No. 25-1101

In the Supreme Court of the United States

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

v.

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

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

MOTION FOR LEAVE TO FILE UNDER SEAL, WITH REDACTED COPIES FOR THE PUBLIC RECORD, REPLY BRIEF FOR THE PETITIONER

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Pursuant to this Court's Rules 21 and 34, Petitioner respectfully moves for leave to file her Reply Brief under seal. Applicants are also filing a proposed redacted version of the brief with this motion (attached as Exhibit A). Counsel have agreed that this material should be filed under seal.

1. The information that warrants filing under seal was contained in two documents that are required to be kept confidential under 28 U.S.C. 360(a) and Rule 23(b) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. The documents were treated as confidential documents under seal by the Federal Circuit Judicial Council, and they remain under seal. Respondents submitted these documents to this Court under seal in the appendix to their [Cert Opp.].

2. The Respondent sealed portions of its submission to this Court, and such motion to seal was granted, and a Reply to those arguments requires that Petitioner respond to and refer to that sealed material.

3. It is necessary that the material to be sealed be included in Petitioner's reply brief. Petitioner relies upon that information to support her arguments that the Solicitor-General's mootness argument is baseless.

Respectfully submitted,

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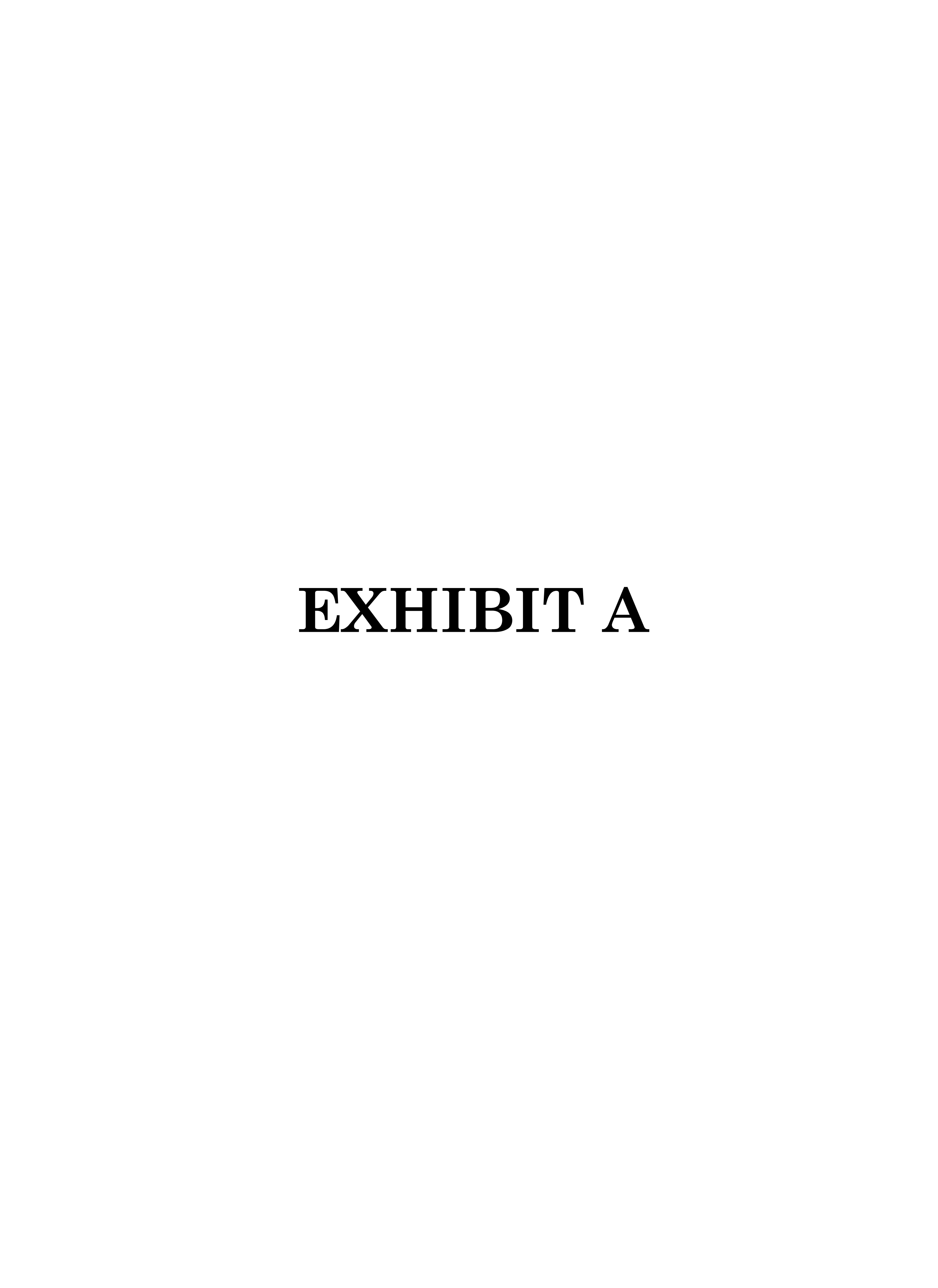

