

ORAL ARGUMENT NOT YET SCHEDULED  
No. 24-5173

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**In the United States Court of Appeals  
for the District of Columbia Circuit**

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THE HON. PAULINE NEWMAN,

*Plaintiff-Appellant,*

*v.*

THE HON. KIMBERLY A. MOORE, et al.,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the District of Columbia

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**JOINT APPENDIX**

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*Counsel of Record*

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**TABLE OF CONTENTS**  
**Joint Appendix**

District Court Docket Sheet.....	JA1
Complaint [Doc. 1] .....	JA7
Amended Complaint [Doc. 10].....	JA31
Motion to Dismiss [Doc. 24].....	JA64
Transcript of Motion Hearing [Doc. 39].....	JA66
Feb. 12, 2024 District Court Memorandum Opinion and Order [Doc. 43] .....	JA147
Answer to Amended Complaint [Doc. 44].....	JA183
Motion for Judgment on Pleadings [Doc. 45]. .....	JA198
July 9, 2024 District Court Order [Doc. 49].....	JA200
July 9, 2024 District Court Memorandum Opinion [Doc. 50].....	JA201
July 10, 2024 Notice of Appeal [Doc. 51] .....	JA216

**1:23cv1334, Newman V. Moore Et Al**

US District Court Docket

United States District Court, District of Columbia

(Washington, DC)

**This case was retrieved on 07/31/2024****Proceedings**

#	Date	Proceeding Text	Source
1	05/10/2023	COMPLAINT against PAULINE NEWMAN with Jury Demand ( Filing fee \$ 402 receipt number ADCDC-10061036) filed by PAULINE NEWMAN. (Attachments: # 1 Civil Cover Sheet Civil Cover Sheet, # 2 Summons Summons to the Hon. Kimberly A. Moore, # 3 Summons Summons to the Hon. Sharon Prost, # 4 Summons Summons to the Hon. Richard G. Taranto, # 5 Summons Summons to Judicial Council of the Federal Circuit)(Vecchione, John) (Entered: 05/10/2023)	
2	05/10/2023	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by PAULINE NEWMAN (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Exhibit Proposed Sealed Exhibit)(Vecchione, John) (Entered: 05/10/2023)	
	05/11/2023	Case Assigned to Judge Christopher R. Cooper. (zrtw) (Entered: 05/11/2023)	
3	05/11/2023	SUMMONS (4) Issued Electronically as to JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Attachments: # 1 Notice and Consent)(zrtw) (Entered: 05/11/2023)	
	05/11/2023	NOTICE OF ERROR re 1 Complaint; emailed to john.vecchione@ncla.legal, cc'd 1 associated attorneys -- The PDF file you docketed contained errors: 1. Missing summonses-government. When naming a government agent or agency as a defendant, you must supply a summons for each defendant & two additional summonses for the U.S. Attorney & U.S. Attorney General. Please submit using the event Request for Summons to Issue. (zrtw, ) (Entered: 05/11/2023)	
4	05/11/2023	REQUEST FOR SUMMONS TO ISSUE to AG Merrick Garland by PAULINE NEWMAN re 1 Complaint, filed by PAULINE NEWMAN. Related document: 1 Complaint, filed by PAULINE NEWMAN.(Vecchione, John) (Entered: 05/11/2023)	
5	05/11/2023	REQUEST FOR SUMMONS TO ISSUE U.S. Attorney for DC by PAULINE NEWMAN re 1 Complaint, filed by PAULINE NEWMAN. Related document: 1 Complaint, filed by PAULINE NEWMAN.(Vecchione, John) (Entered: 05/11/2023)	
6	05/15/2023	SUMMONS (2) Issued Electronically as to U.S. Attorney and U.S. Attorney General (Attachment: # 1 Notice and Consent)(zjm) (Entered: 05/15/2023)	
	05/15/2023	MINUTE ORDER granting 2 Plaintiff's Sealed Motion for Leave to File Documents Under Seal. Signed by Judge Christopher R. Cooper on 05/15/2023. (lccrc3) (Entered: 05/15/2023)	
7	05/15/2023	SEALED DOCUMENT filed by PAULINE NEWMAN. (This document is SEALED and only available to authorized persons.)(zjm) (Entered: 05/24/2023)	

