

No. 25-1101

IN THE
Supreme Court of the United States

PAULINE NEWMAN,
Petitioner,
v.

KIMBERLY MOORE, in her official capacity as Chief
Judge of the U.S. Court of Appeals for 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 HON. JANICE ROGERS BROWN,
HON. PAUL R. MICHEL, HON. KENT A. JORDAN,
HON. RANDALL R. RADER, HON. THOMAS I. VANASKIE,
HON. PAUL G. CASSELL, AND HON. SUSAN G. BRADEN
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Petitioner is an Article III federal judge who has served more than 40 years on the U.S. Court of Appeals for the Federal Circuit. Respondents, citing Petitioner’s decision not to accede to medical examinations they demanded, have effectively removed her from office by imposing repeated one-year suspensions from all judicial responsibilities and making clear their intent to renew those suspensions indefinitely. Petitioner alleges that Respondents’ past conduct and threatened future conduct violate her constitutional rights. She seeks injunctive relief to prevent Respondents from continuing to violate those rights. The courts below first held that the Judicial Conduct and Disability Act, the statute under which Respondents purported to act, is not facially unconstitutional. They then held that 28 U.S.C. § 357(c) bars federal-court jurisdiction over statutory and as-applied constitutional challenges to Respondents’ conduct. This brief focuses on the second of the two questions presented by the Petition:

Does 28 U.S.C. § 357(c), which limits judicial review of “orders and determinations” of Judicial Councils, display the requisite “clear and convincing evidence” that Congress intended to bar federal-court jurisdiction over as-applied constitutional challenges to Judicial Council actions—even threatened future actions—despite the lack of any reference to “constitutional claims” in the statute? Relatedly, if § 357(c) bars federal-court jurisdiction over as-applied constitutional challenges to Judicial Council actions, is the statute unconstitutional as applied to Judge Newman?

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INTERESTS OF *AMICI CURIAE*

Amici curiae are seven recently retired federal judges.¹ Two of them served for many years alongside Petitioner on the U.S. Court of Appeals for the Federal Circuit.

Hon. Janice Rogers Brown served as a Judge on the United States Court of Appeals for the District of Columbia Circuit from 2005 to 2017. From 1996 to 2005, she served as an Associate Justice on the California Supreme Court.

Hon. Kent A. Jordan served as a Judge on the United States Court of Appeals for the Third Circuit from 2006 to 2025. From 2002 to 2006, he served on the United States District Court for the District of Delaware.

Hon. Paul R. Michel served as a Judge on the United States Court of Appeals for the Federal Circuit from 1988 to 2010. He served as Chief Judge of that court from 2004 to 2010.

Hon. Randall Ray Rader served as a Judge on the United States Court of Appeals for the Federal Circuit from 1990 to 2014. He served as Chief Judge of that court from 2010 to 2014.

¹ Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. On April 2, 2026, *amici* notified counsel for the parties of their intent to file.

Hon. Thomas I. Vanaskie served as a Judge on the United States Court of Appeals for the Third Circuit from 2010 to 2019. He served as a Judge on the United States District Court for the Middle District of Pennsylvania from 1994 to 2010; he served as Chief Judge of that court from 1999 to 2006.

Hon. Paul G. Cassell served as a Judge on the United States District Court for the District of Utah from 2002 to 2007. He is currently a Presidential Professor of Criminal Law and a University Distinguished Professor at the University of Utah.²

Hon. Susan G. Braden served as a Judge on the United States Court of Federal Claims from 2003 to 2019. She was designated by the President as Chief Judge in 2017, assumed senior status in 2018, and retired from the bench in 2019.

Each of the *amici* has a strong interest in ensuring that all federal judges are at liberty to exercise their functions with complete independence and are afforded a judicial forum within which to raise constitutional claims.

