No. _____

In the Supreme Court of the United States

PAULINE NEWMAN, HONORABLE; JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, PETITIONER

v.

KIMBERLY A. MOORE, HONORABLE; IN HER OFFICIAL CAPACITIES AS CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, CHAIR OF THE JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND CHAIR OF THE SPECIAL COMMITTEE OF THE JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Disability Act authorizes each circuit's judicial council, after investigation, to "order[] that, on a temporary basis for a time certain, no further cases be assigned to" a judge who engaged in misconduct or has a disability. 28 U.S.C. § 354(a)(2)(A)(i). The Act allows these orders to be reviewed by the Judicial Conference of the United States, but it limits further judicial review of the council's "orders and determinations." *See* 28 U.S.C. § 357(c) ("[A]ll orders and determinations . . . shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."). Nothing in section 357(c), however, even purports to prevent litigants from seeking prospective relief that would restrain the council from issuing orders in the future.

In March 2023, before any investigation, Chief Judge Kimberly Moore of the Federal Circuit told Judge Pauline Newman that she had been removed as an active judge and could either immediately retire or "negotiate senior status." Judge Moore and the Judicial Council of the Federal Circuit then issued a series of administrative orders that prohibit Judge Newman from hearing or participating in any cases at the panel or en banc level. These orders are *ultra vires*, unlawful and unconstitutional. Judge Newman has challenged them and sought to enjoin the judicial council from issuing similar orders in the future. The D.C. Circuit, however, citing a 2001 decision of that court, held that 28 U.S.C. § 357(c)'s bar on judicial review allows her to assert only "facial" constitutional claims that challenge the constitutionality of provisions in the Disability Act, and strips the courts of jurisdiction to consider

any "as-applied" constitutional claims. The questions presented are:

1. Does 28 U.S.C. § 357(c)'s bar on judicial review of previously issued "orders" and "determinations" apply to *ultra vires* acts that exceed the scope of authority conferred by the Disability Act and the Constitution?
2. Does 28 U.S.C. § 357(c)'s bar on judicial review of previously issued "orders" and "determinations" deprive a court of jurisdiction to consider claims that seek forward-looking relief to enjoin future unlawful actions?

PARTIES TO THE PROCEEDING

Petitioner Pauline Newman, Judge of the United States Court of Appeals for the Federal Circuit was the plaintiff-appellant in the D.C. Circuit Court of Appeals.

Respondents Kimberly A. Moore, in her official capacities as Chief Judge of the United States Court of Appeals for the Federal Circuit, Chair of the Judicial Council of the Federal Circuit, and Chair of the Special Committee of the Judicial Council of the Federal Circuit; Sharon Prost, in her official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit; Richard G. Taranto, in his official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit; and the Judicial Council of the Federal Circuit and its members (other than Judge Newman herself) were the defendants-appellees in the D.C. Circuit Court of Appeals.

A corporate disclosure statement is not required because Judge Newman is not a corporation. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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PETITION FOR A WRIT OF CERTIORARI

This petition presents questions concerning crucial constitutional and statutory aspects of lifetime tenure and judicial independence, especially the availability of judicial review for intra-branch infringements on judicial service. These questions affect the very independence of Article III courts and potentially affect every member of the federal judiciary and every litigant who appears before

them. For three years the Federal Circuit has been operating short-handed because the judges of that court have summarily removed its longest-serving and most storied jurist (its "Great Dissenter") from the bench.

The D.C. Circuit Court of Appeals held that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the Disability Act") bars review of the unlawful actions taken against Judge Pauline Newman. This administrative removal of a judge who is famous for dissenting from her colleagues, by those same colleagues, with judicial refusal to review the merits of the action, undermines the judicial independence that is a vital foundation of our constitutional design. Every judge who gets crosswise with her chief judge or her colleagues must now worry whether similar tactics could be used to remove them.

Judge Newman has continued to speak and write before the legal community, and no finding of disability has been made concerning her in the years since the unlawful administrative orders began. She voluntarily underwent and passed three expert evaluations of her mental fitness and was reported as having the mental ability of someone decades younger. She now has been suspended longer than any federal judge in history. The length of the suspension, the apparent intention to keep her off the bench permanently, the same judges acting as complainant, witnesses and judges, and the refusal to transfer the matter to another circuit for neutral investigation are unprecedented.

The Disability Act allows each circuit court to investigate complaints of judicial misconduct or disability. *See* 28

U.S.C. § 351 et seq. (App. 87a–101a). After investigation, the Disability Act authorizes the judicial council of each circuit (consisting of all the active judges of the circuit) to "order[] that, on a temporary basis for a time certain, no further cases be assigned to" a judge found to have engaged in misconduct or to have a disability. 28 U.S.C. § 354(a)(2)(A)(i) (App. 92a). These temporary-suspension administrative orders of the judicial council may be reviewed by the Judicial Conference of the United States. *See* 28 U.S.C. § 357(a) ("A complainant or judge aggrieved by an action of the judicial council under section 354 may petition the Judicial Conference of the United States for review thereof.") (App. 96a). Apart from this review by the Judicial Conference, "orders" and "determinations" of the judicial council are "final and conclusive" and "shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. § 357(c) ("[A]ll orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.") (App. 96a).

The Disability Act does not authorize the judicial council (or anyone else) to act in violation of the Constitution. So the administrative "orders" and "determinations" described in section 357(c) cannot refer to everything that happens to be labeled an "order" or "determination" that emanates from a judicial council, a special committee, or the Judicial Conference. Instead, section 357(c) should be read as limited to "orders" and "determinations" that Congress has constitutionally authorized in the Disability Act. This construction of section 357(c) preserves the courts' jurisdiction to entertain collateral attacks on

previously issued "orders" and "determinations" that are *ultra vires* because they violate the Constitution or exceed the scope of the statutory powers conferred by the Disability Act.

Further, even if section 357(c) can be viewed as limiting the judiciary from disturbing the *past* orders or determinations of the judicial council, it allows litigants to seek prospective judicial relief that prevents the issuance of unlawful (or allegedly unlawful) orders in the future. Section 357(c), by its terms, turns entirely on the type of relief that a litigant is requesting. Those who seek to enjoin the issuance of future orders or determinations may proceed with their claims, regardless of whether those claims are rooted in statutory or constitutional arguments.

The case law of the D.C. Circuit, however, holds that the application of section 357(c) depends not on the type of *relief* that is being sought, but on the type of *claim* that a litigant asserts. *See McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of Judicial Conference of the United States*, 264 F.3d 52, 58–68 (D.C. Cir. 2001). Under the law of the D.C. Circuit, a litigant *may* challenge and ask a court to set aside a previously issued order whenever the litigant brings a "facial" constitutional challenge to provisions of the Judicial Conduct and Disability Act—even though the statute purports to bar *all* judicial review of an extant "order" or "determination" issued under the Disability Act. *See id.* at 58; App. 9a–18a; App. 59a–71a. At the same time, the D.C. Circuit has invoked section 357(c) to block litigants from bringing statutory or "as-applied" constitutional claims when challenging a judicial council's authority under the

Disability Act, even when a litigant seeks prospective relief to restrain the council from issuing future orders or determinations. *See McBryde*, 264 F.3d at 58–64; App. 9a–18a; App. 59a–71a. This approach is doubly wrong. It misconstrues section 357(c) by preventing challenges to *ultra vires* orders and determinations. And it overenforces section 357(c) by reading it to thwart litigants from seeking prospective relief against the council's future actions.

The Judicial Council of the Federal Circuit has issued a series of three one-year suspension orders (so far) under 28 U.S.C. § 354(a)(2)(A)(i) that prohibit Judge Newman from hearing or participating in any cases at the panel or en banc level.[1] In response, Judge Newman sued the council and sought relief that would set aside the previously issued suspension orders, as well as prospective relief that would enjoin the council from renewing or issuing similar suspension orders against her in the future.[2]

But the lower courts were bound by the holding of *McBryde*, which led the district court and the D.C. Circuit panel to consider only Judge Newman's "facial" constitutional challenge to the Disability Act's case-suspension provision. *See* 28 U.S.C. § 354(a)(2)(A)(i); *McBryde*, 264 F.3d at 58. In applying *McBryde*, the district court and the D.C. Circuit panel held that section 357(c) barred them from considering any of Judge Newman's remaining claims on the merits, including her statutory and as-

1. The judicial council has effectively removed Judge Newman permanently, even to the point of preventing her from hiring clerks and reviewing panel opinions circulated before publication.

2. Amended Complaint at 31, available at https://tinyurl.com/4avc3ddw.

applied constitutional challenges to the council's authority—even though Judge Newman was challenging *ultra vires* actions and determinations, as well as seeking prospective relief to which section 357(c) is inapplicable. App. 9a–18a; App. 59a–71a. Judge Newman sought rehearing en banc and asked the D.C. Circuit to reconsider *McBryde*, but the petition was denied. App. 85a–86a.

The Court should grant certiorari and hold that section 357(c) does not preclude jurisdiction over challenges to *ultra vires* orders and determinations. The Court should also hold that section 357(c) allows litigants to seek prospective relief that enjoins the issuance of future orders or determinations. Judge Newman may therefore assert *all* of her claims—both statutory and constitutional—to the extent that she seeks forward-looking relief to prevent future unlawful actions.

OPINIONS BELOW

The opinion of the D.C. Circuit Court of Appeals is available at 151 F.4th 472 and reproduced at App. 1a–23a. The district court's opinions are available at 717 F. Supp. 3d 43 and 743 F. Supp. 3d 62 and reproduced at App. 24a–40a and App. 41a–84a.

The order of the D.C. Circuit Court of Appeals denying rehearing en banc is available at 2025 WL 3765492 and reproduced at App. 85a–86a.

JURISDICTION

The D.C. Circuit Court of Appeals issued its opinion on August 22, 2025. App. 1a. Judge Newman filed a timely petition for rehearing en banc on September 19, 2025, but the D.C. Circuit denied en banc rehearing on December

29, 2025. Judge Newman timely filed this petition on March 12, 2026.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 is codified at 28 U.S.C. § 351 et seq. and set forth in the appendix at App. 87a–101a.

STATEMENT

For the past three years, Chief Judge Kimberly Moore, acting as complainant and leading the administrative process, has sought to remove Judge Pauline Newman as an active judge on the Federal Circuit. Chief Judge Moore has acted on the pretense that Judge Newman is physically and mentally unfit to continue serving as a judge,[3] even though Judge Newman, at the age of 98, remains an "unusually cognitively intact . . . woman" who appears "20 or more years younger than her stated age"[4]—and even though this Court only two terms ago announced a ruling that reversed the 10-2 en banc Federal Circuit and adopted much of the reasoning in Judge Newman's dissent from that en banc decision. *See Rudisill v. McDonough*, 601 U.S. 294 (2024).[5] Judge Newman has

3. The complaint that Chief Judge Moore initiated against Judge Newman included multiple false statements, including a baseless allegation that Judge Newman had suffered a heart attack and subsequently never resumed a full docket. *See infra*, note 7.

4. Expert Report of Dr. Aaron G. Filler at 28, 40 available at https://tinyurl.com/5eczych9.

5. Judge Newman published her now-vindicated dissent in *Rudisill* on December 15, 2022—less than three months before Chief

(continued…)

resisted Chief Judge Moore's campaign of intimidation and continues to hold office (in name only) as a Federal Circuit judge in active service.

Chief Judge Moore has invoked the Disability Act improperly to perpetually sideline Judge Newman until she gives in to the bullying and retires or takes senior status, doing far more than suspending her from new case assignments. The relevant provisions of the Disability Act are described below.

I. THE DISABILITY ACT

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, also known as the Disability Act, allows the judicial council of each circuit to investigate allegations of misconduct or disability against its judges. *See* 28 U.S.C. § 351 et seq.; App. 87a–101a. In practice, whenever allegations against a circuit judge have advanced beyond the preliminary investigatory stage, in every prior case, the chief judge or judicial council has requested (and been granted) a transfer to another judicial council. That is, chief judges have only kept complaints against fellow circuit judges when dismissing them, leaving any more substantive investigations to another judicial council.

The process begins when a written complaint alleging misconduct or disability is filed with the clerk of the court of appeals for that circuit. *See* 28 U.S.C. § 351(a). The chief

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Judge Moore began pressuring her to resign under the pretense that Judge Newman was cognitively unfit to decide cases. *See Rudisill v. McDonough*, 55 F.4th 879, 888–96 (Fed. Cir. 2022) (en banc) (Newman, J., dissenting).

judge of the circuit may also "identify a complaint" by written order even when no complaint has been formally submitted to the clerk by a third party. *See* 28 U.S.C. § 351(b). The chief judge of the circuit must promptly review the complaint and either dismiss it, transfer it, or else convene a special committee to further investigate the allegations. *See* 28 U.S.C. §§ 352–353. If the chief judge convenes a special committee, then the special committee must "conduct an investigation as extensive as it considers necessary." 28 U.S.C. § 353(c). After concluding its investigation, the special committee must "file a comprehensive written report thereon with the judicial council of the circuit." *Id.*

When the judicial council receives a report from a special committee, the Disability Act allows the judicial council to conduct additional investigations or dismiss the complaint. *See* 28 U.S.C. § 354(a)(1)(A)–(B). But if the judicial council declines to dismiss the complaint, the Disability Act requires the council to take "appropriate" action, which may include one or more of the following:

> (i) ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint;
>
> (ii) censuring or reprimanding such judge by means of private communication; and
>
> (iii) censuring or reprimanding such judge by means of public announcement.

28 U.S.C. § 354(a)(2)(A). Notably, the Disability Act does not authorize actions that would prohibit a sitting circuit

judge from participating in en banc proceedings or prevent a judge from continuing to hire law clerks. If the judge at issue is an Article III judge, then the council may also issue a certificate of disability under 28 U.S.C. § 372 or ask the judge to voluntarily retire. *See* 28 U.S.C. § 354(a)(2)(B). The Disability Act expressly prohibits the judicial council from removing an Article III judge from office. *See* 28 U.S.C. § 354(a)(3)(A) ("Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.").

A judge who is aggrieved by an action of the judicial council may petition the Judicial Conference of the United States for review. *See* 28 U.S.C. § 375(a). But the Disability Act limits judicial review of the "orders and determinations" issued under the Act: "Except as expressly provided in this section and section 352(c), all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. § 357(c).

II. THE ADMINISTRATIVE PROCEEDINGS AGAINST JUDGE NEWMAN

On December 15, 2022, Judge Newman authored one of her characteristically excellent dissents from a 10-2 en banc decision in *Rudisill v. McDonough*, 55 F.4th 879, 888–96 (Fed. Cir. 2022) (Newman, J., dissenting). This Court later adopted much of Judge Newman's reasoning when it reversed the Federal Circuit. *See Rudisill v. McDonough*, 601 U.S. 294 (2024). Some two months after Judge Newman wrote that dissent, Chief Judge Moore removed her from normal panel assignments. *See* Report

and Recommendation of the Special Committee of July 31, 2023 (hereinafter "July 31 Report") at 77–79, available at https://tinyurl.com/4az95aat.[6] Judge Newman had not violated objective criteria that warranted the removal. *Id.* at 79.

The next month, on March 8, 2023, the Judicial Council ordered that Judge Newman not hear any more cases. *Id.* at 17 n.6, 54. And Chief Judge Moore told Judge Newman she could either retire or "consider senior status." *In re Complaint No. 23-90015* (Fed. Cir. Mar. 24, 2023) (hereinafter "March 24 Order") at 5, available at http://bit.ly/4pr3smb. Judge Newman refused. *See* July 31 Report at 4–5. Then, on March 24, 2023, Chief Judge Moore acted on her own initiative to "identify a complaint" against Judge Newman under the Disability Act. *See* March 24 Order at 6; 28 U.S.C. § 351(b). Chief Judge Moore alleged that "there is probable cause to believe that Judge Newman's health has left her without the capacity to perform the work of an active judge." *See* March 24 Order at 5. To investigate Judge Newman, Chief Judge Moore convened a "special committee" comprising Chief Judge Moore and circuit judges Sharon Prost and Richard Taranto. *See* July 31 Report at 1.

The order of March 24, 2023, relied on the personal knowledge of Judge Newman's Federal Circuit colleagues. Although none of them had initiated a complaint, Judge Moore claimed that other "judges and staff" had brought concerns about Judge Newman to Chief Judge

6. Specifically, Judge Moore removed Judge Newman from the April 2023 hearing calendar, which was issued at the end of February 2023. *See* July 31 Report at 77–78.

Moore's attention "based on their personal experience." *See* March 24 Order 2. The order also referred to statements that Judge Newman had made "during deliberati[ons]" with other judges (*i.e.*, when no one other than other Federal Circuit judges were in the room), *id.*, and stated that fully "half of the active judges" had expressed concerns about Judge Newman, *id.* at 5–6. The order falsely asserted that two years earlier, in 2021, Judge Newman had "suffer[ed] a heart attack and undergo[ne] coronary stent surgery." *Id.* at 1.[7]

Because the investigation was initiated by Chief Judge Moore and based on accusations leveled by her fellow Federal Circuit judges, Judge Newman asked the Chief Judge and the Special Committee to transfer the investigation to another circuit, given that members of the Special Committee would be serving as witnesses and noting the established routine practice of transferring complaints against circuit judges requiring more than minimal investigation to special committees outside the circuit of the judge under investigation. *See* Letter from Gregory Dolin, Counsel for Judge Pauline Newman, to Chief Judge Kimberly A. Moore et al. at 3 (Apr. 21, 2023), available at https://tinyurl.com/y5rrtd69. Despite their blatant conflict of interest in serving simultaneously as complainant, witnesses, and judges, the Chief Judge and Special

7. Judge Newman never suffered a heart attack (nor a "cardiac episode," as the Special Committee later described it, *see* Report & Recommendation of July 31, 2023, at 14), and she submitted extensive medical records to prove it. So even the initial investigation was predicated on a falsehood.

Committee members denied the request. *See* Order of May 3, 2023, available at https://tinyurl.com/y2hkhpsm.[8]

Before the investigation even began, Chief Judge Moore removed Judge Newman from normal panel assignments. *See* Order of April 6, 2023 at 3–4, available at https://tinyurl.com/yc4uszpt. This was improper because the Disability Act does not authorize sanctions or suspensions until *after* the investigation concludes. *See* 28 U.S.C. § 354(a); Rules for Judicial-Conduct and Judicial-Disability Proceedings Rule 20(b)(1)(D). When Judge Newman e-mailed Chief Judge Moore and asked her to reconsider her exclusion of Judge Newman from the entire June hearing calendar,[9] Chief Judge Moore rebuked Judge Newman for replying to this email and one relating to clerks via an email list named "All Judges." *See* Order of April 6, 2023, at 3–5. Because that list included the email addresses of law clerks and court staff, Chief Judge Moore declared use of the email list possible judicial misconduct. *Id.* at 6–7. She broadened the Special

8. The Judicial Council of the Federal Circuit upheld that refusal to transfer on efficiency grounds: "If the investigation had been transferred to another court, unknown to the staff and less accessible to them, the investigation could not have been carried out in the same expeditious manner. Acting expeditiously is one of the Committee's charges[.]" Order of the Judicial Council of the Federal Circuit at 46, *In re Complaint No. 23-90015* (Fed. Cir. Sept. 20, 2023).

9. *See* E-mail from Judge Pauline Newman to Chief Judge Kimberly A. Moore, April 5, 2023, as quoted in Order of April 6, 2023, at 3 ("To Chief Judge Moore, Yesterday's notice of the June appeal paneling again excludes me from the entire June hearing calendar, despite my request. Please correct this action."), available at https://tinyurl.com/yc4uszpt.

Committee's investigation to include "Judge Newman's disclosure of a confidential employment dispute matter and statements made in regard to that matter." Order of April 6, 2023, at 7, https://tinyurl.com/yc4uszpt; *see also id.* ("I conclude there is sufficient cause to believe that Judge Newman's disclosure of a confidential employment dispute matter and statements made in regard to that matter may constitute additional misconduct and may also be relevant to the matters already under investigation identified in the March 24, 2023 order . . . . I accordingly expand the scope of the investigation to include an investigation into this newly-identified matter.").

The Special Committee ordered Judge Newman to submit to neurological and neuropsychological testing by doctors chosen by the committee. *See* Order of April 7, 2023, available at https://tinyurl.com/mr3rdyah. The committee also ordered Judge Newman to provide her "hospital records, medical, psychiatric or psychological, and other health-professional records" to the committee-selected neurologist. *See* Order of April 17, 2023, at 1–2, available at https://tinyurl.com/2p9jwvty; Order of May 16, 2023, at 6, available at https://tinyurl.com/3xns8zum. In response Judge Newman submitted expert reports from Dr. Ted L. Rothstein and Dr. Regina M. Carney, based on hours of testing and observation, attesting that her cognitive abilities are fully intact and that she remains capable of performing the functions of her office. *See*

Order of the Judicial Council of the Federal Circuit, Sept. 20, 2023, at 50–51.[10]

The Special Committee rejected these expert reports and declared Judge Newman guilty of misconduct for refusing to "cooperate" with the committee.[11] *See* Report & Recommendation of July 31, 2023, at 109–11, available at https://tinyurl.com/4az95aat. It recommended that Judge Newman "not be permitted to hear any cases . . . at the panel or en banc level" for a period of one year "subject to consideration of renewal." *Id.* at 109–11. The judicial

10. All medical records relied on or reviewed by these experts were produced to the judicial council's attorneys. No expert hired by the judicial council stated that Judge Newman was impaired, and the judicial council made no such finding at any time.

