

No. 25-1384

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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SILVERTON MOUNTAIN GUIDES LLC,  
Plaintiff-Appellant,

v.

UNITED STATES FOREST SERVICE,  
Defendant-Appellee,

and

PULSELINE ADVENTURE LLC,  
Defendant-Intervenor-Appellee.

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On Appeal from the United States District Court  
for the District of Alaska  
District Court Case No. 3:22-cv-48

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**BRIEF FOR U.S. FOREST SERVICE**

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## INTRODUCTION

Plaintiff Silverton Mountain Guides, LLC (Silverton) details at length inappropriate and inexcusable off-the-bench behavior by former-Judge Kindred, who resigned in 2024 after he was found to have created a hostile work environment and engaged in a sexual relationship with a former law clerk who was working as an Assistant United States Attorney (AUSA). Plaintiff contends that because Judge Kindred presided over this matter in which the U.S. Forest Service was represented by *other* attorneys at the U.S. Attorney's Office, the underlying judgment against it must be vacated.

The district court correctly denied Silverton's motion to vacate. The district court credited the government's representations that the individuals with whom then-Judge Kindred had a sexualized relationship "had no involvement in this case," ER-8, and Silverton neither challenges that factual finding nor provides any basis to second-guess that fact. The district court correctly explained that, under applicable ethics rules and precedent, Judge Kindred was not required to recuse from this matter involving different attorneys from the U.S. Attorney's Office. Nor did Silverton identify any other basis from which to conclude that Judge Kindred's ruling on this U.S. Forest Service matter created an appearance of partiality. The court further explained that, even if recusal was warranted, the extraordinary remedy of vacating the judgment would not be appropriate in this case, particularly given that Silverton

declined to appeal the original judgment against it. The district court’s order denying Silverton’s motion to vacate should be affirmed.

### **STATEMENT OF JURISDICTION**

The district court had jurisdiction under 28 U.S.C. § 1331. The district court denied a Rule 60(b) motion for relief from final judgment on February 21, 2025. ER-3. Silverton filed a notice of appeal on February 26, 2025. Dkt. 115. This Court has “jurisdiction to hear the appeal under 28 U.S.C. § 1291 because the denial of a Rule 60 motion for relief from judgment is a final, appealable order.” *United States v. Sierra Pac. Indus., Inc.*, 862 F.3d 1157, 1166 (9th Cir. 2017).

### **STATEMENT OF THE ISSUE**

Whether the district court correctly held that former-Judge Kindred’s sexualized relationships with two Assistant United States Attorneys, who were not involved in this case, did not warrant vacating the final judgment.

### **PERTINENT STATUTES**

Pertinent statutes and rules are reproduced in the addendum to this brief.

### **STATEMENT OF THE CASE**

**A.** Silverton sued the U.S. Forest Service in March 2022, challenging the Forest Service’s decision to award permits to conduct helicopter skiing operations on federal lands to companies other than Silverton. Dkt. 1. Silverton sought to set aside the decision under the Administrative Procedure Act (APA), claiming it was arbitrary and capricious, *id.* ¶ 140, and further alleged that the Forest Service was violating the

Freedom of Information Act (FOIA) by failing to produce records identifying the individuals who evaluated those permit applications, *id.* ¶ 150. After two reassignments to different judges, in January 2023, the case was eventually assigned to then-Judge Kindred. Dkt. 58.

The Forest Service voluntarily provided the information sought in the FOIA request pursuant to a protective order. Dkt. 76, at 31. In October 2023, Judge Kindred dismissed Silverton’s APA claim with prejudice, concluding based on the administrative record that the agency’s decision was neither arbitrary nor capricious. Dkt. 100, at 4-21. Judge Kindred also denied Silverton’s request for attorneys’ fees on their FOIA claim. *Id.* at 22-23. Silverton did not appeal.

**B.** In May 2024, the Ninth Circuit Judicial Council entered an order concluding that Judge Kindred “created a hostile work environment for his law clerks,” “engaged in misconduct by having an inappropriately sexualized relationship with one of his law clerks during her clerkship and shortly after her clerkship” when she was an Assistant U.S. Attorney, and “lied” to the Council during the course of its investigation. ER-43. The Council also found that Judge Kindred had “received nude photographs from another, more senior AUSA.” ER-58. Judge Kindred resigned the following month. ER-74.