The courts below did not challenge Petitioner's claims that Respondents: (1) effected her *de facto* removal from office, in violation of the Constitution's prohibition against anyone other than the U.S. Senate taking those actions; and (2) violated her Fifth Amendment rights by failing to transfer consideration of the

² Current employment listed for identification purposes only.

complaint against her to the Judicial Council of another circuit court. The courts below nonetheless declined to consider Petitioner’s as-applied constitutional claims on the merits, ruling that a federal statute precluded them from exercising jurisdiction. *Amici* are troubled by the refusal to grant Petitioner her day in court. The D.C. Circuit acknowledged that interpreting the jurisdictional statute—28 U.S.C. § 357(c)—as precluding judicial review of Petitioner’s as-applied challenge raises “constitutional concerns,” App. 22a, yet it nonetheless failed to consider whether its expansive interpretation of the jurisdictional bar rendered the statute unconstitutional. *Amici* are concerned that permitting misconduct of the sort alleged here to proceed unchecked and unexamined by the federal courts poses a grave threat to the independence of all federal judges, particularly the 50% of judges who are 68 or older.³

STATEMENT OF THE CASE

Petitioner Pauline Newman has served with distinction on the United States Court of Appeals for the Federal Circuit since shortly after its creation in 1982. Physicians who have examined her recently all have concluded that she is cognitively sharp. Neither the medical experts nor anyone else has concluded that Judge Newman is disabled or otherwise incapable of performing her judicial duties.

In 2023, Respondent Kimberly Moore, Chief

³ See Federal Judicial Center, “Demography of Article III Judges, 1789-2024.”

Judge of the Federal Circuit, asked Judge Newman to resign her status as an active judge and assume senior status. Judge Newman declined to do so. Thereafter, Judge Moore initiated a complaint against Petitioner under 28 U.S.C. § 351(b) and demanded that she agree to be examined by a physician hand-picked by Judge Moore and the two other members of a Special Committee selected by Moore. When Judge Newman resisted that demand and instead proffered medical records and opinions from her own physicians, Respondents accused her of “serious” misconduct and removed her from all judicial activities. The initial order imposed a one-year suspension, but Respondents renewed the suspension for another year in both 2024 and 2025, and they have made clear that the suspension will continue indefinitely until Judge Newman acquiesces to their examination demands. Petitioner’s complaint alleges that Respondents will renew the year-long suspensions indefinitely for so long as her alleged misconduct continues. Pet.26.

PROCEEDINGS BELOW

In 2023, Petitioner filed suit against all members of the Special Committee and all members of the Federal Circuit Judicial Council, in their official capacities. Counts I through IV of the Amended Complaint allege that Respondents have removed Judge Newman from the federal bench and that those efforts violate (among other things) separation-of-powers provisions of the Constitution and her Fifth Amendment due process rights.

In February 2024, the district court granted Respondents’ motion to dismiss those four counts.

App.41a-84a. The court held that the Judicial Conduct and Disability Act’s review provision, 28 U.S.C. § 357(c), deprives federal courts of jurisdiction over *as-applied* constitutional challenges to Judicial Council orders and thus that it lacked jurisdiction over Counts II through IV—which it interpreted as as-applied challenges to Respondents’ efforts to remove Judge Newman from office. App.67a-68a. The court held that it possessed jurisdiction over Count I—which raised a facial challenge to a provision of the Judicial Conduct and Disability Act, 28 U.S.C. § 354, which authorizes Judicial Council’s to impose sanctions (including temporary no-case-assignment orders) on judges. App.69a-71a. But it then dismissed Count I for failure to state a claim. App.79a-81a.

The D.C. Circuit affirmed. App.1a-23a. The court held that exercise of jurisdiction over Petitioner’s as-applied constitutional challenges was foreclosed by its 2001 ruling in *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders*, 264 F.3d 52 (D.C. Cir. 2001), which ruled that such challenges are barred by § 357(c). App.3a. It explained that, “as a panel of this court, we are unable to overrule *McBryde*, and we do not resolve whether it was rightly decided.” App.21a. Indeed, after noting that *McBryde* had recognized that a federal statute should not be understood to preclude judicial review of constitutional claims unless there is “clear-and-convincing evidence that the Congress so intended,” App.10a, the panel asserted that there are “substantial arguments” that “the *McBryde* majority misapplied the clear-and-convincing evidence test when interpreting Section 357(c).” App.22a-23a. The court also conceded that *McBryde* “relied on a potentially strained reading

of the relevant legislative history” of § 357. App.22.

The panel also stated that “[t]he seeming absence of a judicial forum to address Newman’s as-applied constitutional claims itself raises constitutional concerns.” *Ibid.* (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988)). It explained:

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.

