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.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION (PUBLIC COPY—SEALED MATERIALS REDACTED)

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. 357(c) bars district-court review of ultra vires challenges to orders and determinations made in judicial conduct and disability proceedings.

2. Whether 28 U.S.C. 357(c) bars district courts from entering prospective relief against conducting judicial conduct and disability proceedings.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.D.C.):

Newman v. *Moore*, No. 23-cv-1334 (July 9, 2024)

United States Court of Appeals (D.C. Cir.):

Newman v. *Moore*, No. 24-5173 (Aug. 22, 2025)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 151 F.4th 472. The order of the court of appeals denying rehearing en banc (Pet. App. 85a-86a) is available at 2025 WL 3765492. The opinions of the district court (Pet. App. 24a-40a, 41a-84a) are reported at 743 F. Supp. 3d 62 and 717 F. Supp. 3d 43.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2025. A petition for rehearing was denied on December 29, 2025 (Pet. App. 85a-86a). The petition for a writ of certiorari was filed on March 12, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act (Act), Pub. L. No. 96-458, 94 Stat. 2035 (recodified by the Judicial Improvements Act of 2002, 28 U.S.C. 351 *et seq.*). The Act and its implementing rules authorize proceedings "to determine whether a covered judge has engaged in" misconduct "or is unable to discharge the duties of office" due to disability. Rule for Judicial-Conduct and Judicial-Disability Proceedings (JC&D Rule) 1(a).

In crafting those procedures, Congress sought to balance multiple "competing risks." Judicial Conduct & Disability Act Study Comm., *Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice* (Breyer Committee Report), 239 F.R.D. 116, 119 (Sept. 2006). On the one hand, permitting judges to be investigated for misconduct or disability by "persons or bodies other than judges" would risk "undue interference with the Constitution's insistence upon judicial independence." *Ibid.* On the other, to "rel[y] for investigation solely upon judges themselves" would risk "inappropriate sympathy with the judge's point of view or de-emphasis of the misconduct problem." *Ibid.*

Balancing these concerns, Congress created a system that "relies upon internal judicial branch investigation of other judges," but "simultaneously insists upon consideration by the chief circuit judge and members of the circuit judicial council, using careful procedures and applying strict statutory standards." Breyer Committee Report, 239 F.R.D. at 119. The Act's purpose "is not to punish but to protect the judicial system and the public from further acts by a judicial officer that are detrimental to the fair administration of justice." *In re Com-*

plaint of Judicial Misconduct, 425 F.3d 1179, 1182 (9th Cir. 2005).

Proceedings under the Act may be initiated if a person alleges judicial misconduct or disability or the circuit's chief judge identifies a complaint. 28 U.S.C. 351(a) and (b). Unless the chief judge summarily dismisses the complaint, she must establish a special committee composed of herself and other judges from the circuit to investigate allegations. 28 U.S.C. 352(b), 353(a); see 28 U.S.C. 363; JC&D Rule 11. Under the Rules promulgated to implement the Act, judges must cooperate with investigations; failure to do so without good cause constitutes "[c]ognizable misconduct." JC&D Rule 4(a)(5). The Act directs proceedings to occur within the subject judge's home judicial council, 28 U.S.C. 353(a)(1), 354(a). The JC&D Rules, however, state that "[i]n exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding." JC&D Rule 26.

Proceedings under the Act unfold as follows. First are proceedings within the circuit's judicial council:

- The special committee investigates and presents a report and recommendation to the circuit's judicial council. 28 U.S.C. 353(c).
- The circuit's judicial council in turn may "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." 28 U.S.C. 354(a)(1)(C). For Article III judges, the Act authorizes the judicial council to censure the judge, 28 U.S.C. 354(a)(2)(A)(i) and (ii), and to certify that the judge is disabled or request that

the judge voluntarily retire on full salary (regardless of age or length of service), 28 U.S.C. 354(a)(2)(B)(i) and (ii). The Act also empowers a judicial council to "order[ ] that, on a temporary basis for a time certain, no further cases be assigned to the judge." 28 U.S.C. 354(a)(2)(A)(i). The Act provides, however, that "[u]nder 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).

- Before the judicial council renders a decision, the subject judge may submit a written response and must be given the opportunity to present argument. JC&D Rule 20(a).

Next, a judge "aggrieved" by a decision of the circuit's judicial council "may petition the Judicial Conference * * * for review." 28 U.S.C. 357(a). The Judicial Conference comprises 27 Article III judges, including the Chief Justice of the United States. 28 U.S.C. 331. The Judicial Conference has delegated responsibility for reviewing judicial-council decisions to a Committee on Judicial Conduct and Disability (JC&D Committee). JC&D Rule 21(a); see 28 U.S.C. 331, 357(b). The Judicial Conference may review the JC&D Committee's decision or let it become final. JC&D Rule 21(a) and (g).