11. The Special Committee eventually found Judge Newman guilty of misconduct for refusing to provide her medical records to (and submit to an examination by) the committee-selected neurologist, on the pretense that this qualified as a "refusal to cooperate with the Committee." *See* Report & Recommendation of July 31, 2023, at 109–11, https://tinyurl.com/4az95aat. But refusing to cooperate with an investigation qualifies as judicial misconduct only when the refusal is unaccompanied by "good cause." *See* Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 4(a)(5) ("Cognizable misconduct includes refusing, *without good cause shown*, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules" (emphasis added)). Judge Newman had "good cause" for refusing to cooperate because she had a constitutional due-process objection to Chief Judge Moore's identifying the complaint and then serving as both a witness and a judge. Other judges on the Federal Circuit were also serving as both witnesses and judges in the matter. She had also been prematurely removed from panels before the investigation began. That is why Judge Newman has said all along that she would cooperate further once the matter was transferred to another circuit, but Chief Judge Moore and the judicial council refused Judge Newman's requests for a transfer.

council approved the Special Committee's recommendation on September 20, 2023. *See* Judicial Council Order of September 20, 2023, at 71–73, available at https://tinyurl.com/mue496ru. Judge Newman sought review before the Judicial Conference of the United States. The JC&D Committee denied her petition on February 7, 2024, affirming the suspension order while leaving her constitutional arguments unaddressed. *See* Memorandum of Decision at 14, 27, *In re Complaint No. 23-01* (Comm. on Jud. Conduct & Disability of the Jud. Conf. of the U.S. Feb. 7, 2024), available at https://tinyurl.com/298emk3v. As the D.C. Circuit put it:

> In this case … neither the Judicial Council's orders nor the JC&D Committee's decision explicitly reflects genuine consideration of Judge Newman's constitutional arguments. None of the orders appear to address any argument by Judge Newman that her suspension violates the Constitution by effectively removing her from office. The JC&D Committee acknowledged that Judge Newman argued for a transfer in constitutional terms, but its order does not much discuss constitutional due process case law.

App. 15a n.3 (citations omitted).

On September 6, 2024—14 days before the expiration of the one-year suspension order—the judicial council renewed Judge Newman's suspension for a second year. *See* Judicial Order of September 6, 2024, available at https://tinyurl.com/2vs2v627. On August 29, 2025, the judicial council issued a third one-year suspension order. *See*

Judicial Council Order of August 29, 2025, available at https://tinyurl.com/4t3k7y5t.[12] The judicial council has continued issuing and renewing these one-year suspension orders because Judge Newman has not agreed to receiving a mental evaluation from a neurologist chosen by the Special Committee.[13]

The upshot is that Judge Newman has been barred from exercising any functions of her judicial office since November 8, 2023—the date on which she issued her last opinion. Chief Judge Moore has prohibited Judge Newman from sitting en banc, leaving the Federal Circuit operating a judge short of its statutory allotment and in violation of a statute requiring all active Federal Circuit judges to sit in en banc proceedings, unless recused or disqualified.[14] Chief Judge Moore has also cut Judge

12. Judge Newman appealed this suspension order to the Judicial Conduct and Disability Committee of the Judicial Conference in October 2025, and her appeal remains pending. But the committee showed no interest in Judge Newman's constitutional claims in rejecting her previous appeal, and we have no reason to expect a different outcome this time around.

13. Even then, the judicial council will not commit to reinstating Judge Newman if she were to submit to and pass the medical examinations. *See*, *e.g.*, Order of August 29, 2025, at 9 ("[T]ransfer will be reconsidered once the ordered testing is completed and the proceeding turns to the ultimate question of disability."). The judicial council has not requested transferring the proceedings to another circuit despite the longstanding practice of transferring investigations of circuit judges so that their circuit-court colleagues (who are typically far from disinterested) will not sit in judgment of the judge under investigation.

14. *See* 28 U.S.C. § 46(c) ("A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95–486

(continued…)

Newman off from the ceremonial functions of her court, as well as pre-publication opinion distributions and administrative matters. She has even prohibited Judge Newman from hiring new law clerks. Judge Newman has, for all practical effect, been removed from office despite Article III's guarantee of tenure during good behavior—and despite the Disability Act's strict admonition that "[u]nder no circumstances may the judicial council order removal from office"[15]—and without the impeachment and conviction needed to remove Senate-confirmed judges from office against their will.

III. THE FEDERAL COURT PROCEEDINGS BELOW

On May 10, 2023, Judge Newman sued Chief Judge Moore, the members of the Special Committee, and the Judicial Council of the Federal Circuit and its members in federal district court. On June 27, 2023, Judge Newman filed an amended complaint that sought both retrospective and prospective relief against the named defendants. The requested retrospective relief would declare unlawful and set aside the previously issued

(92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.").

15. 28 U.S.C. § 354(a)(3)(A).

suspension order of the judicial council.[16] But Judge Newman also sought prospective relief that would enjoin the judicial council from taking action against her in the future. Among other things, Judge Newman asked the court to "enjoin Defendants from continuing any such proceedings" against her. *See* Amended Complaint at 31, available at https://tinyurl.com/4avc3ddw. Judge Newman also asked the court to "order the termination of any further investigation of Plaintiff by the Judicial Council of the Federal Circuit." *Id.* Finally, Judge Newman's catchall request sought "other relief as the Court deems just and proper." *Id.*

Judge Newman also raised a litany of statutory and constitutional claims against the judicial council. She alleged that the suspension orders violated her constitutional rights by removing her from office absent impeach-

16. *See, e.g.*, Amended Complaint at 31, available at https://tinyurl.com/4avc3ddw (asking the court to: "(5) declare any decisions by any and all Defendants authorizing a limitation of Plaintiff's docket or other special restrictions on her actions as a federal judge, including, but not limited to the reduction in statutorily authorized number of staff to be unconstitutional and/or not in accordance with the law, and enjoin Defendants from continuing any such actions; (6) declare any orders of the Special Committee requiring Plaintiff to undergo a compelled medical or psychiatric examination and/or disciplining Plaintiff for objecting in good faith to these demands to be unconstitutional and enjoin Defendants from enforcing the foregoing unconstitutional orders; (7) declare any orders of the Special Committee requiring Plaintiff to surrender her private medical records and/or disciplining Plaintiff for objecting in good faith to these demands to be unconstitutional and enjoin Defendants from enforcing the foregoing unconstitutional orders").

ment and denying her due process of law. *Id.* at 25. She argued that the judicial council lacks statutory authority to issue a series of self-perpetuating, one-year suspension orders that may be renewed indefinitely. *Id.* at 24. And Judge Newman brought a "facial" constitutional challenge to the provision of the Disability Act that authorizes temporary suspension of further case assignments. *Id.* at 22; *see also* 28 U.S.C. § 354(a)(2)(A)(i).

The district court held that 28 U.S.C. § 357, as construed in *McBryde*, allowed it to consider only Judge Newman's "facial" constitutional challenge to 28 U.S.C. § 354(a)(2)(A)(i), and it dismissed Judge Newman's remaining claims for lack of subject-matter jurisdiction. App. 59a–71a. The district court also rejected Judge Newman's facial constitutional challenge to section 354(a)(2)(A)(i) on the merits. App. 79a–81a. The D.C. Circuit affirmed, holding that *McBryde* allows Judge Newman to present only her "facial" constitutional challenge to section 354(a)(2)(A)(i), and rejecting that claim on the merits because Judge Newman could not establish that section 354(a)(2)(A)(i) is "unconstitutional in all applications." App. 18a–19a (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The court of appeals acknowledged that the constitutional issues raised by Judge Newman were important and serious:

> Judge Newman has posed important and serious questions about whether these Judicial Conduct and Disability Act proceedings comport with constitutional due process principles and whether her ongoing suspension comports with

> the structure of our Constitution. That we do not answer those questions is no indication that her arguments lack merit, nor signals how we might have addressed them if we were able.

App. 21a. The panel also recognized that its decision to preclude Judge Newman from raising her as-applied constitutional claims, in federal court, itself presented "constitutional concerns":

> The seeming absence of a judicial forum to address Newman's as-applied constitutional claims itself raises constitutional concerns. Judge Newman presents substantial arguments that her suspension—which has now lasted nearly two years, with a third year recommended—threatens the principle of judicial independence and may violate the separation of powers. She further contends that the refusal to transfer her case to a different circuit deprived her of an impartial tribunal, which if correct would raise due process concerns.

App. 22a (citation omitted). But the panel insisted that its hands were tied by *McBryde*, and that only the en banc D.C. Circuit could overrule the jurisdictional limits imposed by that ruling. App. 22a–23a ("Those doubts, however, would at most suggest that *McBryde* was wrong the day it was decided, not that it does not bind us now."). Judge Newman sought rehearing en banc, asking the full court to overrule *McBryde*, but the court denied her request. App. 85a–86a.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition and restore the critical aspects of judicial lifetime tenure and judicial independence that the Constitution safeguards. It should resolve whether the "orders" and "determinations" described in section 357(c) include *ultra vires* acts that exceed the authority conferred on the judicial council by the Disability Act and the Constitution. The Court should also make clear that section 357(c) allows litigants to seek prospective relief that enjoins future unlawful (or allegedly unlawful) actions. Section 357(c), at most, shields only the *past* orders and determinations from judicial review; it does nothing to stop courts from awarding remedies that restrain or control future activity.

I. THE COURT SHOULD GRANT CERTIORARI AND HOLD THAT 28 U.S.C. § 357(c) DOES NOT SHIELD ULTRA VIRES ACTS FROM JUDICIAL REVIEW

The Court should grant certiorari and resolve whether and to what extent the respondents can hide behind section 357(c) when issuing administrative "orders" and "determinations" that exceed their statutory and constitutional powers. Section 357(c) provides that:

> Except as expressly provided in this section and section 352(c), all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

28 U.S.C. § 357(c). Although this statute refers to "all orders and determinations," it does not shield from judicial review everything that happens to be labeled an "order"

or "determination." Rather, section 357(c) exempts from judicial review only the "orders" and "determinations" made under the authorities conferred by the Disability Act. If a judicial council issued an "order" raising taxes, pardoning a convicted criminal, or declaring war on Venezuela, this so-called order would not be spared from judicial review on account of section 357(c) because it is not an "order" or "determination" authorized by the Disability Act. It is instead an *ultra vires* act issued without *any* statutory or constitutional authority whatsoever, and the courts retain their authority to review and set aside such misbegotten administrative "orders" notwithstanding the bar on judicial review in section 357(c).

This Court has often construed statutes that prohibit judicial review of agency action to nonetheless preserve the courts' authority to set aside *ultra vires* acts taken without any statutory or constitutional authority. In *Johnson v. Robison*, 415 U.S. 361 (1974), for example, Congress had prohibited judicial review of certain "decisions" made by the Administrator of Veterans' Affairs, declaring that:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision.

Id. at 367 (alterations in original) (quoting 38 U.S.C. § 211(a) (1970). The Court nonetheless held that litigants could collaterally attack "decisions" of the Administrator if they were challenging the constitutionality of the

underlying statutes that vested the Administrator with decision-making authority. The holding of *Johnson* is eminently defensible, because an unconstitutional statute cannot confer *any* decision-making authority on an agency official. *See, e.g.*, *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) ("[A]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."); *Ex parte Siebold*, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law."). So *Johnson* construed the statutory prohibition on judicial review to apply only to "decisions" made pursuant to the powers that Congress had constitutionally conferred upon the Administrator of Veterans' Affairs.

Webster v. Doe, 486 U.S. 592 (1988), is in a similar vein. The statute in *Webster* provided that the Director of Central Intelligence:

> may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States.

Id. at 594 (quoting 50 U.S.C. § 403(c) (1988)). When a terminated CIA employee sued and claimed that he had been fired for unconstitutional reasons, the Court held that it could review his claim under the Administrative Procedure Act—notwithstanding the prohibition on judicial review of decisions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). And rightly so: A statute such as 50 U.S.C. § 403(c) can never vest an agency official with

"discretion" to violate the Constitution, no matter how sweeping its language, so the seemingly absolute discretion conferred by section 403(c) still left the courts with room to review constitutional challenges to the CIA director's firing decisions.

The Disability Act, like 50 U.S.C. § 403(c), cannot authorize the judicial council (or anyone else) to act in violation of the Constitution. So the administrative "orders" and "determinations" described in section 357(c) should not refer to any "order" or "determination" that happens to emanate from a judicial council, a special committee, or the Judicial Conference of the United States. Instead, one can rely on *Johnson* and *Webster* to limit section 357(c) to the "orders" and "determinations" that Congress has constitutionally authorized in the Disability Act. This construction of section 357(c) will preserve the courts' jurisdiction to entertain collateral attacks on previously issued "orders" and "determinations" that violate the Constitution or exceed the scope of the statutory powers conferred by the Disability Act.

Judge Newman has raised a host of constitutional challenges to her suspension orders, and she claims that the judicial council has exceeded the scope of its statutory powers and violated the Constitution (and the Act) by effectively removing her from office despite the life tenure promised by Article III. *See* 28 U.S.C. § 354(a)(3)(A) ("Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior."). The Court should grant certiorari to decide whether and to what extent Judge Newman can collaterally attack the previously issued suspension

orders under section 357(c), notwithstanding its prohibition on judicial review, on the ground that the statute shields only the "orders" and "determinations" issued within the scope of constitutionally conferred authorities.

II. THE COURT SHOULD GRANT CERTIORARI AND HOLD THAT 28 U.S.C. § 357(c) DOES NOT FORECLOSE CLAIMS THAT SEEK PROSPECTIVE RELIEF

McBryde failed to recognize that section 357(c) preserves the rights of litigants to sue for *prospective* relief that enjoins the issuance of *future* orders and determinations under the Disability Act. Section 357(c), at most, bars judicial review of *past* orders and determinations; it does nothing to stop Judge Newman (or other litigants) from suing to enjoin a judicial council's *future* actions. Judge Newman's complaint alleges that the respondents will renew Judge Newman's one-year suspension orders indefinitely,[17] and it seeks prospective relief that will enjoin the respondents from issuing future suspension orders against her.[18] And nothing in section 357(c) bars

17. *See* Amended Complaint at ¶ 71, available at https://tinyurl.com/4avc3ddw ("Defendants believe they have authority to suspend and may continue their suspension of Judge Newman even in the absence of any finding of misconduct."); These allegations must be assumed true at this stage of the litigation. *See Manhattan Community Access Corp. v. Halleck*, 587 U.S. 802, 806 (2019) ("Because this case comes to us on a motion to dismiss, we accept the allegations in the complaint as true.").

18. *See* Amended Complaint, at p. 31, available at https://tinyurl.com/4avc3ddw (demanding relief that would, among other things, "order that Judge Newman's ability and authority to hear cases be immediately restored" and "order the termination of any further

(continued…)

courts from enjoining future conduct that is alleged to violate statutory or constitutional rights.

That section 357(c) does not bar such relief is readily apparent from its text:

> Except as expressly provided in this section and section 352(c), all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

28 U.S.C. § 357(c). The statute accords non-reviewability only to orders and determinations that have already issued, and it blocks judicial review only of those extant orders and determinations. This leaves an accused judge free to sue for prospective relief lest the improper and illegal orders and determinations be repeated. Here, such relief would prevent the judicial council from renewing or reissuing the suspension orders in the future. And there is certainly no "clear indication" that section 357(c) strips the courts of jurisdiction to consider claims that seek prospective relief. *See Bowe v. United States*, 146 S. Ct. 447, 456 (2026) ("clear indication" needed before a statute is construed to deprive federal courts of jurisdiction to review claims for relief).

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investigation of Plaintiff by the Judicial Council of the Federal Circuit, except insofar as necessary to transfer the matter to the judicial council of another circuit"); *id.* at ¶ 83 (requesting relief that would "enjoin[]" the defendants "from continuing the investigation into Judge Newman except insofar as any actions are required to transfer this matter to a judicial council of another circuit.")

McBryde led the D.C. Circuit panel to conclude that Judge Newman could pursue only her "facial" constitutional challenge to 28 U.S.C. § 354(a)(2)(A)(i), because *McBryde* held that courts could consider only facial constitutional challenges of this sort when judges sue in response to suspension orders. *See McBryde*, 264 F.3d at 58; App. 10a–12a. But Judge Newman is seeking prospective relief, in addition to remedies that would set aside the past orders and determinations of the judicial council.[19] Even if this Court were to determine that, under section 357(c), Judge Newman cannot bring any claims that would lead to a vacatur or modification of those previously issued orders, she still would remain free to litigate any claim that seeks forward-looking relief that would enjoin the issuance of a future agency action. Both *McBryde* and the panel opinion failed to recognize that section 357(c) turns on the requested relief rather than on whether the plaintiff is asserting "facial" as opposed to "as-applied" constitutional claims.

At the very least, the Court should grant the petition for certiorari, vacate, and remand (GVR) in light of the intervening decision in *Bowe v. United States*, 146 S. Ct. 447 (2026), which forecloses any construction of section 357(c) that would close the doors on Judge Newman's claims for purely prospective relief. *Bowe* establishes that jurisdiction-stripping provisions such as section 357(c) must be construed according to their enacted language—and they cannot be expanded beyond their words to reach situations that might seem similar to yet fall outside the category of claims that the statute places beyond the jur-

19. *See* notes 17–18, *supra*, and accompanying text.

isdiction of the courts. *See id.* at 454–62. More specifically, *Bowe* held that 28 U.S.C. § 2244(b)(3)(E), which provides that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive [habeas corpus] *application* shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari,"[20] does not in any way limit this Court's jurisdiction to review a court of appeals' denial of authorization to file a second or successive *motion* under 28 U.S.C. § 2255. *See Bowe*, 146 S. Ct. at 456 ("[T]he certiorari bar in [28 U.S.C. § 2244(b)(3)(E)] speaks to 'second or successive applications,' which federal prisoners do not file").

Like the statute at issue in *Bowe*, the language of section 357 is "both narrow and specific,"[21] as it insulates only previously issued "orders and determinations" from judicial review. *See* 28 U.S.C. § 357(c) ("Except as expressly provided in this section and section 352(c), all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."). *Bowe* precludes any court from expanding section 357(c) beyond its literal terms, or using section 357(c) to decline jurisdiction over anything other than collateral attacks on extant "orders and determinations." And *Bowe* further requires courts to find a "clear indication" in a statute's language before construing that law to deprive the courts of jurisdiction to consider a claim for prospective relief. *See Bowe*, 146 S. Ct. at 457.

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20. 28 U.S.C. § 2244(b)(3)(E) (emphasis added).

21. *Bowe*, 146 S. Ct. at 458.

Neither *McBryde* nor the panel opinion applied the "clear indication" rule from *Bowe* before interpreting section 357(c) to block Judge Newman's statutory and as-applied constitutional claims. Nor could they, as *Bowe* was announced on January 9, 2026—11 days after the D.C. Circuit denied Judge Newman's petition for rehearing en banc. If the Court is unwilling to grant certiorari and decide the questions presented, it should at least grant, vacate, and remand the petition so that the D.C. Circuit may reconsider its decision in light of the intervening ruling in *Bowe*.

III. THE COURT SHOULD GRANT CERTIORARI DESPITE THE ABSENCE OF A CIRCUIT SPLIT

McBryde has been the law of the D.C. Circuit for nearly 25 years, and the court showed no interest in revisiting it when Judge Newman sought rehearing en banc. App. 85a–86a. But awaiting further percolation is unlikely to produce a circuit split, as litigation over judicial-suspension orders is thankfully rare, and 28 U.S.C. § 357(c)'s apparent bar on judicial review is likely to deter litigation by those who do not realize that its seemingly sweeping language still allows courts to consider claims for prospective relief.

But the rarity of litigation over judicial suspensions does not diminish the importance or certworthiness of these issues, especially in light of the recent attacks on the independence of Article III judges. The Constitution provides Article III judges with life tenure and salary protection (among other protections) so they can apply the law without fear of retaliation from those who dislike their decisions. U.S. Const. art. III, § 1; *see* The Federalist Nos.

78–79 (Alexander Hamilton). And the Constitution empowers Congress—and only Congress—to remove Presidentially-appointed, Senate-confirmed judges through the impeachment process when a judge engages in misconduct that warrants ouster from office. *See* U.S. Const. art. I, § 2, cl. 5.

Chief Judge Moore is using the Disability Act to circumvent these constitutional protections, in an attempt to implement a constructive discharge of a judicial colleague with whom she no longer wishes to serve. These heavy-handed tactics cannot be tolerated if the independence of Article III judges is to be preserved. Other judges who are watching what is happening to Judge Newman can only wonder if a similar fate will befall them if they fail to stay on the good side of their chief judge. This Court cannot allow the internal politics of a court to sideline a Senate-confirmed judge and threaten the independence of other judges who may fear similar reprisals from their colleagues. All of this needs to be nipped in the bud before any further damage is done to the Constitution's protections of judicial independence.

Judge Newman's colleagues have thus far succeeded in silencing her frequently dissenting voice on the court, despite her presidential appointment and lifetime tenure. And, indeed, her effective removal from the bench has had a dramatic effect on the number of dissents issued in the Federal Circuit. One recent study concluded that since Judge Newman's removal from the bench, the rate of

dissent in the Federal Circuit has dropped from 12% to 4%.[22] Just losing Judge Newman's own dissents does not fully account for that drop. This means that other judges are dissenting less often than they used to when Judge Newman was actively participating and setting a good example. Or, perhaps what has happened to Judge Newman has raised the perceived costs of dissenting and intimidated some judges at the margins from authoring dissents. Either way, the Federal Circuit and those who litigate before it are worse off with the lack of vibrant dissent to stimulate more careful thinking and adjudicating.

Attacks on the independence of the judiciary have been increasing from both the left and right, and from the executive, legislative, and even within the judicial branch. For those reasons—and for the reasons given above—it is imperative for the Court to step in and issue a strong statement in support of judicial independence and make clear that the only appropriate method of removing a federal judge is through the constitutional impeachment process.

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22. *See* Dennis Crouch, *Federal Circuit Dissent Rates Collapse After Newman's Removal*, PatentlyO (Mar. 3, 2026), https://bit.ly/46Xb6OG [https://perma.cc/84SW-MZEQ].