Ibid. The appeals court nonetheless ruled that § 357(c) precluded judicial review of Petitioner’s as-applied constitutional claims, explaining that its “doubts would at most suggest that *McBryde* was wrong the day it was decided, not that it does not bind us now.” App.22a-23a.⁴

SUMMARY OF ARGUMENT

The Petition raises an issue of exceptional

⁴ The appeals court also affirmed the district court’s holding that Petitioner’s facial constitutional claims failed to state a claim. App.18a-20a. The Petition does not seek review of that ruling.

importance. In its decision below, the D.C. Circuit reaffirmed a 25-year-old precedent that prevents federal judges from seeking federal-court redress from Judicial Council actions that *de facto* remove them from the federal bench. That bar applies without regard to whether—as alleged here—the Judicial Council has acted in violation of the judge’s rights under the U.S. Constitution. Particularly in light of the threat to judicial independence posed by the many recent attacks on the authority of federal judges, the Court should grant review to reaffirm the authority of federal courts to intervene to hear claims raising constitutional claims of the sort at issue here.

The appeals court based its no-jurisdiction ruling on a federal statute, 28 U.S.C. § 357(c), which limits the jurisdiction of federal courts to hear appeals from “orders and determinations” of Judicial Councils. But that over-broad reading of § 357(c) fails to take proper account of the constitutional-avoidance canon. As the Court has explained, construing a statute to bar federal-court jurisdiction over a constitutional challenge to government action “would, of course, raise serious questions concerning the [statute’s] constitutionality.” *Johnson v. Robison*, 415 U.S. 361, 366 (1974). The constitutional-avoidance canon directs the Court to “first ascertain whether a construction of the statute is fairly possible by which the constitutional question(s) may be avoided”—and if so, to adopt that more limited construction. *Id.* at 367. The Court recognizes a “strong presumption that Congress d[oes] not mean to prohibit all judicial review” of federal action, *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975), and has repeatedly held that a statute will be construed to bar judicial review of

constitutional claims only if there is “clear and convincing” evidence that the Congress so intended. *See, e.g., Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986); *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 370 (2018).

Section 357(c)’s language does not come close to providing the requisite “clear and convincing” evidence that Congress intended to bar judicial review of Judge Newman’s constitutional claims. Section 357(c) is silent about whether its limitations on jurisdiction apply to constitutional claims. *Robison* relied on the the absence of an explicit reference to “constitutional claims” in the jurisdictional statute at issue there, as a basis for concluding that the statute did not bar judicial review of such claims. 415 U.S. at 367.

Moreover, § 357(c)’s bar on judicial review is limited to “orders and determinations” of a Judicial Council. That language indicates congressional intent to limit suits seeking to overturn *past* decisions of a Judicial Council. But as the Petition makes clear, Judge Newman is principally interested in *prospective* relief: she seeks to prevent the Judicial Council from renewing her latest one-year suspension. Section 357(c)’s statement that “orders and determinations” of a Judicial Council “shall not be judicially reviewable” provides no clear and convincing evidence that Congress intended to prevent her from seeking to restrain future unconstitutional actions.

Indeed, the D.C. Circuit recognized the “clear and convincing evidence” standard’s applicability to this case. App.10a. But it conducted no independent analysis of whether § 357(c) clearly and convincingly

barred judicial review of Judge Newman’s as-applied constitutional claims. Rather, it affirmed dismissal based solely on *stare decisis*: it deemed itself bound by *McBryde*, which held in 2001 that § 357(c) barred such claims. App.3a.

Review is particularly warranted because *McBryde* adopted an interpretation of the statute that neither the courts below nor attorneys for Respondents have attempted to defend. *McBryde* claimed to be a compromise decision—it held that federal courts possess jurisdiction to hear facial constitutional challenges to Judicial Council actions but not as-applied constitutional challenges. 264 F.3d at 55. But there is no statutory support for that distinction; neither the language nor the statutory history of § 357(c) supports distinguishing between facial and as-applied challenges, and the court below made no effort to justify such a distinction. *McBryde*’s rationale for construing § 357(c) as permitting federal courts to consider facial challenges applies just as strongly to as-applied challenges; the constitutional-avoidance canon applies equally to both.

