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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

In Re:

GUSTAVO ESCAMILLA, an individual,

Petitioner,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE; and OTIS D. WRIGHT, II, in his official capacity as a United States District Judge,

Respondents.

Case No. 2:26-cv-09383-AB

PETITIONER'S EMERGENCY NOTICE OF MANDATORY DISQUALIFICATION UNDER 28 U.S.C. §§ 455(a) AND 455(b)(5)(i) AND THE DUE PROCESS CLAUSE [PRESIDING JUDGE NAMED AS RESPONDENT IN CRIME VICTIMS' RIGHTS ACT PETITION — NO MOTION OR CONFERENCE REQUIRED]; DECLARATION OF GUSTAVO ESCAMILLA

[CRIME VICTIMS' RIGHTS ACT — EXPEDITED CONSIDERATION REQUESTED UNDER 18 U.S.C. § 3771(d)(3)]

Hon. André Birotte Jr.

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Hon. André Birotte Jr.

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TO THE HONORABLE COURT, TO THE CLERK OF THE COURT, AND TO ALL PARTIES:

EMERGENCY NOTICE OF MANDATORY DISQUALIFICATION

PLEASE TAKE NOTICE that Petitioner Gustavo Escamilla, a federally identified crime victim appearing in pro se, gives notice that the Honorable André Birotte Jr. is disqualified from this action under 28 U.S.C. §§ 455(a) and 455(b)(5)(i) and the Due Process Clause, and that the action must be returned to the Clerk for reassignment. This Notice rests on a single objective fact: Judge Birotte is a named Respondent, in his official capacity, in Petitioner's Emergency Petition for Enforcement of the Crime Victims' Rights Act, filed concurrently with this Notice, which challenges his conduct of this very action: his continuation of the deprivations of the victim's rights documented in the application to disqualify the prior judge (Dkt. 47), an application he decided. (Exs. A, C, D.) The same Notice is filed concurrently in No. 2:26-cv-05207-AB-E.

This Notice is based on the following points and authorities, the Declaration of Gustavo Escamilla, the exhibits, the records of Nos. 2:26-cv-05207, 2:26-cv-09383, and 2:17-cv-07748, and such further argument as the Court may permit.

I. A JUDGE NAMED AS A RESPONDENT MAY NOT PRESIDE: DISQUALIFICATION IS MANDATORY

A judge named as a respondent may not preside. A judge "shall also disqualify himself" where he "[i]s a party to the proceeding." 28 U.S.C. § 455(b)(5)(i). The command is mandatory, and its trigger is a single objective fact: party status. It cannot be waived: "[n]o justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)." *Id.* § 455(e). It requires no motion, no hearing, no finding of bias, and no exercise of discretion. Judge Birotte is a named Respondent, in his official capacity, in the concurrently filed petition, which challenges his conduct of this very action. (Ex. A.) That ends the inquiry. He may not receive that petition by transfer, and no related-case order may place it, or the actions it reviews, before him. What

follows does not explain whether the rule applies. It shows why, on this record, its application is unavoidable.

"[N]o man can be a judge in his own case." *In re Murchison*, 349 U.S. 133, 136 (1955). The Due Process Clause does not require proof that a judge is actually biased. It asks whether, objectively, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *Rippo v. Baker*, 580 U.S. 285, 287 (2017) (per curiam) (vacating where the court asked whether the judge was actually biased rather than whether the risk of bias was too high). An unconstitutional failure to recuse is structural error. *Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016).

Judge Birotte is a named Respondent in the concurrently filed petition. That petition asks whether, in this action and in No. 2:26-cv-05207-AB-E, he has taken up and decided Petitioner's motions "forthwith," as 18 U.S.C. § 3771(d)(3) commands, and whether he has ensured that Petitioner is afforded the rights § 3771(a) guarantees, as § 3771(b)(1) commands. (Ex. A.) Every act and omission it challenges occurred on his dockets. To continue presiding, Judge Birotte would decide, in the cases under review, the very questions on which he is a party in the case that reviews them. The probability of bias that arrangement creates is the kind *Murchison*, *Caperton*, and *Rippo* forbid.

Judge Birotte has known this ground since the day he received this action, because he inherited it with the case. Docket 47 set it out: a judge named as a Respondent in a related crime-victim enforcement petition is a party within § 455(b)(5)(i); "[t]he command is mandatory, and its trigger is a single objective fact: party status"; and the ground "cannot be waived," "not by the parties, and not by the judge." (No. 2:26-cv-05207, Dkt. 47 at 11–12, Page ID #:1203–1204 (citing *Murchison*, 349 U.S. at 136; *Williams*, 579 U.S. at 8, 14).) The prior judge recused fifty minutes after that application was entered on the docket, and Judge Birotte

decided it on October 21, 2026. (*Id.*, Dkts. 49, 53; Exs. C, D.) He now stands where the prior judge stood. That ground did not exist when he decided Docket 47; it arises now, from the filing of the petition that names him. Nor could the Ninth Circuit's 2022 affirmance on law-of-the-case grounds, cured three years later by *In re Davis*, have reached it: in 2021 and 2022, no judge of this Court was a named party. (*Id.*, Dkt. 47 at 23–24, Page ID #:1215–1216.)

Section 455(a) independently requires the same result. A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The command is mandatory, and the standard is objective: "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008). "The goal of section 455(a) is to avoid even the appearance of partiality." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). What matters "is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994). A litigant is entitled to "a fair trial in a fair tribunal" before a judge with no actual bias, *Bracy v. Gramley*, 520 U.S. 899, 904–05 (1997), and "justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14 (1954). Petitioner does not contend that Judge Birotte is biased. He does not have to. A reasonable person with knowledge of all the facts would know each of the following, every one of them of record:

- **The judge is a respondent.** Judge Birotte presides over two crime-victim petitions, Nos. 2:26-cv-05207 and 2:26-cv-09383, and is a named Respondent, in his official capacity, in a third petition that challenges his handling of both. (Ex. A.)
- **The allegations are the same ones that required the prior judge's recusal.** The petition naming Judge Birotte challenges his continuation of the same deprivations of the victim's rights identified in the application to disqualify

the prior judge, filed August 24, 2026. (No. 2:26-cv-05207, Dkt. 47 at 18–32, Page ID #:1210–1224; Section III, *infra*.) That application rested on § 455(a) as well as § 455(b)(5)(i). (*Id.* at 24–32, Page ID #:1216–1224.)

- **Those allegations were never addressed, and have never been denied.** The same record of undenied professional misconduct, and of a court ruling no court ever entered, was placed before the prior judge five times over seven months and never addressed, and it stands undenied on the merits across successive government filings. (*Id.* at 18–23, Page ID #:1210–1215.)
- **The prior judge recused on that application.** Judge Wright recused himself on August 26, 2026, fifty minutes after the application was entered on the docket. (No. 2:26-cv-05207, Dkts. 47, 49, Page ID #:1237.) He recused himself from No. 2:17-cv-07748 the day after the victim moved to disqualify him there. (No. 2:17-cv-07748, Dkts. 26, 30; *id.*, Dkt. 58 at 2–3, Page ID #:1467–1468; Ex. C.)
- **Judge Birotte then ruled on it.** On October 21, 2026, Judge Birotte ruled on that same application, denying it as moot, and continued the deprivations it described. (No. 2:26-cv-05207, Dkt. 53; Ex. D; Section III, *infra*.)