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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March 12, 2026

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 24, 2025 Decided August 22, 2025

No. 24-5173

PAULINE NEWMAN, HONORABLE; CIRCUIT JUDGE,
APPELLANT

v.

KIMBERLY A. MOORE, HONORABLE; IN HER OFFICIAL CAPACITIES AS CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, CHAIR OF THE JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND CHAIR OF THE SPECIAL COMMITTEE OF THE JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:23-cv-01334)

Gregory Dolin argued the cause for appellant. With him on the briefs were *John J. Vecchione* and *Andrew Morris*.

David C. Tryon was on the brief for *amicus curiae* the Buckeye Institute in support of appellant.

Ilya Shapiro was on the brief for *amici curiae* Manhattan Institute, et al. in support of appellant.

Richard A. Samp was on the brief for *amici curiae* Honorable Janice Rogers Brown, et al. in support of appellant.

Christopher A. Zampogna was on the brief for *amicus curiae* the Bar Association of the District of Columbia in support of appellant.

Melissa N. Patterson, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief were Brian M. Boynton, *Principal Deputy Assistant Attorney General*, at the time the brief was filed, *Mark R. Freeman* and *Maxwell A. Baldi*, Attorneys.

Probir K. Bondyopadhyay, Ph.D., pro se, was on the brief for *amicus curiae* Probir K. Bondyopadhyay, Ph.D. in support of appellees.

Before: MILLETT, PILLARD, and GARCIA, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARCIA.

GARCIA, *Circuit Judge*: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 empowers circuit judicial councils to investigate allegations of misconduct or disability lodged against fellow judges. The Act also authorizes judicial councils to take "action" to address such allegations, including by "ordering that, on a temporary basis for a time certain, no further cases be assigned" to the judge in question. 28 U.S.C. § 354(a)(1)–(2).

In 2023, a Special Committee of the Federal Circuit opened an investigation into Judge Pauline Newman under the Act. The Committee asked Judge Newman to undergo medical examinations and produce medical records. Judge Newman refused, contending that those requests and the Committee's investigation were unlawful. In response, the Federal Circuit's Judicial Council suspended Judge Newman from receiving new case assignments for one year, subject to potential renewal. The Ju-

dicial Council in fact renewed that suspension in September 2024, and it will decide whether to do so again in September 2025.

In May 2023, Judge Newman filed this suit in district court, contesting her suspension on multiple grounds. She argued the Judicial Council violated her constitutional due process rights by refusing to transfer the matter to another circuit despite what she submits are stark conflicts of interest. She claimed that the Act's provision authorizing temporary case-assignment suspensions is facially unconstitutional. She contended, alternatively, that the case-suspension provision is unconstitutional as applied to her, because she has been effectively removed from office without being impeached. And she argued that the Judicial Council exceeded its statutory authority in imposing her suspension.

As the district court recognized, our ability to review Judge Newman's statutory and constitutional claims is largely foreclosed by binding precedent. In *McBryde v. Committee to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52 (D.C. Cir. 2001), this court held that Congress precluded our jurisdiction over statutory and as-applied constitutional challenges to judicial council orders. *Id.* at 58–63. Instead, *McBryde* concluded, Congress intended for those claims to be considered exclusively by the Judicial Conference. *Id.* This panel has no authority to depart from *McBryde*.

As a result, we have jurisdiction to consider only Judge Newman's facial constitutional challenge to the Act's case-suspension provision. Under well-settled standards for such claims, that facial challenge fails because—irrespective of whether the provision's applica-

tion to Judge Newman is constitutional—Judge Newman agrees that the provision has many other constitutional applications.

We therefore affirm the district court's judgment. As just explained, however, our reasons for affirming are unrelated to the strength of Judge Newman's statutory claim or as-applied constitutional claims. Nor does our decision reflect our views of the underlying dispute or of Judge Newman's suspension. Under *McBryde*, any recourse for Judge Newman must come from a judicial council or from the Judicial Conference, the entity statutorily empowered to review council decisions.

I

A

The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 "established a formal mechanism by which federal judges could be disciplined by fellow judges for 'conduct prejudicial to the effective and expeditious administration of the business of the courts.'" *Hastings v. Jud. Conf. of U.S.*, 770 F.2d 1093, 1095 (D.C. Cir. 1985) (quoting 28 U.S.C. § 351(a)). The Act outlines the following procedures.

First, "[a]ny person" may submit a complaint alleging judicial misconduct or disability to the clerk of the circuit where the accused judge sits. 28 U.S.C. § 351(a). The clerk will then transmit the complaint to the circuit's chief judge. *Id.* § 351(c). Alternatively, the chief judge may "identify a complaint" on her own initiative. *Id.* § 351(b).

The Act contemplates that proceedings on a complaint will ordinarily take place in the accused judge's own circuit. Congress, however, has also authorized the

Judicial Conference of the United States—a body which includes the Chief Justice of the United States, the chief judge and a district judge from each federal circuit, and the Chief Judge of the Court of International Trade—to promulgate rules governing the proceedings. *See id.* §§ 331, 358(a). One such rule provides that "[i]n exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding . . . to the judicial council of another circuit." R. for Jud. Conduct & Jud. Disability Procs. 26.

Upon receiving or identifying a complaint, the chief judge may dismiss the complaint, "conclude the proceeding" because "intervening events" render action unnecessary, or "certify the complaint" to an investigative "special committee." 28 U.S.C. §§ 352(b), 353(a). A special committee usually consists of the chief judge and two other judges. See id. § 353(a). If appointed, the special committee will "conduct an investigation as extensive as it considers necessary," id. § 353(c), with "full subpoena powers" at its disposal, id. § 356(a). Upon completing the investigation, the committee will prepare "a comprehensive written report," including "recommendations," for the circuit's judicial council, id. § 353(c)—a body that in the Federal Circuit includes all active judges, see id. §§ 332(a)(1), 363; Appellant's Brief 4 n.1.

After receiving a special committee's report, the circuit's judicial council may investigate further, and then must either dismiss the underlying complaint, or "take . . . action" to address it. 28 U.S.C. § 354(a). Potential "action" includes formally censuring the judge or requesting that the judge retire. *Id.* § 354(a)(2). The statute also authorizes a judicial council to "order[] that, on a temporary basis for a time certain, no further cases be

assigned to the judge." *Id.* § 354(a)(2)(A)(i). The Act specifies, however, that judicial councils are prohibited from "order[ing the] removal from office of any [Article III] judge appointed to hold office during good behavior." *Id.* § 354(a)(3)(A).

Following consideration by a judicial council, complaints can be reviewed by the Judicial Conference. *See id.* §§ 331, 357(a)–(b). A circuit's judicial council may directly refer or certify any complaint to the Judicial Conference. *Id.* § 354(b)(1)–(2). Alternatively, a "complainant or judge aggrieved by an action of the judicial council . . . may petition the Judicial Conference . . . for review." *Id.* § 357(a). Upon review, the Conference is empowered to take any of the actions available to a judicial council, or to inform the House of Representatives that it believes impeachment is warranted. *Id.* § 355. The Conference has delegated that responsibility for reviewing judicial council orders to its Committee on Judicial Conduct and Disability (the JC&D Committee). *See* R. for Jud. Conduct & Jud. Disability Procs. 21(a).

The Act, however, purports to preclude judicial review of any orders issued during such proceedings. The Act provides for only two forms of intrabranch review: the Judicial Conference's review of council orders, and a judicial council's review of certain orders issued by the circuit's chief judge. See 28 U.S.C. §§ 352(c), 357(a). But except for those review mechanisms, Section 357(c) of the Act—in a provision entitled "No Judicial Review"—states that "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." *Id.* § 357(c).

B

On March 24, 2023, Federal Circuit Chief Judge Kimberly A. Moore initiated a complaint against Judge Newman, who was then ninety-five years old and remained in active service. Citing reports from court staff, Chief Judge Moore's complaint claimed that Judge Newman could no longer manage her workload due to health- and age-related mental impairments. The Chief Judge certified the complaint to a Special Committee composed of herself and two other Federal Circuit judges.

As part of its investigation into the complaint, the Special Committee asked Judge Newman to submit medical records and undergo independent neurological and neuropsychological examinations. Judge Newman objected to the records' and tests' relevance and refused to comply. She also requested that the complaint be transferred to another circuit, arguing that due process precluded the judges on her circuit's Committee—whom she described as her "accusers" and as "witnesses" to relevant events—from also conducting the investigation and adjudicating the complaint. J.A. 38–39 ¶ 33. The Committee denied her transfer request without prejudice.

On July 31, 2023, the Committee submitted its report to the Judicial Council. The report concluded that Judge Newman's noncooperation itself constituted misconduct, as she had violated Judicial Conduct Rules prohibiting refusal to cooperate in an investigation without good cause. *See* R. for Jud. Conduct & Jud. Disability Procs. 4(a)(5). The Committee recommended that Judge Newman be suspended from receiving new case assignments

for at least one year, subject to renewal if her conduct continued.

On September 20, 2023, the Federal Circuit's Judicial Council issued an order affirming the Committee's conclusions and adopting its recommendation. Specifically, the Council found that the Committee had a reasonable basis to request the medical records and testing at issue, and it concluded that Judge Newman had not shown good cause for her refusal to comply. The Council ordered that Judge Newman not be permitted to hear any new cases "for a period of one year, . . . subject to consideration of renewal if [her] refusal to cooperate continues after that time and to consideration of modification or rescission if justified by an end of the refusal to cooperate." Jud. Council Order (Sept. 20, 2023), at 72–73. Judge Newman petitioned the JC&D Committee for review of her suspension. On February 7, 2024, the JC&D Committee affirmed the Council's order.

In the meantime, Judge Newman filed this suit in district court against Chief Judge Moore, the two other members of the Special Committee, and the Judicial Council. As amended, her complaint asserted eleven counts. Among them were allegations that the Council's proceedings violated her Fifth Amendment due process rights, that her suspension was not authorized by the Act, and that the Act's case-suspension provision was unconstitutional facially and as-applied.

The district court dismissed Judge Newman's complaint in part and granted the defendants' motion for judgment on the pleadings as to the remaining claims. The court concluded that it lacked jurisdiction over Judge Newman's as-applied and statutory challenges

and dismissed her facial constitutional challenge on the merits. Judge Newman appealed.

Before this court, Judge Newman continues to press her claim that the Council exceeded its statutory authority because her suspension is not "temporary" and "for a time certain." 28 U.S.C. § 354(a)(2)(A)(i). She also raises three constitutional challenges to her suspension. First, she argues that the case-suspension provision is facially unconstitutional. Second, she asserts that the provision is unconstitutional as it has been applied to her because it has resulted in her unlawful removal from office. The Constitution, Judge Newman emphasizes, provides that Article III judges "shall hold their Offices during good Behaviour." U.S. Const. Art. III, § 1. And, she submits, the only method to remove a judge from her "Office[]" is impeachment. See Appellant's Brief 27. In Judge Newman's view, because she no longer has pending cases to decide, she cannot exercise judicial power and the suspension has, in effect, unconstitutionally removed her from "Office[]" without impeachment. Appellant's Brief 23–28. Third, Judge Newman brings an as-applied challenge that the Council violated "basic norms of Due Process" by declining to transfer her case to another circuit, and instead "having the same individuals act as both witnesses and adjudicators." *Id.* at 5556, 58–60.

In September 2024, while this appeal was pending, the Federal Circuit's Judicial Council renewed Judge Newman's suspension for a second year. And in July 2025, the Special Committee recommended that her suspension be renewed for a third year.

II

The district court dismissed Judge Newman's as-applied constitutional claims and statutory claim for lack

of jurisdiction. Our court reviews that dismissal de novo. *Statewide Bonding, Inc. v. DHS*, 980 F.3d 109, 114 (D.C. Cir. 2020). We affirm. Binding circuit precedent dictates that federal courts lack jurisdiction to review those claims.

A

Recall that Section 357(c) of the Act provides that "all orders and determinations" of a judicial council or the Judicial Conference "shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. § 357(c). By its plain text, that provision appears to explicitly preclude judicial review of all challenges to covered orders.

The Supreme Court, however, has long instructed that a "serious constitutional question . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citation modified). Thus, "a statutory bar to judicial review" is understood to "preclude[] review of constitutional claims only if there is 'clear and convincing' evidence that the Congress so intended." *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 308 (D.C. Cir. 2014) (citation omitted). To ascertain the scope of an explicit preclusion provision like Section 357(c), our court "examine[s] both the text of the statute and the legislative history" and asks whether there is "clear-and-convincing evidence" of "congressional intent to bar judicial review of constitutional claims." *Id.* at 309.

Twenty-four years ago, our court applied those principles to determine the preclusive scope of Section 357(c). *See McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 264 F.3d 52, 58–63 (D.C. Cir. 2001). In *McBryde*, we considered a

judge's statutory and constitutional challenges to a judicial council order imposing sanctions under the Act. *See id.* at 54–55. We held that Section 357(c) explicitly precluded that judge's statutory claims. *Id.* at 59, 63–64. And we used the clear-and-convincing-evidence test to determine that Section 357(c) precluded some of that judge's constitutional claims. *Id.* at 58–63. Specifically, our court held that Section 357(c) did not preclude facial constitutional challenges given the "serious constitutional question" that would arise if such claims could not be brought in any forum. *Id.* at 58 (quoting *Webster*, 486 U.S. at 603). We also held, however, that Section 357(c) did "preclude review in the courts for as applied constitutional claims." *Id.* at 62–63. In the Act's legislative history, we discerned "clear and convincing" evidence of Congress's intent to channel review of as-applied challenges to the Judicial Conference alone and away from federal courts. *Id.*[1]

McBryde's jurisdictional holding was unambiguous: Section 357(c) bars from federal court statutory and as-applied constitutional challenges to judicial council or Judicial Conference orders issued under the Act. *Id.* at 59, 62–63.

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1. As this description of *McBryde* reflects, our court has treated judicial councils and the Judicial Conference as administrative rather than judicial bodies. *See McBryde*, 264 F.3d at 62–63; *Hastings v. Jud. Conf. of U.S.*, 829 F.2d 91, 103–04 (D.C. Cir. 1987); *cf. also Chandler v. Jud. Council of Tenth Cir.*, 398 U.S. 74, 83–86 (1970) (declining to resolve this issue). Neither party challenges that treatment before our panel. The appellees do, however, "preserve" for later review the argument that these entities should be understood as judicial in nature, in which case their decisions would not be subject to district court review at all. *See* Appellees' Brief 31 n.7.

We are bound by a prior panel decision "unless intervening Supreme Court precedent" has "effectively overrule[d], i.e., eviscerate[d]" that decision. *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, 121 F.4th 1314, 1334 (D.C. Cir. 2024) (citation modified). Neither our court nor the Supreme Court has reconsidered the scope of Section 357(c) (or altered the clear-and-convincing-evidence test) since *McBryde* was decided. And *McBryde* has not otherwise been overruled or meaningfully undermined. We therefore may not review Judge Newman's statutory challenge or as-applied constitutional challenges.

B

Judge Newman resists that conclusion principally by arguing that *McBryde* has been effectively overruled and so no longer forecloses review of statutory challenges or as-applied constitutional challenges. We are not persuaded.

Judge Newman first claims that *McBryde*'s holding respecting statutory challenges was eviscerated by the Supreme Court's decision in *SAS Institute, Inc. v. Iancu*, 584 U.S. 357 (2018). That case, she says, suggests that even an explicit statutory bar cannot preclude judicial review of claims that an agency exceeded its statutory authority. *See* Appellant's Brief 52–53. But *SAS Institute* says no such thing. That case applied the same principles as *McBryde* to a differently worded preclusion provision. And the Court permitted that petitioner's challenge to proceed because the preclusion provision by its terms did not encompass the petitioner's challenge. The provision there stated that a "determination by the Director [of the Patent Office] *whether* to institute an inter partes review under this section shall be final and

nonappealable." *SAS Inst.*, 584 U.S. at 370 (quoting 35 U.S.C. § 314(d)) (emphasis added). But the petitioner challenged *how* the Director conducted his inter partes review—not the Director's determination of "*whether* to institute" such review—so that challenge was not precluded. *Id.* at 370–71. Judge Newman does not argue that the order imposing her suspension somehow falls outside the category of "all orders and determinations" described in Section 357(c). And *SAS Institute* is irrelevant to the argument she does make: that Section 357(c) cannot bar any argument that a judicial council exceeded its statutory authority.[2]

Judge Newman also fails to show that *McBryde*'s holding regarding as-applied constitutional challenges has been eviscerated.

First, Judge Newman argues that *McBryde*'s holding was undermined by Congress's 2002 addition of a sever-

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2. Judge Newman's brief also might be read as suggesting that, despite Section 357(c), we can review her statutory challenge under cases allowing us to review agency overreach of statutory authority that is "so extreme that one may view it as jurisdictional or nearly so." *Griffith v. Fed. Lab. Rels. Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988). She makes any such argument in (at most) a "skeletal" manner, and so it is forfeited. *See N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (quotation omitted). And even if we considered her claim, the exception she invokes has only been applied to statutory schemes raising questions of implicit preclusion, not to explicit preclusion provisions like the one at issue here. *See Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716, 722 (D.C. Cir. 2022). The exception is also exceedingly narrow—as the Supreme Court recently reiterated, it is "essentially a Hail Mary pass [that] in court as in football, . . . rarely succeeds." *Nuclear Regul. Comm'n v. Texas*, 605 U.S. 665, 681–82 (2025) (citation modified).

ability clause to the Act. That clause states: "If any provision of this subtitle . . . or the application of such provision . . . to any person or circumstance is held to be unconstitutional, the remainder of this subtitle . . . and the application of the provisions of such to any person or circumstance shall not be affected thereby." 28 U.S.C. § 351 Note. Judge Newman argues that the provision's text—by imagining that an application of the Act could be found unconstitutional "*expressly* contemplates 'as applied' challenges to the Act being adjudicated in Article III courts." Appellant's Brief 60.

We disagree. The clause does not state that Article III courts can consider as-applied challenges. And although it contemplates some entity finding applications of the Act unconstitutional, it is possible Congress envisioned that a judicial council or the Judicial Conference (not an Article III court) could make such findings. Our court in *McBryde*, after all, concluded that the Judicial Conference could decide such claims. See 264 F.3d at 62, 68. At the least, the clause does not provide clear evidence of Congressional intent to, in effect, partly repeal Section 357(c) as it was understood in *McBryde*. *See United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) ("[R]epeals by implication are not favored, and will not be found unless an intent to repeal is clear and manifest." (citation modified)).

Second, Judge Newman argues that the Judicial Conference has declined to consider constitutional issues in the years since *McBryde* was decided. Its failure to do so, she says, undermines *McBryde*'s reasoning, which emphasized Congress's intent to channel review of those claims to the Judicial Conference. *See* 264 F.3d at 62–63.

Whatever the Judicial Conference's current practices are, they do not undermine *McBryde*. When *McBryde* was decided, the Judicial Conference declined to pass on constitutional issues. *See id.* at 62. The *McBryde* court acknowledged as much and conceded that it had no power to order the Judicial Conference to begin hearing such claims (though it urged the Conference to do so). *See id.* at 62, 68. Our court's reasoning thus never depended on the Conference in fact reviewing constitutional claims. Instead, our holding rested on the finding that Congress had—clearly and convincingly—intended that the Conference, rather than courts, review asapplied challenges (even if the Conference in fact shirked its duty). *See id.* at 59–61.[3]

Third and finally, Judge Newman turns to the Supreme Court's opinions in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), and *Free Enterprise Fund v. Public*

3. The parties debate whether judicial councils and the Judicial Conference have in fact begun to address constitutional issues in this case and others since *McBryde*. Counsel for appellees represents that the Judicial Council agrees it can address asapplied constitutional challenges, and appellees identify one other JC&D Committee decision that, in their view, considered and rejected a Fourth Amendment challenge. See Tr. of Oral Arg. 64; Appellees' Brief 49 (citing In re Complaint of Judicial Misconduct, C.C.D. No. 17-01 (U.S. Jud. Conf. Aug. 14, 2017), at 30–34). In this case, however, neither the Judicial Council's orders nor the JC&D Committee's decision explicitly reflects genuine consideration of Judge Newman's constitutional arguments. None of the orders appear to address any argument by Judge Newman that her suspension violates the Constitution by effectively removing her from office. The JC&D Committee acknowledged that Judge Newman argued for a transfer in constitutional terms, In re Complaint No. 23-90015, C.C.D. No. 23-01 (U.S. Jud. Conf. Feb. 7, 2024), at 14, 21, but its order does not much discuss constitutional due process case law.

Company Accounting Oversight Board, 561 U.S. 477 (2010). On her view, those cases held that all constitutional questions "are outside the scope of agencies' expertise" and so must be reviewable in federal courts. Appellant's Brief 62. Those holdings, she says, undermine *McBryde*'s conclusion that Congress intended to route review of as-applied challenges exclusively to the Judicial Conference.

Judge Newman overreads *Axon* and *Free Enterprise Fund*. Most simply, those cases did not involve an explicit statutory bar on judicial review, and so did not address the same type of legal question as did *McBryde*. In *Axon* and *Free Enterprise Fund*, entities facing agency investigations or enforcement actions sued in district court, arguing that the agencies at issue were unconstitutionally structured. *See Axon*, 598 U.S. at 180; *Free Enter. Fund*, 561 U.S. at 487. As the Court emphasized, neither case involved an explicit jurisdiction-stripping provision like Section 357(c). *See Free Enter. Fund*, 561 U.S. at 489 ("[T]he text does not expressly limit the jurisdiction . . . [of] district courts."); *see also Axon*, 598 U.S. at 185. Instead, the agencies claimed that Congress's creation of a scheme of administrative review, followed by review in a court of appeals, *implicitly* precluded district court suits challenging the agencies' actions. *See Axon*, 598 U.S. at 184–88; *Free Enter. Fund*, 561 U.S. at 489–91. In such a case, rather than the clearand-convincing-evidence test *McBryde* applied, courts deploy a different doctrinal framework stemming from *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). *See Axon*, 598 U.S at 185–86; *Free Enter. Fund*, 561 U.S. at 489–91. That difference alone defeats any argument that *Axon* or *Free*

Enterprise Fund eviscerates *McBryde*'s reading of Section 357(c)'s explicit bar on judicial review.