#	Date	Proceeding Text	Source
8	05/31/2023	NOTICE of Appearance by Stephen Ehrlich on behalf of All Defendants (Ehrlich, Stephen) (Entered: 05/31/2023)	
9	05/31/2023	NOTICE of Appearance by Michael Andrew Zee on behalf of All Defendants (Zee, Michael) (Entered: 05/31/2023)	
10	06/27/2023	AMENDED COMPLAINT against All Defendants with Jury Demand filed by PAULINE NEWMAN. (Attachments: # 1 Exhibit)(Vecchione, John) (Entered: 06/27/2023)	
11	06/27/2023	SEALED MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL filed by PAULINE NEWMAN (This document is SEALED and only available to authorized persons.) (Attachments: # 1 Exhibit)(Vecchione, John) (Entered: 06/27/2023)	
12	06/27/2023	MOTION for Preliminary Injunction by PAULINE NEWMAN. (Vecchione, John) (Entered: 06/27/2023)	
13	06/27/2023	MOTION for Leave to File Excess Pages in Support of Motion for Preliminary Injunction by PAULINE NEWMAN. (Attachments: # 1 Proposed Memorandum In Support of Motion for Preliminary Injunction)(Vecchione, John) (Entered: 06/27/2023)	
14	06/28/2023	PROPOSED BRIEFING SCHEDULE (Joint) by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Attachments: # 1 Text of Proposed Order)(Ehrlich, Stephen) (Entered: 06/28/2023)	
15	06/29/2023	Consent MOTION to Strike 10 Amended Complaint (Exhibits ONLY), Consent MOTION for Leave to File Corrected Exhibits by PAULINE NEWMAN. (Attachments: # 1 Exhibit Replacement Exhibits to the First Amended Complaint)(Vecchione, John) (Entered: 06/29/2023)	
	06/30/2023	MINUTE ORDER: Counsel shall appear for status and scheduling conference on July 6, 2023 at 2:00 PM by Zoom before Judge Christopher R. Cooper. Video connection information will be provided to the parties separately. Signed by Judge Christopher R. Cooper on 06/30/2023. (lccrc3) (Entered: 06/30/2023)	
16	07/05/2023	NOTICE of Appearance by Gregory Dolin on behalf of PAULINE NEWMAN (Dolin, Gregory) (Entered: 07/05/2023)	
	07/06/2023	Minute Entry for video Status Conference held before Judge Christopher R. Cooper on 7/6/2023. Forthcoming briefing Order. (Court Reporter: Jeff Hook) (lsj) (Entered: 07/06/2023)	
17	07/07/2023	NOTICE on Suggestion of Mediation by PAULINE NEWMAN (Dolin, Gregory) (Entered: 07/07/2023)	
	07/07/2023	MINUTE ORDER granting 15 Plaintiff's Consent Motion to Strike Amended Complaint Exhibits and Motion for Leave to File Corrected Exhibits. The Court directs the Clerk's Office to seal the exhibits attached to Plaintiff's 10 Amended Complaint. Signed by Judge Christopher R. Cooper on 07/07/2023. (lccrc3) (Entered: 07/07/2023)	
18	07/11/2023	ORDER referring case to mediation. See full Order for details. Signed by Judge Christopher R. Cooper on 07/11/2023. (lccrc3) (Entered: 07/11/2023)	
19	07/17/2023	NOTICE of Continuation of Deadline to File Joint Status Report on Mediation by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO (Zee, Michael) (Entered: 07/17/2023)	
20	07/25/2023	TRANSCRIPT OF VIDEO STATUS CONFERENCE before Judge Christopher R. Cooper held on July 6, 2023. Page Numbers: 1 - 12. Date of Issuance: July 25, 2023. Court Reporter: Jeff Hook. Telephone number: 202-354-3373. Transcripts may be ordered by submitting the Transcript Order FormFor the first 90 days after this	