Except for such review (and review of certain orders not relevant here), Congress provided that "all orders and determinations" under the Act "shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. 357(c).

2. a. Petitioner has served as a circuit judge on the Federal Circuit for more than four decades. Her many contributions to the law earned the esteem of both bench and bar, including the Chief Judge of the Federal Circuit and her other Federal Circuit colleagues. See, *e.g.*, Judicial Council Order, Ex. 1, *In re Complaint No. 23-90015* (Fed. Cir. Sept. 20, 2023), https://perma.cc/4KHL-2WT2 (March 2023 email from Chief Judge Moore to petitioner asking to "celebrate this amazing career"); D. Ct. Doc. 30-1, at 184 (Oct. 25, 2023) (noting that the Chief Judge "recently paid tribute to Judge Newman as 'the heroine of the patent system' ") (citation omitted).

In early 2023, however, concerns were raised about "extensive delays" in petitioner's resolution of cases, petitioner's "inappropriate behavior in managing staff," and the possibility that petitioner—then 95-years old—"may suffer from impairment of cognitive abilities (i.e., attention, focus, confusion and memory)." D. Ct. Doc. 15-1, at 3, 6 (June 29, 2023). By February 2023, petitioner had accumulated a backlog of assigned opinions that precluded her from participating in the April 2023 sitting under ordinary Federal Circuit procedures. D. Ct. Doc. 30-1, at 247-248; see D. Ct. Doc. 15-1, at 156 (Fed. Cir. Clerical P. 3 ¶ 15) (prohibiting any judge with "four or more opinion assignments over six months old" or "two or more opinion assignments over a year old" from being assigned to new cases); contra Pet. 10-11. Petitioner's extensive opinion backlog persisted, and "[o]n March 8, 2023, the Judicial Council voted unanimously to preclude the assignment of new cases to" petitioner. D. Ct. Doc. 32-1, at 2 (Nov. 17, 2023). When the backlog was not cleared by June, the Judicial Coun-

cil renewed the order under its statutory authority to ensure "the effective and expeditious administration of justice." D. Ct. Doc. 15-1, at 124 (quoting 28 U.S.C. 332(d)(1)).

In March 2023, the Chief Judge also initiated the "limited inquiry" contemplated by the JC&D Rules into petitioner's ability to perform the functions of an active judge. D. Ct. Doc. 15-1, at 3. The Chief Judge determined there existed "probable cause to believe that [petitioner's] health" rendered her unable "to perform the work of an active judge." *Id.* at 6. Half of the circuit's active judges had already tried to "express[ ] their concerns to" petitioner, who was "unwilling to participate in any informal resolution," such as taking senior status. *Id.* at 7; see *id.* at 3, 6-7. When such efforts failed, the Chief Judge identified a complaint and appointed a special committee to investigate under the procedures of the Act and the JC&D Rules. *Id.* at 9.[1]

The Special Committee conducted an extensive investigation, collecting more than 20 statements from court employees regarding their interactions with petitioner. See D. Ct. Doc. 15-1, at 82-89. Those statements included reports of paranoia, increased confusion, and worsening memory problems, as well as petitioner's own emails evidencing the same. *Ibid.* Affidavits stated that petitioner had "accused staff of trickery, deceit,

[1] Though petitioner repeatedly singles out the Chief Judge alone, all actions in the investigation besides the identification of the complaint and the appointment of the special committee to investigate specified matters—tasks the Act and JC&D Rules entrust solely to a Chief Judge—were undertaken at the unanimous direction of either the Judicial Council or the Special Committee.

acting as her adversary, stealing her computer, stealing her files, and depriving her of secretarial support." D. Ct. Doc. 30-1, at 186. As a result, the Clerk of the Court had "advised staff to avoid interacting with [petitioner] in person or, when they must, to bring a coworker with them." *Ibid.* Petitioner did not challenge the accuracy of those affidavits. See *id.* at 219. Additional concerns about petitioner's functioning were raised when her law clerk repeatedly invoked her Fifth Amendment privilege in response to questions regarding her role and responsibilities in petitioner's employ. D. Ct. Doc. 25-1, at 41 (Sept. 1, 2023); Special Committee Report & Recommendation with Attachments 120-159, *In re Complaint No. 23-90015* (Fed. Cir. July 31, 2023), https://perma.cc/DM83-ANYX.

