

No. 25-1101

IN THE
Supreme Court of the United States

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

Petitioner,

v.

KIMBERLY A. MOORE, CHIEF JUDGE,
UNITED STATES COURT OF APPEALS
FOR 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

**BRIEF OF AMICUS CURIAE PROFESSOR
ANDREW C. MICHAELS IN SUPPORT OF
GRANTING THE CERTIORARI PETITION**

ANDREW C. MICHAELS

Counsel of Record

UNIVERSITY OF HOUSTON LAW CENTER
4170 Martin Luther King Boulevard
Houston, TX 77204
(314) 323-2201
acmichaels@uh.edu



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STATEMENT OF AMICUS CURIAE

Amicus is a member of this Court's bar, and a law professor. He served as a law clerk to Judge Newman from 2010-2012. He is interested in bringing light to the Federal Circuit's unfair treatment of Judge Newman with the goal of safeguarding judicial independence and preventing similar abuses of power going forward.¹

SUMMARY OF ARGUMENT

This brief will serve to provide context and highlight the appearance of bias against Judge Newman. When all of the relevant details and circumstances are considered, a strong appearance emerges that the investigation against Judge Newman was, from the beginning, a biased attempt to permanently remove her from judicial service.

The Judicial Conduct and Disability Act of 1980 expressly prohibits permanent removal.² Administrative tribunals should not be permitted to circumvent this prohibition (as well as constitutional guarantees) merely by characterizing the removal as an indefinite series of

1. Amicus has no financial interest in the outcome of this case. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution. No person other than amicus made a monetary contribution to the preparation and submission of this brief. This brief is filed more than ten days before the due date.

2. See 28 U.S.C. § 354(a)(3)(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.”) (emphasis added).

consecutive “temporary” suspensions. Judge Newman has now been “suspended” for over three years, and counting.

This investigation was initiated, led, and directed by Chief Judge Moore, who it seems may have begun laying the groundwork for this illegal and inappropriate action almost immediately upon assuming the office of chief. Within months of assuming that office, Judge Moore reduced Judge Newman’s caseload, allegedly over concerns about her health, which Judge Newman claims are fabrications. Unfortunately, Chief Judge Moore’s multifarious role in these proceedings – serving essentially as judge, jury, witness, accuser, and litigant – is not conducive to a fair and impartial resolution of such disputed factual issues.

Less than two years later, Chief Judge Moore’s initial complaint faulted Judge Newman for allegedly issuing an insufficient number of opinions, but did so *without counting her dissents*, even though almost *two-thirds* of her opinions in the period leading up to her removal were dissents. Judge Newman has long been well known as a frequent dissenter, so this decision not to include her dissents was unlikely to have been an oversight, demonstrating instead the slanted and adversarial nature of the proceedings. Once Judge Newman’s dissents are properly accounted for, her productivity was not the lowest on the court, despite her reduced caseload.

In light of the apparently biased nature of the investigative committee (consisting of Chief Judge Moore and two of her chosen allies on the court), and informed by her decades of personal experience with Judge Moore, Judge Newman requested a transfer to a different circuit,

in accordance with the standard practice in these matters. Judge Newman resisted the committee's demands that she submit immediately to a neurological examination by an examiner of the committee's choosing, fearing that regardless of her actual performance, the results would be portrayed as confirming her unfitness to continue service.

If the committee were truly interested in a prompt and fair resolution of this matter, transferring it to another circuit would have been the proper and standard course of action. Instead, the committee denied the transfer, and held Judge Newman guilty of misconduct for her refusal to submit to what she reasonably perceived would be a biased neurological examination. In an attempt to placate the committee's demands, Judge Newman has provided the results from three separate qualified examiners, all of which concluded that she was fit to continue judicial service. All three reports were summarily dismissed by the investigative committee, all but confirming Judge Newman's perception that the committee would not accept any result other than one that justifies her permanent removal from the bench.

If all of that were not enough, the timing and circumstances further suggest that Chief Judge Moore may have orchestrated an egregious misuse of Federal Circuit en banc procedure in an attempt to portray Judge Newman as incompetent by reversing one of her recent panel majority opinions. The attempt backfired when this Court reversed the en banc Federal Circuit, agreeing with Judge Newman, and further demonstrating the baselessness of the supposed reason for this entire charade, *i.e.*, that Judge Newman was mentally unfit to continue service.

