Mrs. Reynolds, Mrs. Brauner and Mrs. Palya would have had their judgments – for it was the "military secrets" claim alone that led the Court to reverse. *See* fn. 10, and accompanying text. Accordingly, this Court should issue a writ of error *coram nobis,* vacating its 1953 decision, affirming the widows' judgments, and directing the district court to reinstate those judgments *nunc pro tunc,* with interest as allowed by law.[14]

C. Equity Should Be Done.

Even if this Court determines that a writ of error *coram nobis* is inappropriate in this case, it should nevertheless exercise its inherent equitable power to set aside its 1953 decision and reinstate the district court's judgments. To give any further effect to this Court's decision and mandate would be "manifestly unconscionable." *Hazel-Atlas,* 322 U.S. at 244-45. In considering the equities, the Court should remember that the government's fraud not only corrupted its decision-making process, but deprived three young widows with small children of judgments to which they were lawfully entitled. The sums the government took from these families, totaling $55,000 in 1951 dollars, may not seem significant today. But they were quite substantial at

14. When the widows' judgments were entered, interest on Federal Tort Claims Act judgments was fixed at "4 per centum per annum from the date of judgment up to, but not exceeding, thirty days after the date of approval of any appropriation Act providing for payment of the judgment." Act of May 24, 1949, c. 139, § 120, 63 Stat. 106 (*repealed* by Act of April 2, 1982, P.L. 97-164, 97th Cong., 2d Sess., § 302(b), 96 Stat. 56) (former 28 U.S.C. § 2411(b)). Petitioners are entitled to judgment interest on the entire amount of each judgment from February 27, 1951 through June 22, 1953, the date each widow received a partial payment in settlement; and on the unpaid balance of each judgment from June 22, 1953 until the judgment is satisfied.

the time. Petitioners have all of the equities. The United States has none.

III. Petitioners Should Be Awarded Damages They Have Sustained as a Result of the Government's Fraud.

If, indeed, a fraud on the court should be answered with "all the relief necessary" to put the aggrieved parties "in the same position as though [the government's] corruption had been exposed at the original trial," *Hazel-Atlas,* 322 U.S. at 248, 250, then this Court must surely consider more than a mere reinstatement of the widows' original judgments. Certainly, reinstatement will return to the widows and their families some of what the United States took from them. But it will not make them whole. The fact is that, when it fraudulently settled the widows' claims, the government took not only $55,000 that was rightly due them, it also took the use of that money for over fifty years. If petitioners are to recover all that they have lost as a result of the government's deceit, this Court will need to award them damages or, alternatively, instruct the district court to do so.

Petitioners submit that the fair measure of their damages begins with a determination of what the unsatisfied balances of their judgments (a total of $55,000) would be worth today, if invested in 1951 and thereafter at a reasonable and prudent market rate of return, and compounded on a regular basis.[15] From this figure, the

15. One premise of this proposed calculus is that the widows' judgments ought to have been satisfied by the government in full by March 29, 1951, thirty days after the date of their entry. The government's appeals from those judgments were fraudulent and should not be rewarded in any way.

Not surprisingly, there is no regularly published "50-year average return" figure for corporate bonds and similar reasonable and prudent investments. Hence, this is a variable that the parties or the Court will need to determine. To illustrate the potential dimensions of the families' loss, however, if one assumes an average rate of return of 6% per annum,

Court would deduct the unsatisfied balance of the judgments (to avoid double-counting) and the judgment interest that has accrued on that unsatisfied balance (as logic requires).[16] The result would be what the widows and their families have lost, beyond the amount of the judgments and interest, as a consequence of the government's fraud.

There is substantial justice in such an award. The original district court judgments represented "the full value of the life of [each decedent] as of the date of his death." R. 32-33. That "full value" was determined by taking into consideration "the gross sum the decedent would have earned to the end of his life had he not been killed, *reduced to its present cash value.*" R. 32 (Opinion dated February 20, 1951) (emphasis added). In other words, the logic and rationale of the judgments were that the widows would invest the sum awarded and secure a future return that would be sufficient to make up for the loss of their husbands' earnings. Allowing a recovery of the value of the unsatisfied portion of each judgment in today's dollars thus effectuates the district court's express intent in making

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NOTES *(Continued)*

compounded annually, $55,000 invested in 1951 would today be worth $1.14 million.

16. It is debatable, perhaps, whether petitioners should receive both the damages they seek and judgment interest attributable to the non-payment of the $55,000 outstanding balance. This is not because the damages they seek and judgment interest are the same, however. They are not. Rather, it is because it would be logically inconsistent to award damages on the theory that the judgments ought to have been paid on March 29, 1951, while at the same time awarding statutory interest because the judgments were not paid on that date (and, indeed, remain outstanding today). In the unique circumstance of this fraudulently avoided judgment, the Court might permissibly award (1) damages because they are necessary to redress the fraud and make the widows whole, *and* (2) judgment interest because it is a statutory entitlement, once a fraudulently avoided judgment is reinstated. Petitioners, however, are prepared to reduce their damages recovery by the amount of judgment interest they are allowed on the $55,000 that is due them.

the awards. Doing less than that falls short of restoring the judgment the district court intended to enter.[17]

The United States may seek to claim immunity from such a damage award. That claim should fail for at least two reasons.