EXHIBIT A

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REPLY BRIEF FOR THE PETITIONER
(PUBLIC COPY—SEALED MATERIALS REDACTED)

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REPLY BRIEF FOR THE PETITIONER

The Solicitor-General's response is powerful evidence of why this Court should grant certiorari. It attempts to deny an Article III judge access to an Article III court by a selective reading of the arguments below. This failing is compounded by a desperate, [redacted] The *ultra vires* argument Judge Newman has pressed is supported by

this Court's precedent, as is her argument that claims for prospective relief are not foreclosed by the text of section 357(c). The arguments of the amici in this case—particularly former judges who sat with Judge Newman (and Chief Judge Moore) for years on the Federal Circuit—provide yet more support.

I. 28 U.S.C. § 357(c) DOES NOT FORECLOSE CLAIMS THAT SEEK PROSPECTIVE RELIEF

Nothing in the language of section 357(c) prevents litigants from suing for purely prospective relief that restrains the issuance of future orders and determinations. This is clear from the statutory language, which merely bars review of *past* orders and determinations:

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

28 U.S.C. § 357(c). The Solicitor-General dismisses this argument as "wholly atextual,"[1] without explaining what he regards as the textual problems with this stance. A future order or determination that might someday be issued by a judicial council does not exist, and it cannot be ac-

1. Opp. 21.

corded finality or conclusiveness by the language of section 357(c). Nor can a court "review" an order or determination that has not yet issued. Section 357(c) prohibits collateral attacks on extant "orders" and "determinations"; it does not even purport to limit remedies that seek to prevent future unlawful acts.

The Solicitor-General says that excluding prospective-relief claims from 28 U.S.C. § 357(c)'s ban on judicial review would run into "practical problems" because it is "hard to imagine any prospective relief that would not entail judicial review of an extant order or determination." Opp. 21. But if a court acknowledges that it is statutorily prohibited from vacating a previously issued "order" or "determination," then it is not conducting judicial review of that past agency action even if it enjoins the issuance of similar "orders" or "decisions" in the future. The previously issued order will remain in place, even if the reasoning of the court's opinion implies that it never should have issued in the first place. That does not violate section 357(c) because the past "orders" and "determinations" of the judicial council remain undisturbed. Nor does it create an "end-run" around section 357(c) if courts remain powerless to vacate those previously issued orders and determinations no matter how wrong they think they are.