As for the lack of dissent within the court on this matter, there is an appearance that other Judges on the Federal Circuit, as well as staff members of the court, may fear retaliation if they do not fall in line behind Chief Judge Moore. Due to the appearance of bias, even members of the bar who practice before the Federal Circuit fear retaliation, making it more difficult for Judge Newman to find public support and representation. The appearance of bias is in itself thus directly harmful to Judge Newman's due process rights, even aside from the fact that it at least suggests actual bias and a lack of impartiality in the proceedings against Judge Newman.

Indeed, the panel below recognized that Judge Newman's as-applied due process arguments were substantial, but found itself precluded from considering them due to D.C. Circuit precedent. Nor did the Judicial Conference, an administrative tribunal, meaningfully consider Judge Newman's due process arguments. The panel also found itself barred by precedent from considering whether the committee acted beyond the scope of its statutory authority by effectively permanently removing Judge Newman from office. This Court should step in to correct that precedent and safeguard judicial independence by ensuring that judges unlawfully targeted by colleagues can receive meaningful judicial review of their constitutional claims.

ARGUMENT

I. The Proceedings Against Judge Newman And Surrounding Circumstances Strongly Suggest An Appearance Of Bias

A. The Initial Complaint and Actions

Right from the initial complaint, the investigative committee's actions under the control and direction of Chief Judge Moore had the appearance not of a good faith attempt to amicably address concerns about a colleague's fitness, but rather of a premeditated attempt to permanently remove Judge Newman from the bench.

To begin with, the initial complaint of March 2023 faulted Judge Newman for insufficient judicial productivity, without accounting for her dissents. *See In re Complaint No. 23-90015*, Order at 3 (Fed. Cir. March 24, 2023) (available at: <http://bit.ly/4pr3smb>) (“March 24 Order”). It is well known that Judge Newman has long dissented frequently, and her dissents have provided valuable contributions to the law, including laying the groundwork for reversals by this Court. *See, e.g.*, Daryl Lim, *I Dissent: The Federal Circuit's 'Great Dissenter,' Her Influence on the Patent Dialogue, and Why It Matters*, 19 VAND. J. ENT. & TECH. L. 873 (2017). In the year leading up to her involuntary removal, eleven of the seventeen opinions authored by Judge Newman were dissents. *See* Andrew Michaels, *Judge Newman's Recent Dissents Show She Is Fit For Service*, LAW360 (June 6, 2023).

Though her removal from service was initially supposedly justified by alleged concerns about her

cognitive fitness, the opinions authored by Judge Newman in the period leading up to her removal were eminently reasonable, showing no evidence of a lack of fitness. *See id.* Indeed, one of Judge Newman’s dissents issued mere months before the investigation was commenced was later vindicated in a reversal by this Court. *See Rudisill v. McDonough*, 55 F.4th 879, 888-896 (Fed. Cir. Dec. 15, 2022) (en banc) (Newman, J., dissenting); *Rudisill v. McDonough*, 601 U.S. 294 (2024) (reversing the Federal Circuit and agreeing with Judge Newman).

The complaint’s failure to account for this important, well known, and valuable aspect of Judge Newman’s work, while at the same time faulting her for insufficient productivity, is curious and itself strongly suggestive of bias against her. Once Judge Newman’s dissents are properly taken into account, multiple analyses have shown that her productivity in the period leading up to her removal was higher than some of her colleagues. *See* Paul Gugliuzza, *Judicial Disability and the ‘Great Dissenter’*, PATENTLYO (May 11, 2023); Ron D. Katznelson, *Is There a Campaign to Silence Dissent at the Federal Circuit*, Abstract (2023) (available at: <https://dx.doi.org/10.2139/ssrn.4489143>).

Judge Newman’s productivity was not the lowest on the court despite the fact that, as the complaint itself noted, Judge Newman’s caseload had been reduced at the direction of Chief Judge Moore, exacerbating the apparent bias and unfairness in taking action against her for supposed lack of productivity. Judge Moore assumed the office of Federal Circuit Chief on May 22, 2021. The complaint states that almost immediately after that, in “summer of 2021,” Judge Newman’s “sittings were

reduced,” and then further reduced in 2022. *See* March 24 Order at 1.