A further weakness in Judge Newman's analogy is also worth noting. She seizes on the Court's explanation that the SEC and FTC were comparatively inexpert as compared to district courts in evaluating constitutional claims. *See Axon*, 598 U.S. at 194–95; *Free Enter. Fund*, 561 U.S. at 491. But it is far from clear that concern applies equally to judicial councils or the Judicial Conference. Those entities are, after all, composed exclusively of Article III judges.

C

Taking a different tack, Judge Newman argues that, even if *McBryde* generally remains good law, its reasoning does not apply to her specific as-applied challenges. This line of argument also proves unpersuasive.

To start, Judge Newman contends that *McBryde* held in a footnote that Section 357(c) did not cover as-applied challenges (like hers) to long-term disqualifications from hearing cases. That footnote states: "Obviously, we do not decide whether a long-term disqualification from cases could, by its practical effect, [e]ffect an unconstitutional 'removal.'" *McBryde*, 264 F.3d at 67 n.5. Through that footnote, she argues, *McBryde* promised that a court would have jurisdiction to consider that type of as-applied challenge if it arose.

That reading is implausible. *McBryde* squarely held—in an earlier section of the opinion—that Section 357(c) reflects Congress's intent "to preclude review in the courts for as applied constitutional claims." *Id.* at 62–63. The footnote appears in the panel's later discussion of *McBryde*'s facial challenge and does not purport to modify the court's jurisdictional holding.

Next, Judge Newman argues that *McBryde* does not preclude review of her due process challenge to the Judicial Council's refusal to transfer her case. The Act, she notes, does not explicitly provide for Judicial Conference review of a council's decision to transfer (or not transfer) a case. And she argues that *McBryde*'s rationale cannot apply to her due process claim because it turned on the availability of review before the Judicial Conference.

Judge Newman may be right that the Act provides no means to petition the Conference for interlocutory review of the Council's transfer decision. But the Act does provide for Conference review of any final council action stemming from a case that was not transferred. *See* 28 U.S.C. § 357(a)–(b). Judge Newman's due process challenge to the Council's transfer decision can thus be raised to the Conference as part of a petition challenging the Council's final action in this case. Indeed, Judge Newman challenged the Judicial Council's denial of her transfer request in her 2023 petition for review of the Council's initial suspension order, and the JC&D Committee addressed it. *See* In re Complaint No. 23-90015, C.C.D. No. 23-01 (U.S. Jud. Conf. Feb. 7, 2024), at 15–22.

Judge Newman cannot show that *McBryde* has been eviscerated or that her specific claims escape its grasp. We thus lack jurisdiction over her statutory and as-applied constitutional challenges.

III

We do have jurisdiction over Judge Newman's facial challenge to the Act's case-suspension provision, *see McBryde*, 264 F.3d at 58, and now turn to the merits of that challenge.

In a facial challenge, the plaintiff asks a court to look beyond the facts of her own case and declare a statutory

provision unconstitutional in all its applications. Facial challenges thus strain against the many "good reasons" that "courts usually handle constitutional claims case by case, not en masse." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). As a result, under longstanding precedent, such challenges are quite difficult to make out. To succeed in a facial challenge, a plaintiff must show that "no set of circumstances exists under which the law would be valid" or "that the law lacks a plainly legitimate sweep." *Comm. on Ways & Means v. Dep't of Treasury*, 45 F.4th 324, 339 (D.C. Cir. 2022) (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021); *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (citation modified). Put differently, the plaintiff must demonstrate that the provision at issue does not have any—or at least not many—constitutional applications.

Judge Newman's own concessions demonstrate that she cannot meet that settled standard. She challenges 28 U.S.C. § 354(a)(2)(A)(i), which authorizes judicial councils to "order[] that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint." But Judge Newman concedes that, under that provision, short suspensions from receiving new case assignments can be constitutional at least as long as the judge still has cases left to decide—while a judge clears a mounting backlog of opinions, for example. *See* Reply Brief 6, 9; Appellant's Brief 41–43. In fact, both our court and the Supreme Court have suggested the same (albeit in dicta). *See McBryde*, 264 F.3d at 65; *Chandler v. Jud. Council of Tenth Cir.*, 398 U.S. 74, 85 (1970). Judge Newman thus cannot show that there is "no set of circumstances . . . under which the law would be valid" or that it "lacks a

plainly legitimate sweep." *Comm. on Ways & Means*, 45 F.4th at 339 (citation modified). Indeed, Judge Newman does not attempt to make that showing.

Judge Newman's argument instead proceeds as though she needs to show only that some portion of the statute's applications are unconstitutional. She accordingly argues that her lengthy suspension is unconstitutional, and that if the provision authorizes that suspension and similar ones, it must be facially unconstitutional.

That argument misunderstands the law governing facial constitutional challenges. To be sure, in the First Amendment context, statutes may sometimes be deemed facially invalid where only a subset of their applications are unconstitutional. *See United States v. Hansen*, 599 U.S. 762, 769 (2023). But that unique way of evaluating facial challenges—called "overbreadth doctrine"—"[b]reak[s]" from the ordinary rules for evaluating such claims to "guard against" the potential that even partly unconstitutional laws "may deter or 'chill' constitutionally protected speech." *Id.* at 769–70 (citation modified). Given that other types of constitutional challenges do not raise those same concerns, however, courts "have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Salerno*, 481 U.S. at 745; *accord Metro. Wash. Chapter, Associated Builders & Contractors, Inc. v. District of Columbia*, 62 F.4th 567, 577 (D.C. Cir. 2023). This is not a First Amendment case. Overbreadth doctrine does not apply. So Judge Newman's theory fails.

Judge Newman further urges us to adopt a "narrowing construction" of the statute. Appellant's Brief 41–42. She asks us to find that case suspensions like hers are at least constitutionally suspect and construe the case-

suspension provision not to authorize such suspensions to avoid a potentially serious constitutional flaw. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). But a narrowing construction can be justified only if a party first raises a serious constitutional question. *See id.* Here, the only claim properly before us is Judge Newman's facial challenge. And as just explained, that challenge does not present a close question. We therefore have no occasion to consider a narrowing construction.

IV

We have now resolved all issues presented in this case. Before concluding, however, we emphasize two points.

First, we do not consider—because we cannot considerthe merits of Judge Newman's as-applied constitutional claims. Judge Newman has posed important and serious questions about whether these Judicial Conduct and Disability Act proceedings comport with constitutional due process principles and whether her ongoing suspension comports with the structure of our Constitution. That we do not answer those questions is no indication that her arguments lack merit, nor signals how we might have addressed them if we were able. As already discussed, precedent strips us of authority to consider those challenges. We do not reach them for that reason alone.

Second, as a panel of this court, we are unable to overrule *McBryde*, and so do not resolve whether *McBryde* was rightly decided. To be sure, there are substantial arguments that—if judicial councils and the Conference are properly regarded as administrative bodies—the *McBryde* majority misapplied the clear-and-convincing-evidence test when interpreting Section

357(c). Judge Tatel's partial dissent articulated several such arguments: The *McBryde* majority may have applied the clear-and-convincing-evidence test more loosely than our court had in prior cases, in part because it thought that as-applied constitutional claims would still be heard by "a reviewing 'agency' composed exclusively of Article III judges." *McBryde*, 264 F.3d at 62; *see id.* at 73–76 (Tatel, J., concurring in part and dissenting in part) (citing *Ungar v. Smith*, 667 F.2d 188, 193, 195 n.2, 196 (D.C. Cir. 1981); *Griffith v. Fed. Lab. Rels. Auth.*, 842 F.2d 487, 490, 494–95 (D.C. Cir. 1988)). It relied on a potentially strained reading of the relevant legislative history. *See id.* at 74–76. And its holding could be taken to suggest that certain constitutional questions might be heard in no forum (if the Judicial Conference does not consider those challenges) and that, regardless, the Judicial Conference—not the Supreme Court—would be the last word on major questions of constitutional law. *See id.* at 75.

The seeming absence of a judicial forum to address Newman's as-applied constitutional claims itself raises constitutional concerns. *See Webster*, 486 U.S. at 603. Judge Newman presents substantial arguments that her suspension—which has now lasted nearly two years, with a third year recommended—threatens the principle of judicial independence and may violate the separation of powers. She further contends that the refusal to transfer her case to a different circuit deprived her of an impartial tribunal, which if correct would raise due process concerns. *See, e.g.*, *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *In re Murchison*, 349 U.S. 133, 136–37 (1955).

Those doubts, however, would at most suggest that *McBryde* was wrong the day it was decided, not that it

does not bind us now. (Indeed, many of those arguments were presented when *McBryde* was issued, and our full court nonetheless denied en banc review. *See McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 278 F.3d 29, 29 (D.C. Cir. 2002) (per curiam).)

The result of faithfully applying *McBryde* is that Judge Newman cannot raise her as-applied constitutional arguments in any Article III forum.[4] It is thus up to the Judicial Council and the Judicial Conference to genuinely engage with those arguments.

V

The judgment of the district court is affirmed.

So ordered.

4. Appellees suggested at oral argument that the Supreme Court may be able to review Judicial Conference orders via mandamus. *See* Tr. of Oral Arg. 71–74. We express no opinion on that possibility.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HON. PAULINE NEWMAN, Plaintiff, v. **HON. KIMBERLY A. MOORE**, *et al.*, Defendants.	Case No. 23-cv-01334 (CRC)

MEMORANDUM OPINION

In 2021, the Chief Judge of the U.S. Court of Appeals for the Federal Circuit, Kimberly A. Moore, received reports from court staff that raised concerns about whether veteran Federal Circuit Judge Pauline Newman remained fit to carry out her judicial duties. The reports prompted Chief Judge Moore to exercise her authority under the Judicial Conduct & Disability ("JC&D") Act to convene a special committee of the court's judges to conduct an investigation. See 28 U.S.C. §§ 353(a), (c). Judge Newman declined to cooperate with the investigation, however, objecting especially to the committee's requests that she undergo independent neurological testing and provide it relevant medical records. In the face of Judge Newman's recalcitrance, the Federal Circuit Judicial Council, on the recommendation of the special committee, suspended her from receiving new case assignments until she acquiesced to the special committee's demands.

Fighting fire with fire, Judge Newman brought this lawsuit against Chief Judge Moore, the two other members of the special committee, and the Federal Circuit Judicial Council, which is comprised of every member of the court (collectively, "Defendants"). Her eleven-count complaint raised both facial and as-applied challenges to provisions of the JC&D Act, as well as to 28 U.S.C. § 332, which governs the authority of circuit judicial councils. Following an unsuccessful Court-ordered mediation, the Court denied Judge Newman's request for a preliminary injunction and granted Defendants' motion to dismiss most counts of the complaint. The Court determined that it lacked jurisdiction over Judge Newman's as-applied claims and that two of her facial challenges failed to state a claim. Defendants now move for judgment on the pleadings as to the remaining facial challenges, which allege that certain provisions of the JC&D Act violate the Fourth Amendment and are unconstitutionally vague. Because Judge Newman cannot prevail on these counts either, the Court will grant judgment for Defendants and dismiss the case.

I. Background

The Court has already detailed the background of this case, including the relevant statutory frameworks. See Newman v. Moore, No. 23-cv-01334 (CRC), 2024 WL 551836, at *2–5 (D.D.C. Feb. 12, 2024). It need not replow the same ground here. After dismissing most of the counts in Judge Newman's complaint, the Court directed Defendants to answer the remaining counts: Counts Eight and Nine, which present facial challenges to the JC&D Act under the Fourth Amendment, and Counts Five and Seven, which allege that provisions of the Act are unconstitutionally vague. Defendants did so

and simultaneously moved under Federal Rule of Civil Procedure 12(c) for judgment on the pleadings. Judge Newman opposed, and the motion is fully briefed and ripe for review.

II. Legal Standards

A. Motion for Judgment on the Pleadings

Parties may move for judgment on the pleadings after the pleadings are closed but early enough so as not to delay trial. Fed. R. Civ. P. 12(c). Movants are entitled to judgment on the pleadings under Rule 12(c) if they "demonstrate[ ] that no material fact is in dispute and that [they are] entitled to judgment as a matter of law." Schuler v. PricewaterhouseCoopers, LLP, 514 F.3d 1365, 1370 (D.C. Cir. 2008) (quoting Peters v. Nat'l R.R. Passenger Corp., 966 F.2d 1483, 1485 (D.C. Cir. 1992)). Though there are some differences between a Rule 12(b) and Rule 12(c) motion, "[t]he appropriate standard for reviewing a motion for judgment on the pleadings is virtually identical to that applied to a motion to dismiss under Rule 12(b)(6)." Maniaci v. Georgetown Univ., 510 F. Supp. 2d 50, 58 (D.D.C. 2007); see also Tapp v. Washington Metro. Area Transit Auth., 306 F. Supp. 3d 383, 391–92 (D.D.C. 2016) (noting that the "focus of a motion to dismiss lies with the plaintiff's inability to proceed on his claim," while "a motion for judgment on the pleadings centers upon the substantive merits of the parties' dispute"). "When evaluating a motion for judgment on the pleadings, the [C]ourt may rely on the pleadings, the exhibits to the pleadings, and any judicially noticeable facts . . . ." Jimenez v. McAleenan, 395 F. Supp. 3d 22, 30 (D.D.C. 2019) (cleaned up) (alteration in original). And while the Court must construe the factual allegations in

the light most favorable to the nonmoving party, it is not bound by that party's legal conclusions. See Sissel v. U.S. Dep't of Health & Human Servs., 760 F.3d 1, 4 (D.C. Cir. 2014).

III. Analysis

Defendants have moved for judgment as to Counts Five, Seven (in part), Eight, and Nine. Again, Counts Eight and Nine allege that the JC&D Act facially violates the Fourth Amendment of the Constitution, and the other two counts allege that provisions of the Act are unconstitutionally vague. The Court will start with the Fourth Amendment claims before tackling the vagueness challenges.

A. Counts Eight and Nine: Unconstitutional Searches

As detailed in the Court's prior opinion, following receipt of a judicial misconduct or disability complaint, the chief judge of a circuit may convene a special committee to investigate the complaint. See Newman, 2024 WL 551836, at *2; see also 28 U.S.C. §§ 353(a), (c). Here, Chief Judge Moore appointed a special committee to investigate such a complaint against Judge Newman. Id. at *4. Under the JC&D Act's "investigation" provision, the special committee was authorized to "conduct an investigation as extensive as it consider[ed] necessary." 28 U.S.C. § 353(c). Counts Eight and Nine attempt to mount facial attacks to this provision. Specifically, they allege that § 353(c) "violates the Fourth Amendment to the extent it authorizes a compelled medical or psychiatric examination of an Article III judge" (Count Eight) or "a compelled surrender of medical records belonging to an Article III judge" (Count Nine) "without a warrant based on probable cause." FAC ¶¶ 118, 124.

To prevail on a facial attack, Judge Newman must show that § 353(c) "is unconstitutional in all of its applications." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008). Although such a challenge is "the most difficult . . . to mount successfully," in "assessing whether a statute meets this standard," a court must consider "only applications of the statute in which it actually authorizes or prohibits conduct." City of Los Angeles, Calif. v. Patel, 576 U.S. 409, 415, 418 (2015) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

The relevant question therefore is: Does section 353(c) authorize special committees to engage in conduct that does not run afoul of the Fourth Amendment? It does. In "conduct[ing] an investigation as extensive as it considers necessary," a special committee is authorized to undertake action that falls outside the Fourth Amendment. 28 U.S.C. § 353(c). For example, under the aegis of § 353(c), a special committee could interview court employees, request and receive third-party witness statements, or collect relevant communications from the court's email server, none of which necessarily constitutes a search or seizure. See Florida v. Bostick, 501 U.S. 429, 434 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions . . . . [s]o long as a reasonable person would feel free to disregard the police and go about his business." (cleaned up)); United States v. Miller, 425 U.S. 435, 443 (1976) ("[T]he Fourth Amendment does not prohibit the obtaining of information . . . conveyed by [a third party] to Government authorities . . . ."); United States v. Simons, 206 F.3d 392, 395–96, 398 (4th Cir. 2000) (government employee lacked a reasonable expec-

tation of privacy in the "record or fruits of his [i]nternet use" in light of agency's policy that it would monitor employees' internet use and that internet was for official government business only).

Judge Newman concedes that some of § 353(c)'s "investigative tools" "do not implicate the Fourth Amendment." Pl.'s Opp'n at 7 n.5. She nonetheless maintains that the use of these tools does not defeat her facial claim for two other reasons. First, she argues that § 353(c) does "no work" and "is therefore irrelevant" in the context of interviewing a court employee because "the Chief Judge can always interview the Court's employees even in the absence of any complaint against any other judge." Id. But a *special committee* has no power to interview an employee in the absence of § 353(c)'s grant of authority. Indeed, a special committee exists only once a complaint is initiated against a judge, see 28 U.S.C. § 353(a)(1) (permitting the chief judge to appoint a special committee), and its authority to investigate is wholly derived from § 353(c). Thus, a special committee's power to interview a court employee is an "application[] of the statute in which [the statute] actually authorizes . . . conduct." Patel, 576 U.S. at 418 (cleaned up).

Second, Judge Newman contends that Patel's standard for facial challenges limits the inquiry only to "investigative conduct" that "implicate[s] the Fourth Amendment"—as opposed to all conduct authorized by the statute. Pl.'s Opp'n at 7 n.5. But that approach reads Patel too broadly. In Patel, a group of hotel proprietors challenged a provision of the Los Angeles Municipal Code that compelled "[e]very operator of a hotel to keep a record" of certain information about guests and to make this record "available to any officer of the Los An-

geles Police Department for inspection" on demand. 576 U.S. at 412 (alteration in original) (quoting Los Angeles Municipal Code §§ 41.49(2), (3)(a), (4) (2015)). In upholding the plaintiffs' facial challenge, the Supreme Court did not question that the only conduct authorized by this provision constituted a search within the meaning of the Fourth Amendment.[1] The Supreme Court thus characterized the statute as one "authorizing warrantless searches," and explained that, "when addressing a facial challenge to [such] a statute," "the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant"—for example, when "exigency or a warrant justifies an officer's search." Id. at 418. But because § 353(c) authorizes conduct that, as Judge Newman admits, does not implicate the Fourth Amendment, this case presents a different kind of statute. And nothing in Patel suggests that the

1. Before Patel reached the Supreme Court, the parties disputed—and the lower courts considered—"whether a police officer's non-consensual inspection of hotel guest records under [the provision] constitute[d] a Fourth Amendment 'search.'" Patel v. City of Los Angeles, 738 F.3d 1058, 1061 (9th Cir. 2013) (en banc), aff'd sub nom. City of Los Angeles, Calif. v. Patel, 576 U.S. 409 (2015). The Ninth Circuit sitting *en banc* found that such an inspection did implicate the Fourth Amendment. Id. And, only after having made that determination, the circuit concluded that the searches authorized by the provision were unreasonable and—as the final hurdle for a facial challenge—were unreasonable in "all" instances. Id. at 1064–65 ("Because [the] procedural deficiency affects the validity of all searches authorized by § 41.49(3)(a), there are no circumstances in which the record-inspection provision may be constitutionally applied."). But as this order of analysis suggests, the first step in the inquiry is to determine whether all the conduct authorized by the law is a search or seizure—not whether the searches or seizures authorized by the law are constitutional.

Court must narrow its analysis of a facial challenge to conduct that falls within the Fourth Amendment's ambit when the statute also authorizes conduct beyond the amendment's reach.

The D.C. Circuit confirmed as much in Brennan v. Dickson, which challenged a Federal Aviation Administration ("FAA") rule regulating drones. 45 F.4th 48 (D.C. Cir. 2022). The FAA promulgated a "Remote Identification" rule that required "drones in flight to emit publicly readable radio signals reflecting certain identifying information." Id. at 53. The circuit rejected a facial Fourth Amendment challenge to the rule because it found the rule "generally" did not implicate privacy rights. Id. at 61 ("Brennan's facial Fourth Amendment challenge fails because drone pilots generally lack any reasonable expectation of privacy in the location of their drone systems during flight."). And though the court noted that future applications of the rule might "violate a pilot's constitutionally cognizable privacy interest," the plaintiff's facial challenge failed because he had "not shown that [] data collection offends the Fourth Amendment in *every application of the Rule* to the typically very public activity of drone piloting." Id. at 64 (emphasis added). The same is true for § 353(c). Though some investigative conduct might trigger Fourth Amendment concerns, and even constitute violations of an individual's privacy rights, Judge Newman has not shown that every application of the provision offends the Fourth Amendment. Her facial challenges in Counts Eight and Nine therefore fail.

B. Counts Five and Seven: Vagueness

Counts Five and Seven meet the same fate. In these counts, Judge Newman contends that two sections of the

JC&D Act are unconstitutionally vague and violate the Due Process Clause of the Fifth Amendment. Count Five challenges § 351(a), which provides that someone may initiate a JC&D complaint against a judge who "is unable to discharge all the duties of office by reason of mental or physical disability." 28 U.S.C. § 351(a). Judge Newman alleges that this provision "fails to provide adequate notice of what constitutes a mental disability that renders a judge 'unable to discharge all the duties of office.'" FAC ¶ 103 (citing 28 U.S.C. § 351(a)). And in Count Seven, she claims that § 353(c)—the investigation provision also challenged in Counts Eight and Nine—"lacks minimal enforcement guidelines." Id. ¶ 112 (citing 28 U.S.C. § 353(c)).[2] The Court will take up these two challenges in turn.