#	Date	Proceeding Text	Source
		filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter. NOTICE RE REDACTION OF TRANSCRIPTS: The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 8/15/2023. Redacted Transcript Deadline set for 8/25/2023. Release of Transcript Restriction set for 10/23/2023.(Hook, Jeff) (Entered: 07/25/2023)	
21	08/18/2023	Joint STATUS REPORT and Request for Briefing Schedule by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Attachments: # 1 Text of Proposed Order)(Ehrlich, Stephen) (Entered: 08/18/2023)	
23	08/18/2023	MOTION for Briefing Schedule by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (See Docket Entry 21 to view document) (zjm) Modified on 8/21/2023 (zjm). (Entered: 08/21/2023)	
22	08/21/2023	ORDER: In light of the 21 parties' Joint Status Report, the Court sets the following briefing schedule. See full order for details. Signed by Judge Christopher R. Cooper on 8/21/2023. (lccrc3) (Entered: 08/21/2023)	
24	09/01/2023	MOTION to Dismiss by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1: Special Committee Report & Recommendation, # 3 Exhibit 2: JCUS Report, # 4 Exhibit 3: Sixth Circuit Judicial Council Order, # 5 Text of Proposed Order)(Ehrlich, Stephen) (Entered: 09/01/2023)	
25	09/01/2023	Memorandum in opposition to re 12 Motion for Preliminary Injunction filed by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Attachments: # 1 Exhibit 1: Special Committee Report & Recommendation, # 2 Exhibit 2: JCUS Report, # 3 Exhibit 3: Sixth Circuit Judicial Council Order, # 4 Declaration of Jarrett B. Perlow, # 5 Text of Proposed Order)(Ehrlich, Stephen) (Entered: 09/01/2023)	
26	09/01/2023	Consent MOTION for Leave to File Excess Pages for Defendants' Reply Brief by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Attachments: # 1 Text of Proposed Order)(Zee, Michael) (Entered: 09/01/2023)	
27	09/06/2023	ORDER granting 26 Defendants' Motion for Leave to File Excess Pages for their reply brief. Signed by Judge Christopher R. Cooper on 9/6/2023. (lccrc3) (Entered: 09/06/2023)	
28	10/02/2023	Joint MOTION for Amended Briefing Schedule by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Attachments: # 1 Text of Proposed Order)(Ehrlich, Stephen) Modified on 10/2/2023 to correct relief (zjm). (Entered: 10/02/2023)	