The Solicitor-General also says that Judge Newman forfeited her prospective-relief argument by failing to present it in lower-court briefs. Opp. 18–19. But Judge Newman sought prospective relief from the filing of her first Complaint in district court (Pet. 26 nn.17–18). And her hands were tied in the lower courts by *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of Judicial Conference of the United States*,

264 F.3d 52 (D.C. Cir. 2001), which bound the three-judge panel and foreclosed many of Judge Newman's arguments in that court as a matter of stare decisis. The court below, for example, held that *McBryde* blocks litigants from bringing *any* type of statutory or "as-applied" constitutional claim when challenging a judicial council's authority under the Disability Act—even when a litigant seeks purely prospective relief to restrain the council from issuing future orders or determinations. *See id.* at 58–64; App. 9a–18a; App. 59a–71a. So even if Judge Newman primarily litigated her claim below under the *McBryde* framework, which bound both the district court and the appellate panel, a litigant does not forfeit a request to overrule an adverse appellate precedent by arguing within the confines of that precedent in the lower courts and seeking relief in a court not bound by *McBryde*. The pressed-or-passed-upon doctrine does not require Judge Newman to present or develop arguments in the lower courts that are incompatible with binding precedent, and that cannot be considered or accepted by those courts until this Court repudiates *McBryde*.

In *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), for example, Mississippi never argued in the lower courts that abortion was not a constitutional right. *See, e.g.*, Br. of Defendants-Appellants, *Jackson Women's Health Organization v. Dobbs*, 945 F.3d 265 (5th Cir. 2019). That did not forfeit Mississippi's abortion-is-not-a-constitutional-right argument because those courts were bound to apply *Roe* and *Casey*, just as the lower courts here were bound to apply *McBryde*. Litigants who argue cases under the governing precedent in the lower

courts do not forfeit their right to challenge those precedents when their case reaches the Supreme Court.

The Solicitor-General does not deny that the prospective-relief argument was foreclosed by *McBryde*. But he fails to acknowledge this fact when insisting that Judge Newman forfeited the argument. Judge Newman is no differently situated from the petitioners in *Dobbs*, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. 878 (2018), and *Citizens United v. FEC*, 558 U.S. 310 (2010), who litigated their claims in the lower courts under the then-governing legal frameworks while waiting until their cases reached this Court to present their arguments for overruling the governing precedents. None of that constitutes forfeiture. It merely provides additional *arguments* in favor of a *claim* that Judge Newman has asserted and preserved throughout these proceedings: that the federal judiciary has jurisdiction to consider her constitutional challenges to the judicial council's actions. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

II. 28 U.S.C. § 357(c) DOES NOT SHIELD ULTRA VIRES ACTS FROM JUDICIAL REVIEW

The Solicitor-General claims that Judge Newman's *ultra vires* argument is incompatible with 28 U.S.C. § 357(c). Opp. 19–21; *see also* 28 U.S.C. § 357(c) ("[A]ll orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."). On the Solicitor-General's view, section 357(c) precludes *any* type of

collateral attack on *anything* that a judicial council does and gives courts no latitude to characterize a purported "order" or "determination" as outside the scope of the council's delegated authority. Opp. 19 ("'All' means all, whether a challenge characterizes a judicial council's orders or determinations as *ultra vires* or presses some other claim."). Yet the Solicitor-General simultaneously defends the *McBryde*-created exception for "facial" constitutional challenges to provisions in the Disability Act, claiming that "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." Opp. 19.

That is untrue. When Judges McBryde and Newman brought their "facial" constitutional challenges to the Disability Act, they sought judicial remedies that would "set aside,"[2] (*i.e.*, formally revoke)[3] the judicial council's suspension orders due to the unconstitutionality of the underlying statute. The federal judiciary cannot issue remedies directed at enacted statutory language,[4] so the pronouncements of facial statutory unconstitutionality sought by Judges McBryde and Newman can occur *only* in the context of a ruling that sets aside the "order" or "determination" that was purportedly authorized by the unconstitutional statutory provision. It is impossible for litigants to "challenge" a federal statutory provision in the abstract; judicial review of statutes can occur only when a litigant seeks to restrain or revoke an allegedly unconsti-

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2. 5 U.S.C. § 706(2).
3. *See Corner Post, Inc. v. Board of Governors of Federal Reserve System*, 603 U.S. 799, 826–43 (2024) (Kavanaugh, J., concurring).
4. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933 (2018).

tutional *action* of government. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1221 (2010) ("Judicial review is not the review of statutes at large; judicial review is constitutional review of governmental *action*" (citation omitted)). A ruling in Judge Newman's case that pronounces the Disability Act (or part of it) facially unconstitutional, while leaving her suspensions in place and thereby withholding relief that remedies her Article III injuries, would be nothing more than an advisory opinion.