Based on the employee interviews and medical-expert advice, the Special Committee directed petitioner (1) to produce certain medical records to an independent neurologist and (2) to undergo a full battery of non-invasive neurological and neuropsychological examinations to enable resolution of the disability issue. D. Ct. Doc. 15-1, at 77-78, 80-82, 98, 101; D. Ct. Doc. 30-1, at 187-188, 195, 242-243. It was later revealed that petitioner's own expert neurologist had likewise recommended that she undergo such neuropsychological examinations. Special Committee Report & Recommendation 2, 10-13, *In re Complaint No. 23-90015* (Fed. Cir. July 28, 2025) (2025 Report), https://perma.cc/5NSK-47GZ. Petitioner, however, refused to comply with the Committee's orders. See, *e.g.*, D. Ct. Doc. 25-1, at 18-21. Accordingly, the Special Committee's investigation expanded to include whether petitioner's failure to cooperate constituted misconduct. *Id.* at 18.

b. After considering petitioner's briefing, evidence, and argument, the Special Committee determined that petitioner's failure to cooperate in the investigation had "prevented the Committee from fulfilling its statutorily assigned role." D. Ct. Doc. 25-1, at 113. The Special Committee recommended that the Judicial Council exercise its authority under 28 U.S.C. 354(a)(2) to suspend petitioner from hearing new cases for one year, or until she cooperated with the pending investigation into whether she suffered a disability, "whichever comes sooner." D. Ct. Doc. 25-1, at 115.

In September 2023, the Judicial Council unanimously found that the record established "a reasonable basis" to order the specified testing and medical records and that petitioner had not shown good cause for refusing to comply. D. Ct. Doc. 30-1, at 255. The Judicial Council unanimously suspended petitioner from hearing new cases for one year "subject to consideration of renewal if Judge Newman's refusal to cooperate continues" or "modification or rescission if justified by an end of the refusal to cooperate." *Id.* at 255-256.

At several points, petitioner sought a transfer to another circuit's judicial council. See, *e.g.*, D. Ct. Doc. 15-1, at 54. The Chief Judge, the Special Committee, and the unanimous Judicial Council rejected that request without prejudice to petitioner's renewing it after complying with the directive to undergo testing. D. Ct. Doc. 15-1, at 54-58 & n.1, 61, 102; D. Ct. Doc. 30-1, at 188-190, 197 n.8. The Judicial Council explained, among other things, that because the inquiry had "significantly narrowed" to focus on petitioner's failure to cooperate, the inquiry did not involve "'a particular interaction between judges'" on the Federal Circuit or other "dis-

puted facts" warranting transfer. D. Ct. Doc. 30-1, at 226 (citation omitted); contra Pet. 13 n.8 (suggesting that the transfer request was denied solely on "efficiency grounds").

Petitioner sought review of the Judicial Council's September 2023 suspension order by the Judicial Conference's JC&D Committee, which comprises seven Article III judges from outside the Federal Circuit. See 28 U.S.C. 331, 357(a) and (b); JC&D Rule 21. In February 2024, the JC&D Committee issued an order rejecting all of petitioner's arguments. D. Ct. Doc. 40-1, at 14 (Feb. 7, 2024). First, as to petitioner's argument that the investigation should have been transferred to another circuit, the JC&D Committee concluded that the narrow question about misconduct did not necessitate council members serving as witnesses (and petitioner agreed), nor was there any evidence of bias or its appearance. *Id.* at 16-21; D. Ct. Doc. 30-1, at 200. Second, the JC&D Committee rejected petitioner's argument that alleged violations of the Act, the JC&D Rules, and the Fifth Amendment gave petitioner good cause not to comply with the Special Committee's order to undergo medical testing. D. Ct. Doc. 40-1, at 21-26. The JC&D Committee emphasized that petitioner "was not denied due process," *id.* at 21 (capitalization omitted), and had been granted "more process than she was due under the Rules," *id.* at 22. Third, the JC&D Committee rejected petitioner's statutory and constitutional challenge to the Judicial Council's authority to suspend her for one year. *Id.* at 26-29.

c. Thereafter, petitioner continued to refuse to undergo the medical testing ordered. See Special Committee Report and Recommendation 2, *In re Complaint*

No. 23-90015 (Fed. Cir. July 24, 2024), https://perma.cc/8HGJ-CJRS. In September 2024, after giving petitioner an opportunity to present new evidence and arguments, the Judicial Council unanimously imposed another one-year suspension, subject to the same possible renewal or rescission. See Judicial Council Order 1-2, *In re Complaint No. 23-90015* (Fed. Cir. Sept. 6, 2024), https://perma.cc/D8WT-LWUN.