The timing of these events suggests an appearance that Judge Moore possibly began laying the groundwork for her desired removal of Judge Newman almost immediately upon assuming the office of Chief. Moreover, the complaint rested on disputed factual statements. The alleged basis for the initial reduction in the summer of 2021 was a supposed heart attack, which Judge Newman claims is a fabrication. *See* Petition at 12, n.7. And the stated reason for the further reduction of Judge Newman’s caseload in 2022 was that Judge Newman supposedly “fainted following an argument and was unable to walk without assistance.” *See* March 24 Order at 1. Judge Newman disputes this as well, and as her counsel has pointed out, Chief Judge Moore is apparently the only proffered witness to this alleged event. *See Newman v. Moore*, Petition for Rehearing En Banc, No. 24-5173, at 7, n.4 (D.C. Cir. Sept. 19, 2025). Observers have also remarked as to how Judge Moore’s ubiquitous role in these proceedings does not appear conducive to an impartial hearing for Judge Newman. *See, e.g.*, Josh Blackman, *The Stealth Impeachment of Judge Newman in the Federal Circuit*, FEDSOC BLOG (Apr. 24, 2023) (“Chief Judge Kimberly Moore cannot be the judge, jury, and executioner of Judge Newman.”).

B. The Shift to Misconduct and Refusal to Transfer

Two weeks after the initial complaint, when Judge Newman was still unrepresented by council, the investigative committee consisting of Chief Judge Moore

along with two of her chosen allies on the court, issued another order demanding that Judge Newman submit within four days to neurological testing conducted by neurologists chosen at the direction of the committee, and threatening to charge Judge Newman with misconduct if she refused. *See In re Complaint No. 23-90015*, Order at 2-3 (April 7, 2023) (available at: <https://www.cafc.uscourts.gov/release-of-prior-orders-in-ongoing-judicial-investigation/>); *Newman v. Moore*, Memorandum of Law in Support of Plaintiff’s Motion for a Preliminary Injunction, No. 1:23-cv-01334-CRC, D.I. 13-1 at 16 (D.D.C. Jun 27, 2023) (“Preliminary Injunction Motion”). Less than a week later, on April 13, 2023, the committee “made good on its threat,” issuing another order expanding the investigation into whether Judge Newman’s alleged failure to cooperate constituted “additional misconduct.” *See id.*

The threatening and demanding nature of these orders further suggested that the committee’s disposition towards Judge Newman was more adverse than collegial. In light of the circumstances suggestive of bias discussed above, and informed by her decades of personal experience with Judge Moore, Judge Newman requested that the investigation be transferred to a different circuit. Judge Newman reasonably did not trust that any examination conducted at the direction of the committee led by Chief Judge Moore would be conducted and interpreted fairly, and reasonably feared that regardless of her actual performance, such an examination would be portrayed as conclusive evidence of her unfitness.

Judge Newman has publicly stated that she would fully cooperate with an examination after transfer to a different circuit. *See, e.g.*, David Lat, *‘Integrity’: An Interview With Judge Pauline Newman*, ORIGINAL JURISDICTION (Jan.

17, 2024) (available at: <https://davidlat.substack.com/p/integrity-an-interview-with-judge-pauline-newman>) (“Lat Interview”) (“Judge Newman said she’d be happy to cooperate with an investigation – as long as it’s conducted by a neutral party, namely, the judicial council of another circuit.”); Petition at 15 n.11.

The committee refused to request the transfer, but stated that it may reconsider that ruling *after* Judge Newman submits to an examination, thus disregarding Judge Newman’s primary reason for requesting the transfer, *i.e.*, that she did not trust that the testing would be conducted and interpreted fairly. The committee further denied Judge Newman’s request to at the very least participate in the selection of examining doctors. *See* Preliminary Injunction Motion at 21.

Judge Newman’s refusal to submit to what she reasonably perceives may be a biased mental examination process remains to this day the stated basis for her suspension. *See In re Complaint No. 23-90015*, Order at 3 (August 29, 2025) (“The question before the Council remains the same and is limited to whether Judge Newman’s refusal to undergo the ordered testing warrants the sanction imposed on September 6, 2024, and the imposition of a further sanction now.”). If the investigative committee had been truly interested in resolving this matter and giving Judge Newman the opportunity to return to service, it could have taken the requested actions to have the matter transferred to a neutral circuit at any point in the past three years. The fact that it chose not to do so furthers the appearance that its goal is instead to keep Judge Newman permanently removed from service.