1. Count Five

"A vague law denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions." Hastings v.

2. A reminder on how the Court reads Count Seven. As described in the Court's previous opinion, the count makes three allegations: (1) the JC&D Act is "unconstitutionally vague to the extent it purports to authorize compelled medical or psychiatric examinations . . . or demands for . . . Article III judges to surrender their private medical records," (2) § 353(c), "which authorizes a Special Committee to conduct an investigation 'as extensive as it considers necessary' lacks minimal enforcement guidelines," and (3) the act "vests virtually complete discretion in the hands of a Special Committee." FAC ¶ 112; see also Newman, 2024 WL 551836, at *16 n.13. The Court has already dismissed the third allegation. See id. at *17–18. And the first allegation collapses into the second as the provision purportedly authorizing the Special Committee to compel medical examinations and the production of records is § 353(c).

Jud. Conf. of U.S., 829 F.2d 91, 105 (D.C. Cir. 1987). Statutes are not impermissibly vague, however, merely because they "require[] a person to conform his conduct to an imprecise but comprehensible normative standard, whose satisfaction may vary depending upon whom you ask." United States v. Bronstein, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (cleaned up). "Rather, a statute is unconstitutionally vague if, applying the rules for interpreting legal texts, its meaning 'specifie[s]' 'no standard of conduct . . . at all.'" Id. (quoting Coates v. Cincinnati, 402 U.S. 611, 614 (1971)); see also Fed. Express Corp. v. United States Dep't of Com., 39 F.4th 756, 773 (D.C. Cir. 2022) ("The Due Process Clause's fair notice requirement generally requires only that the government make the requirements of the law public and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." (cleaned up)). As the Supreme Court has cautioned, the vagueness doctrine "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing [] statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." Colten v. Kentucky, 407 U.S. 104, 110 (1972).

Given the text, legislative history, and implementing rules of the JC&D Act, section 351(a) is not unconstitutionally vague. First, the text. Section 351(a) provides that someone may initiate a JC&D complaint against a judge who "is unable to discharge all the duties of office by reason of mental or physical disability." 28 U.S.C. § 351(a); see also id. § 354(2)(A) (providing that judicial councils may impose penalties based on valid complaints). The statute's standard of conduct is thus de-

fined in reference to the "duties of [judicial] office." And judges, the only individuals against whom § 351(a) can be enforced, are well aware of their duties. Indeed, before taking office, all judges must swear an oath to "faithfully and impartially discharge and perform all the duties incumbent upon" them. 28 U.S.C. § 453. Because the provision is pegged to "knowable criteria," it is not impermissibly vague. United States v. Ragen, 314 U.S. 513, 523 (1942) (cleaned up); see also Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 247–48 (2010) (rejecting a vagueness challenge to a Bankruptcy Code provision because the individuals against whom the provision would be enforced—"[a]ttorneys and other professionals who give debtors bankruptcy advice"—"must know" of other provisions in the Code that impose similar standards).

The legislative history of the JC&D Act provides further color to § 351(a)'s standard. See United States v. Poindexter, 951 F.2d 369, 379 (D.C. Cir. 1991) (suggesting that clear legislative history can render a "facially vague" provision constitutional). As the D.C. Circuit held in the context of an overbreadth challenge to a related provision of the JC&D Act, the "legislative history demonstrates that the Act was directed against serious judicial transgressions." Hastings, 829 F.2d at 106; see also id. at 106 n.59 ("It is worth pointing out that federal judges, the individuals to whom the Act is directed, are unusually well qualified to interpret statutes in light of their legislative history."). The Act "[wa]s not designed," by contrast, "to assist the disgruntled litigant who is unhappy with the result of a particular case." S. Rep. No.

96-362, 96th Cong., 1st Sess., 8 (1979), reprinted in 1980 U.S. Code Cong. & Ad. News 4315, 4323.[3]

Congress also supplied several reference points for interpreting § 351(a). See Arnett v. Kennedy, 416 U.S. 134, 160 (1974) (finding no vagueness issue when a statute "was not written upon a clean slate"). The Senate Report noted that § 351(a) was "a paraphrase of [the] existing statutory language" of 28 U.S.C. 372(b). S. Rep. No. 96-362, 9. Section 372(b), which was enacted in 1957, permits the president to appoint an additional judge when a sitting judge, who is eligible to retire but does not do so, becomes "unable to discharge efficiently" her duties "by reason of permanent mental or physical disability." 28 U.S.C. § 372(b); see also P.L. 85-261, September 2, 1957, 71 Stat. 586. The Senate Report further counseled that the JC&D Act's standards should be informed by the Code of Judicial Conduct and the Canons of Judicial Ethics of the American Bar Association, resolutions of the Judicial Conference related to judicial conduct, and acts of Congress about judicial conduct. S. Rep. No. 96-362, 9; see also Hastings, 829 F.2d at 106 (citing same).[4]

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3. Under the version of the statute then before the Senate Judiciary Committee, what is now § 351(a) was located at § 372(c)(1)(a) and had a slightly different formulation. Then-section 372(c)(1)(a) permitted any person to file a written complaint alleging that a "judge is or has been unable to discharge efficiently all the duties of his or her office by reason of mental or physical disability." S. Rep. No. 96-362, 8.

4. The commentary to the Code of Judicial Conduct reflects this purpose. It notes that the code "may [] provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980."

(continued…)

Finally, the Rules for Judicial-Conduct and Judicial-Disability Proceedings ("JC&D Rules"), promulgated by the Judicial Conference of the United States, clarify the meaning of disability in § 351(a). See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 504 (1982) (noting that the adoption of "administrative regulations" can "sufficiently narrow potentially vague or arbitrary interpretations" of a local ordinance).[5] The rules list as "[e]xamples of disability" "substance abuse, the inability to stay awake during court proceedings, or impairment of cognitive abilities that renders the judge unable to function effectively." JC&D R. 4(c). Given these definitions, § 351(a) "provides a discernable standard." Bronstein, 849 F.3d at 1107.

Judge Newman offers two main rebuttals. First, she claims that the "history of enforcement of [§ 351(a)]," and in particular the proceedings against her, "illustrate[] how standardless [the provision] is." Pl.'s Opp'n at 19. But at most, her examples suggest that the statute is subject to multiple interpretations. See, e.g., id. at 21 (claiming that aspects of the Federal Circuit's investigation "confirm[] the latent subjectivity at play"); id. 24 ("'[E]ffectiveness' is in the eye of the beholder."). A sub-

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Code of Conduct for United States Judges, Canon 1, Commentary, https://perma.cc/JW2B-99GU.

5. Judge Newman claims the "needed clarity" cannot come from the JC&D Act's implementing rules. Pl.'s Opp'n at 23. But neither of the cases she draws on for support concerns a Fifth Amendment vagueness challenge. See Texas Educ. Agency v. United States Dep't of Educ., 992 F.3d 350, 361 (5th Cir. 2021) (state waivers of sovereign immunity); Bennett v. Kentucky Dep't of Educ., 470 U.S. 656, 666 (1985) (limits on state uses of federal funding).

jective statute is not an unconstitutional one. See Bronstein, 849 F.3d at 1107 ("[A] statutory term is not rendered unconstitutionally vague because it do[es] not mean the same thing to all people, all the time, everywhere." (cleaned up) (second alteration in original)). Second, she suggests that any subjectivity in § 351(a) is impermissible because it undermines judicial independence. See, e.g., Pl.'s Opp'n at 25 ("[B]ecause an Article III judge is not subject to 'supervision' by any of her colleagues, an Article III judge need not meet any other judge's . . . definition of 'effectiveness.'"). But, as the D.C. Circuit (and this Court) have held, "Article III's grant of 'judicial independence'" does not give "judges 'absolute freedom from' discipline or sanctions that fall short of removal or salary diminution." Newman, 2024 WL 551836, at *18 (quoting McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S., 264 F.3d 52, 65 (D.C. Cir. 2001)). Nor does the Constitution "exclude[] discipline of judges *by* judges." Id. (quoting McBryde, 264 F.3d at 65). Given these accepted limits on judicial independence, there is no reason to believe that Article III imposes a heightened standard of clarity on statutes affecting judicial authority. Accordingly, the Court grants Defendants' motion as to Count Five.

2. Count Seven

Section 353(c) is not unconstitutionally vague either. The vagueness doctrine "prevents the government from imposing criminal and, to a lesser extent, civil penalties if the statute or regulation specifying the prohibited conduct is not sufficiently specific to provide fair notice" or, as Judge Newman alleges with respect to § 353(c), "fair enforcement." Maxwell v. Rubin, 3 F. Supp. 2d 45, 49 (D.D.C. 1998); see also Beckles v. United States, 580 U.S.

256, 265 (2017) ("[T]win concerns underly[] vagueness doctrine—providing notice and preventing arbitrary enforcement."). But "the vagueness doctrine applies only to laws that regulate the primary conduct of private citizens"—*i.e.*, "laws that define crimes," "laws that fix sentences," "laws that restrict speech," and "laws that regulate businesses." United States v. Matchett, 837 F.3d 1118, 1119, 1122 (11th Cir. 2016) (en banc); see also El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 856 n.4 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring) ("If a statute regulating private conduct provides no discernible standards and therefore insufficient notice of what actions are prohibited, the statute might be void for vagueness under the Due Process Clause."). The Supreme Court has found that a statute can lead to arbitrary enforcement in one of two scenarios: "[I]f it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case, . . . or permits them to prescribe the sentences or sentencing range available." Beckles, 580 U.S. at 266 (cleaned up); see also id. at 262.

The JC&D's investigation provision does not fall into either category. It does not vest a special committee with authority to decide what judicial conduct is or is not permissible, nor does it allow a committee to choose the proper penalty for such conduct. Instead, it merely sets the outer boundaries for how a special committee may investigate once a JC&D complaint has been initiated. It also bears noting that § 353(c) is not unusual. Federal prosecutors and some federal agencies enjoy similarly broad investigative authority. See, e.g., Justice Manual 9-2.001 ("The statutory duty to prosecute for all offenses against the United States (28 U.S.C. § 547) carries with

it the authority necessary to perform this duty. The [U.S. Attorney] is invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority."); 15 U.S.C. § 78u ("The [Securities and Exchange] Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter.").

Judge Newman does not address whether the vagueness doctrine applies to § 353(c) as a threshold matter. She does offer two tangential arguments. Neither succeeds. First, she claims that "[b]ecause there is no defined reference point" for § 351(a)'s disability standard, "it necessarily follows that any inquiry into whether that standard has been met will itself be hopelessly vague." Pl.'s Opp'n at 28. As explained above, however, 351(a) has defined reference points. Second, she repackages an argument that she made—and the Court rejected—in the last round of motions. She claims that the "issue" with § 353(c) is that "Defendants can *compel* Judge Newman to turn over private documents and then *directly sanction* her for declining to do so." Pl.'s Opp's at 28 (emphasis in original). It is difficult to see how this is a vagueness challenge. In any event, this point confuses the authority of special committees with that of circuit judicial councils. Though a special committee can issue orders to subject judges, the JC&D Act "does not give [it] enforcement power." Newman, 2024 WL 551836, at *17. Instead, the Act "directs special committees to present a report to the judicial council with 'recommendations for necessary and appropriate action by the judicial council.'" Id. (quoting 28 U.S.C. § 353(c)). The JC&D Rules also divest the special committee of enforcement

power. They "allow subject judges to refuse to comply with investigations for 'good cause,'" and empower "the judicial council, [or] ultimately the Judicial Conference [of the United States]," but not the special committee, to "decide whether the judge had good cause to refuse." Id. (quoting JC&D R. 4(a)(5)). Finally, to the extent judicial councils (as opposed to special committees) have the power to both compel and sanction, the D.C. Circuit has found no constitutional defect in that arrangement. See Newman, 2024 WL 551836, at *17 ("[In Hastings,] [t]he circuit held that the JC&D Act's vesting of both investigative and adjudicatory functions in the same body did not violate due process." (citing Hastings, 829 F.2d at 104–05)).

In sum, § 353(c) is not unconstitutionally vague, and Defendants are therefore entitled to judgment on the pleadings as to Count Seven.

IV. Conclusion

For these reasons, the Court will grant Defendants' motion for judgment on the pleadings and dismiss this case as to all remaining claims. A separate Order shall accompany this memorandum opinion.

/s/ Christopher R. Cooper
CHRISTOPHER R. COOPER
United States District Judge

Date: July 9, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HON. PAULINE NEWMAN, Plaintiff, v. **HON. KIMBERLY A. MOORE**, *et al.*, Defendants.	Case No. 23-cv-01334 (CRC)

MEMORANDUM OPINION

Veteran Federal Circuit Judge Pauline Newman has sued Federal Circuit Chief Judge Kimberly A. Moore, along with all the other judges on the court, over their handling of reports from court staff implicating Judge Newman's fitness for office. Judge Newman has been hailed, by Chief Judge Moore no less, as a "trailblazer" and "heroine of the patent system." Kimberly A. Moore, *Anniversaries and Observations*, 50 AIPLA Q. J. 521, 524–25 (2022). After leading the intellectual property department of a major corporation at a time when "female attorneys, particularly female patent attorneys, were rare," id. at 524, Judge Newman became the first judge directly appointed to the Federal Circuit, by President Ronald Reagan in 1984. First Amended Complaint ("FAC") ¶ 10. During her tenure on the court, she has authored hundreds of opinions and been particularly recognized for her "insightful dissents." Id. ¶¶ 13, 74. On multiple occasions when Judge Newman dissented, the

Supreme Court reversed the Federal Circuit and "adopt[ed] . . . [her] reasoning." Moore, *supra*, at 525.

In 2021, however, court personnel began reporting "behavior that [] called into question Judge Newman's ability to perform her duties." Mot. Dismiss at 4. Specifically, staff relayed information about Judge Newman "indicative of memory loss, a lack of focus, confusion over simple matters, uncharacteristic paranoia, and an inability to perform simple tasks." Id. These reports eventually led to Chief Judge Moore convening a Special Committee to investigate a judicial misconduct complaint against Judge Newman; the Federal Circuit Judicial Council suspending Judge Newman from hearing new cases on the recommendation of the Special Committee; and Judge Newman filing this lawsuit against members of the Special Committee and the Judicial Council as a whole ("Defendants"). At the Court's urging, the parties attempted to resolve the dispute through mediation with retired D.C. Circuit Judge Thomas B. Griffith. The mediation proved unsuccessful, however, and litigation resumed.

At the heart of the dispute are two important, but at times competing, priorities: judicial independence and the need for oversight of Article III judges. The Constitution provides for judicial independence through the "great bulwarks" of life tenure and undiminished salary during good behavior. McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S., 264 F.3d 52, 64 (D.C. Cir. 2001); U.S. CONST. Art. III, § 1. But with this independence comes the risk that, should judges falter in performing their duties, there is no means for sanctioning them short of impeachment.

Congress addressed this gap by creating a system for the judiciary to police itself. With the passage of 28 U.S.C. § 332, which created circuit judicial councils, and later the Judicial Conduct and Disability ("JC&D") Act, Congress gave "the judiciary the power to 'keep its own house in order.'" McBryde, 264 F.3d at 61 (citing S. Rep. No. 96-362, at 11); see also Chandler v. Jud. Council of Tenth Cir. of U.S., 398 U.S. 74, 85 (1970). Employing this "housekeeping" power, federal courts created common-sense rules to deal with shortcomings in judges' performance. One such rule, a variant of which Judge Newman's colleagues invoked in this case, provides that "when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his 'backlog.'" Chandler, 398 U.S. at 85. The Supreme Court has blessed these rules. See id. ("These are reasonable, proper, and necessary rules, and the need for enforcement cannot reasonably be doubted."). And it has rejected the notion that "the extraordinary machinery of impeachment" is the "only recourse" "if one judge in any system refuses to abide by such reasonable procedures." Id.

Cases dealing with this system of oversight thankfully are rare, but they have consistently affirmed the judiciary's authority to police itself. See, e.g., McBryde, 264 F.3d at 61–64; Hastings v. Jud. Conf. of U.S. ("Hastings II"), 829 F.2d 91, 103–05 (D.C. Cir. 1987). Judge Newman now asks the Court to break ranks with higher courts that have upheld this self-regulatory regime. The Court must decline the invitation.

Spanning eleven counts, Judge Newman's First Amended Complaint mounts both facial and as-applied constitutional challenges to the JC&D Act and 28 U.S.C.

§ 332. Now before the Court are two motions. First, Judge Newman has moved for a preliminary injunction to prohibit Defendants from continuing her suspension from new case assignments and from proceeding with any further disciplinary proceedings until the matter is transferred to the judicial council of another circuit. Second, Defendants have moved to dismiss the case, primarily on jurisdictional grounds. For the reasons explained below, Judge Newman is not entitled to preliminary relief because the Court lacks jurisdiction over most of her claims and she has failed to establish a likelihood of prevailing on the others. Moving to Defendants' motion, the Court will dismiss the claims over which it lacks jurisdiction (Counts II–IV, VI, and X–XI). As for the remaining claims, Defendants have moved to dismiss two (Count I and part of Count VII) under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The Court will grant that relief. Defendants have not, however, sought Rule 12(b)(6) dismissal of the remaining claims over which the Court has jurisdiction (Counts V and VIII–IX and part of Count VII). The Court therefore may not entertain dismissal of the case in its entirety at this juncture. Defendants may seek dismissal of the surviving claims under Rule 12(c) or via summary judgment.

I. Background

A. Statutory Frameworks

Under federal law, each circuit has a judicial council, composed—in most cases—of the chief judge of the circuit and an equal number of district and circuit judges. 28 U.S.C. § 332(a)(1). The Judicial Council for the Federal Circuit, however, is composed of all active judges of the Federal Circuit. See United States Court of Appeals

for the Federal Circuit, Judicial Council.[1] Judicial councils have a range of powers, but two sources of authority are of particular relevance here: 28 U.S.C. § 332 and the JC&D Act, 28 U.S.C. § 351 et seq.

Under 28 U.S.C. § 332(d), judicial councils may "make all necessary and appropriate orders for the effective and expeditious administration of justice within [their] circuit." As the Supreme Court explained over fifty years ago, "[t]he legislative history of 28 U.S.C § 332 and related statutes is clear that some management power was both needed and granted." Chandler, 398 U.S. at 85. And courts since have found that § 332 "gives considerable discretion to courts and circuit Judicial Councils to choose how to regulate court business, whether by formal rules, standing orders, or other means." Truesdale v. Moore, 142 F.3d 749, 760 (4th Cir. 1998).

Second, judicial councils may "take [] action" on judicial misconduct complaints filed under the JC&D Act. 28 U.S.C. § 354(a)(1)(C). The act permits any person to file a complaint "alleging that [a] judge is unable to discharge all the duties of office by reason of mental or physical disability." Id. § 351(a). "In the interests of the effective and expeditious administration of the business of the courts," the chief judge may also "identify a complaint" and dispense with the filing of a written complaint. Id. § 351(b). The chief judge then reviews the complaint and takes one of several routes. Id. § 352(a). She may dismiss the complaint (*e.g.*, because it is frivolous, relates to the merits of a decision, or lacks any factual foundation), id. §§ 352(b)(1), (b)(1)(A)(ii)–(iii),

1. https://perma.cc/2AF4-LG8R.

(b)(1)(B); conclude the proceeding if appropriate action has already been taken, id. § 352(b)(2); or appoint a special committee to conduct "an investigation as extensive as it considers necessary," id. §§ 353(a), (c). On this final avenue, once the committee completes its investigation, it presents its findings and recommendations to the judicial council. Id. § 353(c).

The judicial council, in turn, may conduct an additional investigation, dismiss the complaint, or "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." Id. § 354(a)(1)(C). One possible action is to "order[] that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint." Id. § 354(a)(2)(A)(i). A judge aggrieved by an action of a judicial council may petition the Judicial Conference of the United States' Committee on Judicial Conduct and Disability for review. Id. § 357(a).[2] The Judicial Conference, in turn, "after consideration of the prior proceedings and such additional investigation as it considers appropriate" may take the same actions available to a judicial council. Id. § 355(a). Or, if the Judicial Conference deems impeachment war-

2. Created by Congress, the Judicial Conference of the United States, through an executive committee and nineteen topic-related subcommittees, establishes and implements policies for the administration of the federal judiciary. United States Courts, About the Judicial Conference, https://perma.cc/A9XB-9C8F. Though Judicial Conference review of complaints is discretionary, see JC&D R. 21(a), the D.C. Circuit found it "fair to suppose that both houses of Congress realistically expected that the Judicial Conference would hear all *serious* claims," McBryde, 264 F.3d at 61.

ranted, it may certify and transmit that determination to the House of Representatives. Id. § 355(b)(1).

B. Proceedings against Judge Newman

In 2021, according to Defendants, Federal Circuit court personnel began reporting "behavior that [] called into question Judge Newman's ability to perform her duties." Mot. Dismiss at 4. These reports included "information indicative of memory loss, a lack of focus, confusion over simple matters, uncharacteristic paranoia, and an inability to perform simple tasks." Id. In early March 2023, Chief Judge Moore allegedly met with Judge Newman and "attempted to convince [her] to retire." FAC ¶ 17. After she refused, the Federal Circuit Judicial Council proceeded along two separate, but overlapping, tracks: It pursued action under both § 332(d) and the JC&D Act.

Starting with § 332, on March 8, 2023, the Judicial Council convened without Judge Newman present to consider "concerns raised about [her] mental fitness" and "her abnormally large backlog in cases." FAC, Ex. O at 1. Though the Council did not issue a written order or identify the source of its authority, it voted on March 8 to preclude the assignment of new cases to her. Id. After Judge Newman asked to be restored to the case calendar, the Judicial Council reconsidered its March 8 opinion "*de novo*." Id. at 2. In a June 5 order, the Council concluded that "precluding Judge Newman from new case assignments [wa]s warranted" under the Council's § 332 authority. Id. at 4. The Council cited Judge Newman's "continued backlog of cases, and her inability to clear the backlog despite the absence of new cases." Id. Specifically, the June 5 order noted that Judge Newman still "ha[d] a backlog of seven opinions, three of which

[were] pending for over 200 days and all of which [we]re pending for over 100 days." Id. at 3.

