

Case No. 25-1101

IN THE
Supreme Court of the United States

PAULINE NEWMAN, HON.; JUDGE OF THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT,
Petitioner,

v.

KIMBERLY A. MOORE, HON.; IN HER OFFICIAL
CAPACITY 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

**BRIEF OF AMICUS CURIAE,
PATRICK J. COYNE, IN SUPPORT OF
PETITIONER, PAULINE NEWMAN**

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STATEMENT OF AMICUS CURIAE

Amicus is a member of this Court's bar, the United States Court of Appeals for the Federal Circuit bar, and of the bars of multiple other United States Courts of Appeals and U.S. District Courts. Amicus has served as President of three voluntary, national bar associations and has been a practicing attorney since 1982, arguing cases before the Federal Circuit and this Court. Amicus clerked for Circuit Judge Edward S. Smith of the U.S. Court of Appeals for the Federal Circuit from 1982-1984. Circuit Judge Newman was commissioned on February 28, 1984, during the last year of amicus' clerkship.

SUMMARY OF THE ARGUMENT

Amicus desires to bring to the Court's attention that the proceedings below violate the proscriptions of the Code of Conduct for United States Judges providing that the Judicial Council avoid the appearance of impropriety. Amicus respectfully submits that the District Court and Court of Appeals' refusals to entertain Judge Newman's constitutional claims are inconsistent with the Judiciary's Constitutional responsibilities.¹

¹ Amicus prepared this brief, in its entirety. No other person contributed to authorship, or made any monetary contribution to the preparation, of this brief. All Counsel of Record received timely notice of Amicus's intent to file this brief. This brief is timely filed, within 30 days after the case was placed on the docket.

ARGUMENT

The Code of Conduct for United States Judges requires that the proceedings below be conducted to avoid the “appearance of impropriety.” This standard does not rise to the level of actual bias, misconduct, or violation of law. The commentary to Canon 2 provides, in pertinent part: “An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by reasonable inquiry, would conclude that the judge’s honesty, integrity, *impartiality*, temperament, or fitness to serve as a judge is impaired.” Code of Conduct of United States Judges, Commentary to Canon 2 (emphasis added). Further, the Comment to Canon 2B provides that a judge as a witness creates the appearance of impropriety. Amicus submits that the multiple amicus briefs filed in the Court of Appeals (including by former Federal Circuit Chief Judges) and in support of this Petition establish an appearance of impropriety in the Judicial Council’s proceedings.

Yet, the Federal Circuit Judicial Council proceeded. Chief Judge Moore prepared and signed the Complaint, in the form of an Order. Most of the allegations in her initial Order addressed speed and efficiency, not *good behavior* or fitness for service. Others alleged errors in Judge Newman’s opinions, and incorrect statements about her productivity and health. None justifies removal; the Judicial Council does not have jurisdiction to remove her.

Violating this proscription against the appearance of impropriety has resulted in substantial damage. By virtue of its exclusive jurisdiction, inter-circuit

conflicts do not arise. Rather, this Court relies on dissents to distill issues reaching it from the Federal Circuit. Circuit Judge Newman is thorough, thoughtful, and has dissented more frequently than any other Federal Circuit judge in the Circuit's 44-year history. Her dissents have been critically valuable to development of the law. The *Rudisill* case, discussed in Professor Michaels amicus brief, is merely one example. *Rudisill v. McDonough*, 4 F.4th 1297 (Fed. Cir. 2021); 55 F.4th 879 (Fed. Cir. 2022); 601 U.S. 294 (2024). While her colleagues may not appreciate her frequent dissents, the Federal Circuit's jurisprudence suffers from their absence. Her dissents reaching this Court are more often correct. This Court ultimately sided with the position taken by Judge Newman in dissent in 13 of 16 Federal Circuit cases reaching this Court on certiorari.

The *appearance of impropriety* compelled the Judicial Council to transfer these proceedings to a different Circuit. The Judicial Council refused, the Judicial Conference wrongly affirmed that decision. As indicated by the Bar Association of the District of Columbia and Professor Michaels in their amicus briefs, the proceedings below have inhibited bar members' willingness to speak out on this critical issue of judicial independence.

A Presidential-appointee, Senate-confirmed, and Commissioned Article III Judge, Judge Newman is entitled to substantially greater protection in her position than are other federal employees. Yet, she has received far less. The Judicial Council denied her basic due process and equal protection rights guaranteed by the Constitution to all citizens. The record below establishes that the Judicial Council failed to provide Circuit Judge Newman an

opportunity to confront her accuser, to present evidence in her own defense, and to cross-examine the evidence taken by the Judicial Council.

It denied her equal protection by imposing sequential civil contempt sanctions, suspending her from active duty for three years. This violation is continuing. It vastly exceeds the standards this Court and the Courts of Appeals have established (roughly 18 months) for civil contempt sanctions. Unless this Court intervenes, her suspension will likely be indefinite, expressly contravening the statutory requirement that any disciplinary order be only “for a time certain.” 28 U.S.C. § 354(a)(2)(A)(i). The Judicial Council’s sanction is not deigned to coerce but, rather, to punish.

Despite the explicit Constitutional requirement that Judge Newman can be removed only by impeachment by the Congress, the Judicial Council has effectively removed her from judicial service. While Amicus recognizes that Circuit Judge Newman is in her 90s, she holds a life-appointment. It is beyond the scope of this proceeding to debate whether there should be an age limit on Article III judicial service. There is none. The Judicial Conference appears to be trying to “run out the clock” on Judge Newman.

The courts below declined to entertain Judge Newman’s as-applied constitutional challenges and denied her facial challenge, citing *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States*, 2604 F.3rd 52 (D.C. Cir. 2001). Their deference to legislation to determine the scope of their judicial review violates the most basic concepts of Constitutional law.

Returning to these basic principles, as this Court must, Hamilton noted in *The Federalist* No. 78: “. . . this cannot be the natural presumption” Hamilton continues: “A constitution is, in fact, and must be regarded by the judges, as a fundamental law.” *Id.* Hamilton notes further: “It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.” Critically, in this case: “whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.” *Id.*

Two hundred and twenty-three years of judicial precedent contravene the lower courts’ parsimonious approach. In *Marbury*, this court held: It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Favoring legislative limits precluding judicial review over providing redress for constitutional violations—as did the lower courts—would, in Justice Marshall’s opinion: “subvert the very foundation of all written constitutions.” *Id.* at 178. Marshall concluded: “The judicial power of the United States is extended to **all cases** arising under the Constitution.” *Id.* (emphasis added).

Congress has periodically attempted to preclude judicial review, as it did in the Disability Act. 28 USC 28 U.S.C. § 354. This Court has rejected such attempts. In *Webster*, Congress gave the CIA Director authority to terminate any CIA employee: “in his discretion.” As does the Disability Act, the statute in *Webster* purported to preclude judicial review. The Court disagreed and held then, as it should now: “On remand, the district court should thus address respondent’s constitutional claims and the propriety

of the equitable remedy sought.” *Webster v. DOE*, 486 U.S. 592, 605 (1988) (citations omitted).

Regardless of this Court’s decision on *McBryde*, Amicus requests that this Court grant certiorari to review the Federal Circuit Judicial Council’s failure, despite the appearance of impropriety, to transfer this case to another circuit. Further, the Court should consider the District Court and Court of Appeals’ refusal to entertain Judge Newman’s constitutional complaints and the equitable remedies she sought.

Respectfully submitted,

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