Petitioner asked the Judicial Council to reconsider the renewed suspension, submitting a new expert report based on a particular type of scan showing blood flow in the brain. 2025 Report 6-7, 30. The Special Committee retained experts to review petitioner's submissions, received expert reports, permitted petitioner to file supplemental reports, and at petitioner's request, allowed depositions of all experts. *Id.* at 7-9; see 28 U.S.C. 353(c); JC&D Rule 13(a).

Petitioner also produced medical records that raised concerns about her cognitive abilities. For example, records from 2022 refer to "'memory impairment'" and "'forgetfulness,'" and some records refer to petitioner's law clerk as her "'caregiver,' 'caretaker,' 'emergency contact,' and even as her 'legal guardian.'" 2025 Report 4-5.[2] Moreover, petitioner's initial expert, Dr. Rothstein, testified that he had actually recommended further test-

[2] At petitioner's request, all materials in this matter have been released but for sensitive employee information and material that petitioner demanded be kept confidential or redacted. *E.g.*, Order, *In re Complaint No. 23-90015* (Fed. Cir. July 8, 2024), https://perma.cc/7ZFN-AAWG; Order 6-7, *In re Complaint No. 23-90015* (Fed. Cir. Feb. 26, 2025), https://perma.cc/GW6U-D6XD; contra Buckeye Inst. Amici Br. 12 (contending that proceedings were "conducted in secret, despite [petitioner's] demand for openness").

ing and that his initial report avoided "definitive" language about fitness for duty. *Id.* at 2-3. Other experts testified that reliance on a physical brain scan showing blood flow to diagnose cognitive impairment "is not consistent with scientific principles and not a recognized and acceptable way to measure cognitive impairment." *Id.* at 36 (citation and internal quotation marks omitted). Although petitioner's experts had performed additional cognitive tests, they were conducted in "only a few minutes." *Id.* at 18; see Rothstein Deposition Tr. 76-77 (May 9, 2025), https://perma.cc/RR2L-L4ET. Given that evidence, the Special Committee concluded that the brain-scan results or prior tests petitioner had offered were inadequate to establish her fitness to perform her judicial functions. 2025 Report 10-71.

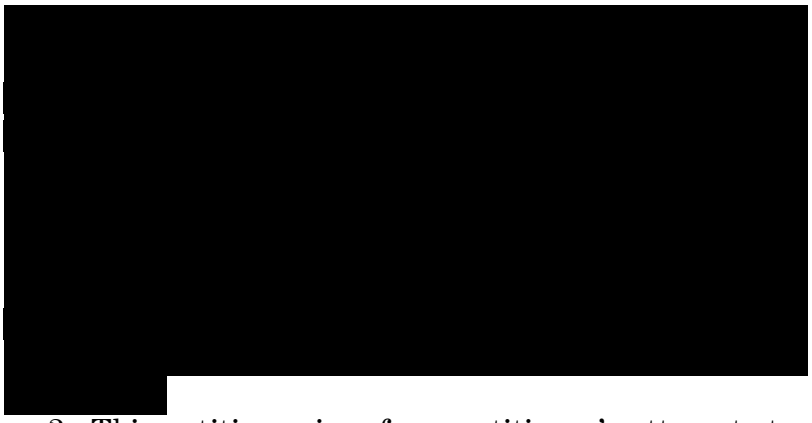
Against that backdrop, in August 2025, the circuit's Judicial Council again unanimously concluded that good cause existed to order petitioner to undergo neurological and neuropsychological examination and imposed a third one-year suspension, subject to the same possibility of renewal or rescission. Judicial Council Order 13, *In re Complaint No. 23-90015* (Fed. Cir. Aug. 29, 2025) (2025 Order), https://perma.cc/Z48G-J5YC. The Judicial Council emphasized that "the keys" to unlock petitioner's "suspension are in her pocket." *Id.* at 11 (quoting Gov't C.A. Br. 28).

d. Petitioner appealed the Judicial Council's 2025 Order to the JC&D Committee. See Memorandum of Decision 3-5, *In re Complaint No. 23-90015*, C.C.D. No. 25-02 (JC&D Comm. Mar. 24, 2026) (2026 JC&D Decision), https://perma.cc/JU9H-UQ8T.

In March 2026, the JC&D Committee denied the petition for review and affirmed the renewed one-year suspension. 2026 JC&D Decision 19. It rejected petitioner's argument that her suspension had become indefinite, in excess of the Judicial Council's statutory authority to order a "temporary" suspension under 28 U.S.C. 354(a)(2)(A)(i). 2026 JC&D Decision 5-9. The JC&D Committee explained that the renewal order was not "simply a rubberstamp," and that because "the prospect for resolution is a real option" depending on the results of the Special Committee's "careful review," the "renewed suspension remains 'temporary'" within the meaning of the statute. *Id.* at 6, 8. The JC&D Committee also rejected petitioner's argument that the Judicial Council's misconduct finding required it to refer her for impeachment. *Id.* at 8-9.