The June 5 order remained in effect until November 9, 2023. On November 8, the seventh and final case in Judge Newman's backlog issued. The following day, the Judicial Council "*sua sponte* vacate[d]" the June 5 order. Defs.' Reply, Ex. 4 at 2.

Separately, the Judicial Council proceeded along the track laid by the JC&D Act. On March 24, 2023, Chief Judge Moore initiated a complaint against Judge Newman under the act. FAC, Ex. A. She did so pursuant to Rule 5 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings ("JC&D Rules"), which permits a chief judge to "identify" a complaint upon a finding of "probable cause to believe that misconduct occurred or that a disability exists." JC&D R. 5(a); see also 28 U.S.C. § 351(b). In the order initiating the complaint, Chief Judge Moore cited several factors as providing probable cause, including Judge Newman's delay in issuing opinions and voting on other judges' opinions, reports that she had made statements indicating a lack of awareness about the issues in cases, and reports that she had inappropriately managed staff. FAC, Ex. A.

Chief Judge Moore then appointed a special committee, consisting of herself and Federal Circuit Judges Sharon Prost and Richard G. Taranto, to investigate the allegations in the complaint. FAC ¶ 23. Throughout the spring, the Special Committee issued a series of orders affecting the scope of its investigation and seeking cooperation from Judge Newman. Among them, the Special Committee expanded the investigation to include alleged misconduct in Judge Newman's management of staff, FAC, Exs. B, E; ordered Judge Newman to submit to

neurological and neuro-psychological testing by physicians of the committee's choosing, FAC, Exs. C, K; and directed Judge Newman to provide the Committee with medical records related to incidents described in the complaint, FAC, Exs. E, K.

When Judge Newman refused to undergo testing by doctors chosen by the Special Committee or share her medical records, the Committee changed course. It decided to narrow the investigation to focus only on "whether Judge Newman's refusal to cooperate with the Committee's investigation constitute[d] misconduct." FAC, Ex. N at 3; see also JC&D R. 4(a)(5) ("Cognizable misconduct includes . . . refusing, without good cause shown, to cooperate in the investigation of a complaint. . . ."). In early May, the Judicial Council also denied Judge Newman's request to transfer her complaint to the judicial council of another circuit. FAC, Exs. H–I. The Council denied the transfer request without prejudice to re-filing after Judge Newman complied with its orders for her to undergo the specified testing and provide relevant medical records. FAC, Ex. H at 9.

As part of its investigation, the Special Committee interviewed more than twenty court employees, reviewed case-processing records, and consulted with a physician experienced in judicial-disability matters. Mot. Dismiss at 13. Judge Newman's counsel countered with several letters raising objections to the Special Committee's investigation and orders. See FAC, Exs. QT. Counsel also provided the Committee with medical records from one of Judge Newman's own doctors. FAC ¶ 16; id., Ex. Y (filed under seal). On July 31, the Special Committee released its Report & Recommendation to the Judicial Council. Mot. Dismiss at 15; id., Ex. 1. The report con-

cluded that "there is, at a minimum, a reasonable basis for concluding that Judge Newman may suffer from a disability that renders her unable to perform the duties of her office" and that her "failure to cooperate with the Committee's orders constitutes misconduct." Mot. Dismiss, Ex. 1 at 31, 60. The Special Committee recommended that Judge Newman not be permitted to hear new cases "for the fixed period of one year or at least until she ceases her misconduct and cooperates such that the Committee can complete its investigation, whichever comes sooner." Id. at 110–11.

After receiving Judge Newman's response, the Judicial Council adopted the Special Committee's recommendations. Pl.'s Opp'n, Exs. A–B. The Council found that the Committee had a reasonable basis to order Judge Newman to undergo medical examinations and submit medical records, and that her refusal to comply "was not excused by good cause." Pl.'s Opp'n, Ex. B at 37, 40. The Council therefore concluded that her "refusal, without good cause" "constitute[d] serious misconduct." Id. at 72. The Council ordered that she not be permitted to hear any cases "for a period of one year," "subject to consideration of renewal if [her] refusal to cooperate continues after that time and to consideration of modification or rescission if justified by an end of the refusal to cooperate." Id. at 72–73.

Judge Newman petitioned the Judicial Conference of the United States for review of the Judicial Council's order, and the Judicial Conference affirmed the order on February 7, 2024. Defs.' Notice of JC&D Comm. Order [ECF No. 40] at 14. The Judicial Conference found that (1) the Chief Circuit Judge and Judicial Council had not abused their discretion by refusing to request transfer of

the complaint to another circuit's judicial council, (2) Judge Newman had not shown good cause for refusing to cooperate with the Special Committee's investigation, and (3) the sanction imposed by the Judicial Council did not exceed its statutory authority. Id. at 14–29.

While the Judicial Council proceedings were still ongoing, Judge Newman filed this federal lawsuit. Compl. She subsequently amended her complaint and now brings eleven counts against the three judges on the Special Committee (Chief Judge Moore and Judges Prost and Taranto) in their official capacities and the Judicial Council of the Federal Circuit. FAC ¶¶ 4–7. (The Court will elaborate on the specific claims later.) Judge Newman also moved for a preliminary injunction, asking the Court to enjoin the Defendants "from suspending [her] from, or otherwise interfering with, the duties and functions of the judicial office to which [she] was confirmed." Prelim. Inj. at 2. At the Court's suggestion, the parties agreed to informal mediation with retired D.C. Circuit Judge Thomas B. Griffith.[3] See Joint Statement on Notice of Mediation [ECF No. 17]; Mediation Referral Order [ECF No. 18]. Despite Judge Griffith's best efforts, the mediation proved unsuccessful. See Joint Status Report [ECF No. 21] at 1. Defendants followed with a motion to dismiss. Both motions are fully briefed, and the Court heard argument on the motions on January 25, 2024.

3. The Court thanks Judge Griffith for his volunteer service.

II. Legal Standards

A. Motion for Preliminary Injunction

"A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004). To obtain a preliminary injunction, the moving party must show: (1) that she is likely to succeed on the merits of his claim; (2) that she is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in her favor; and (4) that a preliminary injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). An absence of irreparable injury is fatal to a preliminary injunction motion. Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006). The D.C. Circuit has suggested, without holding, that failure to establish a likelihood of success on the merits also categorically forecloses preliminary relief. Sherley v. Sebelius, 644 F.3d 388, 393 (D.C. Cir. 2011); see also Changji Esquel Textile Co. v. Raimondo, 40 F.4th 716, 726 (D.C. Cir. 2022).

B. Motion to Dismiss

Defendants challenge this Court's subject matter jurisdiction and argue that certain counts fail to state a claim. The Court will therefore apply Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

As "[f]ederal courts are courts of limited jurisdiction," Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994), a court must ensure it has subject matter jurisdiction over a claim before proceeding to the merits, Moms Against Mercury v. FDA, 483 F.3d 824,

826 (D.C. Cir. 2007). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of establishing jurisdiction. Knapp Med. Ctr. v. Hargan, 875 F.3d 1125, 1128 (D.C. Cir. 2017). The Court must "accept all well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor," but need not "assume the truth of legal conclusions" in the complaint. Williams v. Lew, 819 F.3d 466, 472 (D.C. Cir. 2016) (cleaned up). The Court also "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." Jerome Stevens Pharms., Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

To survive a Rule 12(b)(6) motion, a complaint must contain sufficient factual allegations, accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is plausible on its face if it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A court evaluating a Rule 12(b)(6) motion will "construe the complaint 'liberally,' granting plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" Barr v. Clinton, 370 F.3d 1196, 1199 (D.C. Cir. 2004) (quoting Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994)). However, a "court need not accept a plaintiff's legal conclusions as true, . . . nor must a court presume the veracity of legal conclusions that are couched as factual allegations." Alemu v. Dep't of For-Hire Vehicles, 327 F. Supp. 3d 29, 40 (D.D.C. 2018) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2009)).

III. Analysis

A. Judge Newman's Challenges to Judicial Council Action Taken Pursuant to 28 U.S.C. § 332(d) Are Moot

Defendants' first line of attack asserts that Judge Newman's challenges to Judicial Council action taken pursuant to 28 U.S.C. § 332(d) are moot. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (cleaned up). Even where claims presented a live controversy when filed, the mootness doctrine "requires a federal court to refrain from deciding it if events have so transpired that [a judicial] decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc) (cleaned up); see also Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." (cleaned up)).

The Judicial Council's November 9 order rendered Judge Newman's § 332(d) challenges moot. Recall that on June 5, citing its authority under § 332(d), the Judicial Council excluded Judge Newman from new case assignments because she had accumulated a backlog of opinions that had been pending for more than one hundred days. FAC, Ex. O at 3–4. On November 9, the Judicial Council *sua sponte* vacated the June 5 order because Judge Newman's final backlogged opinion had issued the

day before. Defs.' Reply, Ex. 4 at 2. Because the Judicial Council vacated the June 5 opinion, any challenge based on § 332(d) is moot.[4] See Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45, 46 (D.C. Cir. 1992) (finding a case "plainly moot" when the agency's "challenged orders . . . were superseded by a subsequent [] order"); Am. Wild Horse Pres. Campaign v. Salazar, 800 F. Supp. 2d 270, 271 (D.D.C. 2011) ("[Because] [the] administrative decision [] was rescinded after the filing of the complaint, . . . the action is now moot.").

Indeed, Judge Newman does not contest that the June 5 order is moot; she instead contends that an exception to the mootness doctrine rescues her § 332(d) claims. See Pl.'s Surreply at 1. First, she argues her claims are "capable of repetition, yet evade[] review." City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983). And second, she contends the Court retains jurisdiction because "voluntary cessation of allegedly illegal conduct does not deprive a court of power to hear and determine the case." Am. Bar Ass'n v. F.T.C., 636 F.3d 641, 648 (D.C. Cir. 2011) (quoting County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)). Neither mootness exception applies.

The first exception requires two circumstances to be "simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to

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4. Any challenge based on the March 8 order is also moot for similar reasons. In the June 5 order, the Judicial Council reviewed the March decision "*de novo*" and voted to suspend Judge Newman from case assignments.

the same action again." Lewis v. Cont'l Bank Corp., 494 U.S. 472, 481 (1990) (cleaned up). The June 5 order satisfies the first requirement as courts assume "orders of less than two years' duration ordinarily evade review." McBryde, 264 F.3d at 55–56. But it flunks the second because there is no reasonable expectation that Judge Newman will be subject to the same action again. "When considering the likelihood that an injury will be repeated, the Supreme Court has in general 'been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.'" Id. at 56 (quoting Honig v. Doe, 484 U.S. 305, 320 (1988)). The Court must therefore presume that Judge Newman will not repeat the "misconduct" that led to the imposition of the June 5 order—that is, accumulate a "backlog of cases." FAC, Ex. O at 4.

Judge Newman attempts to sidestep this presumption by declaring it "unlikely" that her "speed in issuing opinions will change." Pl.'s Sur-reply at 2. But her speed in issuing opinions is a factor within her control. Indeed, she was able to clear her recent backlog, leading to the vacatur of the June 5 order. Defs.' Reply, Ex. 4 at 2. And the Supreme Court has declined to find the case or controversy requirement satisfied "where, as here, the litigant[] simply 'anticipate[s] violating'" a valid rule. See United States v. Sanchez-Gomez, 584 U.S. 381, 394 (2018) (quoting O'Shea v. Littleton, 414 U.S. 488, 496 (1974)); see also id. at 393 ("Our decisions in [prior] civil cases rested on the litigants' inability, for reasons beyond their control, to prevent themselves from transgressing and avoid recurrence of the challenged conduct."). The analysis might be different if Judge Newman were seeking to challenge the Judicial Council's au-

thority to issue case-backlog rules in the first instance.[5] See, e.g., O'Shea, 414 U.S. at 497 ("[We] are [] unable to conclude that the case-or-controversy requirement is satisfied by general assertions . . . that in the course of their activities respondents will be prosecuted for violating *valid* criminal laws." (emphasis added)). But she is not. She rather challenges the punishment the Judicial Council imposed (or might impose) for violations of the rules.

The voluntary cessation exception does not save Judge Newman's § 332(d) claims either. "As a general rule, a defendant's 'voluntary cessation of allegedly illegal conduct does not deprive'" a court of jurisdiction. Am. Bar Ass'n v. F.T.C., 636 F.3d at 648 (quoting Davis, 440 U.S. at 631). But that general rule does not apply here for two reasons. First, the D.C. Circuit has characterized the voluntary cessation exception as "focused on preventing a private defendant from manipulating the judicial process." Clarke, 915 F.2d at 705 (D.C. Cir. 1990). And it has expressed "doubt" about whether courts should "impute such manipulative conduct" to Congress, a non-private defendant and a coordinate branch of government. Id. Defendants therefore contend that the voluntary cessation exception does not apply to them as government actors. Defs.' Resp. to Sur-Reply at 2. The Court hesitates to adopt a bright-line rule that the exception can never be applied against public-sector defendants. But Defendants' point is well taken in this context. Though separation-of-powers concerns do not ani-

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5. Of course, such a challenge would be unlikely to succeed given the Supreme Court's explicit endorsement of "backlog" rules. See Chandler, 398 U.S. at 85.

mate the analysis as in Clarke, "it would seem inappropriate" for this district court "to impute [] manipulative conduct" to the entire roster of Federal Circuit judges save one. Clarke, 915 F.2d at 705; see also Chandler, 398 U.S. at 94 (Harlan, J., concurring) ("[D]irect review by a district judge of the actions of circuit judges would present serious incongruities and practical problems.").

Second, regardless whether the voluntary cessation exception applies to government defendants, "[t]he established law of this circuit is that the [] exception . . . has no play when the [defendant] did not act in order to avoid litigation." Alaska v. U.S. Dep't of Agric., 17 F.4th 1224, 1229 (D.C. Cir. 2021) (cleaned up). Judge Newman opines that the "Defendants vacated the June 5 Order strategically and solely to avoid risking an unfavorable judicial decision." Pl.'s Sur-reply at 3. But the timeline of events tells a different story. The Judicial Council initially suspended Judge Newman from hearing new cases on March 8, 2023. FAC, Ex. O at 1. On May 10, Judge Newman filed her complaint and challenged—among other actions—her case suspension. Compl. ¶¶ 20, 45, 50. On June 5, reviewing its March 8 order de novo, the Judicial Council doubled down and again voted to suspend Judge Newman from hearing cases. FAC, Ex. O at 2. If the Judicial Council had wanted to avoid "an unfavorable judicial decision," it seems a poor choice to dig itself a deeper hole by reaffirming its decision. Then on November 9, the Judicial Council vacated the June 5 order. Though Judge Newman disputes how the Judicial Council calculated the number of cases on her backlog and adjudged the backlog to have been cleared, see Pl.'s Sur-reply at 3 n.2, there is no question that the Council vacated the order *the day after* the final backlogged opin-

ion issued, see Defs.' Reply, Ex. 4 at 2. The record thus suggests that Judge Newman's own conduct, rather than this litigation, precipitated the Judicial Council's decision to vacate the order. Accordingly, the voluntary cessation doctrine has "no play."

B. 28 U.S.C. § 357(c) Precludes Judge Newman's As-Applied Challenges

Because Judge Newman's challenges to the Judicial Council's § 332(d) orders are moot, the Court now turns to the second track along which the Judicial Council proceeded: the JC&D Act. Judge Newman has raised both facial and as-applied challenges based on the act. Before parsing out which claims are facial and which are as-applied, the Court must examine the scope of its jurisdiction to hear challenges to the act.

1. *28 U.S.C § 357(c), as in interpreted in McBryde, precludes district courts from reviewing as-applied challenges to the JC&D Act*

The Court lacks jurisdiction to review Judge Newman's as-applied challenges to the JC&D Act. Section 357 of the act, titled "No Judicial Review," precludes district court review of judicial council action. It states, "[e]xcept as expressly provided in this section and section 352(c), all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. § 357(c). The enumerated exceptions create avenues for review *within* the framework of the JC&D Act. Under 352(c), judges may petition judicial councils for review of certain final orders by the chief judge. Id. § 352(c). And, under § 357(a), judges may peti-

tion the Judicial Conference for review of judicial council action. Id. § 357(a). But neither exception allows for district court review of judicial council action.

The D.C. Circuit confirmed as much in McBryde. The court held that *facial* challenges to the constitutionality of the JC&D Act—*i.e.*, "challenges to the decisions of Congress"—are not precluded by § 357(c).[6] McBryde, 264 F.3d at 58; see also id. ("This interpretation . . . avoid[s] the 'serious constitutional question' that would

6. When McBryde was decided, the judicial-review provision was codified in § 372(c)(10) of the JC&D Act. See 28 U.S.C. § 372(c)(10) (2000). Congress reorganized the statute in 2002 and relocated the relevant part of 28 U.S.C. § 372(c)(10), without material changes, in § 357(c). See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107–273, § 357(c), 116 Stat. 1758, 1853 (2002). Judge Newman contends that the addition of a severability clause in the 2002 reorganization rendered McBryde's holding on as-applied challenges no longer good law. See Prelim. Inj. at 30. The severability clause provides that if "any provision of this subtitle, an amendment made by this subtitle, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of [the JC&D Act] . . . shall not be affected." 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107–273, § 11044, 116 Stat. 1758, 1856 (2002) (codified as Note to 28 U.S.C. § 351). According to Judge Newman, the "only circumstance where an *application* of a provision of the Disability Act could be held unconstitutional is in a proceeding before a district court (and any subsequent appeals)." Prelim. Inj. at 30. This reading, however, ignores the judicial-review procedure established by § 357(c) (formerly § 372(c)(10)) and endorsed by the D.C. Circuit in McBryde. Via the appeal right created in § 357(c), Congress "enabled a sanctioned judge to seek review by . . . the Judicial Conference of all claims except (presumably) facial attacks on the statute." McBryde, 264 F.3d at 62. The Judicial Conference is thus empowered to find unconstitutional an application of the JC&D Act.

be posed 'if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.'" (quoting Webster v. Doe, 486 U.S. 592, 603 (1988)). But it found that § 357(c) precludes review in a district court for as-applied claims, including as-applied claims that invoke the Constitution. Id. at 59, 62–63. Only the Judicial Conference can review those challenges. Id. at 62. The circuit explained that members of Congress, "[p]ut ultimately to a choice between review by an Article III 'Court' and review by a committee of Article III judges chosen by and from the Judicial Conference, [] chose the latter." Id. at 63.

2. *McBryde remains good law and applies to this case*

Judge Newman attempts to circumvent McBryde's holding that § 357(c) bars district court review of as-applied claims. She offers three theories, but none succeeds. See Pl.'s Opp'n at 33–36. First, Judge Newman contends that McBryde is no longer good law in the wake of the Supreme Court's recent admonition in Axon Enterprises Inc. v. Federal Trade Commission that "agency adjudications are generally ill suited to address structural constitutional challenges." Pl.'s Opp'n at 34 (quoting Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 195 (2023)). In McBryde, the Judicial Conference had "disclaimed" any authority to rule on constitutional challenges on the grounds that it was "not a court" and had "no competence to adjudicate the facial constitutionality of the [JC&D Act] or its constitutional application to the speech of an accused judge." 264 F.3d at 62. The D.C. Circuit rejected the Judicial Conference's disavowal of authority. Id. Treating the Conference as an agency, the Circuit held that "agencies [] have an obligation to

address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress." Id. (cleaned up). Judge Newman contends that Axon repudiated this element of McBryde.[7]

But this argument overlooks the fact that McBryde allows facial challenges to the JC&D Act to proceed in district court. The kinds of "structural constitutional challenges" that Axon found agencies are "ill suited to address" are exactly the claims McBryde funnels to Article III courts. See McBryde, 264 F.3d at 58 ("[T]he wording of § 372(c)(10) [now § 357(c)] does not withhold jurisdiction over Judge McBryde's claims that the *Act* unconstitutionally impairs judicial independence and violates separation of powers."). Though it is perhaps a stretch to say McBryde was prescient (and, indeed, Axon is in many ways an application of Thunder Basin Coal

7. In response to the Judicial Conference order affirming her suspension, Judge Newman filed a notice indicating that the Conference "declined to evaluate [her] constitutional claims, thus leaving these matters to properly constituted Article III courts." Pl.'s Notice [ECF No. 41] at 2. As neither party filed in this Court a copy of Judge Newman's petition to the Conference, the Court is unable to assess which, if any, claims the Conference declined to address. In any event, as noted above, McBryde rejected the notions that Congress intended for the Conference to "disclaim[] authority to rule on as applied . . . constitutional challenges," or that a disavowal of authority by the Conference confers jurisdiction on Article III courts. See McBryde, 264 F.3d at 62–63 ("[T]he statutory mandate to the [Judicial Conference JC&D] committee appears to contain no language justifying a decision to disregard claims that a circuit judicial council has violated a judge's constitutional rights in application of the Act. . . . [W]e find the evidence clear and convincing that Congress intended [§ 357(c)] to preclude review in the courts for as applied constitutional claims."). This Court is bound by the D.C. Circuit's pronouncements in this regard.

Co. v. Reich, 510 U.S. 200 (1994), a case predating McBryde), McBryde's holding accords fully with Axon and its line of cases.[8]

Judge Newman's second theory is that McBryde does not govern because—unlike the judges involved in Judge McBryde's discipline—the members of the Federal Circuit Judicial Council are all her colleagues and were witnesses to her alleged disability. Pl.'s Opp'n at 34. Due to this difference, she contends her challenge is permitted under Dart v. United States, where the D.C. Circuit held that a statute's bar on judicial review of agency decisions does not apply "when [the] agency is charged with acting beyond its authority." 848 F.2d 217, 221 (D.C. Cir. 1988). But, as the circuit noted in McBryde, Dart's exception does not stretch so far as to negate a statute's judicial-review bar "whenever the complainant asserts legal error." 264 F.3d at 63. Rather, Dart's "narrow exception" applies when "agency action on its face violate[s] a statute." Dart, 848 F.2d at 221–22 (quoting Griffith v. FLRA, 842 F.2d 487, 492 (D.C. Cir.