First, under 28 U.S.C. § 1912, this Court has discretion, when it affirms a judgment, to "adjudge to the prevailing party just damages for his delay, and single or double costs." Neither Congress nor this Court has exempted the United States from this statute. *Id.; see also* S. Ct. R. 42(2) (damages and costs may be awarded for frivolous filings, without exception for United States). If the Court vacates its prior decision and affirms the widows' original judgments, it can and should require the government to pay the "just damages for [its] delay" that petitioners request.

Second, this Court has the inherent power to sanction litigants appearing before it, particularly when they have practiced a fraud upon the court. *Chambers v. NASCO, Inc.*, 501 U.S. at 44-45 (where a court has been defrauded, "[a] primary aspect of [the court's] discretion is the ability to fashion an appropriate sanction for conduct which abuses

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17. Such a recovery is an award of damages for fraud, and not further judgment interest. *Damages* are monies paid to redress a wrong. Here, the government wronged petitioners, cheating them out of over $55,000 by fraud, and concealing that fraud for fifty years. Petitioners have been damaged. And, a proper measure of their loss is the value of $55,000 in today's dollars. *Interest*, by contrast, is a charge levied to compensate for the belated receipt of money that is owed another. *Library of Congress v. Shaw*, 478 U.S. 310, 322 (1986). In *Shaw*, the district court had increased an attorneys fee award against the United States to compensate the attorney for the delay in payment of that fee. This Court held that, inasmuch as the increase was intended "to compensate for the belated receipt of money," it was the equivalent of interest, and because the United States had not consented to pay such interest, the increase was unlawful. *Id.* at 322. This case is different. The damages petitioners seek are not "to compensate for the belated receipt of money" the government owed petitioners. Rather, they are to compensate for the government's wrongful *taking* of money from the petitioners by fraud.

the judicial process"). This is true when the fraud is perpetrated by the federal government. *Dixon v. Commissioner,* No. 00-70858, 2003 U.S. App. LEXIS 640, at *15 (directing entry of judgments for taxpayers and against Internal Revenue Service on tax deficiencies because, where there is fraud on the court, "[w]e have the inherent power to vacate the judgment of the Tax Court, fashion an appropriate remedy and sanction a party or its lawyers for willful abuse of the judicial process") (citations omitted). It was, it should be remembered, the United States – not the petitioners – that fraudulently availed itself of this Court's jurisdiction and power fifty years ago. The allowance of the damages petitioners seek is well within the Court's power to sanction the United States for its misconduct.

IV. Petitioners Should Be Awarded Their Attorneys Fees and Costs.

Where a court finds "that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings [can] justly be assessed against the guilty parties." *Universal Oil Products Co. v. Root Refining Co.,* 328 U.S. at 580. *See also Chambers v. NASCO, Inc.,* 501 U.S. at 45 (where a court is defrauded, the sanction "of an assessment of attorney's fees is undoubtedly within a court's inherent power"). An award of attorneys fees and costs in such circumstances is simply one application of a common law exception to the American Rule, the exception for litigation conduct that is undertaken "in bad faith, vexatiously, wantonly or for oppressive reasons." *See Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 258-59 (1975), and cases cited therein.

The lone remaining question is whether such fees and costs may be awarded against the United States. The answer is yes. Attorneys fees may be viewed as an element of "just damages for . . . delay" and costs awardable against the government under 28 U.S.C. § 1912. *See In re Good Hope Industries, Inc.,* 886 F.2d 480, 482 (1st Cir. 1989) (rejecting

claim of immunity and awarding fees against United States for frivolous appeal). They may be regarded as within the Court's inherent powers to redress fraud on the Court or to sanction misconduct, as to which the government can make no legitimate claim to immunity. *Chambers v. NASCO, Inc.*, 501 U.S. at 44-45. And, they may be awarded pursuant to 28 U.S.C. § 2412(b), which expressly makes the common law exceptions to the American Rule applicable to the federal government. *See Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506, 1510 (11th Cir. 1988); *see also In re Good Hope Industries, Inc.*, 886 F.2d at 482. Accordingly, in addition to other relief requested herein, petitioners are entitled to recover their attorneys fees and costs. Again, this Court may make the award or, by its writ or other order, instruct the district court to do so.

Conclusion

Some may find in this Petition reason to doubt the wisdom of this Court's holding in *United States v. Reynolds*. Others will see this "back-story" as merely a sad footnote that takes nothing away from the logic of the Court's 1953 decision. The merits of the *Reynolds* holding – and its impact on present day controversies – present interesting and no doubt important questions. But petitioners do not come here to raise any of them. Whether the legal principles established in *Reynolds* are right or wrong is for another day and another case.

For petitioners, the only issue this Court must confront today is whether it will tolerate a fraud – a fraud that struck at the integrity of the Court's decision-making process and that cheated three struggling widows and their children out of that which was rightly theirs. Petitioners pray that it will not.

Respectfully submitted,

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