Moreover, despite ruling that § 357(c) barred federal-court jurisdiction over Petitioner’s as-applied constitutional claims after conceding that such a statutory construction “raises constitutional concerns,” App.22a, the D.C. Circuit failed to address the constitutional issue that arises logically from its ruling, and *one that Judge Newman requested that it address*: is § 357(c) unconstitutional as applied to Petitioner if construed as preventing her from raising her constitutional claims in a federal court? That failure provides an additional reason to grant review.

The D.C. Circuit’s longstanding interpretation of § 357(c) should not be left in place without any consideration being given to whether that interpretation renders the statute unconstitutional. And this Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), strongly suggests that the statute is unconstitutional as so construed because the constitutional right at issue here—the right of federal judges to remain in office unless impeached and convicted by Congress—is explicitly spelled out in the Constitution.

Finally, review is warranted in light of increasing and widespread challenges to the authority of federal judges. Those challenges often arise, as here, outside the realm of congressional impeachment proceedings. The Court should grant review to re-affirm the constitutional impropriety of such attacks.

REASONS FOR GRANTING THE PETITION

I. THE APPEALS COURT’S ERRONEOUS READING OF SECTION 357(c) CONFLICTS WITH THE CONSTITUTIONALLY PROTECTED LIFE TENURE AFFORDED TO ARTICLE III JUDGES

The U.S. Constitution preserves the independence of federal judges by granting them lifetime tenure “during good Behavior,” U.S. Const., Art. III, § 1, and by reserving solely to the U.S. Senate the power to remove them from office via the impeachment process. U.S. Const., Art. I, § 3, cl. 6 & 7. The court of appeals has undermined that independence by precluding judicial review of efforts to circumvent the mandated impeachment process. It

asserted that the relevant jurisdictional statute distinguishes between facial challenges (federal court review is permitted) and as-applied challenges (jurisdiction precluded), but it provided no justification for that assertion. Review is urgently needed to restore the judicial independence that is integral to the principles that undergird our constitutional democracy.

A. Section 357(c) Does Not “Clearly and Convincingly” Bar Federal Courts from Exercising Jurisdiction over Judge Newman’s As-Applied Constitutional Claims

A broad jurisdictional statute, 28 U.S.C. § 1331, grants federal district courts “original jurisdiction of all civil actions arising under the Constitution.” Included within that grant is the power “to issue injunctions ... to protect rights safeguarded by the Constitution.” *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 461 U.S. 477, 481 n.2 (2010); *see Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 205 (2023) (Gorsuch, J., concurring in the judgment) (stating that § 1331’s broad jurisdictional grant “is as clear as statutes get” and noting its provision that federal district courts “*shall*” have jurisdiction over “*all*” civil actions “arising under federal law”).

Congress may enact legislation that imposes limits on federal district court jurisdiction, but this Court historically has declined to interpret federal statutes as precluding jurisdiction over constitutional claims because of the threat to liberty posed by any such interpretation. *Robison*, 415 U.S. at 366 (construing a statute as barring challenges to the

constitutionality of a federal law as applied “would, of course, raise serious questions concerning the constitutionality” of the statute). Toward that end, the Supreme Court has determined that there exists a “strong presumption” that district courts possess jurisdiction to adjudicate constitutional challenges and that this presumption can be overcome only by “clear and convincing indications that Congress meant to foreclose review.” *SAS Inst.*, 584 U.S. at 370.

Judge Newman alleges that Respondents violated and are continuing to violate her constitutional rights by effectively removing her from the federal bench. She seeks an injunction to prevent Respondents from continuing her suspension indefinitely. The D.C. Circuit’s holding that 28 U.S.C. §357(c) deprives federal courts of jurisdiction to hear that constitutional claim is erroneous and warrants review by this Court.

Section 357(c) states that “all orders and determinations of a Judicial Council “shall be final and conclusive and shall not be reviewable on appeal or otherwise.” By its plain terms, the statute’s jurisdictional limitations focus solely on “orders and determinations” issued by Respondents. But Judge Newman’s constitutional challenges extend far beyond Respondent’s “orders and determinations.” She challenges Respondents’ actions designed to permanently deprive her of her office, and she seeks prospective relief against future actions by Respondents—which she alleges to be imminent. The text of § 357(c) provides no “clear and convincing” indication that Congress intended to foreclose jurisdiction to issue injunctive relief to prevent *future*

conduct that violates Petitioner’s constitutional rights.