A reasonable observer told those facts would not ask whether Judge Birotte is in fact impartial. He would ask why a judge now named as a respondent, over the same record that required his predecessor to step aside, is still deciding the cases that record concerns. That question is the one § 455(a) answers, and it answers it in one word: "shall."

Moreover, the mechanism by which this action came to rest on a calendar of this Court, the mandatory relatedness referral under General Order 08-05, § 5.2, "is a clerical, non-discretionary function committed to the Clerk," which a presiding judge "has no authority to cure . . . , to waive . . . , or to strike . . . away." (No. 2:26-cv-05207, Dkt. 47 at 7–8, Page ID #:1199–1200.) The proper course is "not for [the judge] to decide anything, but to take the single step the law leaves open to him: to

step aside." (*Id.*) The prior judge took that step. Judge Birotte received this action with the § 5.2 referral still unperformed, and it remains unperformed today. (*Id.*, Dkts. 4, 26, 45, 46, 49; Section VI, *infra*.)

This Court has stated the governing principle in its own voice. In *Ingenuity 13 LLC v. Doe*, No. 2:12-cv-08333-ODW (JCx), 2013 WL 1898633, at *1 (C.D. Cal. May 6, 2013), a sanctions order issued for fraud upon the court, the Court opened with the words: "The needs of the many outweigh the needs of the few." The needs of the many, the integrity of the tribunal and the public's confidence that no judge sits in his own case, outweigh any interest in a single judge retaining a matter the law does not permit him to keep. (No. 2:26-cv-05207, Dkt. 47 at 8, Page ID #:1200.) Petitioner asked that principle of the prior judge, and the prior judge stepped aside. Petitioner asks no more than that it apply with equal measure here.

This is not a suit filed to remove a judge. A suit against a judge is not, by itself, a ground for recusal. *United States v. Studley*, 783 F.2d 934, 939–40 (9th Cir. 1986). This petition seeks no damages and no personal relief; it is an official-capacity petition, authorized by statute, to enforce duties Congress placed on the Court itself, 18 U.S.C. § 3771(b)(1), (d)(3), and it challenges only his conduct of these very cases. The identical ground, based on a fabricated ruling and multiple instances of unaddressed and undenied allegations of professional misconduct, has already required the prior judge's recusal from this same action. (Section II, *infra*.)

PRELIMINARY STATEMENT

A badge does not make an unaddressed fabricated federal court ruling lawful. No existing federal statute or governing law permits it. Yet on November 4, 2026, Judge Birotte accepted that fraud on the court "as true" and held that it would not affect the outcome of the case, in contravention of controlling Ninth Circuit authority that has already identified this species of misconduct. (No. 2:17-cv-07748, Dkt. 58 at 3, Page ID #:1468; Ex. B.) In *Lanuza v. Love*, 899 F.3d 1019 (9th Cir. 2018), a government officer "forged and submitted evidence" in a federal

proceeding to deprive a Mexican father of relief the law made available to him, *id.* at 1028, and the court refused to let him "cloak himself in the government's protection," *id.* at 1029.

First, the agent. Here, a DHS special agent fabricated a federal court ruling in favor of the primary bad actor that never existed; the court had ruled the other way. (No. 2:17-cv-07748, Dkt. 1, Ex. 9, Page ID #:50; *Greenway Nutrients, Inc. v. Blackburn*, No. 1:13-cv-01088 (D. Colo.), Dkt. 129 at 10–11.) The same DHS special agent used that fabricated federal court ruling to suspend DHS's criminal investigation as to the victims, depriving a Mexican-American grandfather of every right and of his status as a victim under the Crime Victims' Rights Act, 18 U.S.C. § 3771, and of the restitution Congress made mandatory under the Mandatory Victims Restitution Act, 18 U.S.C. §§ 3663A, 3664. The victims identified those deprivations with exhaustive specificity in both crime-victim petitions now before Judge Birotte. (No. 2:26-cv-05207, Dkt. 1; No. 2:26-cv-09383, Dkt. 1.) Controlling Ninth Circuit authority makes them enforceable in this District. *In re Davis*, Nos. 24-3090 & 24-3092, 146 F.4th 710 (9th Cir. 2025) (as amended Aug. 1, 2025).

Then, the Office. The United States Attorney's Office for this District did not merely defend the nonexistent, fabricated ruling. It never corrected it, despite its obligations under 28 U.S.C. § 530B(a) and California Rules of Professional Conduct 3.3(a)(1) and (3). Instead, it compounded the fabrication. It carried the ruling into this Court in 2018, and in 2021 it mischaracterized, recast, and republished it, in proceedings concerning a prosecution in which neither the prior judge nor that Office had any involvement whatsoever. (No. 2:17-cv-07748, Dkt. 9 at 11, Page ID #:132; Dkt. 11 at 6; Dkt. 15 at 2–3, Page ID #:320–321.)

And in 2026 it went further. A DHS special agent had identified the victim's company as a lead victim in one of the Government's largest criminal counterfeit investigations and prosecutions of its kind, and the United States Attorney's Office in Missouri had agreed it would be added as a victim in the Government's case. (*Id.*,

Dkt. 13 at 2–3, Page ID #:210–211; No. 2:26-cv-05207, Dkt. 1.) In the criminal case against the victim's nephew, the Office recast that federal criminal proceeding as "Mr. Escamilla's ill-fated complaint and CVRA petitions," "all of which involve broad allegations of government misconduct that courts have repeatedly rejected," while declaring in the same filing that "the government does not address them here in substance." (*United States v. McCormick*, No. 2:20-cr-00346(B)-DMG, Dkt. 864 at 4–5, Page ID #:11427–11428.) The victim was not a party to that case and could not respond. No court has ever "rejected" those allegations. The Office conceded them arguendo in 2021, and on November 4, 2026, this Court accepted them as true.

Then, the concession. When the fabrication was placed before the Office under oath, it did not deny it. It argued that, "assuming arguendo" a fraud on the court existed, "it would not 'affect the outcome of the case.'" (*Id.*, Dkt. 23 at 5, Page ID #:753.) The allegations of professional misconduct, multiple, specific, and sworn, stand undenied to this day.