**C.** Following Judge Kindred’s resignation, and nearly one year after final judgment had been entered against it in this case, Silverton filed a Rule 60(b) motion to vacate the judgment on the grounds that the former clerk and the more senior

Assistant U.S. Attorney were both attorneys in the same U.S. Attorney's Office that represented the Forest Service in this matter. *See* ER-18. This case was reassigned to Chief Judge Gleason, Dkt. 103, who denied the motion, ER-3-16.

The district court “credit[ed] the U.S. Forest Service’s representation that the former law clerk and the senior AUSA did not enter an appearance in [this] case, did not work for the US[ Attorney’s Office’s] civil division at the time, and had no involvement in this case.” ER-8. Further, Silverton’s motion had conceded that “the two AUSAs in question were both only handling criminal cases during the entire time that this [civil] case was pending.” ER-8. The court rejected Silverton’s argument that, under the Alaska Rules of Professional Conduct, a conflict should be imputed to the entire U.S. Attorney’s Office, and the court held there was no other basis to conclude that then-Judge Kindred was required to recuse. ER-9-12. The district court alternatively held that the relevant factors would not warrant the extraordinary relief of vacating the judgment under Rule 60(b), even if then-Judge Kindred should have recused. ER-12-16. In particular, the district court emphasized that Silverton “did not timely appeal Judge Kindred’s order,” and that accepting Silverton’s arguments for reopening the judgment in its case would also support vacating “all judgments and orders by Judge Kindred” in *any* case “involving the [U.S. Attorney’s Office] without regard to the actual attorneys of record.” ER-14-16.

## SUMMARY OF ARGUMENT

The district court correctly denied Silverton’s Rule 60(b) motion to vacate the judgment. The two Assistant U.S. Attorneys with whom then-Judge Kindred had improper relationships “had no involvement with this case” and “were both” handling only “criminal cases during the entire time that this [civil] case was pending.” ER-8. The district court correctly recognized, therefore, that under relevant ethics rules and precedent then-Judge Kindred had no duty to recuse in this case in which the U.S. Attorney’s Office represented the Forest Service in a permitting dispute. Silverton’s contrary argument that conflicts are imputed within a United States Attorney’s Office finds no support in the ethics rules or cases Silverton relies upon. And Silverton fails to advance any other basis on which a reasonable person would doubt then-Judge Kindred’s impartiality in this case. Silverton’s broader argument that then-Judge Kindred was unfit to be a judge based on his inexcusable off-the-bench conduct does not mean that he was not impartial in this matter.

Moreover, even if then-Judge Kindred’s failure to recuse would have warranted recusal, Rule 60(b) relief is not “categorically available” for such violations. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). In deciding to grant such extraordinary relief, a court must consider “the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public’s confidence in the judicial process.” *Id.* The district court correctly held that those factors did not support vacating the judgment

in this case, particularly where Silverton “did not timely appeal Judge Kindred’s order” and where Silverton’s arguments would, if accepted, support vacating “all judgments and orders by Judge Kindred” in any case “involving the US[ Attorney’s Office] without regard to the actual attorneys of record”—a consequence that would itself have a “deleterious effect” on the judicial system. ER-14-16.

### **STANDARD OF REVIEW**

The “denial of a motion for relief from judgment under Rule 60(b)” is reviewed “for an abuse of discretion,” *Henson v. Fidelity Nat’l Fin., Inc.*, 943 F.3d 434, 443 (9th Cir. 2019). “[T]he district court’s factual findings” are reviewed “for clear error.” *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 616 (9th Cir. 2016). The decision not to recuse is reviewed “for an abuse of discretion.” *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir. 1993); *accord In re Creech*, 119 F.4th 1114, 1121 (9th Cir. 2024) (asking, in deciding a mandamus petition, whether there was an “abuse of discretion” in decision not to recuse).

### **ARGUMENT**

#### **THE DISTRICT COURT CORRECTLY DENIED SILVERTON’S MOTION TO VACATE THE JUDGMENT**

A movant must make two independent showings to succeed on a motion to vacate a judgment under Rule 60(b) on the basis that a judge failed to recuse. The movant first must establish that the district court judge abused his discretion by failing to recuse. And because Rule 60(b) relief is not “categorically available” even if such

an abuse of discretion occurred, the movant must additionally establish that the judgment should be vacated after “consider[ing] the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public’s confidence in the judicial process.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). The district court correctly held that Silverton failed to make either showing, much less both of them.