The refusal to transfer is out of step with the standard practice in these investigations. As Judge Newman’s council has pointed out, this was the first time in the history of the Disability Act that a complaint against a circuit judge which proceeded to the committee investigation stage was kept within the same circuit. *See, e.g.*, Petition at 8. One recent analysis compiles a list of at least seventeen instances where a complaint has been transferred to a different circuit. *See Fix the Court, Complaint Transfer Has Happened More Than Two Dozen Times. It Should Happen Again* (Dec. 6, 2025) (available at: <https://fixthecourt.com/2025/12/complaint-transfer/>). Another prominent legal commentator observed that transfer to another circuit is “routine,” and called the failure to transfer “completely inappropriate.” *See* Lat Interview, *supra*.

The refusal to transfer has been criticized not only by legal commentators, but also by current and former members of the judiciary, as a deviation from the standard practice, and particularly inappropriate in light of the committee’s apparent bias against Judge Newman. For example, Edith Jones, a current federal appellate judge on, and former chief judge of, the Fifth Circuit called the failure to follow the “usual practice” of transfer “inexplicable,” and viewed the proceedings against Judge Newman as “[a]t odds with fundamental due process.” Edith Jones, *Federal Judges Deserve Due Process, Too*, WALL STREET JOURNAL (Aug. 15, 2023). And Paul Michel, a former Chief Judge of the Federal Circuit who served alongside both Judge Newman and Judge Moore, wrote that “the appearance of bias against [Judge Newman] by the chief judge is hard to dismiss,” finding the refusal to transfer the investigation “troubling.” Judge Paul Michel,

Judge Newman's Suspension by the CAFC has Marred Faith in the Federal Judiciary, IPWATCHDOG (Dec. 2, 2024).

In an attempt to placate the committee's demands without submitting to a biased examination, Judge Newman submitted three mental examinations, all of which found Judge Newman mentally fit to continue judicial service, yet all of which were summarily dismissed by the committee. *See* Petition at 2, n.4, 14-15; Judge Paul Michel, *supra* ("Judge Newman submitted to extensive evaluations by three renowned neurological experts Although they found her entirely fit both mentally and physically to ably perform the duties of an appellate judge, their reports were essentially ignored or discounted."). Moreover, the committee appears to have malevolently mischaracterized one of the evaluations, incorrectly claiming that Judge Newman "failed 80% of the memory related questions," which the examining doctor responded was a "distortion" and "very inappropriate." *See* Chris Williams, *Pauline Newman's Doctor Has Some Choice Words For The Judicial Panel That Ruled Against Her*, ABOVE THE LAW (Aug. 8, 2023).

The committee's slanted characterizations of her submitted evaluations all but confirm the reasonableness of Judge Newman's refusal to submit to an examination conducted at the direction of the apparently biased committee. Indeed, yet another former chief of the Federal Circuit spoke out in favor of a transfer and called the "prolonged proceeding" against Judge Newman "puzzling," "especially in the face of her entirely successful cognitive medical examination." Randall Rader, *The*

Federal Circuit Owes Judge Newman an Apology, IPWATCHDOG (July 12, 2023).

C. Apparent Misuse of En Banc Procedure

If all of that were not enough, the facts and circumstances further suggest that the Federal Circuit, under the leadership of Chief Judge Moore, may have misused en banc procedure in an apparent attempt to demonstrate Judge Newman's supposed incompetence, an attempt which backfired when this Court reversed the Federal Circuit, vindicating Judge Newman's opinion and competence.