Then, the first judge. A judge "should take appropriate action upon receipt of reliable information indicating the likelihood that a judge's conduct contravened this Code . . . or that a lawyer violated applicable rules of professional conduct." Code of Conduct for U.S. Judges, Canon 3B(6). The prior judge received that information five times over seven months in 2021, and again in 2026. He took no action of any kind. He was also a judge without authority. The only case that had been before him was a 2017 civil rights complaint under 42 U.S.C. § 1983 and the Federal Tort Claims Act, neither of which has anything to do with a crime victim's rights, status, or restitution under 18 U.S.C. § 3771. Even in that case, his own 2018 Order held that the Court lacked subject-matter jurisdiction. (No. 2:17-cv-07748, Dkt. 13 at 9–13, Page ID #:217–221.) A court without jurisdiction may only "announc[e] the fact and dismiss[] the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

When the victim petitioned under the Crime Victims' Rights Act in 2021, the prior judge reached back to that jurisdictional dismissal and ordered the victims to show cause why their petition was not "barred by issue and claim preclusion." (No. 2:21-cv-01910, Dkt. 10 at 1, Page ID #:293.) Nothing in that dismissal could preclude anything. A jurisdictional dismissal is not an adjudication on the merits. *Costello v. United States*, 365 U.S. 265, 285 (1961); Fed. R. Civ. P. 41(b). No § 1983 or FTCA claim decides a victim's rights under § 3771. There was no prior issue and no prior claim; the victim's rights had never been addressed by any court, and they have not been addressed to this day. Yet the prior judge invoked an "earlier determination that Plaintiffs have supplied no basis to establish any rights under the Crime Victims' Rights Act." (No. 2:21-cv-01910, Dkt. 10 at 2, Page ID #:294.) No such determination exists. The 2018 Order never mentions the Act.

Nor was the criminal investigation and prosecution in which those rights arose in doubt. The prior judge had acknowledged it himself. His 2018 Order recited that DHS and the Department of Justice had conducted the investigation, that more than $20 million had been recovered in it, that the United States Attorney's Office in Missouri had agreed the victim would be added to the Government's case, and that DHS had advised Petitioner that his company would be eligible to recover from an established victims' fund. (No. 2:17-cv-07748, Dkt. 13 at 2–3, Page ID #:210–211.) Three years later, he faulted the victims for having "failed to specifically identify a criminal proceeding," in the same paragraph in which he quoted their identification of it: the sealed case against "SELAKOVIC, BLACKBURN and others" in "the Western District of Missouri." He then dismissed the victims' account of what had become of that prosecution as "merely speculation pulled from the ether." (No. 2:21-cv-01910, Dkt. 10 at 2, Page ID #:294.) A court that had held it had no power to decide anything made findings against the victims on a statute that was never before it, while the fabrication on which the 2018 dismissal rested went unmentioned. (No. 2:26-cv-05207, Dkt. 47 at 18–20, 29–31, Page ID #:1210–1212,

#:1221–1223; No. 2:17-cv-07748, Dkt. 54, Ex. A, Statement of Facts at 2–4, Page ID #:1392–1394.) When the victim named him a Respondent on those same allegations, he recused. (No. 2:26-cv-05207, Dkts. 47, 49.)

Then, the second judge, only worse. Judge Birotte received the same record. On November 4, 2026, he accepted "as true" the victims' allegations of fraud on the court, the same allegations the prior judge had left unaddressed: that this fabrication deprived the victims of every right, their status as victims, and the restitution Congress made mandatory under the Mandatory Victims Restitution Act, 18 U.S.C. §§ 3663A, 3664. He then held that it would not change the outcome, the position the Office took in 2021, and left every deprivation in place. (No. 2:17-cv-07748, Dkt. 58 at 3, Page ID #:1468; Ex. B; *id.*, Dkt. 23 at 5, Page ID #:753.) The outcome he protected rests, by his own description, on "this Court's lack of subject matter jurisdiction."

He concluded that nothing the victim presented "could overcome the grounds on which Judge Wright dismissed the case **with prejudice**," and faulted the victim for failing to explain how new matters "establish subject matter jurisdiction over his § 1983 claims and state law claims." (*Id.*, Dkt. 58 at 3–4, Page ID #:1468–1469.)

Neither ruling could stand on that footing. A court without subject-matter jurisdiction cannot dismiss with prejudice. Its dismissal **must be without prejudice**, because it has **no power to reach the merits**. *Kelly v. Fleetwood Enters., Inc.*, 377 F.3d 1034, 1036 (9th Cir. 2004); *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017); *see* Fed. R. Civ. P. 41(b); *Costello*, 365 U.S. at 285. Judge Birotte himself recited that the 2018 Order dismissed the claims "with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction." (No. 2:17-cv-07748, Dkt. 58 at 2, Page ID #:1467.)

He did not correct that error. He gave it effect: he treated a "with prejudice" label that a court without jurisdiction had no power to attach as a bar the victim could not "overcome." He measured a federally identified crime victim by a

2017 civil case that never touched § 3771. His order does not once mention the Crime Victims' Rights Act, the Mandatory Victims Restitution Act, or restitution.

He did so although the victim had told the Office in writing that the 2017 case arose under "an entirely different statutory framework (42 U.S.C. §1983, and the Federal Tort Claims Act)." Neither of his two letters was answered. (No. 2:26-cv-05207, Dkt. 44 at 19–25, Page ID #:1141–1147, at #:1144; No. 2:26-cv-09383, Dkt. 24, Ex. C, Page ID #:1066–1078.)

Before reaching the merits, he denied the victim's motion as "untimely," because the same grounds had been raised in 2021, in motions stricken under Local Rules 7-3 and 11-6 and never decided on the merits. (No. 2:17-cv-07748, Dkt. 58 at 3, Page ID #:1468.)

A motion to set aside a judgment for fraud on the court has no time limit

Rule 60(c)(1)'s timing requirement governs only motions "under Rule 60(b)," and Rule 60(d)(3) provides that the Rule "does not limit a court's power to . . . set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(c)(1), (d)(3).

The Supreme Court set aside a judgment procured by fraud years after its entry, holding that "preservation of the integrity of the judicial process" cannot "always wait upon the diligence of litigants." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 246 (1944).

The Ninth Circuit has described that power as "so free from procedural limitations." *United States v. Estate of Stonehill*, 660 F.3d 415, 444 (9th Cir. 2011) (quoting 11 Wright & Miller, Federal Practice and Procedure § 2870). The Office assumed the fraud arguendo; the Court accepted it as true. (No. 2:17-cv-07748, Dkt. 23 at 5, Page ID #:753; *id.*, Dkt. 58 at 3, Page ID #:1468.)

No time bar can be raised against a fraud both have conceded. Moreover, the Supreme Court and the Ninth Circuit have already said so. Fed. R. Civ. P. 60(d)(3); *Hazel-Atlas*, 322 U.S. at 244, 246; *Stonehill*, 660 F.3d at 444.

The same fraud that required the prior judge's recusal is the fraud Judge Birotte has now accepted as true. He inherited the entire docket of No. 2:26-cv-05207 on August 26, 2026, and has presided over No. 2:26-cv-09383 since at least September 15, 2026. (No. 2:26-cv-05207, Dkt. 49; No. 2:26-cv-09383, Dkt. 22.)

In neither case has he required the Government to respond: a party that carried a DHS special agent's fabrication into this Court, compounded by multiple unaddressed and undenied allegations of professional misconduct; that was personally served on May 18, 2026; that has refused to enter either case; and that has never responded to either petition, contrary to its mandatory obligations under the Crime Victims' Rights Act, 18 U.S.C. § 3771(c)(1), the Attorney General Guidelines for Victim and Witness Assistance, art. III.B.4, at 13 (2022 ed.), and the Justice Manual. (No. 2:26-cv-05207, Dkt. 44, Page ID #:1134–1136; Escamilla Decl. ¶ 4.)