**A. Then-Judge Kindred’s Failure to Recuse Was Not an Abuse of Discretion.**

1. Under 28 U.S.C. § 455(a), “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” This Court has “interpreted this rule to require recusal ‘where a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned.’” *In re Creech*, 119 F.4th 1114, 1121 (9th Cir. 2024) (quoting *United States v. Carey*, 929 F.3d 1092, 1104 (9th Cir. 2019)). This general standard in Section 455(a) is supplemented by Section 455(b), which provides “concrete example[s] where the appearance of partiality suffices to establish a ground for recusal under section 455(a) even absent actual bias.” *Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991). The two subsections are interpreted together, as it would generally be “unreasonable to interpret § 455(a) ... as implicitly eliminating a limitation explicitly set forth in § 455(b).” *Liteky v. United States*, 510 U.S. 540, 552-53, 553 n.2 (1994).

“[I]n the absence of a legitimate reason to recuse himself, ‘a judge should participate in cases assigned’” to him. *United States v. Holland*, 519 F.3d 909, 912 (9th Cir. 2008). Judges are therefore “bound to recuse ... when the law and facts require,” but are also “bound” “to hear cases when there is no reasonable factual basis for recusal.” *Id.*

2. Former-Judge Kindred was found by the Judicial Council to have engaged in an inappropriately sexualized relationship with one of his former law clerks, who had become an Assistant U.S. Attorney (AUSA). ER-61-64. Judge Kindred also “received nude photographs from another, more senior AUSA.” ER-58. On the basis of these inappropriate relationships, Silverton seeks to have the judgment against it in this matter vacated. But as the district court found in denying that motion, the two Assistant U.S. Attorneys with whom former-Judge Kindred had relationships “had no involvement in this case” and “were both” handling only “criminal cases during the entire time that this [civil] case was pending.” ER-8. Silverton has not challenged that factual finding.

Silverton nonetheless urges (at 26) that that former-Judge Kindred was required to recuse under § 455(a) because other Assistant U.S. Attorneys from the District of Alaska represented the U.S. Forest Service in this matter. Silverton thereby insists that former-Judge Kindred was required to recuse from any matter involving the U.S. Attorney’s Office for the District of Alaska, regardless of who the actual attorneys of record were in the case and irrespective of the nature of the case. Silverton does not

cite any authority supporting that conclusion. To the contrary, judicial ethics sources generally reflect that, “absent [the] personal involvement” of a government attorney with whom a judge has a relationship, the judge is not required to recuse from a matter in which the government law department is involved. *See* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 27.6, at 444 (3d ed. 2017). This reflects, in part, the particular role of an Assistant U.S. Attorney, who is “the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... is not that it shall win a case, but that justice shall be done.” *See* Comm. on Codes of Conduct, Jud. Conf. of the U.S., Advisory Op. No. 38, *Disqualification when Relative Is an Assistant United States Attorney* (2009), 2009 WL 8484540, at \*1 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). The U.S. Judicial Conference’s Committee on Codes of Conduct has opined, for example, that where a “judge’s spouse, child, or other relative serves as an Assistant United States Attorney,” a judge is generally not required to recuse from matters involving the U.S. Attorney’s Office absent circumstances such as the relative acting as an attorney in the proceeding or having supervisory responsibility over such an attorney. *See id.* at \*1-2.<sup>1</sup>

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<sup>1</sup> “Although the Committee on Codes of Conduct is not authorized to render advisory opinions interpreting [§] 455 ..., Canon 3C of the Code of Conduct for United States Judges closely tracks the language of § 455, and the Committee is authorized to provide advice regarding the application of the Code.” Comm. on Codes of Conduct, Jud. Conf. of the U.S., *supra*, 2009 WL 8484540, at \*2.

Silverton’s assertion that a reasonable person would draw conclusions about Judge Kindred’s “partiality toward those with whom he was in intimate relationships,” Br. 28, therefore does not help it. Although a reasonable person may very well question a judge’s impartiality if the judge had an intimate relationship with a counsel of record in the case, a reasonable person “who understands all the relevant facts and has examined the record and law,” *Holland*, 519 F.3d at 913-14 (alteration and quotation marks omitted), would not question a judge’s impartiality towards an entire government legal department in a case where no attorney with whom the judge had an intimate relationship was involved. And Silverton does not identify any other facts about the civil Assistant U.S. Attorneys who represented the Forest Service in this matter other than that they “worked at the” U.S. Attorney’s Office. Br. 26. For the same reason, Silverton’s emphasis (at 4, 17, 24) on the Judicial Council’s finding that Judge Kindred’s “physical interactions” with his former law clerk “are severe enough to cause the public to question his honesty, integrity, impartiality, temperament, and fitness to serve as a judge,” ER-65, does not advance its argument as to Judge Kindred’s impartiality *in this case*, where that former law clerk had no involvement.