#	Date	Proceeding Text	Source
	10/04/2023	MINUTE ORDER granting the 28 parties' Joint Motion for Amended Briefing Schedule. Plaintiff's combined opposition to Defendants' motion to dismiss and reply in support of her motion for preliminary injunction shall be due by October 25, 2023. Defendants' reply in support of their motion to dismiss shall be due by November 17, 2023. Signed by Judge Christopher R. Cooper on 10/4/2023. (lccrc3) (Entered: 10/04/2023)	
29	10/16/2023	MOTION for Dispute Resolution Process by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Attachments: # 1 Text of Proposed Order)(Ehrlich, Stephen) (Entered: 10/16/2023)	
	10/17/2023	MINUTE ORDER granting 29 Defendants' Motion for Dispute Resolution Process. It is further ORDERED that the parties are directed to jointly contact Chief Circuit Mediator Robert Fisher at Robert_Fisher@cadc.uscourts.gov for further directions concerning the resolution of this dispute. Signed by Judge Christopher R. Cooper on 10/17/2023. (lccrc3) (Entered: 10/17/2023)	
30	10/25/2023	REPLY to opposition to motion re 12 MOTION for Preliminary Injunction Combined Response in Opposition to Motion to Dismiss and Reply in Support of Motion for Preliminary Injunction filed by PAULINE NEWMAN. (Attachments: # 1 Declaration Declaration of Gregory Dolin with Supporting Exhibits)(Dolin, Gregory) Modified on 10/26/2023 to correct docket text/ link. (zjm). (Entered: 10/25/2023)	
31	10/25/2023	RESPONSE re 24 MOTION to Dismiss filed by PAULINE NEWMAN. (See Docket Entry 30 to view document) (zjm) (Entered: 10/26/2023)	
	10/26/2023	NOTICE OF ERROR re 30 Reply to opposition to Motion; emailed to greg.dolin@NCLA.legal, cc'd 14 associated attorneys -- The PDF file you docketed contained errors: 1. Notice of Corrected Docket Entry: Your entry has been modified as a courtesy. Please note the appropriate reminders for future filings; do not refile document, 2. Please note the following for future filings; do not refile document, 3. Counsel is reminded for two-part documents; second docket entry is required. (zjm, ) (Entered: 10/26/2023)	
32	11/17/2023	REPLY to opposition to motion re 24 MOTION to Dismiss filed by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Attachments: # 1 Exhibit 4: November 9 Judicial Council Order)(Ehrlich, Stephen) (Entered: 11/17/2023)	
33	11/28/2023	Consent MOTION for Leave to File Sur-reply to ECF32 by PAULINE NEWMAN. (Attachments: # 1 Text of Proposed Order)(Dolin, Gregory) (Entered: 11/28/2023)	
34	11/29/2023	ORDER granting 33 Plaintiff's Motion for Leave to File Sur-reply. See full Order for details. Signed by Judge Christopher R. Cooper on 11/29/2023. (lccrc3) (Entered: 11/29/2023)	
35	12/06/2023	SURREPLY to re 24 MOTION to Dismiss , 33 Consent MOTION for Leave to File Sur-reply to ECF32 filed by PAULINE NEWMAN. (Vecchione, John) (Entered: 12/06/2023)	
36	12/13/2023	SUR-SURREPLY to re 24 MOTION to Dismiss to Plaintiff's Surreply filed by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Ehrlich, Stephen) Modified on 12/13/2023 to correct event (zjm). (Entered: 12/13/2023)	

#	Date	Proceeding Text	Source
	12/19/2023	MINUTE ORDER: The parties are hereby directed to appear for a hearing on 12 Plaintiff's Motion for a Preliminary Injunction and 24 Defendants' Motion to Dismiss on January 25, 2024 at 10:00 AM in Courtroom 27A (In Person) before Judge Christopher R. Cooper. Signed by Judge Christopher R. Cooper on 12/19/2023. (lccrc3) (Entered: 12/19/2023)	
	01/25/2024	Minute Entry for Motion Hearing held before Judge Christopher R. Cooper on 1/25/2024. Oral arguments submitted on Plaintiff's Motion 12 for Preliminary Injunction and Defendants' Motion 24 to Dismiss. Motions are taken under advisement; forthcoming Order. (Court Reporter: Tammi Sefranek) (lsj) (Entered: 01/25/2024)	
37	01/30/2024	NOTICE by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO (Ehrlich, Stephen) (Entered: 01/30/2024)	
38	01/31/2024	RESPONSE re 37 Notice (Other) after oral argument by PAULINE NEWMAN (Dolin, Gregory) Modified on 2/1/2024 to correct event (zjm). (Entered: 01/31/2024)	
39	02/02/2024	TRANSCRIPT OF MOTION HEARING before Judge Christopher R. Cooper held on 1/25/24; Page Numbers: 1-81. Date of Issuance:2/2/24. Court Reporter/Transcriber Tamara Sefranek, Telephone number 202-354-3246, Transcripts may be ordered by submitting the Transcript Order FormFor the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter.NOTICE RE REDACTION OF TRANSCRIPTS: The parties have twenty-one days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 2/23/2024. Redacted Transcript Deadline set for 3/4/2024. Release of Transcript Restriction set for 5/2/2024.(Sefranek, Tamara) (Entered: 02/02/2024)	
40	02/07/2024	NOTICE of JC&D Committee Order by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO (Attachments: # 1 Feb. 7 JC&D Order)(Ehrlich, Stephen) (Entered: 02/07/2024)	
41	02/08/2024	RESPONSE re 40 Notice (Other) . by PAULINE NEWMAN (Attachments: # 1 Exhibit)(Dolin, Gregory) Modified on 2/9/2024 to correct event (zjm). (Entered: 02/08/2024)	
42	02/09/2024	RESPONSE re 41 Notice (Other) filed by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Ehrlich, Stephen) (Entered: 02/09/2024)	
43	02/12/2024	MEMORANDUM OPINION AND ORDER denying 12 Plaintiff's Motion for a Preliminary Injunction and granting in part and denying in part 24 Defendants' Motion to Dismiss. Defendants shall file an answer to the remaining counts in the Amended Complaint by March 13, 2024. See full Memorandum Opinion and Order for details. Signed by Judge Christopher R. Cooper on 2/12/2024. (lccrc3) (Entered: 02/12/2024)	
	02/12/2024	MINUTE ORDER granting 11 Plaintiff's Sealed Motion for Leave to File Document Under Seal and 13 Plaintiff's Motion for Leave to	