He required the victim to confer with, and to serve, the same Government whose agent initiated the fabrication and whose Office carried it into this Court, struck the victim's filings when that Office would not answer, and struck the filing that placed the complaint of judicial misconduct before him. (Section III, *infra*.) And having found them "**victims of the criminal counterfeiting**," he described federally identified victims of crimes committed through ongoing fraud and deceit as parties "dissatisfied with how the Defendants' agents handled the case." (Ex. B at 2.)

***Step back*, and the record reads in a single line**. A federal agent fabricated a court ruling. The Office obligated to correct it carried it into this Court instead. Confronted under oath, the Office did not deny it; it said it would not matter. A judge without authority, who had held that he lacked jurisdiction over a § 1983 and FTCA case that never touched the Crime Victims' Rights Act, invoked a CVRA "determination" that case never made, treated it as precluding rights no court had

ever addressed, called the victims' account of a prosecution his own Order had acknowledged "speculation pulled from the ether," and recused only when named. (No. 2:21-cv-01910, Dkt. 10 at 1–2, Page ID #:293–294.)

His successor held that the same "**lack of subject matter jurisdiction over his claims**" defeated a federally identified crime victim, accepted the fraud as true, held that it would not matter, imposed a time bar the law does not permit, required nothing of the Office that produced it, and struck the victim's filings. At every step, the parties who deprived a federally identified crime victim of his rights, his status, and the restitution Congress made mandatory had no involvement whatsoever in the criminal investigation and prosecution in which those rights arose. That is a violation of 18 U.S.C. § 3771(d)(3) and of the Court's own duty to "ensure that the crime victim is afforded" those rights, § 3771(b)(1). The ground that required the first judge's recusal requires the second's.

II. THE SAME GROUND REQUIRED THE PRIOR JUDGE'S RECUSAL FROM THIS VERY ACTION, AND RESPONDENT JUDGE RULED ON IT

This Notice rests on the same ground as the application that ended the prior judge's assignment to this action. Petitioner named the prior judge a Respondent on August 21, 2026, and applied to disqualify him on August 24 because he had become "a named party"; he recused on August 26, fifty minutes after the application was entered. Judge Birotte then decided the same application, denying it as moot on October 21, 2026. (No. 2:26-cv-09383, Dkt. 1; No. 2:26-cv-05207, Dkts. 47, 49, 53; Exs. C, D.)

The rule he applied then applies to him now. A judge named as a respondent in a crime-victim petition premised on his own conduct of the case stood aside in August. The same result is required in November.

The posture that required the prior judge's recusal is the posture Judge Birotte now occupies, and his own conduct has aggravated it. Docket 47 presented two

related requests, each grounded in the documentary record. (No. 2:26-cv-05207, Dkt. 47 at 9–10, Page ID #:1201–1202.)

- **The mis-relation.** No. 2:26-cv-05207 was transferred to the prior judge's calendar as related to the 2017 action, a civil-rights action under 42 U.S.C. § 1983 and the Federal Tort Claims Act that asserted no right under the Act, rather than to *United States v. McCormick*, the case Petitioner designated. (No. 2:26-cv-05207, Dkts. 4, 11; *id.*, Dkt. 47 at 9–10, Page ID #:1201–1202; Section VI, *infra*.)
- **The contradictory orders.** The prior judge's two orders contradict each other on the dispositive question: the existence of the federal criminal proceeding from which victim status arises. The April 4, 2018 Order recited an "extensive investigation for criminal trademark infringement," that "ICE and the United States Attorney's Office had recovered over $26 million in the investigation," that Plaintiffs "may be able to recover from an established victims' fund," and that the Western District of Missouri Office "agreed that Greenway would be added as a victim in the government's case." (No. 2:17-cv-07748, Dkt. 13 at 2, Page ID #:210.) The April 2, 2021 Order held that Plaintiffs "failed to specifically identify a criminal proceeding," in the same order that quoted Petitioner's identification of a "criminal case under seal against SELAKOVIC, BLACKBURN and others." (No. 2:21-cv-01910, Dkt. 10 at 1–2, Page ID #:293–294.) "The Court recited the very proceeding it said had not been identified." (No. 2:26-cv-05207, Dkt. 47 at 17, Page ID #:1209.) The Government made no appearance in that 2021 proceeding. (*Id.* at 10, Page ID #:1202.)

Every one of those facts now applies to Judge Birotte, and every one has grown worse:

- **He holds all three cases.** Judge Birotte presides over this action, No. 2:26-cv-05207-AB-E, and the 2017 action itself. The transfer that related a crime-

victim petition to a § 1983 and Federal Tort Claims Act action has never been corrected, and the § 5.2 determination Petitioner's Notice of Related Cases invoked has never been made. (No. 2:26-cv-05207, Dkts. 4, 11, 45, 46, 49.)

- **He has not merely inherited the two orders; he has applied them.** On November 4, 2026, in the 2017 action, Judge Birotte accepted Petitioner's showing that the 2018 judgment was procured by fabricated evidence **"as true,"** and in the same order relied on that judgment, including its alternative Rule 12(b)(6) rulings, and required nothing of the Government. (No. 2:17-cv-07748, Dkt. 58 at 2–4, Page ID #:1467–1469; Ex. B.)
- **The Government still has not appeared.** As in 2021, the Government has filed no responsive pleading in either crime-victim petition, and Judge Birotte has required none. (Section III, *infra*.)

Petitioner does not ask this Court to vacate the 2018 or 2021 orders. But the crime-victim petitions turn on the question those orders addressed, and Judge Birotte has now answered it himself, by applying a judgment he accepted as procured by fabrication. That conduct is a subject of the petition naming him. (Ex. A.)

This Notice does not ask the Court to review the correctness of any ruling. It rests on two things: Judge Birotte is a named Respondent, and the petition naming him arises from the deprivation of a federally identified crime victim's rights, by parties who had no involvement in the criminal investigation and prosecution in which those rights arose, in the cases before him.

The Office itself placed that investigation and prosecution before this Court: the April 4, 2018, Order recited that Greenway had been identified as a victim and that the United States Attorney's Office for the Western District of Missouri had agreed to add Greenway as a victim, and it attributed those facts to the Government's own motion. (No. 2:17-cv-07748, Dkt. 13 at 2–3, Page ID #:210–211.)

That is the absurdity at the center of this record: an Office and a Court with no role in that investigation or prosecution have deprived the victims of every right, their status, and the restitution it gave rise to, on a ruling that never existed, after the Office itself put the investigation on the record.

Judge Birotte is fully aware of that record. On November 4, 2026, he held that he would deny relief **"[e]ven accepting [the victim's] late-presented allegations of fraud on the court as true,"** and treated the 2018 Order's alternative Rule 12(b)(6) rulings as binding. (No. 2:17-cv-07748, Dkt. 58 at 2–4, Page ID #:1467–1469; Ex. B.)