So the Solicitor-General *must* allow for the judicial revocation of "orders" and "determinations" that are issued pursuant to "facially" unconstitutional statutory provisions, notwithstanding his insistence on the absolutism of section 357(c), because otherwise courts would lack Article III jurisdiction to consider the "facial" constitutional challenges to the Disability Act that *McBryde* permits. And the reason those "orders" and "determinations" must fall once the underlying statute is pronounced facially unconstitutional is because they were issued *ultra vires*, *i.e.*, without lawful authority, and therefore cannot qualify as "orders" or "determinations" within the meaning of section 357(c), which refers only to "orders" and "determinations" made under the authorities conferred by the Disability Act. No different result should obtain when a litigant challenges an *ultra vires* order or determination that exceeds the authority conferred on the judicial council by the Disability Act and the Constitution.

Johnson v. Robison, 415 U.S. 361 (1974), for example, construed a seemingly absolute prohibition on judicial review worded similarly to 28 U.S.C. § 357(c). *See id.* at 367 (quoting 38 U.S.C. § 211(a) (1970)). Yet *Johnson* allowed

litigants to challenge agency action taken pursuant to allegedly unconstitutional statutory enactments, notwithstanding the statute's categorial ban on judicial review of the "decisions" made by the Administrator of Veterans' Affairs. The Solicitor-General acknowledges *Johnson*'s holding but denies that it allowed challenges to agency "decisions." Opp. 20. Instead, the Solicitor-General tries to characterize *Johnson* as a ruling that allows only "facial challenges to the constitutionality of the scheme itself," rather than challenges to "'decisions' under the relevant scheme." Opp. 20. But a "facial" constitutional challenge to the constitutionality of a statute must always be made in the context of a claim that seeks to restrain or set aside government *action* taken pursuant to that allegedly unconstitutional law. *See* pp. 6–7, *supra*. And a successful constitutional challenge to a statute that empowers the Administrator of Veterans' Affairs will necessarily take down the "decisions" that the Administrator makes pursuant to that statute, as all those decisions become *ultra vires* when there is no longer a constitutional statute supporting them. So too here: a statute such as 28 U.S.C. § 357(c) that purports to ban judicial review of "orders" and "determinations" still leaves room for courts to determine whether those "orders" and "determinations" are authorized by the Constitution and the underlying statutory scheme.

Webster v. Doe, 486 U.S. 592 (1988), involves a differently worded statute allowing the CIA director, "in his discretion," to terminate any officer or employee when he deems their termination in the interests of the United States. *Id.* at 594 (citation omitted). But *Webster* properly recognized that statutes are incapable of conferring

"discretion" to violate the Constitution, so it preserved judicial review of CIA termination decisions that are attacked on constitutional grounds. A decision to violate the Constitution can never be "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2), so courts retain authority to review allegations of *ultra vires* firing decisions that fall outside the scope of lawfully conferred authority. *Id*. at 597. The Solicitor-General tries to make *Webster* into a case about congressional intentions or desires,[5] but Congress can *never* vest an agency officer with "discretion" to violate the Constitution regardless of whether it desires to shield those allegedly unconstitutional actions from judicial review. The "orders" and "determinations" described in section 357(c) should likewise be interpreted to include only those "orders" and "determinations" that fall within the authority conferred on the judicial council by the Disability Act and the Constitution. That is especially true given the serious constitutional questions that arise from interpreting a jurisdiction-stripping statute to preclude review of a pure question of law. *See INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001).