8. In any case, the jurisdictional provisions in Axon, dubbed "special statutory review schemes" by the Supreme Court, functioned differently than § 357(c). The Securities Exchange Act and Federal Trade Commission ("FTC") Act, which supplied the review schemes at issue, required litigants to pursue challenges in federal courts of appeal, not district courts, following exhaustion of the administrative process. Axon, 598 U.S. at 180–81. The plaintiffs in Axon, however, sued in district court while their administrative petitions were pending, alleging that "fundamental aspect[s] of the [agencies'] structure violate[d] the Constitution." Id. at 182. Unlike the Exchange and FTC Acts, the JC&D Act does not create a "special statutory review scheme" that simply bypasses district court review. It bars Article III review—in district and circuit courts alike—of all as-applied challenges. See 28 U.S.C. § 357(c).

1988) (cleaned up)). The make-up of the Federal Circuit Judicial Council does not violate the JC&D Act on its face. The JC&D Act's default framework charges judges with reviewing complaints about other judges in their circuit. See 28 U.S.C. §§ 352–53.[9] In fact, the JC&D Rules mandate that special committees from the Federal Circuit "be selected from the judges serving on the subject judge's court." JC&D R. 12(a); see also 28 U.S.C. § 363. And JC&D Rule 26 instructs that complaints should be transferred out-of-circuit only "[i]n exceptional circumstances." JC&D R. 26. The composition of the Federal Circuit Judicial Council thus did not "on its face violate[]" the JC&D Act.

Finally, at the motions hearing, Judge Newman's counsel suggested for the first time that two related Supreme Court cases — Cuozzo Speed Technologies, LLC v. Lee, 579 U.S. 261 (2016), and SAS Institute, Inc. v.

9. The JC&D Act's framework also contemplates that, in some cases, the members of a judicial council will have personal knowledge about the facts underlying complaints. For this reason, it is not evident that 28 U.S.C. § 455 — which mandates that judges recuse from "any proceeding[s]," among others, where their "impartiality might reasonably questioned" or where they have "personal knowledge of disputed evidentiary facts" — applies to judicial council proceedings. 28 U.S.C. §§ 455(a)–(b). Moreover, § 455 defines "proceeding" as including "pretrial, trial, appellate review, or other stages of litigation." Id. § 455(d)(1). None of those terms maps onto the actions of a judicial council, and — it would seem — for good reason. A judicial council's activities fall outside of the normal rubric of judicial activity. See also McBryde, 264 F.4d at 58, 62–63 (holding the district court was precluded from reviewing Judge McBryde's due process claim, which alleged that the whole investigation "arose out of a conflict between [Judge McBryde] and Chief Judge Politz . . . [and] Chief Judge Politz refused to recuse himself" (cleaned up)).

Iancu, 138 S. Ct. 1348 (2018)—have superseded McBryde. Tr. at 36–38. In both cases, the Supreme Court considered whether 35 U.S.C. § 314's bar on judicial review precluded federal court review of challenges to certain determinations by the Director of the U.S. Patent and Trademark Office. Specifically, § 314 allows third parties, through a procedure known as "inter partes review," to challenge previously issued patents in an adversarial process before the Patent Office. SAS Institute, 138 S. Ct. at 1350. The statute's "No Appeal" clause provides that "[t]he determination by the Director [of the Patent Office] whether to institute an inter partes review under this section shall be final and nonappealable." 35 U.S.C. § 314(d). In both cases, the Supreme Court began by noting that to overcome "the 'strong presumption' in favor of judicial review, . . . th[e] Court's precedents require 'clear and convincing' indications that Congress meant to foreclose review." SAS Institute, 138 S. Ct. at 1359 (quoting Cuozzo, 579 U.S. at 273). In SAS Institute, which clarified Cuozzo, the Court held that § 314(d) did not preclude judicial review of challenges to *how* the Director conducted the inter partes review. 138 S. Ct. at 1359. Rather, because of § 314(d)'s plain text and the presumption in favor of judicial review, the Court found "§ 314(d) precludes judicial review only of the Director's 'initial determination'" to institute inter partes review. Id. (quoting Cuozzo, 579 U.S. at 273).[10]

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10. Both cases reviewed Federal Circuit decisions. True to form, Judge Newman authored a dissent in each case. See In re Cuozzo Speed Techs., LLC, 793 F.3d 1268, 1283 (Fed. Cir. 2015) (Newman, J., dissenting); SAS Inst., Inc. v. ComplementSoft, LLC., 825 F.3d 1341, 1353 (Fed. Cir. 2016) (Newman, J., concurring in part and dissenting in part). In Cuozzo, the Supreme (continued…)

Neither case upsets McBryde's holding. If anything, they reinforce it. In McBryde, the circuit noted the presumption in favor of judicial review, see 264 F.3d at 59, and undertook a painstaking review of the congressional record before finding "the evidence clear and convincing that Congress intended § 372(c)(10) [now § 357(c)] to preclude review in the courts for asapplied constitutional claims," id. at 59–63. Moreover, § 357(c)'s bar on judicial review does not contain the kind of limiting language present in § 314(d). Section 357(c) bars review of "all orders and determinations, including denials of petitions for review," and not just a sub-set of decisions (as § 314(d) does). 28 U.S.C. § 357(c).

The Court thus finds no basis in Supreme Court or D.C. Circuit case law to question McBryde's binding interpretation of § 357(c). The Court therefore lacks jurisdiction over Judge Newman's as-applied challenges to the JC&D Act.

3. *28 U.S.C. § 357(c), as interpreted in McBryde, bars this Court from exercising jurisdiction over six of Judge Newman's claims*

Having found that it lacks jurisdiction over as-applied challenges to the JC&D Act, the Court must assess which counts in the First Amended Complaint mount as-applied, as opposed to facial, challenges to the act. A facial challenge alleges that "no set of circumstances exists under which" a statute is valid. United States v. Salerno,

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Court rejected her interpretation of § 314(d)'s bar on judicial review. 579 U.S. at 273. In SAS Institute, Judge Newman did not address § 314(d), but the Supreme Court largely adopted her interpretation of other parts of the statute. 138 S.Ct. at 1354–57.

481 U.S. 739, 745 (1987). The "plaintiffs' claim and the relief that would follow" must "reach beyond the particular circumstances of [individual] plaintiffs." John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010). An "as-applied challenge, by contrast, asks a court to assess a statute's constitutionality with respect to the particular set of facts before it." Hodge v. Talkin, 799 F.3d 1145, 1156 (D.C. Cir. 2015).

The Court concludes that six counts of the amended complaint raise as-applied challenges. Section 357(c) therefore bars this Court from exercising jurisdiction over those claims. Because some of the counts are related, the Court will take them up in batches.

First, Counts II and III allege that neither the JC&D Act nor § 332(d) permit the Judicial Council to suspend Judge Newman from her cases, reduce her staff, or force her to submit to a mental health examination, among other restrictions. FAC ¶¶ 86–87, 91–92. The complaint does not distinguish between Judicial Council action taken pursuant to the JC&D Act and that taken pursuant to § 332(d). See id. ¶¶ 87, 92 (listing the same conduct as violations of both statutes). But the Court need not disentangle the two. As explained above, challenges to the Judicial Council's orders under § 332(d) are moot. And the challenges to the JC&D Act are as-applied. Indeed, Count II begins with a tip off that its challenge is as-applied. See id. ¶ 86 ("To the extent that the Judicial Disability Act of 1980 is constitutional . . ."). The Court is thus precluded from reviewing any parts of Counts II and III that remained live controversies after the Judicial Council's November 9 order.

Second, Count IV, titled "As Applied Due Process of Law Violation," contends that Defendants' continued in-

vestigation "violates the fundamental principles of due process because the Special Committee is composed of complainants about and witnesses to Plaintiff's alleged disability." Id. ¶ 96. As Judge Newman concedes, this count raises an as-applied challenge to the Special Committee's conduct as the claim is premised on the particular membership of the committee. See Pl.'s Opp'n at 28.

Third, Count VI alleges that "[n]either the [JC&D] Act nor the U.S. Constitution authorizes compelling an Article III judge to undergo a medical or psychiatric examination or to surrender to any investigative authority her private medical records." FAC ¶ 107. The count further alleges that because "Defendants have neither statutory nor constitutional power to compel" Judge Newman to comply with these requirements, their imposition is "*ultra vires* and unconstitutional." Id. ¶ 108. Though she does not identify a specific provision of the JC&D Act, § 353(c) allows a special committee to "conduct an investigation as extensive as it considers necessary." 28 U.S.C. § 353(c). This count therefore boils down to an allegation that, in ordering Judge Newman to undergo a medical examination and produce medical records, the Special Committee acted beyond the scope of its § 353(c) authority. This is a prohibited asapplied challenge. McBryde interpreted § 357(c) as barring district courts from considering challenges that "reduce[] to arguments as to the exact reach of the [JC&D Act's] provisions." McBryde, 264 F.3d at 64. Count VI makes exactly that kind of argument. Judge Newman does not contend that every application of § 353(c) is unlawful; instead she alleges that the provision does not permit the orders levied against her. And, to the extent Judge Newman intends

to raise a facial challenge to § 353(c), she has done so in other counts of the complaint (*i.e.*, Counts V, VII–IX).

Finally, Counts X and XI raise as-applied Fourth Amendment challenges. The counts claim Judge Newman's rights were violated because Defendants lacked "either a warrant issued on probable cause" or "a constitutionally reasonable basis" for requiring her "to submit to an involuntary medical or psychiatric examination" (Count X) or "to surrender her private medical records" (Count XI). FAC ¶¶ 128, 132. Judge Newman does not contest that these counts present as-applied attacks. See Pl.'s Opp'n at 28, 33. And, even though the challenges invoke the Constitution, McBryde still precludes their review. "[T]he evidence [is] clear and convincing that Congress intended [§ 357(c)] to preclude review in the courts for as applied constitutional claims." McBryde, 264 F.3d at 62–63; see also id. at 59 (classifying Judge McBryde's similar claim that the Judicial Council's "use of psychiatrists" was "fundamentally destructive of judicial independence" as an as-applied challenge).

For those keeping track, Counts II–IV, VI, and X–XI mount as-applied attacks precluded by McBryde. Defendants contend that the remaining counts also pose as-applied challenges, see Mot. Dismiss at 21–23, but the Court disagrees. Even though Counts I and VII–IX reference or allude to specific orders of the Judicial Council, they challenge the underlying provisions of the JC&D Act authorizing the Judicial Council to issue those orders. See Pl.'s Opp'n at 33 ("Judge Newman does not seek review of orders issued pursuant to the statute, but rather challenges the authorization to issue such orders in the first place."). In other words, the counts contend that "no set of circumstances exists under which" the

Judicial Council could validly apply those parts of the statute. Salerno, 481 U.S. at 745. Of course, that is a demanding standard, and one the Court will hold Judge Newman to later in assessing the merits of her facial challenges.

Count V also mounts a facial attack. It alleges that the JC&D Act is unconstitutionally vague in that it fails to "provide adequate notice of what constitutes a mental disability" and "lacks minimum enforcement guidelines." FAC ¶ 103. Defendants contend this too is a disguised as-applied challenge. They begin by correctly noting that a plaintiff "to whose conduct a statute clearly applies may not successfully challenge it for vagueness," Parker v. Levy, 417 U.S. 733, 756 (1974), and that, as a result, courts must "examine the complainant's conduct before analyzing other hypothetical applications of the law," Vill. of Hoffman Ests. v. Flipside, Hoffman Ests. Inc., 455 U.S. 489, 495 (1982). Judge Newman's challenge, they then argue, requires the Court "to perform the very inquiry . . . that Congress placed off limits in § 357(c)"decide "an as-applied challenge to the Act." Mot. Dismiss at 23.

This argument falters at its initial premise. Judge Newman is not "clearly" someone to whom the JC&D Act's standard of disability applies because none of the complaints about her potential disability have been substantiated. Defendants have acknowledged as much. In April, the Special Committee ordered "Judge Newman to undergo [medical examinations] to *determine* whether she suffers from a disability." FAC, Ex. H at 1 (emphasis added). In a May 16 order, the Special Committee again explained that its "sole purpose regarding the disability inquiry" was to "*determin*[*e*] whether Judge Newman

has a disability and if so the nature and scope . . . ." FAC, Ex. K at 23 (emphasis added). And in its final Report and Recommendation, the Special Committee did not reach a conclusion about whether the JC&D Act's disability standard applied to Judge Newman. See Mot. Dismiss, Ex. 1 at 22 (explaining that "the Committee's ability to make an informed assessment of whether Judge Newman suffers from a disability" was "significantly impaired"). Because Judge Newman is not someone to whom the JC&D Act's definition of disability clearly applies, she may raise a vagueness challenge to that definition.

In sum, § 357(c) permits this Court to exercise jurisdiction over Counts I, V, and VII–IX.

C. Original Jurisdiction and Comity

According to Defendants, § 357(c) is not the only limitation on this Court's jurisdiction. They also raise two additional jurisdictional arguments: (1) as a Court with original—not appellate—jurisdiction, this Court cannot review decisions of the Federal Circuit Judicial Council, and (2) prudential concerns of comity and exhaustion should cause the Court to decline jurisdiction.

1. *This Court has original jurisdiction to hear Judge Newman's facial challenges to the JC&D Act*

Defendants contend that this Court lacks appellate jurisdiction to review the Judicial Council's actions. See Mot. Dismiss at 24. The argument goes like this. When the Judicial Council, acting pursuant to the JC&D Act, suspended Judge Newman from hearing cases, it performed a "judicial" function. Id. at 24–26; see also Chandler, 398 U.S. at 102 (Harlan, J., concurring) ("[I]n the

issuance of orders to district judges to regulate the exercise of their official duties, the Judicial Council acts as a judicial tribunal[.]"); Pitch v. United States, 953 F.3d 1226, 1245 (11th Cir. 2020) (en banc) (Pryor, J., concurring) ("The ordinary meaning of 'judicial proceeding' plainly include[s] the process required by the Judicial Conduct and Disability Act."). Because the Judicial Council's actions were judicial in nature, only a court with appellate jurisdiction over the Council can review its actions. Mot. Dismiss at 26. And, because the Judicial Council functions as a court of appeals, the only court that might be able to don that mantle is the Supreme Court. Id. at 27. (Defendants acknowledge that the Supreme Court in Chandler left unresolved "the knotty jurisdictional problem" of whether it could review Judicial Council actions. Id. at 27 (quoting Chandler, 398 U.S. at 88–89)).

But while the Federal Circuit Judicial Council may have been performing a "judicial" function when it suspended Judge Newman (more on that below), it is not a court of appeals. That is, it is not equivalent to the Federal Circuit. Even though their membership is the same, they are created by different sections of the United States Code. See 28 U.S.C. §§ 41 (Federal Circuit), 332 (Judicial Council). And they have different jurisdiction and different powers. See 28 U.S.C. §§ 1295 (Federal Circuit), 332 (Judicial Council). It is therefore not clear where, if anywhere, the Federal Circuit Judicial Council sits within Article III's hierarchy of courts.

The better analog for a judicial council—and the one the D.C. Circuit has used—is an administrative body. See Hastings v. Jud. Conf. of U.S. ("Hastings I"), 770 F.2d 1093, 1102 (D.C. Cir. 1985) ("The [Judicial] Coun-

cils, in short, are essentially administrative bodies." (cleaned up)); see also McBryde, 264 F.3d at 62 (treating the Judicial Conference as an agency). Thus, instead of trying to place the Federal Circuit Judicial Council within Article III's hierarchy, the Court will look to the framework for judicial review of agency adjudications. And that framework varies by agency—and by statute. Certain statutes grant district courts jurisdiction to review agency adjudications. See, e.g., 42 U.S.C. § 405(g) (social security benefit determinations); 42 U.S.C. § 1395ff(b)(2)(C) (certain Medicare claim determinations). But other statutes bypass the district courts and channel review directly to the courts of appeal. See, e.g., 29 U.S.C. § 160(f) (National Labor Relations Board decisions); 15 U.S.C. § 78y(a)(1) (Securities & Exchange Commission decisions). Here, the relevant review scheme is laid out in the JC&D Act. And, as noted above, the JC&D Act bypasses both district and circuit courts for as-applied claims and channels review to the Judicial Conference. 28 U.S.C. §§ 357(a), (c); see also McBryde, 264 F.3d at 63. But the act directs facial challenges to the district court. McBryde, 264 F.3d at 58.

In sum, then, though Judge Newman's as-applied challenges to the Judicial Council's actions do not require the Court to exercise jurisdiction over a superior Article III court, judicial review is nonetheless foreclosed by § 357(c). Her facial challenges, however, fall within the Court's original jurisdiction.

Even if the Federal Circuit Judicial Council sat above district courts within the Article III hierarchy, the Court would not lose jurisdiction over all of Judge Newman's claims because only some of her claims challenge "judicial" actions. These are the same claims that mount

asapplied challenges to the Judicial Council's orders. Her other claims, *i.e.*, the ones challenging the facial validity of the JC&D Act, do not require the Court to review "judicial" determinations by the Judicial Council; they instead require review of an act of Congress.

The Supreme Court considered the nature of judicial proceedings in District of Columbia Court of Appeals v. Feldman, where two D.C. bar applicants challenged a D.C. Court of Appeals bar-admission rule. 460 U.S. 462 (1983). "A judicial inquiry," the Court held, "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." Id. at 477 (quoting Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908)). Judicial inquiries often involve "legal arguments," but their "essence" is an "adjudicat[ion]" of a "present right." Id. at 480–81. See also In re Summers, 325 U.S. 561, 567 (1945) (In a judicial proceeding, "[a] declaration on rights as they stand must be sought, not on rights which may arise in the future, and there must be an actual controversy over an issue, not a desire for an abstract declaration of the law." (cleaned up)).

When the Federal Circuit Judicial Council or its Special Committee chose to preclude Judge Newman from new case assignments, investigated her conduct, and ordered her to undergo medical examinations and produce medical records—e.g., the basis for the allegations in Counts II–IV, VI, and X–XI—they acted as part of a "judicial inquiry." Starting with the initiation of the complaint against Judge Newman, the Defendants "investigate[d]," see, e.g., Mot. Dismiss, Ex. 1 at 12 (the Special Committee "interview[ed] [] court staff" and retained a physician consultant); "declare[d]" id. at 64 (the Special

Committee concluded that Judge Newman's refusal to cooperate "constitute[d] a serious form of misconduct"); and "enforce[d] id. at 110 (the Special Committee recommended imposing a "sanction" of "temporary suspension of all case assignments") "liabilities as they st[ood] on present or past facts," Feldman, 460 U.S. at 470 (cleaned up). Moreover, throughout the proceeding, the "court [] had before it legal arguments against the validity of [its actions]." Id. at 480; see also FAC, Exs. Q–U (letters from Judge Newman's counsel). See also Chandler, 398 U.S. at 102 (Harlan, J., concurring) ("[A]t least in the issuance of orders to district judges to regulate the exercise of their official duties, the Judicial Council acts as a judicial tribunal . . . .").[11] Thus, to the extent

11. In Chandler, four justices "decline[d]" to decide whether a "challenged action of the Judicial Council was a judicial act or decision by a judicial tribunal." 398 U.S. at 86. In dicta, however, they "[found] no indication that Congress intended to or did vest traditional judicial powers in the Councils." Id. at 86 n.7. Justice Harlan responded to this footnote with a lengthy concurrence, where he examined the legislative history of the act establishing judicial councils and considered relevant Supreme Court precedent. See id. at 96–112. Based on this analysis, he concluded that "at least in the issuance of orders to district judges to regulate the exercise of their official duties, the Judicial Council acts as a judicial tribunal for purposes of this Court's appellate jurisdiction." Id. at 102 (Harlan, J., concurring). In dissent, Justices Douglas and Black agreed with Justice Harlan that the Judicial Council was "under the circumstances an inferior judicial tribunal." Id. at 135 (Douglas, J., dissenting). Since Chandler, other circuits have adopted Justice Harlan's concurrence and concluded that judicial councils, in certain settings, conducted "judicial proceedings" or "judicial inquir[ies]." See, e.g., Pitch, 953 F.3d at 1245 (Pryor, J., concurring); In re McBryde, 117 F.3d 208, 221 (5th Cir. 1997). This Court does the same and applies the standard set out in Feldman to determine when the Federal Circuit Judicial Council acted as a judicial tribunal.

Judge Newman's claims challenge the Judicial Council's application of the JC&D Act to her, those claims challenge a "judicial inquiry."

But that is not the end of the story. The Feldman Court went on to hold that "[t]o the extent [the plaintiffs] mounted a general challenge to the constitutionality of [the D.C. bar admission rule], . . . the District Court did have subject matter jurisdiction over their complaints." 460 U.S. at 482–83. That was so because "state supreme courts may act in a non-judicial capacity in promulgating rules regulating the bar." Id. at 485. Likewise here, Congress acted in a non-judicial capacity when it enacted the JC&D Act. See Prentis, 211 U.S. at 226 ("Legislation, [as opposed to a judicial inquiry], looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some parts of those subject to its power."). Thus, consistent with § 357(c), the Court may exercise jurisdiction over Judge Newman's challenges to the constitutionality of the act—in other words, her facial challenges.