The JC&D Committee next rejected petitioner's constitutional claims. 2026 JC&D Decision 9-19. It determined that Article III permits processes by which judges are temporarily prevented from hearing cases, see *id.* at 9-13, because a "temporary suspension of case assignments * * * does not amount to removal from office," *id.* at 13. It also held that the refusal to seek a transfer of proceedings at this stage did not violate petitioner's due-process rights. *Id.* at 13-19. After assuming that some due-process-protected interest was implicated, *id.* at 15, the JC&D Committee concluded that the Judicial Council members did not have an impermissible conflict of interest, see *id.* at 16-18. In an administrative proceeding, the JC&D Committee explained, "investigative and adjudicative functions" may be combined without violating procedural due-process rights. *Id.* at 17 (citing *Withrow* v. *Larkin*, 421 U.S. 35,

47 (1975)). And it rejected petitioner's argument that there was any conflict of interest at this stage, "where the Judicial Council is considering the narrow question of whether Judge Newman has failed to cooperate with the investigation, which does not require members of the Judicial Council to serve as witnesses or provide testimony." *Id.* at 18-19.



3. This petition arises from petitioner's attempts to collaterally litigate the Judicial Council's orders in federal court proceedings. In May 2023—as the Special Committee was conducting its initial inquiry into petitioner's ability to serve as an active judge—petitioner sued the Chief Judge, the members of the Special Committee, and the Judicial Council in the United States District Court for the District of Columbia. As relevant here, petitioner asserted that she had been improperly removed from office, see C.A. App. 51-54, and deprived of due process, *id.* at 54-55, and she sought a preliminary injunction against her suspension from new case assignments until the matter can be transferred to another circuit.

a. The district court dismissed the majority of petitioner's claims and denied her request for preliminary relief. Pet. App. 41a-84a. The court explained that 28 U.S.C. 357(c) generally precludes "district court review of judicial council action," except for "*facial* challenges to the constitutionality of the" Act, which the D.C. Circuit had held not to be precluded in *McBryde* v. *Committee to Review Circuit Council Conduct & Disability*

Orders, 264 F.3d 52 (2001), cert. denied, 537 U.S. 821 (2002). Pet. App. 60a. The court therefore held that it lacked jurisdiction to review petitioner's constitutional and statutory challenges to orders issued by the Judicial Council suspending her from new cases, her due-process challenge to the Judicial Council's failure to request a transfer, and her statutory and constitutional attack on the order requiring her to undergo medical tests. *Id.* at 66a-71a.

The district court considered and rejected petitioner's arguments that the Act is facially unconstitutional because it allows judges to exercise the power of impeachment and removal, Pet. App. 79a-81a, and affords the Special Committee too much discretion, *id.* at 81a-84a. The court further rejected petitioner's remaining claims, see *id.* at 24a-40a, and entered judgment for respondents. C.A. App. 200.

b. The court of appeals unanimously affirmed. Pet. App. 1a-23a. The court explained that 28 U.S.C. 357(c) "bars from federal court statutory and as-applied constitutional challenges to judicial council or Judicial Conference orders issued under the Act." Pet. App. 11a (citing *McBryde*, 264 F.3d at 59, 62-63). And it noted that Congress "intended for those claims to be considered exclusively by the Judicial Conference." *Id.* at 3a.

The court of appeals rejected petitioner's argument that *McBryde* had been "effectively overruled" by intervening decisions of this Court, including *SAS Institute Inc.* v. *Iancu*, 584 U.S. 357 (2018). Pet. App. 12a. The court of appeals noted that the judicial-review bar at issue in *SAS* did not apply because "by its terms" it "did not encompass the petitioner's challenge." *Ibid.* By contrast, the court explained, petitioner here had

not argued that the suspension order "somehow falls outside the category of 'all orders and determinations' described in Section 357(c)." *Id.* at 13a. The court further noted that to the extent petitioner's brief "might be read as suggesting that, despite Section 357(c), we can review her statutory challenge under cases allowing us to review" particularly "'extreme'" agency overreach, such a claim had been presented "in (at most) a 'skeletal' manner, and so it is forfeited." *Id.* at 13a n.2 (citation omitted). The court added that in all events, that exception "has only been applied to statutory schemes raising questions of implicit preclusion, not to explicit preclusion provisions like the one at issue here." *Ibid.* After applying *McBryde* to preclude petitioner's as-applied challenges, *id.* at 17a-18a, the court rejected petitioner's facial challenges. *Id.* at 18a-21a.

c. Petitioner sought rehearing en banc, which the court of appeals denied without any judge requesting a vote. Pet. App. 85a-86a.