The single case in the entire year of 2022 that the Federal Circuit decided en banc involved a rather arcane issue of statutory interpretation related to benefits for veterans. See FEDCIRCUITBLOG, En Banc Cases (<https://fedcircuitblog.com/en-banc/cases/>) (listing *Rudisill v. McDonough* as the only case decided en banc in 2022). Judge Newman's thorough and well-reasoned panel majority opinion in the case held that the veteran, James R. Rudisill, was entitled to the education benefits he sought, affirming the ruling of the Court of Appeals for Veterans Claims. See *Rudisill v. McDonough*, 4 F.4th 1297 (Fed. Cir. 2021). Yet the en banc Federal Circuit reversed the opinion, 10-2, over a dissent by Judge Newman. See *Rudisill v. McDonough*, 55 F.4th 879 (Fed. Cir. Dec. 15, 2022) (en banc). This Court then reversed the Federal Circuit, agreeing with Judge Newman and holding that the en banc Federal Circuit's interpretation was incorrect – contrary to not only the clear text of the statute, but also, if there had been any ambiguity, to the pro-veterans canon as well. See *Rudisill v. McDonough*, 601 U.S. 294 (2024).

It seems curious that the Federal Circuit went so far out of its way to misinterpret a statute so as to deny U.S. veterans the benefits that Congress had lawfully granted them, overruling what should have been routine affirmance of the Veterans Court, and making this the one case in the entire year deemed worthy of en banc decision. However, the timing of events is consistent with the possibility that Chief Judge Moore may have used her influence to corral the court into taking the case en banc in order to help lay the groundwork for her planned ouster of Judge Newman.

The order granting en banc consideration issued in February 2022, less than one year after Judge Moore assumed the office of chief, and around the time Judge Newman's sittings were being reduced according to the complaint, as discussed *supra*. See *Rudisill v. McDonough*, 2022 U.S. App. LEXIS 3067 (Fed. Cir. Feb. 3, 2022) (en banc). And the en banc decision issued in December of that year, shortly before Judge Newman was removed from hearing new cases altogether in March 2023.

The entire episode at least illustrates the biased and skewed perspective that Judge Newman's colleagues hold about her supposed incompetence, contrary to this Court's views, and furthers the appearance that Chief Judge Moore began laying the groundwork for her premeditated removal of Judge Newman from the bench almost immediately upon assuming the office of chief.

D. Staff Complaints and Mischaracterizations

The appearance of bias and premeditation against Judge Newman is additionally consistent with and furthered by the committee's actions and characterizations relating to one of Judge Newman's former staff members.

A new paralegal was installed in Judge Newman's chambers shortly after Judge Moore assumed the office of Chief in May 2021. Almost as soon as the investigation began, this staff member testified against Judge Newman, which testimony was cited heavily in the council's order. *See* Order of the Judicial Council of the Federal Circuit, Affidavit 1, para. 1 (Sept. 20, 2023) ("I worked as Judge Newman's paralegal from Dec. 28, 2021 until April 19, 2023") ("Paralegal Affidavit"). Reliance on the paralegal's claims is suspect, for one thing because the staff member's continued employment depends upon remaining in the good graces of Chief Judge Moore. *See* Preliminary Injunction Motion at 26.

Former Federal Circuit Chief Paul Michel (who is obviously in a very good position to understand the potential influence of that position), questioned the propriety of the committee's reliance on staff testimony, stating:

Because the chief judge (the chief accuser) made clear she wanted Newman off the court, the staff witnesses could plausibly have felt under pressure to misstate or exaggerate in the affidavits the chief judge asked them to file. The risk of 'Command Influence' is a phenomenon not limited to the military. Without cross-

examination of these staff employees, how can anyone know the reliability and candor of their affidavits? Moreover, how are non-judge staff members competent to assess a judge's competence to decide cases?³

Michel, *supra*.

Moreover, the council's uncharitable characterizations of the paralegal's testimony regarding Judge Markey furthers the appearance of bias against Judge Newman. The paralegal testified that Judge Newman had at one point stated that "Chief Judge Markey [had] *at some time in the past* told her she could take up to 30 days to vote" on circulating opinions, in contrast to the court's current rules which required a vote within five days. *See* Paralegal Affidavit at para. 22 (emphasis added). The Judicial Council, however, has essentially portrayed this statement as indicating that Judge Newman believed Judge Markey to still be alive. *See* Order of the Judicial Council of the Federal Circuit at 21-22 (Sept. 20, 2023)

3. The paralegal stated, for example, that after Judge Newman would make edits to draft opinions written by law clerks, the "clerks then would often need to make substantial corrections to clean up and clarify these revisions because of the deterioration of the quality of the now-revised opinion." Paralegal Affidavit at para. 21. Reliance on this testimony is indicative of bias, as the paralegal is frankly in no position to judge whether the quality of the opinions had deteriorated. To the contrary, this Court vindicated one of Judge Newman's most recent opinions after the en banc court reversed it (over her dissent). *See* Part I(C), *supra*. Amicus' analysis of Judge Newman's opinions in the period prior to her ouster found that they were of high quality. *See* Michaels, LAW360, *supra*.