The 2018 Order had held that the Court **lacked subject-matter jurisdiction over every claim in that action.** (*Id.*, Dkt. 13 at 9–13, Page ID #:217–221.) A court without jurisdiction may only "announc[e] the fact and dismiss[] the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). A jurisdictional dismissal is not an adjudication on the merits. *Costello v. United States*, 365 U.S. 265, 285 (1961); Fed. R. Civ. P. 41(b). Docket 47 showed that the prior judge reached past his jurisdiction to discredit the victim, "while the Government's fabrications went unmentioned." (No. 2:26-cv-05207, Dkt. 47 at 29–31, Page ID #:1221–1223.) Judge Birotte has done the same with more knowledge, not less. He cannot be the judge of whether, in doing so, he accorded the victims their rights.

The point of these petitions is restitution the law makes mandatory, and the fraud Judge Birotte accepted as true is what took it. The petitions proceed under 18 U.S.C. § 3771(d)(3) and the Mandatory Victims Restitution Act, as *In re Davis*, Nos. 24-3090 & 24-3092, 146 F.4th 710 (9th Cir. 2025) (as amended Aug. 1, 2025), construes them. For an offense "committed by fraud or deceit," the court "shall order" restitution "in the full amount of each victim's losses," and "[n]o victim shall be required to participate in any phase of a restitution order." 18 U.S.C. §§ 3663A(a)(1), (c)(1)(A)(ii), 3664(f)(1)(A), (g)(1).

That restitution was not lost in the Western District of Missouri. It was taken in this District, by an Office and before a Court with no role in that prosecution, on a court ruling that never existed and a substituted name: the Office discounted the victim's evidence against Greenway's former attorney, Michael J. Ryan, as "actually rather old," citing 2013 communications that went to a different man, Thomas F. Ryan, and the Court adopted the premise. (No. 2:17-cv-07748, Dkt. 9 at 18 n.11, Page ID #:139; Dkt. 13 at 16 n.6, Page ID #:224; Dkt. 28 at 22–24, Page ID #:830–832.) Selakovic and those acting with him kept diverted Greenway product with a retail value exceeding $100 million, for which Greenway has never been compensated. (*Id.*, Dkt. 28 at 32–33, 36, Page ID #:840–841, #:844.) All of this was before Judge Birotte when he ruled, and again on November 2, 2026. (*Id.*, Dkt. 56; No. 2:26-cv-09383, Dkt. 60 at 24, 34–36, Page ID #:2031, #:2041–2043.)

III. THE VIOLATIONS OF THE VICTIM'S RIGHTS DOCUMENTED IN DOCKET 47 — WHICH JUDGE BIROTTE ABSORBED WITH THE CASE, RULED ON, AND HAS CONTINUED

Docket 47 was also a record of the specific rights of which a federally identified crime victim had been deprived in this action, each pinned to the docket. That record came to Judge Birotte with the case, and he ruled on it. (No. 2:26-cv-05207, Dkts. 47, 49, 53; Exs. C, D.) Each deprivation rested on an interlocutory order he could revise at any time, Fed. R. Civ. P. 54(b), and each was a continuing deprivation of a right the Court must "ensure that the crime victim is afforded," 18 U.S.C. § 3771(b)(1). He revised none of them:

- **The right to have his motions taken up and decided forthwith, § 3771(d)(3), and to proceedings free from unreasonable delay, § 3771(a)(7).** Docket 47 showed that the victim's applications to take up and decide the Petition forthwith were struck on August 14 and 18, 2026. (Dkt. 47 at 27–28, Page ID #:1219–1220; Dkts. 35, 43.) **Under Judge Birotte:** the strikes stand. The Petition has been pending since May 14, 2026, 176 days, and it has not

been decided. "The unexplained, three-month passage of time without a ruling by the district court does not comply with the statute." *In re Simons*, 567 F.3d 800, 801 (6th Cir. 2009). *Simons* was placed before Judge Birotte (No. 2:17-cv-07748, Dkt. 56 at 13, Page ID #:1421; *see* No. 2:26-cv-05207, Dkt. 20 at 9, 12), who states that he reviewed "the entire docket." (No. 2:17-cv-07748, Dkt. 58 at 1–2, Page ID #:1466–1467; Ex. B.) **The Petition has now gone nearly six months without a ruling**, and the Government has not been required to respond to it. Notwithstanding that, **Judge Birotte held that, even accepting the fraud on the court as true**, it would not change the outcome. (No. 2:17-cv-07748, Dkt. 58 at 3, Page ID #:1468; Ex. B.) But the outcome is the restitution Congress made mandatory, 18 U.S.C. §§ 3663A(a)(1), (c)(1)(A)(ii), 3771(a)(6), and that is controlling in this Circuit under *In re Davis*, Nos. 24-3090 & 24-3092, 146 F.4th 710 (9th Cir. 2025) (as amended Aug. 1, 2025), on which both petitions before him rest. (No. 2:26-cv-05207, Dkt. 1; No. 2:26-cv-09383, Dkt. 1.) Judge Birotte knew, or reasonably should have known, that its denial is an ongoing deprivation of the victims' rights under the Crime Victims' Rights Act and the Mandatory Victims Restitution Act.

- **The right to be reasonably protected from the accused, § 3771(a)(1).** The same orders struck the victim's Motion for Reasonable Protection from an enterprise with a documented history of witness intimidation. (Dkts. 35, 43.) **Under Judge Birotte:** the strike stands, and the victim's renewed application for protection in No. 2:26-cv-09383 has sat undecided since he transferred that case to himself on September 14, 2026. (No. 2:26-cv-09383, Dkts. 9, 21.)
- **The right to confer with the attorney for the Government, § 3771(a)(5).** Docket 47 showed that the victim was faulted for failing to confer with an Office that disclaimed service, was served again under Rule 4(i), and never appeared: "A victim cannot confer with a party that refuses to enter his case,

nor be defaulted for the silence of the party the statute charges with protecting him." (Dkt. 47 at 28, Page ID #:1220.) **Under Judge Birotte:** the Office has still not appeared and has answered none of eleven written requests to confer. (No. 2:17-cv-07748, Dkt. 47 at 21–22, Page ID #:1122–1123; *id.*, Dkt. 56, Ex. A.)

- **The right to be reasonably heard, § 3771(a)(4).** Docket 47 showed an order to show cause threatening dismissal of the victim's Petition (Dkt. 36), answered on August 21, 2026 (Dkt. 44), and the victim's Notice of Clerical Error, identifying how the case reached the prior judge's calendar, struck rather than heard. (Dkt. 47 at 27, 36, Page ID #:1219, #:1228.) **Under Judge Birotte:** the order to show cause remains undischarged, seventy-seven days after the victim answered it, and nothing the victim filed in this action has been heard.
- **The related-case determination under General Order 08-05, § 5.2.** Docket 47 asked, as separate relief, that the related-case processing be corrected. (Dkt. 47 at 12–14, 34–38, Page ID #:1204–1206, #:1226–1230.) **Under Judge Birotte:** that request did not depend on who presided, and the prior judge's recusal did not moot it. He denied the entire application as moot. (Dkt. 53.) The referral has never been made. (Section VI, *infra*.)
- **The right to be treated with fairness and with respect for the victim's dignity, § 3771(a)(8).** Docket 47 showed that the 2021 order, entered without subject-matter jurisdiction, called the victim's sworn account of the sealed Western District of Missouri prosecution "speculation pulled from the ether." (Dkt. 47 at 17, 29–31, Page ID #:1209, #:1221–1223.) **Under Judge Birotte:** the characterization has never been withdrawn. On November 4, 2026, he found the victim a victim and accorded him nothing.
- **The Government's duty of best efforts, § 3771(c)(1), and the Court's duty to ensure, § 3771(b)(1).** Docket 47 showed a Government that never entered

this action yet argued against the victim's status in *McCormick*, where he cannot answer. (Dkt. 47 at 31–32, Page ID #:1223–1224.) **Under Judge Birotte:** no order directs the United States to appear, respond, or state a position in either crime-victim case. (Escamilla Decl. ¶ 4.)