Silverton is no more successful in attempting to spin out complicated theories by which former-Judge Kindred must have been biased in favor of the entire U.S. Attorney’s Office. The basis for Silverton’s argument is shifting and not entirely clear. At times, Silverton appears to suggest that former-Judge Kindred wanted to “avoid provoking the [two] AUSAs” to keep their intimate relationships a secret and was

therefore inclined to rule in favor of the U.S. Attorney's Office in any case in which the office was involved. Br. 28. At other times, Silverton appears to suggest (at 23, 32-33) that the Assistant U.S. Attorneys involved in this case had knowledge of the inappropriate relationships (for which Silverton presents no evidence) and that then-Judge Kindred hoped those attorneys who appeared before him would remain silent or lie to the Judicial Council if he ruled in the government's favor. In other instances, Silverton appears to combine these two theories suggesting vaguely (at 34) that there were unspecified attorneys, including in leadership at the U.S. Attorney's Office, who were not involved with the case but who knew about these relationships and that former-Judge Kindred may have thought he could curry favor with those attorneys by ruling in the government's favor in any case in which the office was involved regardless of whether those unspecified attorneys appeared in the case.

In all events, Silverton merely speculates about these possibilities. But simply because a possible motivation could be envisioned does not mean that a reasonable person would have doubts about the judge's impartiality. *See, e.g., Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913, 929 (2004) (Scalia, J., memorandum regarding recusal motion) (declining to recuse because it would not be "reasonable to think" a judge was partial because he had accepted a flight to a hunting trip from the Vice President, who later had a case come before the Court); *Planned Parenthood Fed'n of Am., Inc. v. Newman*, No. 20-16068, 2022 WL 13613963, at \*10 (9th Cir. Oct. 21, 2022) (upholding a decision not to recuse despite judge's spouse making favorable social-

media posts about the party and the judge having previously worked closely with a charity that partners with the party).<sup>2</sup> “[T]o say that the applicable disqualification statute requires concern for appearances is not to say that it requires concern for mirages.” Flamm, *supra*, § 16.5, at 294 (paraphrasing *United States v. El-Gabrowni*, 844 F. Supp. 955, 961 (S.D.N.Y. 1994)). And requiring recusal on the basis of such speculation has significant consequences of its own, inviting forum shopping and risking the standard “becom[ing], in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.” *United States v. Mikbel*, 889 F.3d 1003, 1027 (9th Cir. 2018) (quoting *Holland*, 519 F.3d at 913); *cf. In re Billedeaux*, 972 F.2d 104, 106 (5th Cir. 1992) (upholding a decision not to recuse when the alleged interest of the judge was “so remote and speculative as to dispel any perception of impropriety”).

Thus, when assessing recusals, this Court has recognized that “[t]he reasonable person is not someone who is hypersensitive or unduly suspicious, but rather is a well-informed, thoughtful observer.” *Mikbel*, 889 F.3d at 1027 (quoting *Holland*, 519 F.3d at 913). And there must be “a significant risk that the judge will resolve the case on a basis other than the merits.” *Clemens v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 428 F.3d 1175, 1178 (9th Cir. 2005) (per curiam) (citation omitted). The district court correctly held that, considering the facts and law, a reasonable observer would not believe that

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<sup>2</sup> See *National Abortion Fed’n v. Center for Med. Progress*, 257 F. Supp. 3d 1084, 1089-92 (N.D. Cal. 2017) (recounting the facts related to the recusal motion).

former-Judge Kindred “would do anything,” Br. 28, to rule in favor of the government in any case in which the U.S. Attorney’s Office was involved—regardless of who the actual counsel of record in the case were, and irrespective of subject matter—in hopes that an office of government lawyers would assist him in covering up his misconduct. *See* ER-11-12.