In fact, the Disability Act expressly admonishes that “under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.” 28 U.S.C. § 354(a)(3)(A). Petitioner, of course, alleges that Respondents have done precisely what the statute prohibits: ordered her “removal from office.” It is unlikely that Congress, having adopted the § 354(a)(3)(A) prohibition, would then decree that prohibition to be unenforceable by a federal court.

More importantly, as *Robison* explained, construing § 357(c) as a bar to jurisdiction over Petitioner’s constitutional claims would raise “serious questions” regarding the statute’s constitutionality. 415 U.S. at 366. Under the constitutional-avoidance canon, “when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.” *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018). Because § 357(c) does not expressly state that its jurisdiction limitations apply to constitutional claims, the statute is certainly “susceptible” to being interpreted as inapplicable to such claims—and thus that interpretation is the one required by the constitutional-avoidance canon. Indeed, *Robison* held that the absence of explicit reference to “constitutional claims” in a statute broadly limiting review of Veterans Administration determinations strongly supported the Court’s conclusion that that the statute failed to provide the requisite “clear and convincing” evidence that Congress intended to bar courts from

hearing constitutional challenges to VA determinations. 415 U.S. at 366-67. Similarly, in construing 8 U.S.C. § 1226(e)—a statute that expressly bars courts from reviewing decisions of the Attorney General to detain an alien—the Court relied on the statute’s omission of any “explicit reference barring habeas relief” as its basis for concluding that the statute does not bar the exercise of jurisdiction over an alien’s habeas-based constitutional challenge to his detention. *Demore v. Kim*, 538 U.S. 510, 517 (2003).

B. There Is No Support for the D.C. Circuit’s Rationale—that Section 357(c) Somehow Distinguishes Between Facial and As-Applied Constitutional Challenges

In its 2001 *McBryde* decision, the D.C. Circuit acknowledged that the constitutionality of 28 U.S.C. § 357(c)⁵ would be open to serious question if it prevented courts from hearing *any* constitutional claims of federal judges aggrieved by the actions of Judicial Councils. 264 F.3d at 58-59. It conceded that § 357(c)’s statutory language “closely parallels” the jurisdiction-limiting VA statute at issue in *Robison*, and that this Court had interpreted the VA statute as authorizing federal-court jurisdiction over constitutional claims “to avoid the ‘serious constitutional question’ that would be posed ‘if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.’” *Id.* at 58

⁵ At the time that *McBryde* was decided, the statute at issue here was codified as 28 U.S.C. § 372(c)(10).

(quoting *Webster v. Doe*, 486 U.S. 592, 693 (1988)). Thus perceiving itself constrained by *Robison*, *McBryde* held that § 357(c) “does not withhold jurisdiction” over facial constitutional challenges. *Ibid.* But it went on to hold that “in [§ 357(c)], Congress clearly and convincingly barred our review” of as-applied constitutional challenges. *Id.* at 63.

McBryde’s holding that § 357(c) distinguishes between the reviewability of facial and as-applied constitutional challenges is unsupported and unsupportable. Neither the text nor the legislative history of the statute supports such a distinction. *McBryde*’s only basis for making the distinction was its apparent belief that *Robison* dictated that federal courts have jurisdiction to adjudicate facial challenges to Judicial Council actions. It perceived *Robison*’s precedential force as less clear with respect to as-applied constitutional challenges—thus freeing the appeals court to reach the opposite conclusion with respect to jurisdiction over as-applied challenges.

But *McBryde*’s distinction cannot be squared with *Robison*. The plaintiff in *Robison* was a conscientious objector who performed required alternative civilian service during the Vietnam War. He claimed that a statute that denied him access to veterans’ educational benefits (because he had never “served on active duty” in the U.S. military) was unconstitutional *both* facially *and* as applied to him—it allegedly denied his rights to the free exercise of religion and equal protection of the law. 415 U.S. at 363-64. The Court held that 38 U.S.C. § 211(a) (which states that “no ... court of the United States shall have

power or jurisdiction to review any ... decision” of the VA administrator “on any question of law or fact concerning a claim for benefits”) barred judicial review of neither the plaintiff’s facial challenge nor his as-applied constitutional challenge to the statute that denied him educational benefits. *Id.* at 367-74. In other words, if (as *McBryde* conceded) the statutory language of § 357(c) “closely parallels” the language of 38 U.S.C. § 211(a), then *Robison* requires a finding that § 357(c) permits federal courts to exercise jurisdiction over *all* constitutional claims against Judicial Council actions, not simply facial claims.