- **The right to full and timely restitution as provided in law, § 3771(a)(6).** Docket 47 showed that the post-judgment restitution pathway under 18 U.S.C. § 3664(d)(5), as construed by *In re Davis*, 146 F.4th 710 (9th Cir. 2025), is available, and that "the restitution deprivation is ongoing and undisclosed." (Dkt. 47 at 24, Page ID #:1216.) **Under Judge Birotte:** no order addresses the Mandatory Victims Restitution Act, the § 3664(d)(5) petition, or the seized assets placed before him on September 1, 2026, although restitution for an offense committed by fraud or deceit is mandatory. (No. 2:26-cv-05207, Dkt. 50 at 34–37, Page ID #:1271–1274; 18 U.S.C. § 3663A(c)(1)(A)(ii).)
- **Sworn, undenied facts, and reliable information of attorney misconduct, Canon 3B(6).** Docket 47 documented that the same information, that from July through October 2021 attorneys of the United States Attorney's Office, led by then-Acting United States Attorney Tracy L. Wilkison, misrepresented the record and republished DHS's fabricated court ruling, was placed before the court five times over seven months and "disposed of each time sua sponte, unaddressed." (Dkt. 47 at 18, Page ID #:1210.)

– *First, March 29, 2021.* Counsel placed the misconduct before the court under a heading stating that "U.S. Attorneys provided this Court with a fabricated narrative and filed false and materially misleading declarations and pleadings." (No. 2:21-cv-01910, Dkt. 9; Dkt. 47 at 18–19, Page ID #:1210–1211.)

– *Second, April 2, 2021.* The Government did not appear and filed no responsive pleading. The court dismissed the petition sua sponte on a preclusion ground

drawn from its jurisdictional 2018 Order, without addressing the uncontested information. (Dkt. 47 at 19, Page ID #:1211.)

– *Third, July 12, 2021.* Counsel placed the same misconduct before the court again, quoted the governing judicial-conduct canon, and noticed the forthcoming Rule 60(d)(3) motion. (No. 2:17-cv-07748, Dkts. 14, 14-1; Dkt. 47 at 19, Page ID #:1211.)

– *Fourth, September 18–20, 2021.* The Rule 60(d)(3) fraud-on-the-court motion was struck "for failure to comply with Local Rule 7-3." Counsel then initiated the conference with the Office and, after two weeks without a response, refiled: the sole stated impediment was cured by the movant and defaulted by the Government. (No. 2:17-cv-07748, Dkts. 18, 20; Dkt. 47 at 19, Page ID #:1211.)

– *Fifth, October 18 – November 1, 2021.* The refiled motion showed that every disposition from 2017 forward rested on the nonexistent court ruling and false declarations. The Government's opposition denied none of it on the merits, arguing only that, "assuming arguendo" a fraud on the court existed, "it would not 'affect the outcome of the case.'" (No. 2:17-cv-07748, Dkts. 21, 23, 24; Dkt. 47 at 20, Page ID #:1212.)

• Those facts are sworn. They were placed before the court under penalty of perjury in Petitioner's July 12, 2021 declaration, filed as an affidavit under 28 U.S.C. § 144, and such facts are taken as true. (No. 2:17-cv-07748, Dkt. 14-1, Page ID #:251–318); *Berger v. United States*, 255 U.S. 22, 35–36 (1921). The Government's July 19, 2021 opposition, signed by Assistant United States Attorney Grace Y. Park, who had supplied a sworn declaration defending DHS officials in the 2017 action, did not deny them on the merits; nor did its October 25, 2021 opposition, which rested on "assuming arguendo." (No. 2:17-cv-07748, Dkts. 15, 23; Dkt. 47 at 21–23, 25, Page ID #:1213–1215, #:1217.)

- **Under Judge Birotte, it is worse.** The same information came before him in eleven filings across No. 2:17-cv-07748 and No. 2:26-cv-09383. (No. 2:17-cv-07748, Dkts. 40, 44, 52, 54, 56; No. 2:26-cv-09383, Dkts. 44, 52, 54, 56, 58, 60.) In 2021 it went unaddressed. Judge Birotte accepted it "as true," and still required nothing of the Government. He denied the first filing as futile and struck the rest without addressing what any of them contained. (Ex. B at 3–4.)
- **The misconduct complaint, struck.** On October 30, 2026, Petitioner placed before Judge Birotte his verified Complaint of Judicial Misconduct concerning the prior judge, now docketed by the Circuit Executive as No. 26-90261. (No. 2:17-cv-07748, Dkt. 54, Ex. A, Page ID #:1388–1395; No. 2:26-cv-09383, Dkt. 58, Ex. A.) It reports the conduct Judge Birotte inherited: a court that, "[r]equiring no response from the U.S. Attorney's Office," raised "a defense the government never raised," and "took no action of any kind" under Canon 3B(6) while the fabrication "changed shape" across three administrations of the Office. (No. 2:17-cv-07748, Dkt. 54, Ex. A, Statement of Facts at 2–5, Page ID #:1392–1395.) Five days later, Judge Birotte struck the filing that presented it, without addressing it. (*Id.*, Dkt. 58; Ex. B.)
- **The concurrent complaint of judicial misconduct.** Petitioner is filing with the Circuit Executive, concurrently with this Notice and under 28 U.S.C. § 351(a), a complaint of judicial misconduct concerning Judge Birotte. It arises from the same November 4, 2026 order. Before ruling, Judge Birotte stated that he had reviewed "the entire docket." (No. 2:17-cv-07748, Dkt. 58 at 1, 3, Page ID #:1466, #:1468.) That docket included the verified misconduct complaint against the prior judge. (*Id.*, Dkt. 54, Ex. A, Page ID #:1388–1395.) He then accepted "as true" the allegations of fraud on the court on which that complaint rests. He did not take "appropriate action" under Canon 3B(6) on reliable information that lawyers had violated the applicable rules of

professional conduct, including California Rule of Professional Conduct 3.3(a)(1) and (3), which bind the Office under 28 U.S.C. § 530B(a). Instead, he struck the victim's filings, including the filing that presented the complaint, without addressing either the fabrication or the misconduct. That is the same fabrication and misconduct that required the prior judge's recusal. He left every deprivation they produced in place. (*Id.*, Dkt. 58 at 3–4, Page ID #:1468–1469; Ex. B; Escamilla Decl. ¶ 3.)