2. *Prudential concerns do not mandate dismissal*

Defendants raise two prudential doctrines as final barriers to this Court's jurisdiction. In a brief filed before the Federal Circuit Judicial Council finalized, and the Judicial Conference affirmed, the order suspending Judge Newman from new case assignments for one year, Defendants urged this Court to decline jurisdiction because neither body had rendered a final decision. See Mot. Dismiss at 46–48. Defendants suggested that the "prudential concern[]" of comity and the "complementary" doctrine of exhaustion counseled against this Court "rendering judgment on the constitutionality of proceed-

ings *while* the proceedings themselves are going on." Id. at 47 (cleaned up). In no small part because circumstances have changed since Defendants raised this argument, the Court declines to stand down on this basis.

Principles of comity and exhaustion do not preclude this Court from exercising jurisdiction where, as here, the Judicial Council has already imposed a sanction on Judge Newman. The D.C. Circuit's treatment of Judge Alcee Hastings's federal lawsuit explains why. Judge Hastings, a former district judge in the Southern District of Florida, sued various judges on the Judicial Conference and the Eleventh Circuit's Judicial Council after a JC&D complaint was initiated against him. Hastings I, 770 F.2d at 1095. A judge of this court refused to enjoin the investigation into Judge Hastings that was underway by an Eleventh Circuit special committee. Id. On appeal, the D.C. Circuit agreed. Id. at 1097. It declined to reach the merits of Judge Hastings's challenges to the JC&D Act because, at the time of the district court's decision, the Special Committee was "still at work" and "[n]o report had issued from the [c]ommittee with recommendations for disposition of the complaint." Id. Because of the misconduct proceeding's nascency, "the possible outcomes under the [JC&D] Act"—*e.g.*, that the Judicial Council or Conference might reject the committee's recommended penalties, adopt them, or impose different penalties all together—were "only *possibilities*." Id. at 1100. The D.C. Circuit therefore concluded that "the [judicial] councils and Conference are entitled to a measure of comity sufficient to preclude disruptive injunctive relief by federal courts absent a showing that serious and irremediable injury will otherwise result." Id. at 1102.

Unlike in Hastings I, the outcomes in Judge Newman's case are no longer mere possibilities. The Special Committee submitted its report and recommendation, Mot. Dismiss, Ex. 1; the Judicial Council imposed a sanction suspending Judge Newman from hearing new cases, Pl.'s Opp'n, Ex. B; and—just days ago—the Judicial Conference affirmed the Judicial Council's order, Defs.' Notice of JC&D Comm. Order at 14. Judge Newman is therefore already subject to a "serious and irremediable injury." Thus, to the extent the Court retains jurisdiction over Judge Newman's claims, it will not decline to exercise that jurisdiction because of prudential factors.[12]

D. Merits of Facial Challenges

After facing several obstacles to the exercise of its jurisdiction, the Court is left with jurisdiction over Counts I, V, and VII–IX. The only two counts presently at issue, however, are Count I and part of Count VII.[13]

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12. Defendants also cite Chandler as support for their suggestion the Court bow to the principles of comity and exhaustion. In Chandler, however, the Supreme Court did not decline to interfere with a judicial council's orders due to prudential concerns. Instead, the Court declined to issue the "extraordinary relief of mandamus or prohibition" because Judge Chandler had not, in the first instance, sought relief directly from the Judicial Council. 398 U.S. at 87, 89. Indeed, Judge Chandler had acquiesced in the Judicial Council's decision to assign new cases to judges other than himself. Id. at 79, 87.

13. A note on how the Court reads Count VII. The count makes three allegations: (1) the JC&D Act is "unconstitutionally vague to the extent it purports to authorize compelled medical or psychiatric examinations . . . or demands for . . . Article III judges to surrender their private medical records"; (2) § 353(c), "which authorizes a Special Committee to conduct an investigation 'as extensive as it considers necessary' lacks minimal enforcement guidelines"; and (3) the act "vests virtually complete discretion

(continued…)

That is so because Judge Newman does not seek a preliminary injunction based on the likelihood of prevailing on the other counts, see Prelim. Inj. at 39–51, and Defendants do not challenge these counts on Rule 12(b)(6) grounds, see Tr. at 66.[14] The Court will therefore address the merits of only Count I and part of Count VII.

1. *Count I: Improper Removal and Violation of Separation of Powers*

As with much of this case, McBryde forecloses Count I. But this time, on the merits. "Count I challenges the Disability Act's authorization to suspend Article III judges from office." Pl.'s Opp'n at 29. Judge Newman contends that the JC&D Act unconstitutionally "delegate[s]" to judges "the impeachment power which the

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in the hands of a Special Committee" in violation of due process and Article III. FAC ¶ 112. To the extent the Court can consider the first allegation, see McBryde, 264 F.3d at 64 (barring the Court from considering provisions that "reduce[] to arguments as to the exact reach of the [JC&D Act's] provisions"), the allegation collapses into the second. The provision purportedly authorizing the Special Committee to compel medical examinations and the production of records is § 353(c). As Defendants acknowledged at the motions hearing, they challenge only the third allegation on 12(b)(6) grounds. Tr. at 66.

14. Should Defendants wish to argue that the remaining counts fail to state a claim, they may do so in a motion for judgment on the pleadings or a motion for summary judgment. See Fed. R. Civ. P. 12(g)(2) ("Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion."); Fed. R. Civ. P. 12(h)(2)(B) ("Failure to state a claim upon which relief can be granted . . . may be raised . . . by a motion under Rule 12(c).").

Constitution reserves to the House and Senate." FAC ¶ 81.

The D.C. Circuit considered and rejected this argument in McBryde. Judge McBryde argued that "the clause vesting the impeachment power in Congress [] preclude[d] *all* other methods of disciplining judges." McBryde, 264 F.3d at 64. "On this theory," he contended, the JC&D Act "violate[s] separation of powers doctrine." Id. The circuit disagreed, concluding that the Constitution "sheltered" judges "from removal and salary diminution," absent impeachment, but not "from lesser sanctions of every sort." Id. at 65; see also id. ("Judge McBryde's attempt to fudge the distinction between impeachment and discipline doesn't work. The Constitution limits judgments for impeachment to removal from office and disqualification to hold office . . . . It makes no mention of discipline generally."). The circuit therefore held that the JC&D Act, by permitting discipline short of impeachment or salary diminution, did not violate the Constitution.

Judge Newman attempts to escape McBryde's clutches by casting her challenge as "precisely of the type left open by [McBryde's] Footnote 5," Pl.'s Opp'n at 36, where the D.C. Circuit noted that it did "not decide whether a long-term disqualification from cases could, by its practical effect, affect an unconstitutional 'removal,'" 264 F.3d at 67 n.5. Like the circuit, this Court need not decide that question. Because Count I raises a facial challenge to the JC&D Act, the Court must construe it as alleging that any disqualification, no matter its duration, constitutes an "arrogat[ion]" of "the impeachment power." FAC ¶ 81. See Salerno, 481 U.S. at 745 ("A facial challenge to a legislative Act is, of course, the most diffi-

cult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). But, as noted above, the D.C. Circuit held that at least some suspensions do not unconstitutionally arrogate Congress's impeachment power. McBryde, 264 F.3d at 65.

Moreover, contrary to Judge Newman's contention, footnote 5 does not create a carve-out to McBryde's bar on as-applied challenges. She claims that "[i]n order to address" "whether a long-term disqualification from cases could . . . affect an unconstitutional 'removal,'" "there first has to exist 'a long-term disqualification' . . . and such disqualification can exist only once the Disability Act is *applied* to a particular judge." Pl.'s Opp'n at 36. But nothing in McBryde, including footnote 5, suggests that the circuit intended for Article III courts to decide as-applied challenges based on long-term disqualifications. To the contrary, the circuit held that the JC&D Act funnels "all" non-facial claims, including constitutional claims, to the Judicial Conference. 264 F.3d at 62.

2. *Count VII: Complete Discretion in the Special Committee*

Finally, Count VII contends that the JC&D Act violates the Fifth Amendment's due process protection and Article III's guarantee of judicial independence by "vest[ing] virtually complete discretion in the hands of a Special Committee to determine when compliance with [orders] may be compelled." FAC ¶ 112. Though the Court must credit the plaintiff's wellpleaded factual allegations as true, at least on a motion to dismiss, it need not accept the complaint's legal conclusions. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2009). And two related features of JC&D investigations cabin a

special committee's discretion. First, the JC&D Act does not vest special committees with the authority to compel compliance with their orders. The act charges special committees with "conduct[ing] an investigation as extensive as [they] consider[] necessary." 28 U.S.C. § 353(c). But the act does not give them enforcement power. Instead, it directs special committees to present a report to the judicial council with "recommendations for necessary and appropriate action by the judicial council." Id. Second, the JC&D Rules erect guardrails around a special committee's investigation. They allow subject judges to refuse to comply with investigations for "good cause." JC&D R. 4(a)(5). And, as was the case here, the judicial council, and ultimately the Judicial Conference, decide whether the judge had good cause to refuse. See Pl.'s Opp'n, Ex. B at 40–68; Defs.' Not. of Defs.' Notice of JC&D Comm. Order 21–26.

In some cases, a circuit judicial council (or even the Judicial Conference) may choose to conduct its own investigation after receiving a special committee's report and recommendation (or, in the Judicial Conference's case, an appeal from the judicial council). See 28 U.S.C. §§ 354(a)(1), (a)(1)(A) ("The judicial council of a circuit, upon receipt of [the special committee's report] . . . may conduct any additional investigation which it considers to be necessary."): id. § 355 ("Upon referral or certification of any matter . . . , the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate . . . ."). In those cases, the same body would both issue orders as part of an investigation and then determine whether good cause exists to refuse compliance. The D.C. Circuit found no due process concerns with this

arrangement in Hastings II, when Judge Hasting's case arrived back at the circuit following its initial remand. The circuit held that the JC&D Act's vesting of both investigative and adjudicatory functions in the same body did not violate due process. 829 F.2d at 104–05. In its view, there was "no [] risk [of actual bias of prejudgment] inherent in the procedures established by the [JC&D] Act." Id. at 104–05. "The fact that federal judges administer the mechanism described by the Act contribute[d] in no small measure to this conclusion. They are called upon every day to put aside considerations not legally relevant to their decisions." Id. at 105.

To be sure, Hastings II presented a due process, and not an Article III, challenge to judicial councils' authority. But the reasoning of McBryde picks up where Hastings II left off. As noted above, in McBryde, the circuit rejected the notion that Article III's grant of "judicial independence" gives judges "absolute freedom from" discipline or sanctions that fall short of removal or salary diminution. 264 F.3d at 65–66. The circuit also held that the Constitution does not "exclude[] discipline of judges *by* judges." Id. at 66. Surely if the Constitution permits judges to subject other judges to discipline or sanction, it also tolerates judicial councils determining when compliance with orders may be compelled. In fact, in many cases, there may be no difference between seeking compliance with an order and imposing a sanction.

Accordingly, the Court grants Defendants' motion to dismiss as to Count I and part of Count VII. Because Judge Newman has not shown a likelihood of prevailing on the merits of these counts, the Court also denies her

motion for a preliminary injunction. See Changji Esquel Textile Co., 40 F.4th at 726.

IV. Conclusion

For these reasons, it is hereby

ORDERED that [ECF No. 12] Judge Newman's Motion for a Preliminary Injunction is DENIED. It is further

ORDERED that [ECF No. 24] Defendants' Motion to Dismiss is GRANTED in part and DENIED in part. It is further

ORDERED that Defendants shall file an answer to the remaining counts by March 13, 2024.

SO ORDERED.

/s/ Christopher R. Cooper
CHRISTOPHER R. COOPER
United States District Judge

Date: February 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-5173 **September Term, 2025**
1:23-cv-01334-CRC
Filed On: December 29, 2025

Pauline Newman, Honorable; Circuit Judge,

Appellant

v.

Kimberly A. Moore, Honorable; in her official capacities as Chief Judge of the United States Court of Appeals for the Federal Circuit, Chair of the Judicial Council of the Federal Circuit and Chair of the Special Committee of the Judicial Council of the Federal Circuit, et al.,

Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs,* Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, the sealed and redacted versions of the response thereto, the 28(j) letter, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

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* Circuit Judge Childs did not participate in this matter.

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Lillian R. Wright
Deputy Clerk

CHAPTER 16—COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

Sec.

§ 351. Complaints; judge defined

(a) FILING OF COMPLAINT BY ANY PERSON.—Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

(b) IDENTIFYING COMPLAINT BY CHIEF JUDGE.—In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the

chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this chapter and thereby dispense with filing of a written complaint.

(c) TRANSMITTAL OF COMPLAINT.—Upon receipt of a complaint filed under subsection (a), the clerk shall promptly transmit the complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this chapter only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge whose conduct is the subject of the complaint. The clerk shall also transmit a copy of any complaint identified under subsection (b) to the judge whose conduct is the subject of the complaint.

(d) DEFINITIONS.—In this chapter—

(1) the term "judge" means a circuit judge, district judge, bankruptcy judge, or magistrate judge; and

(2) the term "complainant" means the person filing a complaint under subsection (a) of this section.

(Added Pub. L. 107–273, div. C, title I, §11042(a), Nov. 2, 2002, 116 Stat. 1848.)

§ 352. Review of complaint by chief judge

(a) EXPEDITIOUS REVIEW; LIMITED INQUIRY.—The chief judge shall expeditiously review any complaint received under section 351(a) or identified under section 351(b). In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining—

(1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation; and

(2) whether the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation.

For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint. Such response shall not be made available to the complainant unless authorized by the judge filing the response. The chief judge or his or her designee may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and any other person who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.

(b) ACTION BY CHIEF JUDGE FOLLOWING REVIEW.—After expeditiously reviewing a complaint under subsection (a), the chief judge, by written order stating his or her reasons, may—

(1) dismiss the complaint—

(A) if the chief judge finds the complaint to be—

(i) not in conformity with section 351(a);

(ii) directly related to the merits of a decision or procedural ruling; or

(iii) frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation; or

(B) when a limited inquiry conducted under subsection (a) demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence; or

(2) conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.

The chief judge shall transmit copies of the written order to the complainant and to the judge whose conduct is the subject of the complaint.

(c) REVIEW OF ORDERS OF CHIEF JUDGE.—A complainant or judge aggrieved by a final order of the chief judge under this section may petition the judicial council of the circuit for review thereof. The denial of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(d) REFERRAL OF PETITIONS FOR REVIEW TO PANELS OF THE JUDICIAL COUNCIL.—Each judicial council may, pursuant to rules prescribed under section 358, refer a petition for review filed under subsection (c) to a panel of no fewer than 5 members of the council, at least 2 of whom shall be district judges.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1849.)

§ 353. Special committees

(a) APPOINTMENT.—If the chief judge does not enter an order under section 352(b), the chief judge shall promptly—

(1) appoint himself or herself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(2) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(3) provide written notice to the complainant and the judge whose conduct is the subject of the complaint of the action taken under this subsection.

(b) CHANGE IN STATUS OR DEATH OF JUDGES. A judge appointed to a special committee under subsection (a) may continue to serve on that committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45. If a judge appointed to a committee under subsection (a) dies, or retires from office under section 371(a), while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

(c) INVESTIGATION BY SPECIAL COMMITTEE. Each committee appointed under subsection (a) shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1850.)

§ 354. Action by judicial council

(a) ACTIONS UPON RECEIPT OF REPORT.

(1) ACTIONS.—The judicial council of a circuit, upon receipt of a report filed under section 353(c)—

(A) may conduct any additional investigation which it considers to be necessary;

(B) may dismiss the complaint; and

(C) if the complaint is not dismissed, shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.

(2) DESCRIPTION OF POSSIBLE ACTIONS IF COMPLAINT NOT DISMISSED.

(A) IN GENERAL.—Action by the judicial council under paragraph (1)(C) may include—

(i) ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint;

(ii) censuring or reprimanding such judge by means of private communication; and

(iii) censuring or reprimanding such judge by means of public announcement.

(B) FOR ARTICLE III JUDGES.—If the conduct of a judge appointed to hold office during good behavior is the subject of the complaint, action by the judicial council under paragraph (1)(C) may include—

(i) certifying disability of the judge pursuant to the procedures and standards provided under section 372(b); and

(ii) requesting that the judge voluntarily retire, with the provision that the length of

service requirements under section 371 of this title shall not apply.

(C) FOR MAGISTRATE JUDGES.—If the conduct of a magistrate judge is the subject of the complaint, action by the judicial council under paragraph (1)(C) may include directing the chief judge of the district of the magistrate judge to take such action as the judicial council considers appropriate.

(3) LIMITATIONS ON JUDICIAL COUNCIL REGARDING REMOVALS.

(A) ARTICLE III JUDGES.—Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.

(B) MAGISTRATE AND BANKRUPTCY JUDGES.—Any removal of a magistrate judge under this subsection shall be in accordance with section 631 and any removal of a bankruptcy judge shall be in accordance with section 152.

(4) NOTICE OF ACTION TO JUDGE.—The judicial council shall immediately provide written notice to the complainant and to the judge whose conduct is the subject of the complaint of the action taken under this subsection.

(b) REFERRAL TO JUDICIAL CONFERENCE.—

(1) IN GENERAL.—In addition to the authority granted under subsection (a), the judicial council may, in its discretion, refer any complaint under section 351, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(2) SPECIAL CIRCUMSTANCES.—In any case in which the judicial council determines, on the basis of a complaint and an investigation under this chapter, or on the basis of information otherwise available to the judicial council, that a judge appointed to hold office during good behavior may have engaged in conduct—

(A) which might constitute one or more grounds for impeachment under article II of the Constitution, or

(B) which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(3) NOTICE TO COMPLAINANT AND JUDGE.—A judicial council acting under authority of this subsection shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge whose conduct is the subject of the action taken under this subsection.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1850.)

§ 355. Action by Judicial Conference

(a) IN GENERAL.—Upon referral or certification of any matter under section 354(b), the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate,

shall by majority vote take such action, as described in section 354(a)(1)(C) and (2), as it considers appropriate.

(b) IF IMPEACHMENT WARRANTED.—

(1) IN GENERAL.—If the Judicial Conference concurs in the determination of the judicial council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

(2) IN CASE OF FELONY CONVICTION.—If a judge has been convicted of a felony under State or Federal law and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under section 354(b), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1852.)

§ 356. Subpoena power

(a) JUDICIAL COUNCILS AND SPECIAL COMMITTEES.—In conducting any investigation under this chapter, the judicial council, or a special committee appointed under section 353, shall have full subpoena powers as provided in section 332(d).

(b) JUDICIAL CONFERENCE AND STANDING COMMITTEES.—In conducting any investigation under this chapter, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331, shall have full subpoena powers as provided in that section.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1852.)

§ 357. Review of orders and actions

(a) REVIEW OF ACTION OF JUDICIAL COUNCIL.—A complainant or judge aggrieved by an action of the judicial council under section 354 may petition the Judicial Conference of the United States for review thereof.

(b) ACTION OF JUDICIAL CONFERENCE.—The Judicial Conference, or the standing committee established under section 331, may grant a petition filed by a complainant or judge under subsection (a).

(c) NO JUDICIAL REVIEW.—Except as expressly provided in this section and section 352(c), all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1853.)

§ 358. Rules

(a) IN GENERAL.—Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this chapter, including the processing of petitions for review, as each considers to be appropriate.

(b) REQUIRED PROVISIONS.—Rules prescribed under subsection (a) shall contain provisions requiring that—

(1) adequate prior notice of any investigation be given in writing to the judge whose conduct is the subject of a complaint under this chapter;

(2) the judge whose conduct is the subject of a complaint under this chapter be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(3) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

(c) PROCEDURES.—Any rule prescribed under this section shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such rule shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this section may limit the period of time within which a person may file a complaint under this chapter.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1853.)

§ 359. Restrictions

(a) RESTRICTION ON INDIVIDUALS WHO ARE SUBJECT OF INVESTIGATION.—No judge whose conduct is the subject of an investigation under this chapter shall serve upon a special committee appointed under section 353, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331, until all proceedings under this chapter relating to such investigation have been finally terminated.

(b) AMICUS CURIAE.—No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this chapter.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1853.)

§ 360. Disclosure of information

(a) CONFIDENTIALITY OF PROCEEDINGS.—Except as provided in section 355, all papers, documents, and records of proceedings related to investigations conducted under this chapter shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that—

(1) the judicial council of the circuit in its discretion releases a copy of a report of a special committee under section 353(c) to the complainant whose complaint initiated the investigation by that special committee and to the judge whose conduct is the subject of the complaint;

(2) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(3) such disclosure is authorized in writing by the judge who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331.

(b) PUBLIC AVAILABILITY OF WRITTEN ORDERS.—Each written order to implement any action under section 354(a)(1)(C), which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order shall be accompanied by written reasons therefor.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1854.)

§ 361. Reimbursement of expenses

Upon the request of a judge whose conduct is the subject of a complaint under this chapter, the judicial council may, if the complaint has been finally dismissed under section 354(a)(1)(B), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the in-

vestigation which would not have been incurred but for the requirements of this chapter.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1854.)

§ 362. Other provisions and rules not affected

Except as expressly provided in this chapter, nothing in this chapter shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1854.)

§ 363. Court of Federal Claims, Court of International Trade, Court of Appeals for the Federal Circuit

The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the provisions of this chapter, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this chapter.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1854.)

§ 364. Effect of felony conviction

In the case of any judge or judge of a court referred to in section 363 who is convicted of a felony under State or Federal law and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the following shall apply:

(1) The judge shall not hear or decide cases unless the judicial council of the circuit (or, in the case of a judge of a court referred to in section 363, that court) determines otherwise.

(2) Any service as such judge or judge of a court referred to in section 363, after the conviction is final and all time for filing appeals thereof has expired, shall not be included for purposes of determining years of service under section 371(c), 377, or 178 of this title or creditable service under subchapter III of chapter 83, or chapter 84, of title 5.

(Added Pub. L. 107–273, div. C, title I, § 11042(a), Nov. 2, 2002, 116 Stat. 1855.)