#	Date	Proceeding Text	Source
		File Excess Pages. Signed by Judge Christopher R. Cooper on 2/12/2024. (lccrc3) (Entered: 02/12/2024)	
44	03/08/2024	ANSWER to 10 Amended Complaint by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO.(Ehrlich, Stephen) (Entered: 03/08/2024)	
45	03/08/2024	MOTION for Judgment on the Pleadings by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Ehrlich, Stephen) (Entered: 03/08/2024)	
46	03/14/2024	Joint MOTION for Briefing Schedule by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Attachments: # 1 Text of Proposed Order)(Ehrlich, Stephen) (Entered: 03/14/2024)	
	03/18/2024	MINUTE ORDER granting the 46 Joint Motion for Briefing Schedule. Plaintiff shall file her opposition to 45 Defendants' Motion for Judgment on the Pleadings by April 5, 2024. Defendants shall file their reply by April 19, 2024. Signed by Judge Christopher R. Cooper on 3/18/2024. (lccrc3) (Entered: 03/18/2024)	
47	04/05/2024	Memorandum in opposition to re 45 MOTION for Judgment on the Pleadings filed by PAULINE NEWMAN. (Dolin, Gregory) Modified on 4/11/2024 to correct event (zjm). (Entered: 04/05/2024)	
48	04/18/2024	REPLY to opposition to motion re 45 MOTION for Judgment on the Pleadings filed by JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT AND ALL MEMBERS THEREOF, KIMBERLY A. MOORE, SHARON PROST, RICHARD G. TARANTO. (Zee, Michael) (Entered: 04/18/2024)	
49	07/09/2024	ORDER granting 45 Defendants' Motion for Judgment on the Pleadings. See full Order and accompanying Memorandum Opinion for details. Signed by Judge Christopher R. Cooper on 7/9/2024. (lccrc3) (Entered: 07/09/2024)	
50	07/09/2024	MEMORANDUM OPINION re 49 Order granting 45 Defendants' Motion for Judgment on the Pleadings. Signed by Judge Christopher R. Cooper on 7/9/2024. (lccrc3) (Entered: 07/09/2024)	
51	07/10/2024	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 49 Order on Motion for Judgment on the Pleadings by PAULINE NEWMAN. Filing fee \$ 605, receipt number ADCDC-11017011. Fee Status: Fee Paid. Parties have been notified. (Dolin, Gregory) (Entered: 07/10/2024)	
52	07/11/2024	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid re 51 Notice of Appeal to DC Circuit Court. (zjm) (Entered: 07/11/2024)	
	07/18/2024	USCA Case Number 24-5173 for 51 Notice of Appeal to DC Circuit Court filed by PAULINE NEWMAN. (zjm) (Entered: 07/22/2024)	



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

THE HON. PAULINE NEWMAN,  
Circuit Judge  
United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, NW  
Washington, DC 20005,

*Plaintiff,*

v.