(“Judge Newman said that she did not have to comply with this rule because Chief Judge Markey told her she could take 30 days to vote. Chief Judge Markey has been dead for 17 years and has not been a member of the Court for 32 years.”). Contrary to this portrayal, the paralegal’s testimony as to Judge Newman’s alleged statement (even if believed) is entirely consistent with her simply noting that the rule was different in the past.

The portrayal of Judge Newman as confused about the corporeal status of Judge Markey also seems implausible in light of the many recent testimonials regarding Judge Newman’s lucidity (not to mention the three neurological examinations that she passed, discussed earlier). *See, e.g.,* Michel, *supra* (“Over the last two years, members of the bar have heard her speak repeatedly and lucidly at public events.”). For example, one prominent legal commentator, after meeting with Judge Newman and her clerks in chambers for about four hours, and then later interviewing her on his podcast for another hour, stated that he was “now of the view that she’s completely lucid and sane,” and that he had reason to “disbelieve or at least question” the “gossipy details in Chief Judge Moore’s various reports that made Newman sound, well, totally out of it.” *See* Lat Interview.

E. Supposed Unanimity and The Question of Motive

One predictable response to the suggestion of bias has been that, although many have spoken up in Judge Newman’s defense, including former Federal Circuit judges, no active Federal Circuit judge has dissented publicly from the court’s actions against her. However, one

fairly obvious explanation for this is that active Federal Circuit judges fear retaliation from the court's current chief.

The article by former Federal Circuit Chief Paul Michel explicitly suggested as much. *See* Michel, *supra* (“Given the chief judge’s apparent animus against Judge Newman, how can she herself be regarded as an impartial adjudicator? Even the impartiality of the other judges may be questioned if, like the staff, they were perhaps fearful of adverse consequences if they failed to support the wishes of the chief judge.”). Again, as a former chief of the Federal Circuit, Judge Michel is in a uniquely knowledgeable position to understand the power and influence that comes with that role, as well as how it could potentially be abused.

In this regard, it is also worth noting that another active Federal Circuit judge, Judge Katherine O’Malley, announced her retirement only about two months after Judge Moore assumed the position of Chief. *See Second CAFC Judgeship Opens as O’Malley Retirement Announced*, IPWATCHDOG (July 28, 2021). Judge O’Malley (much like Judge Newman) was known as an independent minded judge who was not afraid to dissent. The timing of her retirement, at the age of only 64, is curious and at the very least consistent with the possibility that Judge Moore has shown a willingness to misuse her influence as chief and bully those who do not fall in line behind her.

As for why Chief Judge Moore would be motivated to use her power and influence against Judge Newman, although personal motives are often complicated and multifaceted, the circumstances suggest some possibilities. One

is that Judge Newman's frequent dissents are bothersome, and indeed, one commentator has attempted to quantify the degree of additional work created by such dissents. *See* Katznelson, *supra*, at 37 (finding that replacing Judge Newman with another judge that dissents less frequently "would result in substantial authorship workload reduction by an average of more than 5% for each of her colleagues").

The circumstances also suggest that some interpersonal tensions may have been at play. Former Chief Judge Michel, who served alongside Judge Moore and Judge Newman for many years, referred to "the chief judge's apparent animus against Judge Newman." Michel, *supra*. David Lat has referred to "interpersonal issues between Chief Judge Moore and Judge Newman." Lat, *supra*. Professor Hugh C. Hansen, who long hosted the Fordham IP Conference attended by some Federal Circuit judges, has written that "Judge Newman gets more positive critical attention than the chief judge," and that Judge Newman's "dissents are causing some internal discontent that the chief judge would like to be able to remove and get credit for." *See* Hugh C. Hansen, *There's No Excuse. 39 Years of Judicial Excellence Rewarded with Degrading Judicial Abuse* (available at: <https://fordhamipinstitute.com/theres-no-excuse-39-years-of-judicial-excellence-rewarded-with-degrading-judicial-abuse/>); *see also* Michel, *supra* ("just this year and last, [Judge Newman] has been the recipient of many awards and much adulation by the bar"). And in early 2023, just before the formal investigation against Judge Newman was launched, the American Intellectual Property Law Journal published a symposium issue which featured an article by Judge Newman as the lead article, ahead of an article by Chief Judge Moore. *See* <https://www.aipla.org/detail/journal-issue/quarterly-journal-50-4>.