Silverton’s additional observations similarly do not advance its argument. First, Silverton suggests (at 5, 27-30) that the district court applied the wrong standard by looking for actual bias. But the district court applied the correct standard. ER-9 (“The test under § 455(a) is whether a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned.” (quoting *F.J. Hanshaw Enters, Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1144 (9th Cir. 2001))); *see* ER-11 (discussing “appearance of impropriety”). The district court correctly recognized that former-Judge Kindred’s order ruling in favor of the U.S. Forest Service does not, on its own, “create an appearance of impropriety,” and “[o]utside of the two undisclosed relationships with AUSAs in the criminal division” who were not involved in this civil case, Silverton offered nothing other than speculation to suggest that Judge Kindred was required to recuse. ER-11-12.

Second, Silverton relies (at 27) on other cases that it suggests support recusal in this case, but the factual circumstances in those cases do not help it. In *Liljeberg*, the judge was the trustee of an institution that was negotiating a major real estate transaction that would be materially affected by the litigation at issue. 486 U.S. 853-

55. Silverton asserts (at 25-26) that this case is “even easier” than *Liljeberg* because then-Judge Kindred was aware of the facts, but that misunderstands the relevant issues. In *Liljeberg*, the facts clearly required recusal, and the issue was whether his lack of awareness negated the otherwise obvious conflict. But if the facts are not a reason to recuse, awareness of the facts is irrelevant. Here, as explained, the relevant facts simply do not require recusal. This Court’s decision in *Preston*, 923 F.2d 731, similarly does not support Silverton’s argument. In that case, the judge previously worked at a private law firm that was representing a company in the litigation at issue, and the firm had represented that company in matters relating to the litigation during the time of the judge’s employment—a circumstance specifically requiring recusal under § 455(b)(2), *see infra* p. 16. And although Silverton is correct that the company was not a named “party” in the litigation before the judge, Br. 27, it omits that the company had indemnified the defendant and so “faced a potential claim for indemnification” if the defendant lost. *Preston*, 923 F.2d at 735. The specific factual circumstances requiring recusal in those cases only underscore the far more speculative and attenuated nature of Silverton’s arguments here.

Finally, Silverton advances numerous arguments (at, *e.g.*, 26, 29) that Judge Kindred’s substantial misconduct demonstrates that he was not fit to be a judge. The Judicial Council likewise questioned his fitness to be a judge, and Judge Kindred ultimately resigned from the bench. But none of that answers the question whether Judge Kindred was required to recuse in this matter because a reasonable observer

would question his impartiality in this case. For the reasons explained above, Silverton has made no such showing.

3. Silverton advances an “[a]lternative[]” argument that Judge Kindred was required to recuse under the Alaska Rules of Professional Conduct. Br. 30-31. According to Silverton, Judge Kindred had a conflict of interest with the two Assistant U.S. Attorneys with whom he had sexualized relationships, and the Alaska Rules of Professional Conduct “impute the conflict” “to the entire office.” Br. 30. That is without merit. Even assuming the Alaska Rules of Professional Conduct have bearing on whether a federal judge was required to recuse, Silverton misreads those rules. Alaska’s Rules of Professional Conduct impute conflicts within private firms but not within government law departments. Rule 1.10 provides that conflicts can be imputed within a “firm.” Alaska R. Pro. Conduct r. 1.10. While the defined term “firm” includes the “law department of an organization, including the government,” *id.* r. 9.1 cmt., a separate provision in Rule 1.10(d) exempts “a firm with ... current government lawyers” from the operation of Rule 1.10 and instead states that those government law departments’ conflicts are “governed by Rule 1.11,” *id.* r. 1.10(d). As the commentary to the latter rule explains, Rule 1.11 “does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees.” *Id.* r. 1.11 cmt; *compare id.* r. 1.11(d), *with id.* r. 1.10(a). That is consistent with the judicial ethics rule discussed above, which likewise recognizes a distinction between government attorneys and private law

firms. *See supra* p. 9; *see also, e.g.*, Flamm, *supra*, § 27.6, at 444-45 (collecting cases and noting that “the vast weight of persuasive authority” supports not imputing a conflict within a government law department (citation omitted)). Section 455 itself reflects this distinction, requiring a judge coming from private practice to recuse from any matter that he *or his law firm* worked on while the judge was at the firm, 28 U.S.C. § 455(b)(2), but requiring a judge coming from government practice to recuse from only the matters he personally worked on, *id.* § 455(b)(3). *Accord* Model Rules of Jud. Conduct r. 2.11(A)(6)(a)-(b).