ARGUMENT

The petition fails this Court's criteria for review many times over. For starters, petitioner's claims are largely forfeited. Petitioner contends (Pet. 22-26) that the Act's judicial-review bar, 28 U.S.C. 357(c), does not preclude challenges to judicial-council orders alleged to be *ultra vires*. She further contends (Pet. 26-30) that the judicial-review bar does not preclude claims for prospective relief. But neither claim was adequately pressed or passed upon below, making this case manifestly unsuited for this Court's review. Further, petitioner's contentions lack merit and implicate no circuit split. As the courts below correctly held, Congress di-

rected challenges to judicial-council orders to the Article III judges serving on the Judicial Conference, not to federal district courts. That sensible policy decision ensures a mechanism for reviewing allegations of judicial misconduct or incapacity that comports with separation-of-powers considerations, offers multiple layers of review, and prevents overburdening federal courts with complaints about judicial-council decisions. And petitioner identifies no plausible conflict among the circuit courts warranting this Court's review. [redacted] The Court should deny the petition.

1. This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and its "traditional rule * * * precludes a grant of certiorari" on a question that "'was not pressed or passed upon below,'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). But petitioner failed to preserve most of the theories that she presses now. That alone should doom the petition.

Before this Court, petitioner first contends (Pet. ii, 22-26) that 28 U.S.C. 357(c) permits federal courts to review of orders and determinations made under the Act that are allegedly "*ultra vires*." Recognizing that the statute precludes judicial review of "'all orders and determinations'" under the Act, petitioner asks (Pet. 22) this Court to "resolve whether the 'orders' and 'determinations' described in section 357(c) include *ultra vires* acts."

As the court of appeals correctly observed, petitioner did not press that argument below. See Pet. App. 13a ("[Petitioner] 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 although petitioner's opening brief in the court briefly asserted that "review of actions that are plainly in excess of authority granted by Congress remains," Pet. C.A. Br. 54, the court found that petitioner "forfeited" "any such argument" about *ultra vires* review by presenting it in "a 'skeletal' manner." Pet. App. 13a n.2. This Court ordinarily declines to review claims "without the benefit of thorough lower court opinions to guide our analysis of the merits." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012).

At times, the petition also seems to use the label "*ultra vires*" to refer to orders alleged to violate the Constitution on an as-applied basis. See, *e.g.*, Pet. 25 ("The Disability Act * * * cannot authorize the judicial council (or anyone else) to act in violation of the Constitution."). To the extent that petitioner is asking for judicial review of as-applied constitutional claims, such an argument is not forfeited, see Pet. App. 13a, but fails on the merits for the reasons explained below, see p. 19-21, *infra*.

Moreover, petitioner wholly failed to preserve her second claim in this Court (Pet. 26-30): that 28 U.S.C. 357(c) does not apply to claims for prospective relief. Petitioner never argued in any court below that the applicability of the Act's judicial-review bar turns on the type of relief sought. Cf. D. Ct. Doc. 30, at 36-39 (Oct. 25, 2023); Pet. C.A. Br. 55-60; Pet. C.A. Reply Br. 27-28; C.A. Pet. for Reh'g 12-20. Nor did she disentangle her

claims challenging the Judicial Council's past orders from her request for prospective relief to "enjoin [respondents] from continuing any such actions" in the future. C.A. App. 29, 61. She likewise never explained how the courts below could have crafted purely prospective relief without engaging in any backward-looking judicial review of the judicial-council "orders and determinations" that Section 357(c) insulates. 28 U.S.C. 357(c).

2. Regardless, petitioner's contentions lack merit.

a. Neither text nor precedent supports petitioner's argument that the judicial-review bar excludes *ultra vires* claims. Section 357(c) broadly provides that "*all* orders and determinations" by a judicial council or the Judicial Conference "shall not be judicially reviewable on appeal *or otherwise*." 28 U.S.C. 357(c) (emphases added). "All" means all, whether a challenge characterizes a judicial council's orders or determinations as *ultra vires* or presses some other claim. Pet. App. 10a. To be sure, a facial challenge to the constitutionality of the *Act* itself is not a request for review of an "order" or "determination," and thus is not barred. See *id.* at 11a; *McBryde* v. *Committee to Review Circuit Council Conduct & Disability Orders*, 264 F.3d 52 (D.C. Cir. 2001), cert. denied, 537 U.S. 821 (2002). But as to statutory or as-applied constitutional challenges to judicial-council orders themselves, Congress directed all review to an alternative forum: persons aggrieved by such orders "may petition the Judicial Conference"—constituted of Article III judges—for "review thereof." 28 U.S.C. 357(a); see 28 U.S.C. 357(b).