Regardless of the motive, when the details and circumstances are presented and considered, the appearance of bias against Judge Newman is unmistakable.

II. The Apparent Bias Demonstrates The Need For Review By This Court To Ensure That Constitutional Challenges Can Meaningfully Be Heard

The apparent bias in the investigation against Judge Newman demonstrates the need for reconsideration of the D.C. Circuit precedent which bars Article III courts from meaningfully considering whether such judicial investigations comport with the constitution, as well as whether they are beyond statutory authority.

The panel decision below all but recognized as much, stating that the “seeming absence of a judicial form to address Newman’s as-applied constitutional claims itself raises constitutional concerns.” *Newman v. Moore*, 151 F.4th 472, 485 (D.C. Cir. 2025). The panel also recognized Judge Newman’s argument that “the refusal to transfer her case to a different circuit deprived her of an impartial tribunal,” which the court stated “if correct would raise due process concerns.” *Id.*

As detailed above, there has been an appearance of bias in the proceedings against Judge Newman, strongly suggesting that she has indeed been deprived of an impartial tribunal, and thus raising serious due process concerns. Moreover, even aside from the fact that it suggests actual bias, the appearance of bias itself implicates due process concerns. *See, e.g., Michel, supra* (“the mere appearance of bias is regarded as being just

as harmful to justice as actual bias”). For example, the appearance of bias has made it more difficult for Judge Newman to find representation and public support in this matter, because members of the bar who practice before the Federal Circuit are understandably fearful of retaliation. *See* Brief of Amicus Curiae Bar Association of District of Columbia in Support of Petitioner at 4 (“These practitioners fear, whether justified or not, that publicly supporting Judge Newman’s effort might adversely impact their own appeals”).

The panel was barred by its own precedent from meaningfully considering Judge Newman’s constitutional arguments. Specifically, the panel pointed to the D.C. Circuit decision in *McBryde* as holding that it was barred from considering Judge Newman’s as-applied constitutional challenges, and could consider only her facial constitutional challenges. *See Newman v. Moore*, 151 F.4th at 476 (citing *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)). And under D.C. Circuit precedent, Judge Newman’s facial challenges failed merely because challenged provisions of the Disability Act have possible constitutional applications. *See id.*, at 476. The court was thus barred from considering whether the investigation against Judge Newman has met the constitutional standards of due process.

The panel below (applying *McBryde*) held that as-applied review was precluded by the text of the Disability Act, which states that “all orders and determinations” of a judicial council or the Judicial Conference “shall not be judicially reviewable on appeal or otherwise.” *See id.* at 479 (quoting 28 U.S.C. § 357(e)). But as the court recognized,

this language should not be interpreted to preclude all constitutional challenges, as it would raise “serious constitutional questions” if a statute were “construed to deny any judicial forum for a colorable constitutional claim.” *See id.* (citing *Webster v. Doe*, 486 U.S. 592 (1988)). Where the D.C. Circuit goes wrong, however, is in holding that only facial constitutional challenges may be raised. In light of the strong appearance of bias against her, Judge Newman’s as-applied constitutional challenge is certainly colorable, and thus the D.C. Circuit precedent denying its review in a judicial forum raises serious constitutional questions which should be considered by this Court.