Silverton briefly suggests (at 30) that the small size of the District of Alaska’s U.S. Attorney’s Office and the small size of the legal market warrant greater imputation and a heightened recusal standard. But Silverton provides no support for that theory; indeed, if anything, the case law reflects the opposite concern. *See, e.g.*, *Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir. 2003) (noting the Court has been “mindful that there are relatively few federal court litigators” in smaller markets and it is “quite likely” that federal judges in those markets are “acquainted with most of the lawyers” in ways that may differ from larger markets); *accord Nelson v. Jones*, 781 P.2d 964, 972 (Alaska 1989) (upholding a decision not to recuse while observing that “social meetings with guardians ad litem and counsel were difficult to avoid in a [small] community”).

Silverton is thus left to insist that the ordinary rules governing the imputation of conflicts do not apply because of the “extraordinary” nature of Judge Kindred’s

misconduct. Br. 31-32. But Silverton’s recitation of Judge Kindred’s misconduct is irrelevant to whether a conflict should be imputed to the U.S. Attorney’s Office as a whole.<sup>3</sup> Silverton’s reliance (at 31-32) on *United States v. Williams*, 68 F.4th 564 (9th Cir. 2023), is misplaced. In *Williams*, this Court considered whether a district court had “properly disqualified the entire Arizona U.S. Attorney’s Office” based on alleged misconduct involving one Assistant U.S. Attorney. *Id.* at 571. Recognizing that “every circuit court that has reviewed an officewide disqualification has reversed,” this Court held that such a “sweeping disqualification” would be appropriate only “in the most extraordinary circumstances” where there is “a clear basis in fact and law” for such disqualification. *Id.* at 572-74 (citation omitted). And this Court explained that such a showing had not been made in that case, where “it was pure speculation to conclude that any conflict or misconduct pervaded the entire U.S. Attorney’s Office.” *Id.* at 574. To the extent that disqualification case is relevant here, it only underscores that it would be “extraordinary” for an entire U.S. Attorney’s Office to all independently have an ethical conflict—not, as Silverton suggests (at 32-33), that extraordinary or unusual conflicts are subject to different imputation rules.

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<sup>3</sup> Much of Silverton’s argument (at 32-34)—despite being in the imputation section of its brief—is a mislabeled argument that former-Judge Kindred actually had conflicts with each attorney in the office. For the reasons explained above, the attorneys involved in this case did not have a conflict that required Judge Kindred’s recusal. *See supra* pp. 10-12.

**B. Even If Then-Judge Kindred Should Have Recused, Vacating the Judgment Would Not Be Warranted.**

Even if then-Judge Kindred violated § 455 by failing to recuse, that statute “does not, on its own, authorize the reopening of closed litigation.” *Liljeberg*, 486 U.S. at 863. “Rule 60(b)(6)” by contrast, “grants federal courts broad authority to relieve a party from a final judgment ‘upon such terms as are just.’” *Id.* “Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455(a) violations.” *Id.* at 864. “[I]n determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public’s confidence in the judicial process.” *Id.*

As the district court correctly held, each of these factors counsels in favor of not reopening the judgment, even if former-Judge Kindred should have recused. As the court observed, Silverton “fails to show a meaningful risk of injustice” to it because it “has not shown how Judge Kindred’s improper relationships” hindered its ability “to fully litigate its claims” in this Forest Service matter, where the attorneys with whom he had an improper relationship were indisputably not involved in this case, and where the legal issues have no relation to Judge Kindred’s alleged misconduct. ER-14. Moreover, Silverton had the opportunity to appeal the judgment when it was entered—and could have received de novo judicial review of its APA claim, *see Turtle Island Restoration Network v. National Marine Fisheries Serv.*, 340 F.3d 969,

973 (9th Cir. 2003)—but Silverton did not do so. For many of the same reasons, Silverton has not established that denial of relief would produce injustice in other cases or undermine the public’s confidence in the judiciary. To the contrary, as the district court found, *granting* relief “may have the deleterious effect of litigants attempting to relitigate all of Judge Kindred’s closed” cases involving the U.S. Attorney’s Office, irrespective of the attorneys actually involved and the subject-matter of the case. ER-15.