In certain narrow contexts, this Court has held that an agency order not subject to judicial review under the

judicial-review provisions of the Administrative Procedure Act or other statutes may nevertheless be available if the agency acted *ultra vires*. See, *e.g.*, *Leedom* v. *Kyne*, 358 U.S. 184, 185-189 (1958). That type of "nonstatutory ultra vires review," however, is unavailable where, as here, "a statutory review scheme forecloses all other forms of judicial review" expressly. *Nuclear Regulatory Comm'n* v. *Texas*, 605 U.S. 665, 681 (2025); see *Board of Governors* v. *MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (explaining that nonstatutory *ultra vires* review is not available in light of "the clarity of the congressional preclusion of review"). Petitioner thus does not rely on those cases.

Petitioner instead invokes (Pet. 22-26) this Court's decisions in *Johnson* v. *Robison*, 415 U.S. 361 (1974), and *Webster* v. *Doe*, 486 U.S. 592 (1988), but neither supports her argument. In *Webster*, a statute committed certain military employment decision to agency discretion, but its text did not clearly indicate that "Congress meant to preclude consideration of colorable constitutional claims" arising out of that statutory authority. 486 U.S. at 603. And in *Johnson*, the plain text of the statutory judicial-review bar at issue covered only challenges to "decisions" under the relevant scheme, not facial challenges to the constitutionality of the scheme itself. 415 U.S. at 367 ("[N]o explicit provision of § 211(a) bars judicial consideration of appellee's constitutional claims."); see 38 U.S.C. 211(a) (1982). Here, unlike in *Johnson* and *Webster*, the text of Section 357(c)'s judicial-review bar expressly covers petitioner's claims, foreclosing her arguments about *ultra vires* review.

Moreover, the key reason for permitting judicial review of constitutional claims in those cases is not pre-

sent here, because Congress has not cut off all other paths to judicial review. See *Demore* v. *Kim*, 538 U.S. 510, 517 (2003). Unlike the statute challenged in *Johnson* or the termination decision in *Webster*, the Judicial Council's decision to suspend petitioner from hearing further cases *is* subject to review by tenure-protected Article III judges, through the Judicial Conference. That review encompasses both statutory and as-applied constitutional challenges. See *McBryde*, 264 F.3d at 62, 68. Indeed, petitioner's expectation (Pet. 17 n.12) that review through the Judicial Conference's JC&D Committee would not afford review of her constitutional claims has been resoundingly refuted by that Committee's thorough analysis (and rejection) of petitioner's as-applied constitutional claims. See 2026 JC&D Decision 9-19. A suit under 28 U.S.C. 1331 heard by a single district judge is not the only meaningful form of judicial review.

b. Petitioner's backup argument (Pet. 27-30) that Section 357(c) permits at least claims for prospective relief fares no better. Petitioner contends that the provision's text applies only to review of "*previously issued* 'orders and determinations,'" Pet. 29 (emphasis added), not claims seeking to enjoin *future* orders and determinations. That limitation is wholly atextual.

Moreover, petitioner's own case underscores the serious practical problems with that argument. Setting aside facial challenges to the constitutionality of the Act (which *McBryde* permits), it is hard to imagine any prospective relief that would not entail judicial review of an extant order or determination. If a judge sought to enjoin an investigation before it began, an as-applied challenge to that investigation presumably would be unripe

because it would depend on "contingent future events." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (citation omitted). Once an investigation begins, any injunction to prevent that investigation from continuing would necessarily entail judicial review of the past determination to launch the investigation—thus falling squarely within Section 357(c)'s terms. That prospective-retrospective distinction would thus drive a gaping hole in the scheme Congress prescribed, where Congress intended for virtually all claims to end up before the Judicial Conference rather than being diverted to district court. Litigants could always end-run that scheme by reframing their challenges as attacking the continuation of the allegedly unlawful action.

Contrary to petitioner's assertion (Pet. 27-30), *Bowe* v. *United States*, 146 S. Ct. 447 (2026), does not support her forfeited argument—let alone supply a basis to grant, vacate, and remand, as she remarkably proposes (Pet. 28). Petitioner reads *Bowe* to stand broadly for the proposition that courts must "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." Pet. 29. But *Bowe* was about the reach of a statutory exception to this Court's certiorari jurisdiction, and turned on the specific language of that provision. In all events, the court of appeals below *did* find "'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." Pet. App. 11a.