It is no answer to say that such challenges could be reviewed by the Judicial Conference, first because the Judicial Conference is an administrative body rather than a judicial one. *See Newman v. Moore*, 151 F.4th at 480 n.1 (“our court has treated judicial councils and the Judicial Conference as administrative rather than judicial bodies”); *see also id.* at 486 (“The result of faithfully applying *McBryde* is that Judge Newman cannot raise her as-applied constitutional arguments in any Article III Forum.”). Moreover, even if it were to be considered a judicial body, the Judicial Conference, as demonstrated by this case, cannot be relied upon to seriously consider as-applied constitutional challenges, and is thus no substitute for Article III review of such issues. *See id.* at 482 n.3 (“neither the Judicial Council’s orders nor the JC&D Committee’s decision explicitly reflects genuine consideration of Judge Newman’s constitutional arguments”).

This Court has in other cases interpreted jurisdictional bars similar to the one at issue here not to necessarily

preclude review of constitutional due process issues in administrative proceedings. *See Cuozzo Speed Techs. v. Lee*, 136 S. Ct. 2131, 2142 (2016) (“we do not categorically preclude review of a final decision where . . . there is a due process problem with the entire proceeding”); *Johnson v. Robison*, 415 U.S. 361 (1974) (finding that a statute precluding review of “any question of law or fact . . .” does not bar review of constitutional challenges).

The constitutional concerns at issue here are all the more serious in light of the unprecedented and unauthorized sanction imposed, which has on any realistic assessment amounted effectively to removal from service. *See e.g., Michel, supra* (“the effective removal is not based on a proven disability, but only Judge Newman’s refusal to be tested by experts selected, directly or indirectly, by the chief judge and the court”). The Disability Act authorizes only suspension “on a temporary basis for a time certain.” *See Newman v. Moore*, 151 F.4th at 477 (quoting 28 U.S.C. § 354(a)(2)(A)(i)). Moreover, the Act explicitly makes clear that “judicial councils are prohibited from ordering the removal from office of any Article III judge appointed to hold office during good behavior.” *Id.* (citing 28 U.S.C. § 354(a)(3)(A)). The investigative committee thus acted beyond the scope of its statutory authority in effectively removing Judge Newman from service. But the court below (again applying *McBryde*) improperly found itself barred from considering whether the administrative body exceeded its statutory authority. *See id.* at 480-81.

This Court has however suggested that jurisdictional bars need not preclude judicial review of whether an administrative body has acted beyond its statutorily prescribed limits. *See Cuozzo*, 136 S. Ct. at 2142 (“nor

does our interpretation [of the jurisdictional bar] enable the agency to act outside its statutory limits”); *cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (“Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority . . .”). Judge Newman has been denied meaningful review of these arguments as well, further demonstrating the insufficiency of relying upon review by the Judicial Conference, and the need for review by this Court. *See Newman v. Moore*, 151 F.4th at 482 n.3 (“None of the orders appear to address any argument by Judge Newman that her suspension violates the Constitution by effectively removing her from office.”). Moreover, at the time of the Judicial Conference order, Judge Newman’s suspension was still in its first year, and the order reasoned merely that “a one-year suspension of cases is not grossly in excess of other suspensions imposed under the Act.” *See In Re Complaint No. 23-90015*, C.C.D. No. 23-01 (U.S. Jud. Conf. Feb. 7, 2024). The “suspension” is now in its third year, and counting.

Finally, the panel below recognized that “Judge Newman presents substantial arguments that her suspension . . . threatens the principle of judicial independence and may violate the separation of powers,” but again was precluded by D.C. Circuit precedent from considering these arguments. *Newman v. Moore*, 151 F.4th at 485. There is often a possibility that independent thinkers like Judge Newman may provoke the ire of some colleagues, but Article III’s guarantee of lifetime tenure exists precisely to ensure that Judges may remain of independent mind. *See, e.g.*, Alexander Hamilton, *Federalist No. 78* (1788) (“The standard of good behavior for the continuance in office of the judicial magistracy

. . . . is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”). Without meaningful constitutional review, chief judges inclined to abuse their power have the potential to stifle dissent, undermining judicial independence as well as the constitutional design.

This Court should thus step in to review the D.C. Circuit precedent barring Article III consideration of as-applied constitutional and beyond statutory authority challenges under the Judicial Conduct and Disability Act, so as to safeguard judicial independence and prevent similar abuses of power in the future.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

ANDREW C. MICHAELS

Counsel of Record

UNIVERSITY OF HOUSTON LAW CENTER

4170 Martin Luther King Boulevard

Houston, TX 77204

(314) 323-2201

acmichaels@uh.edu