The Solicitor-General also contends that Judge Newman forfeited her *ultra vires* claim. He asserts that the *ultra vires* claim was only "briefly asserted" in the D.C. Circuit briefing and held to be forfeited by the panel below. Opp. 18; Pet. App. 13a n.2.

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5. Opp. 20 (claiming that the Court allowed the constitutional claim to proceed in *Webster* because the text of 50 U.S.C. § 403(c) "did not clearly indicate that 'Congress meant to preclude consideration of colorable constitutional claims' arising out of that statutory authority" (quoting *Webster*, 486 U.S. at 603)).

But Judge Newman did much more than "briefly assert" her claim. Heading III of her opening appellate brief reads, "The Court Has Jurisdiction to Entertain 'As Applied' Challenges to the Disability Act." D.C. Circuit Opening Br. at 50–65. Newman argued that footnote 5 of *McBryde* revealed the decision's limited scope and that its dicta (that as-applied challenges were barred by Section 357(c)) did not apply to the facts of Newman's case. The reply brief (at p. 28) states, "*McBryde* simply cannot be read as endorsing the proposition that Section 357(c) is a blanket prohibition on judicial review of all as-applied constitutional claims, no matter the content of the judicial council's orders." After the panel rejected those claims and held that *McBryde* sets forth a blanket prohibition against review of all as-applied constitutional claims, the rehearing petition re-raised the issue; the very first "issue of exceptional importance" listed in the rehearing petition was "Whether the panel erred when it construed *McBryde* as precluding all judicial review of as-applied challenges to Judicial Council orders." Judge Newman forcefully argued below that she was entitled to adjudicate her as-applied constitutional claims and that *McBryde* presented no obstacles to that argument; that Newman is entitled to bring an as-applied constitutional challenge focusing on prospective relief is merely a refinement of the argument raised in the D.C. Circuit. Newman cannot be charged with forfeiture simply because she asserts a somewhat *less* broad justiciability claim than she asserted in the D.C. Circuit.

So the Solicitor-General and the D.C. Circuit are wrong to accuse Judge Newman of failing to develop her *ultra vires* argument below. Judge Newman's D.C.

Circuit briefs repeatedly argued that section 357(c) allows courts to review claims that the judicial council exceeded its statutory authority. *See, e.g.*, D.C. Circuit Opening Br. at 53 ("28 U.S.C. § 357(c) … does not preclude this Court from ensuring that the Judicial Council of the Federal Circuit (which is an administrative agency and not a court) did not act in excess of its statutory authority."); *id.* at 54 ("[R]eview of actions that are plainly in excess of authority granted by Congress remains."). Judge Newman fully preserved this argument despite the obstacles imposed by *McBryde*.

Finally, the pressed-or-passed-upon doctrine is far from an absolute rule,[6] and this Court often indulges and considers claims or arguments that were never considered or ruled upon by lower courts. *See Kennedy v. Braidwood Management, Inc.*, 606 U.S. 748, 779–93 (2025) (ruling on whether Congress "vested" the HHS Secretary with appointment powers over the U.S. Preventive Services Task Force, even though the court of appeals had never considered or addressed this argument); *Mitchell v. Wisconsin*, 588 U.S. 840, 868 (2019) (Sotomayor, J., dissenting) (criticizing majority for reversing lower court based on an argument Wisconsin never raised); *Teague v. Lane*, 489 U.S. 288, 292–316 (1989) (plurality opinion) (imposing new restrictions on federal habeas remedies *sua sponte*). There are compelling reasons to do so here given the threats posed to judicial independence.

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6. *See Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("Rules of practice and procedure are devised to promote the ends of justice, not to defeat them…. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."); *Illinois v. Gates*, 462 U.S. 213, 219 (1983) ("[T]he so-called 'not pressed or passed upon below' rule [is] merely a prudential restriction.").

III. THE SOLICITOR GENERAL'S MOOTNESS ARGUMENT IS BASELESS

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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