CIVIL CASE NO. 23-cv-1334

THE HON. KIMBERLY A. MOORE,  
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,  
717 Madison Place, NW  
Washington, DC 20005,

THE HON. SHARON PROST,  
in her official capacity as  
Member of the Special Committee of the Judicial Council of  
the Federal Circuit,  
717 Madison Place, NW  
Washington, DC 20005,

THE HON. RICHARD G. TARANTO,  
in his official capacity as  
Member of the Special Committee of the Judicial Council of  
the Federal Circuit,  
717 Madison Place, NW  
Washington, DC 20005,

and

THE JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT  
AND ALL MEMBERS THEREOF,  
in their official capacities,  
717 Madison Place, NW  
Washington, DC 20005,

*Defendants.*

### **INTRODUCTION**

Plaintiff, The Honorable Pauline Newman, brings this action for declaratory and injunctive relief against Defendants The Hon. Kimberly A. Moore, 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, The Hon. Sharon Prost, in her official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit, The Hon. Richard G. Taranto, in his official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit, and the Judicial Council of the Federal Circuit. As grounds therefor, Plaintiff alleges as follows:

### **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

**PARTIES**

3. Plaintiff Pauline Newman is a Presidentially-appointed, Senate-confirmed federal Circuit Judge of the United States Court of Appeals for the Federal Circuit (“Federal Circuit”).
4. Defendant Kimberly A. Moore serves as Chief Judge of the Federal Circuit and, in that capacity, is chair of the Federal Circuit’s Judicial Council. Chief Judge Moore became the Chief Judge of the Federal Circuit pursuant to operation of law, 28 U.S.C. § 45(a), on May 22, 2021. In addition to these roles, Chief Judge Moore chairs a “special committee” investigating the complaint against Judge Newman—a complaint which Chief Judge Moore herself initiated. Chief Judge Moore is being sued 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.
5. Defendant Sharon Prost serves as Circuit Judge of the Federal Circuit and was appointed by Chief Judge Moore to be one of the members of the special committee investigating the complaint against Judge Newman. Judge Prost is being sued in her official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit.
6. Defendant Richard G. Taranto serves as Circuit Judge of the Federal Circuit and was appointed by Chief Judge Moore to be one of the members of the special committee investigating the complaint against Judge Newman. Judge Taranto is being sued in his official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit.
7. Defendant Judicial Council of the Federal Circuit (“Judicial Council”) is the administrative body of the U.S. Court of Appeals for the Federal Circuit and consists of all active-duty judges of that Court. The Judicial Council is responsible for, *inter alia*, receiving and reviewing reports by special committees charged with investigating complaints of judicial misconduct

and/or disability filed under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-64 (“the Act”). The Judicial Council derives its authority from §§ 332 and 352-54 of the Act and Rules 18-20 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.

8. The Judicial Council is unique among all circuit judicial councils because unlike the other circuit judicial councils which consist of a rotating mixture of circuit and district judges, the Judicial Council of the Federal Circuit consists exclusively of the judges of the Federal Circuit who serve as members of the Judicial Council throughout their tenure on that Court.