Nor is there logical reason why Congress would decide to bar all as-applied constitutional claims while simultaneously authorizing facial constitutional challenges. A plaintiff suffering constitutional injury is no less aggrieved simply because the defendant’s misconduct affected no one other than the plaintiff. And if a plaintiff’s only viable constitutional claims are as-applied claims, depriving him of a judicial forum in which to adjudicate those claims is no less constitutionally problematic simply because he has been offered a judicial forum for non-meritorious facial constitutional claims.

The D.C. Circuit made no effort in Judge Newman’s appeal to defend *McBryde*’s reasoning. Indeed, it displayed much more sympathy with Judge Tatel’s dissenting opinion in *McBryde* than it did with the majority opinion. *See* App.22a. It acknowledged, “The *McBryde* majority may have applied the clear-and-convincing test more loosely than our court had in prior cases.” *Ibid.* It conceded that *McBryde* “relied on a potentially strained reading of the relevant

legislative history” and “could be taken to suggest” that an administrative body—“not the Supreme Court—would be the last word on major questions of constitutional law.” *Ibid.* And it expressed serious concern over an issue that arises if one applies *McBryde* to Judge Newman’s case: “[t]he seeming absence of a judicial forum to address Newman’s as-applied constitutional claims raises constitutional concerns.” *Ibid.*⁶

Nonetheless, the court below felt compelled—solely on *stare decisis* grounds—to affirm dismissal based on lack of jurisdiction. App.3a (stating that “[t]his panel has no authority to depart from *McBryde*”). As such, the panel could not have been clearer that it was not endorsing *McBryde*’s holding. It expressly washed its hands of the matter by stating that while it had doubts about the *McBryde* decision, “[t]hose doubts ... would at most suggest that *McBryde* was wrong the day it was decided, not that it does not bind us now.” App.22a-23a.

⁶ The Disability Act authorizes judges aggrieved by the actions of a Judicial Council to seek administrative review before the Judicial Conference of the United States. 28 U.S.C. § 357(a). That Article III judges sit on the Judicial Conference of the United States does not change the fact that it is an administrative body that does not exercise judicial powers. Thus, even if Judge Newman could get a full hearing on her constitutional claims from the Judicial Conference, she would not thereby be provided a judicial forum of the sort mandated by *Robison*. This Court has recognized that Article III judges frequently perform roles of an administrative nature and that when they do so, they are not exercising their judicial powers. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 384-85 (1989).

Review is particularly warranted because the D.C. Circuit dismissed Judge Newman’s constitutional claims based on a 25-year-old decision whose holding is in direct conflict with this Court’s *Robison* decision and whose reasoning the D.C. Circuit was unwilling to defend. By pointing out *McBryde*’s many flaws, the court implicitly invited this Court to grant review.

C. Review Is Warranted Because the Court Below Failed to Address a Key Issue Raised by Petitioner: Is Section 357(c) Unconstitutional if Construed to Bar Jurisdiction over Petitioner’s As-Applied Constitutional Claims?

This Court has long held that any time a statute is construed as “bar[ring] federal courts from deciding the constitutionality of” government action, there arise “serious questions concerning the constitutionality of” the statute. *Robison*, 415 U.S. at 366. The constitutional-avoidance canon teaches that a court should “shun” interpretations that would bar a federal court from exercising jurisdiction if a statute is “susceptible” to a contrary interpretation. *Jennings*, 583 U.S. at 286.

The D.C. Circuit—both in *McBryde* and in the decision below—recognized the potential unconstitutionality of § 357(c) if interpreted as barring federal-court jurisdiction over the constitutional claims of federal judges challenging the actions of Judicial Councils. App.22a. Accordingly, the appeals court held that the statute should not be interpreted to bar jurisdiction in the absence of “clear and convincing

evidence” that Congress so intended. *McBryde*, 264 F.3d at 309. After examining the text of § 357(c) and its legislative history, the court concluded, “[W]e find the evidence clear and convincing that Congress intended [the statute] to preclude review in the courts for as applied constitutional claims.” *Id.* at 312-13.