The complaint is not offered as an independent ground. A complaint against a judge does not, by itself, require recusal. *Studley*, 783 F.2d at 939–40. It is offered because it confirms what § 455(b)(5)(i) already requires. Judge Birotte's own conduct of these cases is now the subject of two concurrent filings: the petition naming him, filed in this Court, and the complaint of judicial misconduct, filed concurrently with the Ninth Circuit for its review.

Both involve the same thing: a federal court ruling that never existed, fabricated by a DHS official and carried into this Court by the United States Attorney's Office, compounded by multiple undenied allegations of professional misconduct that **Judge Birotte accepted as true**. A reasonable observer, knowing all the facts, would question the impartiality of a judge who continued to decide those matters. 28 U.S.C. § 455(a); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

- **Notices of newly discovered facts, struck as "excessive."** The six filings struck on November 4, 2026, were notices of facts that arose after the victim's motion was filed: the Office's failure to oppose by its October 16, 2026 deadline; his complaint to the Department of Justice Office of the Inspector General; his State Bar complaints and the case numbers assigned to them; his complaint of judicial misconduct; and the business cards of the agents who identified Greenway as a victim. (No. 2:17-cv-07748, Dkts. 44, 47, 50, 52, 54, 56.) Each stated that it "requests no ruling and no relief beyond

what the pending motions already seek." (*Id.*, Dkt. 56 at 6, Page ID #:1414.) Before each one, the victim met every conference requirement Judge Birotte's own Standing Order imposes, in writing, with a stated deadline. The Office never responded to one. (*Id.*, Dkt. 47 at 21–22, Page ID #:1122–1123; Dkts. 44, 52, 56, Ex. A.) The victim's compliance was struck as "repetitive and unduly burdensome"; the Office's silence was excused. (Ex. B at 4.) That was done in proceedings concerning a prosecution in which neither this Court nor the United States Attorney's Office for this District had any role whatsoever, to protect a record built on multiple undenied allegations of professional misconduct and on a court ruling that no court ever entered. It is the conduct the Ninth Circuit condemned in *Lanuza v. Love*, 899 F.3d 1019, 1028 (9th Cir. 2018), where a government officer "forged and submitted evidence" to deprive an individual of his right to relief, and *Lanuza* was placed before Judge Birotte. (No. 2:17-cv-07748, Dkt. 54, Ex. A, Statement of Facts at 1, Page ID #:1391; No. 2:26-cv-09383, Dkt. 58, Ex. A, Statement of Facts at 1.) § 3771(a)(4), (a)(5), (a)(8), (b)(1).

- **A threat to strike the victim's crime-victim filings.** In the same order, which the docket describes as "STRIKING EXCESSIVE 'EMERGENCY' NOTICES," Judge Birotte warned that "similar overlong briefs or other rule violations, whether in this case or in his related cases, may be stricken." (No. 2:17-cv-07748, Dkt. 58 at 3 n.2, Page ID #:1468; Ex. B.) **The related cases are the victim's two crime-victim petitions, in which he asserts the very rights the fabrication took from him**. A victim whose proof of fraud was accepted as true, and held not to matter, was then warned that his filings to enforce his rights may be struck. That warning is a further deprivation of the right to be reasonably heard, § 3771(a)(4), and to be treated with fairness and with respect for his dignity, § 3771(a)(8), and a departure from the Court's duty to ensure both, § 3771(b)(1).

These are not complaints about rulings. They are deprivations of rights Congress named, imposed by parties who had no involvement in the criminal investigation and prosecution in which those rights arose, each documented in an application Judge Birotte decided, each left in place by him, and each now the subject of the petition naming him. He cannot sit in judgment of whether, in doing so, he accorded the victim his rights.

IV. THE PETITION NAMING RESPONDENT JUDGE ARISES FROM HIS CONDUCT OF THIS ACTION

The petition naming Judge Birotte is not collateral to this action. It is about this action, and every act and omission it challenges appears on his own dockets: he has decided neither crime-victim petition, nor any motion asserting a victim's right in either (No. 2:26-cv-05207, Dkts. 1, 49; No. 2:26-cv-09383, Dkt. 21); he has required nothing of the United States, which has been served in both and appeared in neither (Escamilla Decl. ¶ 4); he left the inherited strikes and the undischarged order to show cause in place (No. 2:26-cv-05207, Dkts. 35, 36, 43, 44); and he decided the closed 2017 case instead, striking six of Petitioner's notices and warning that filings "in his related cases" may be stricken (No. 2:17-cv-07748, Dkt. 58 at 1–4 & n.2, Page ID #:1466–1469; Ex. B). He also:

- **He supplied a service defense the Government never raised.** Insufficient service is the served party's defense, waived unless raised by motion or responsive pleading. Fed. R. Civ. P. 12(b)(5), (h)(1). The Office raised it only by letter, while declining to appear. On August 16 and September 14, 2026, Petitioner answered in writing that nothing in the Crime Victims' Rights Act, the Justice Manual, or the Attorney General Guidelines for Victim and Witness Assistance requires a victim to serve the Government for his rights to attach; the Guidelines start the Department's duties at "the opening of a criminal investigation." (No. 2:26-cv-05207, Dkt. 44 at 19–25, Page ID #:1141–1147; No. 2:26-cv-09383, Dkt. 24, Ex. C, Page ID #:1066–1078; AG

Guidelines art. III.B.4, at 13 (2022 ed.).) Nor does the Mandatory Victims Restitution Act: "[n]o victim shall be required to participate in any phase of a restitution order." 18 U.S.C. § 3664(g)(1). The Office never answered. Judge Birotte nonetheless directed that any party "not served within 90 days . . . must be dismissed." (No. 2:26-cv-09383, Dkt. 22 ¶ 1.) In 2021, the prior judge likewise supplied a preclusion defense the Government never raised. (No. 2:21-cv-01910, Dkt. 10 at 1, Page ID #:293.)

Those are the acts and omissions the petition challenges. They are also the acts and omissions Judge Birotte would be called on to continue, revisit, or defend if he remained on this case. That is what § 455(a) and the Due Process Clause forbid.

V. NO COURT OF THIS DISTRICT, AND NO OFFICE OF THIS DISTRICT, WAS GIVEN AUTHORITY TO DETERMINE THESE VICTIMS' STATUS IN PROCEEDINGS IT DID NOT PRESIDE OVER OR PROSECUTE

The offenses of which Petitioner and Greenway are victims were investigated by Homeland Security Investigations, Kansas City, and prosecuted in the Western District of Missouri. Fed. R. Crim. P. 18. No judge of this District presided over that prosecution, and the United States Attorney's Office for this District did not prosecute it. No provision of the Crime Victims' Rights Act, the Attorney General Guidelines for Victim and Witness Assistance, or the Justice Manual conditions a victim's rights on his proving, to a California judge with no connection to the prosecution, that the crime occurred. A victim's rights attach upon the Government's notification, under the duty § 3771(c)(1) imposes on officers "engaged in the detection, investigation, or prosecution of crime," not by leave of a court or an office with no role in the case. (No. 2:26-cv-05207, Dkt. 47 at 9, Page ID #:1201.)