### **STATEMENT OF FACTS**

9. Judge Newman was the first-ever judge appointed directly to the Federal Circuit by President Ronald Reagan on January 30, 1984. She was confirmed to the seat less than a month later by a voice vote. She received her commission as a Circuit Judge on February 28, 1984.
10. Since 1984, Judge Newman continued to faithfully, diligently, and meticulously exercise the duties of her office, to recognition and acclaim. In 2018, she was named “one of the 50 most influential people in the IP world” by Managing IP Magazine.
11. At all relevant times, Judge Newman has been and is in sound physical and mental health. She has authored majority and dissenting opinions in the whole range of cases before her Court, has voted on petitions for rehearing *en banc*, and has joined in the *en banc* decisions of the Court.
12. In the course of her continuing service as an active-status Circuit Judge, Judge Newman has authored hundreds of majority, concurring, and dissenting opinions. Often, Judge Newman’s dissenting opinions are adopted by the Supreme Court in its frequent reversals of the Federal Circuit.

13. At all relevant times, Judge Newman has been willing and able to fully participate in the work of the Court and, consistent with the Court's internal practice and procedures for active-status judges, has requested to be assigned to the regular panel sittings of the Court.
14. In early March 2023, Chief Judge Moore met with Judge Newman for about 45 minutes and attempted to coax Judge Newman into retirement. Judge Newman declined Judge Moore's entreaties.
15. On or about March 17, 2023, Chief Judge Moore drafted an order in which she, pursuant to Rule 5 of the Rules of Judicial Conduct and Judicial Disability Proceedings ("Conduct Rules"), "identified a complaint" against Judge Newman alleging that there is a "probable cause to believe that Judge Newman 'has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts' an/or 'is unable to discharge all the duties of office by reason of mental or physical disability.'"
16. Chief Judge Moore offered not to "docket" the complaint were Judge Newman to agree to an "informal resolution" consisting of retiring from the Court. When Judge Newman declined to do so, on or about March 24, 2023, Chief Judge Moore "docketed" the Order ("March 24 Order") and began the formal investigative process under Rule 11 of the Conduct Rules.
17. The March 24 Order, which served as the basis for launching the disciplinary process and purportedly contained "probable cause to believe that Judge Newman 'has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts' and/or 'is unable to discharge all the duties of office by reason of mental or physical disability,'" is riddled with errors. For example, the March 24 Order alleges that "[i]n the summer of 2021, Judge Newman, at the age of 94, was hospitalized after suffering a heart attack and having to undergo coronary stent surgery." During the period (June 2021 through September 2021)

when Chief Judge Moore claims that Judge Newman suffered a heart attack, Judge Newman sat on ten panels and issued at least eight (including majority, concurring, and dissenting) opinions. Had Judge Newman suffered a heart attack, it would be extremely unusual for anyone, let alone a 94-year-old person, to serve throughout that period without skipping a beat (so to speak). Besides which, even were the allegation true, having coronary artery disease is simply irrelevant to one's ability to be able to carry out judicial functions.

18. Even more problematic (as these facts were readily available to Chief Judge Moore upon even a cursory inspection) is the allegation in the March 24 Order that “[b]ecause [of] those health issues, [Judge Newman’s] sittings were reduced compared to her colleagues.” To the contrary, in the summer of 2021, Judge Newman was a member of *ten* different panels of the Court—more than any other colleague but two.
19. Upon the issuance of the March 24 Order, Chief Judge Moore appointed a special committee consisting of herself, Circuit Judge Sharon Prost, and Circuit Judge Richard G. Taranto. Chief Judge Moore selected herself to chair the special committee to investigate her own complaint.
20. Before any evidence was taken, hearings held, or reports written, Chief Judge Moore unconstitutionally and unilaterally removed Circuit Judge Newman from all future sittings of the Court. In an email sent on April 5, 2023, and CC’ed to all judges of the Court, Chief Judge Moore confirmed that Judge Newman, though an active-status member of the Court, “will not be assigned any new cases until these [disciplinary] proceedings are resolved.” Chief Judge Moore stated that this was a unanimous decision of Judge Newman’s colleagues. No legal basis or precedent for such an action or decision has ever been provided.
21. Judge Newman has not been assigned to sit on any panels of the Court for the May, June, and July 2023 sittings, despite repeatedly requesting such assignments.