But the appeals court failed to address the constitutional issue that logically arises from its construction of § 357(c): is a statute that bars federal judges from raising as-applied constitutional challenges to Judicial Council actions consistent with the U.S. Constitution? The court failed to address the issue despite Judge Newman’s explicit request that it do so. That failure provides an additional reason for the Court to grant review. The D.C. Circuit’s longstanding interpretation of § 357(c) should not be left in place without any consideration of whether that interpretation renders the statute unconstitutional.

This Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), strongly suggests that the statute is unconstitutional as so construed. *Boumediene* addressed the constitutionality of Section 7(a) of the Military Commissions Act of 2006 (MCA), which barred federal district courts from exercising jurisdiction over *habeas corpus* actions filed by alleged foreign terrorists being detained by the U.S. military at Guantanamo Bay, Cuba.⁷ This Court concluded that the detainees were entitled to invoke the protections of

⁷ The Detainee Treatment Act of 2005, 119 Stat. 2739, instead directed detainees wishing to challenge their confinement to file administrative appeals with military commissions, with an eventual right of appeal to the D.C. Circuit.

the Suspension Clause,⁸ 553 U.S. at 771, and that the MCA was unconstitutional because it deprived them of those protections by barring federal courts from exercising jurisdiction over their claims. *Id.* at 771-792.

Boumediene explained that Congress's efforts to restrict the detainees' access to federal court "raised troubling separation of powers concerns." *Id.* at 764. It held that the Constitution did not grant Congress "the power to decide when and where its terms apply." *Id.* at 765. The Court also rejected the contention that "the political branches have the power to switch the Constitution on or off at will," as it "would permit a striking anomaly in our tripartite system of government" by denying this Court the power to "say 'what the law is.'" *Ibid.* (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

Interpreting 28 U.S.C. § 357(c) to prevent federal courts from adjudicating Judge Newman's as-applied constitutional claims raises separation-of-powers concerns at least as serious as those at issue in *Boumediene*. Article III's grant of life tenure to federal judges is a crucial component of an independent judiciary. Authorizing Congress to eliminate the authority of federal courts to decide whether a federal judge has been improperly deprived of life tenure would be a devastating blow to that independence. The D.C. Circuit's failure to address that constitutional concern before denying Judge Newman her day in court provides an additional reason for granting the

⁸ U.S. Const., Art. I, § 9, cl. 2.

petition.

II. REVIEW IS WARRANTED IN LIGHT OF INCREASING AND WIDESPREAD CHALLENGES TO THE AUTHORITY OF FEDERAL JUDGES

As noted above, the U.S. Constitution preserves the independence of federal judges by granting them lifetime tenure “during good Behavior,” U.S. Const., Art. III, § 1, and by reserving solely to the U.S. Senate the power to remove them from office via the impeachment process. U.S. Const., Art. I, § 3, cl. 6 & 7. The suspension of Judge Newman is emblematic of the increasingly frequent use of other means—not authorized by the Constitution—to undermine the authority of federal judges. In light of such efforts—and of repeated statements personally attacking judges, statements that Chief Justice John Roberts recently described as “dangerous”—review is warranted to reinforce the constitutional protections afforded to Article III judges.

Filing a misconduct complaint under the Judicial Conduct and Disability Act is one means by which individuals can seek to undermine the authority of a federal judge. Complaints often result in some curtailment of the judge’s activities (including a bar on the assignment of certain categories of cases) while a Judicial Council is investigating the complaint. Misconduct complaints are an increasingly common method by which a judge’s antagonists can circumvent the constitutionally prescribed impeachment process.

Respondents filed and prosecuted a judicial misconduct complaint against Judge Newman,

accusing her of engaging in “serious” misconduct by declining to be examined by physicians of their choice. As have others who file judicial misconduct complaints, Respondents are seeking to remove Judge Newman from her life-tenured position without invoking the impeachment process. Review is warranted to call a halt to this unconstitutional practice.

CONCLUSION

Judge Newman stands accused of “serious” misconduct for having declined to be examined by doctors chosen by Respondents. If Respondents believe that the alleged misconduct is sufficiently serious to warrant impeachment, they should refer the matter to Congress to initiate impeachment proceedings. But what they may not do is to take it upon themselves to remove her from office by imposing a never-ending suspension. And Judge Newman is entitled to her day in court to make that constitutional argument.

The Court should grant the Petition.

Respectfully submitted,

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