Yet the only rulings ever entered against Petitioner's status were entered here, by courts that had held they **lacked jurisdiction**: the 2018 dismissal of his civil-rights action under 42 U.S.C. § 1983 and the Federal Tort Claims Act, which

asserted no right under the Crime Victims' Rights Act, for lack of subject-matter jurisdiction; and the 2021 dismissal of his first crime-victim petition, on a preclusion defense the Government never raised, calling his account of the Missouri prosecution "merely speculation pulled from the ether," though the 2018 Order had recited that very investigation and the Government's agreement to treat Greenway as a victim. (No. 2:17-cv-07748, Dkt. 13 at 2–3, 10, 13, Page ID #:210–211, #:218, #:221; No. 2:21-cv-01910, Dkt. 10 at 1–2, Page ID #:293–294; No. 2:26-cv-05207, Dkt. 47 at 9, Page ID #:1201.) Neither was an adjudication on the merits. (Section II, *supra*.)

On November 4, 2026, Judge Birotte relied on that same 2018 judgment, including its alternative Rule 12(b)(6) rulings, to deny Petitioner relief, in the same order in which he found Petitioner a victim. (No. 2:17-cv-07748, Dkt. 58 at 2–4, Page ID #:1467–1469.) Whether that reliance accorded Petitioner his rights is among the questions the petition naming him presents. (Ex. A.) It is not a question Judge Birotte may decide in the cases that petition reviews.

VI. THE RELATED-CASE DETERMINATION BELONGS TO THE CHIEF JUDGE

Petitioner's Notice of Related Cases in No. 2:26-cv-05207 designated *United States v. McCormick*, No. 2:20-CR-00346(B)-DMG, before Chief Judge Dolly M. Gee, and invoked General Order 08-05, § 5.2. (No. 2:26-cv-05207, Dkt. 4.) That determination has never been made. (*Id.*, Dkts. 26, 45, 46.) Petitioner has filed a Notice of Related Cases with the petition naming Judge Birotte, asking that any related-case determination concerning it be made by the Chief Judge. Petitioner asks that this action, upon reassignment, be routed so that the § 5.2 determination is made by the Chief Judge, and that no related-case transfer place the petition naming Judge Birotte, or this action, on his calendar.

The mis-relation is of record. On May 22, 2026, an Order Re Transfer related No. 2:26-cv-05207 to No. 2:17-cv-07748, not to the *McCormick* action Petitioner

designated, and the prior judge signed the "Consent" block accepting the transfer to his own calendar. No proposed transfer order went to Chief Judge Gee, as § 5.2 requires. (No. 2:26-cv-05207, Dkt. 11; *id.*, Dkt. 47 at 13, Page ID #:1205.) Petitioner designated *McCormick* because the same supervisory officials of the Office appear in it, then-United States Attorney Nicola T. Hanna and then-Acting United States Attorney Tracy L. Wilkison, under whom the Office republished the nonexistent August 17, 2015 Colorado ruling. (*Id.*, Dkt. 47 at 14–15, Page ID #:1206–1207.) That transfer remains uncorrected.

Disqualification here is not a discretionary call on a close record. It is required on independent grounds: Judge Birotte is a named Respondent in a crime-victim petition arising from his conduct of these cases, 28 U.S.C. § 455(b)(5)(i); the § 455(a) record is complete on the face of the orders, his own of November 4, 2026, among them; and the § 5.2 determination has never been made.

Beneath it all runs the asymmetry Docket 47 described: a Government that will not enter the victim's action yet "crosses into a collateral criminal proceeding, where the victim has no standing and no voice, to litigate against his rights," before a Court that "has required nothing of that Government while striking his own filings." (No. 2:26-cv-05207, Dkt. 47 at 37, Page ID #:1229; *McCormick*, Dkt. 864 at 4–5, Page ID #:11427–11428.) Since August 26, 2026, that Court has been Judge Birotte's. Section 455(a) exists for precisely this. Disqualification ends it.

VII. RELIEF REQUESTED

Because § 455 places the duty on the judge, Petitioner requests, without awaiting any motion, conference, or response:

1. That the disqualification of Judge Birotte from this action under 28 U.S.C. §§ 455(a) and 455(b)(5)(i) and the Due Process Clause be given effect, and the action returned to the Clerk for reassignment;
2. That the related-case determination under General Order 08-05, § 5.2, be referred to the Chief Judge;

3. That no transfer under General Order 08-05 place this action, No. 2:26-cv-05207-AB-E, or the concurrently filed petition on the calendar of the disqualified judge; and
4. That this Notice be acted on promptly, as 18 U.S.C. § 3771(d)(3) requires for any motion asserting a victim's right.

DATED: November 6, 2026

Respectfully submitted,



GUSTAVO ESCAMILLA
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Petitioner in Pro Se

DECLARATION OF GUSTAVO ESCAMILLA

I, Gustavo Escamilla, declare:

1. I am the Petitioner in this action. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could and would testify to them.
2. Concurrently with this Notice, I filed an Emergency Petition for Enforcement of the Crime Victims' Rights Act, naming the Honorable André Birotte Jr., in his official capacity as a United States District Judge, as a Respondent. A true and correct copy of its first page is attached as Exhibit A.
3. Concurrently with this Notice, I am filing with the Circuit Executive of the United States Court of Appeals for the Ninth Circuit, under 28 U.S.C. § 351(a), a complaint of judicial misconduct concerning the Honorable André Birotte Jr., arising from his November 4, 2026 order in No. 2:17-cv-07748 (Dkt. 58).
4. As of the date I sign this declaration, no attorney for the United States has filed an appearance, answer, opposition, or any other document in No. 2:26-cv-05207 or No. 2:26-cv-09383, and no order in either action directs the United States to appear or respond.
5. Exhibits B, C, and D are true and correct copies of the orders and filings described in the Index of Exhibits, as they appear on the Court's docket.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 6, 2026, at Glendale, California.

DATED: November 6, 2026

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INDEX OF EXHIBITS

Ex. A First page of Emergency Petition for Enforcement of the Crime Victims' Rights Act (filed concurrently with this Notice), naming André Birotte Jr., in his official capacity, as a Respondent

Ex. B Order, No. 2:17-cv-07748-AB, Dkt. 58 (Nov. 4, 2026)

Ex. C Notice and Application to Disqualify, No. 2:26-cv-05207, Dkt. 47 (Aug. 24, 2026), and Order of Recusal, Dkt. 49 (Aug. 26, 2026)

Ex. D Minute Order Denying as Moot Motion to Disqualify Judge Wright, No. 2:26-cv-05207, Dkt. 53 (Oct. 21, 2026)

CERTIFICATE OF COMPLIANCE WITH THE COURT'S GENERATIVE ARTIFICIAL INTELLIGENCE ORDER

The undersigned certifies the following regarding the use of generative artificial intelligence in the preparation of this filing:

_X_ This filing USES generative artificial intelligence.

____ This filing DOES NOT use generative artificial intelligence.

Petitioner used a generative artificial intelligence tool to assist in drafting portions of this filing. Petitioner has reviewed and revised the content, has verified the legal citations and the factual assertions to the best of his ability, and adopts the filing as his own. The positions and representations set forth herein are made in good faith and in compliance with Federal Rule of Civil Procedure 11.

DATED: November 6, 2026

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