Silverton’s arguments do not establish the district court erred. Silverton contends that the district court was wrong to rely on its failure to appeal in determining whether to reopen the judgment. This Court has observed in other contexts, however, that a party’s “[d]iligence ... in litigating his claim” is relevant to the propriety of reopening a judgment. *Bynoe v. Baca*, 966 F.3d 972, 984 (9th Cir. 2020). Nor is it true that “in every case seeking” relief under Rule 60(b) on the basis of alleged bias that the party necessarily “did not ‘appeal’” the original judgment. Br. 19-20. Indeed, while Silverton states (at 39) that the losing party in *Liljeberg* had not appealed the original judgment, that is incorrect. After the district court had “found for Liljeberg,” the losing party did appeal the original judgment, and “the Court of Appeals” had “affirmed”; following the appeal, the losing party later moved to reopen that judgment in district court after learning of the district court judge’s conflict. *Liljeberg*, 486 U.S. at 850; *see also Health Servs. v. Liljeberg*, 691 F.2d 500 (5th Cir. 1982)

(unpublished table decision); *Health Servs. Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 798 (5th Cir. 1986).

Silverton’s assertion that vacating the judgment in this case would incentivize government lawyers “to be forthcoming,” Br. 37, also misses the mark. Silverton refers generally to the U.S. Attorney’s Office needing to “disclose[]” improper relationships with Judge Kindred, *id.*, but Silverton says nothing about the actual lawyers who appeared in this case. That only reinforces that Silverton’s position, if accepted, would support reopening every judgment in which Judge Kindred presided and the U.S. Attorney’s Office appeared, regardless of who the attorneys in the matter were and regardless of the nature of the case. And while Silverton emphasizes that a “willingness to enforce § 455 may” “encourag[e] recusal” by judges, Br. 36, Silverton ignores that the ethics rules and case law are concerned not only with *insufficient* recusals but also *excessive* recusals, which have deleterious effects of their own. *See, e.g., Holland*, 519 F.3d at 912; *Mikbel*, 889 F.3d at 1027. Under Silverton’s contrary argument, this factor would *categorically* favor vacating every judgment when a judge should have recused, but the Supreme Court has made clear that is not the case. *See Liljeberg*, 486 U.S. at 864.

Finally, Silverton relies heavily on the Judicial Council’s findings that then-“Judge Kindred’s conduct ‘raises serious concerns about the public’s confidence in the integrity of the judiciary.’” Br. 38 (quoting ER-65). But contrary to Silverton’s assertions, the relevant question for purposes of Rule 60(b) is not whether “*Judge*

*Kindred's conduct* “would naturally diminish public confidence” in the Judiciary or whether his “*conduct* ‘raises serious concerns,’” Br. 38 (emphases added), but rather whether failing to reopen the judgment in this case would undermine public confidence in the Judiciary. The district court correctly concluded that it will not—and indeed, that reopening the judgment would itself risk undermining the public’s confidence, where the attorneys with whom Judge Kindred had a sexualized relationship were not involved, and where Silverton declined to appeal the original judgment against it.

Silverton’s further suggestion that, absent reopening the judgment against it, the public will believe the Judiciary is not “enforcing strict standards on itself” or would be “closing ranks,” Br. 38-39, is without merit. Indeed, the Judicial Council—made up of members of the Judiciary—took appropriate steps to sanction then-Judge Kindred, leading to his resignation. But for the reasons explained, whether former-Judge Kindred faced consequences for his misconduct is a different question from whether the judgment against Silverton in this civil case should be reopened. The district court correctly applied the Rule 60(b) factors and held that it should not.

## CONCLUSION

For the foregoing reasons, the district court's denial of Silverton's Rule 60(b) motion should be affirmed.

Respectfully submitted,

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**STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, appellees state that they know of no related case pending in this Court.

*s/ Derek Weiss*  
\_\_\_\_\_  
Derek Weiss

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Circuit Rule 28.1-1 because it contains 5,390 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in Garamond 14-point font, a proportionally spaced typeface.

*s/ Derek Weiss*

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Derek Weiss

**ADDENDUM**

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**Federal Rule of Civil Procedure 60(b)**

**(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.**

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b) ;
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

**28 U.S.C. § 455**

**§ 455. Disqualification of justice, judge, or magistrate judge**

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) “fiduciary” includes such relationships as executor, administrator, trustee, and guardian;

(4) “financial interest” means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a “financial interest” in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.