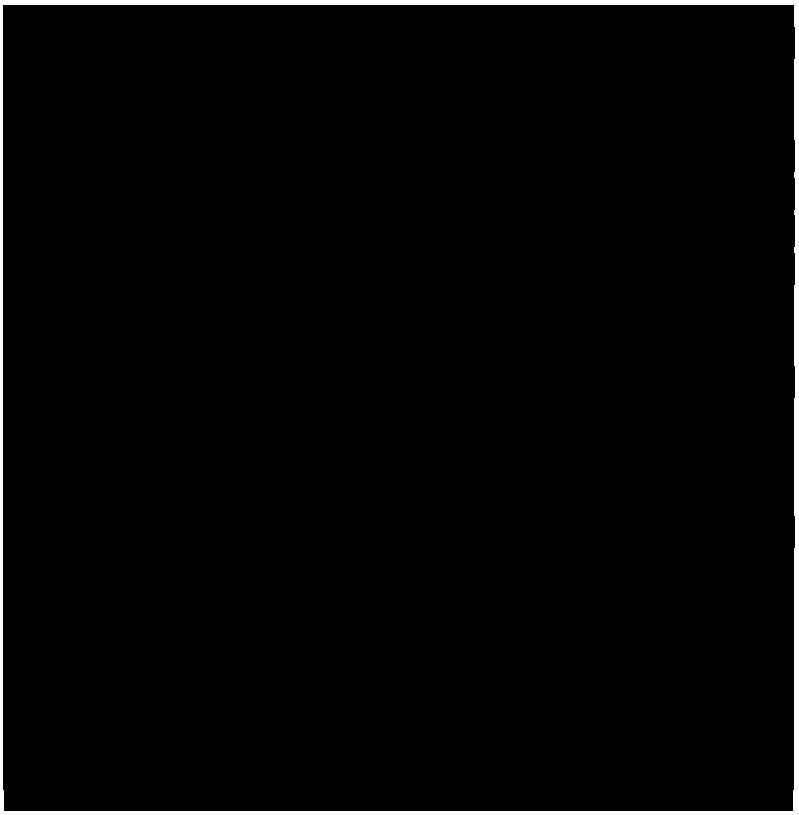
3. Further counseling against this Court's review is the conceded (Pet. 30) lack of any conflict of authority among lower courts on the scope of 28 U.S.C. 357(c). In-

stead, the other courts of appeals to consider the issue are in agreement, with one observing that "Congress has made crystal clear its intent that the federal courts as such exercise no appellate jurisdiction" over judicial-council decisions under the Act. *In re McBryde*, 117 F.3d 208, 220 n.7 (5th Cir. 1997), cert. denied, 524 U.S. 937 (1998); see *Miller* v. *Judicial Council*, No. 25-2616, 2026 WL 1091647, at *1 (3d Cir. Apr. 22, 2026) (per curiam) (holding that Section 357(c) barred review of as-applied constitutional claims). If actual conflicts arise, this Court may address them then, but none has happened in the 40-plus years since the Act was passed.

Petitioner's arguments (Pet. 30-32) for why review is nevertheless needed now are unavailing. Petitioner notes that the rate of dissent in the Federal Circuit has dropped recently. See Pet. 31-32 & n.22 (citing Dennis Crouch, *Federal Circuit Dissent Rates Collapse After Newman's Removal*, Patently-O (Mar. 3, 2026), https://perma.cc/RCR5-2876). But the full article that petitioner cites opines that it is "unlikely" that "misconduct proceedings themselves exerted a chilling effect." Crouch, *supra*, at 5.

Petitioner further argues (Pet. 30-32) that this Court's review is essential to ensure judicial independence. But she never explains why review by the Judicial Conference's Article III judges—the structure Congress chose to maximize judicial independence, see S. Rep. No. 362, 96th Cong., 1st Sess. 11 (1979)—is insufficient to protect judges. Indeed, Congress had good reason to vest responsibility for such matters in the Judicial Conference. Most of those aggrieved by judicial conduct and disability decisions made by Chief Judges or Judicial Councils are not judges, but rather litigants.

See United States Courts, Tbl. S-22, *Complaints Filed and Action Taken Under 28 U.S.C. § 351-364* (Dec. 8, 2025), https://perma.cc/QZ8W-WTAQ. Congress did not intend to open the federal courts to a flood of as-applied challenges to sensitive decisions made under the Act—a prospect that would not only burden the court system, but expose the judges targeted in such challenges to the possible need to attempt to participate to defend their conduct or abilities in such suits. See *ibid.* (in 2024-2025, 1854 complaints were filed and 644 petitions for JC&D Committee review were filed).



[redacted]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2026