22. On or about April 6, 2023, Chief Judge Moore issued a new and virtually unprecedented order (“April 6 Order”) expanding the scope of the special committee’s investigation into Judge Newman’s alleged “disability” and “misconduct” to include the questions of internal operations of Judge Newman’s chambers.
23. On April 7, 2023, the special committee issued an order (“April 7 Order”) demanding that Judge Newman submit to neurological and neuropsychological examinations before physicians of the special committee’s choosing. The order was based in part on the special committee’s alleged “direct observations of Judge Newman’s behavior.” The April 7 Order afforded Judge Newman, who at that time was still not represented by counsel, a mere *three days* to comply with the request. Contrary to the Commentary to Rule 13 of the Conduct Rules, no attempt to “enter into an agreement with [Judge Newman] as to the scope and use that may be made of the examination results” was made. The April 7 Order did not specify either the scope of the requested examination nor any limits on the use of examination results.
24. On April 13, 2023, Chief Judge Moore, claiming that the failure to respond to the unreasonably short three-day deadline set forth in the April 7 Order constituted “sufficient cause to believe that Judge Newman [engaged in] additional misconduct,” issued an order (“April 13 Order”) further expanding the scope of investigation.
25. On April 17, 2023, the special committee entered yet another order, this time demanding that Judge Newman share private medical records regarding medical events identified in the March 24 Order. The special committee once again set an unreasonably short response deadline of *four days*. Furthermore, because the events to which this order referred (*i.e.*, “heart attack” and “coronary stents”), even if they had transpired, are not relevant to any questions pending

before the special committee or the Judicial Council, these requests constitute a baseless invasion into Judge Newman's constitutionally and statutorily protected privacy interests.

26. On April 19, 2023, Chief Judge Moore unilaterally reassigned Judge Newman's judicial assistant/paralegal to another office. Chief Judge Moore refused to permit Judge Newman to hire a replacement judicial assistant, thus leaving her office short-staffed. This has greatly impaired Judge Newman's ability to accomplish her judicial duties such as processing her opinions, answering phone calls and emails from her colleagues and the like. To date, Chief Judge Moore refuses to authorize a search for a new judicial assistant.

27. On the same date, Chief Judge Moore unilaterally reassigned one of Judge Newman's law clerks to the chambers of another Judge. Given the strained relationship that developed between Judge Newman and this law clerk, Judge Newman responded by email that terminating that law clerk's employment in her chambers was "appropriate." She, however, did not consent to the law clerk being reassigned to another chambers. Chief Judge Moore has refused to authorize Judge Newman to hire a replacement law clerk, even though Judge Newman remains an active judge of the Federal Circuit, and is statutorily entitled to four law clerks and a judicial assistant.

28. On April 20, 2023, Chief Judge Moore issued a new order once again expanding the scope of investigation, this time to cover matters concerning the internal workings of Judge Newman's chambers. The complaint alleged, *inter alia*, that Judge Newman's refusal to assign her own law clerk to another judge's chambers—a highly unusual, if not unprecedented practice—likely constituted misconduct.

29. On April 21, Judge Newman, now represented by the undersigned counsel, sent a letter to Chief Judge Moore and the remaining members of the special committee requesting immediate



restoration of Judge Newman to the hearing calendar as well as a transfer of the identified complaint to a different Judicial Council as contemplated by Rule 26 of Conduct Rules. Judge Newman explained that basic norms of due process cannot permit the same individuals to be accusers, witnesses, rapporteurs, and adjudicators of a complaint against her.

30. The letter to Chief Judge Moore cited opinions of leading judicial ethics experts who have unequivocally stated that in these circumstances transfer to another circuit's judicial council is necessary.
31. The letter to Chief Judge Moore and other members of the special committee reiterated that Judge Newman "will not fail to cooperate with any investigation that is conducted consistent with the limits that the Constitution, the Judicial Disability Act of 1980, and the Rules for Judicial Conduct and Judicial Disability Proceedings place on such investigations."
32. At and around the time the undersigned counsel sent the letter to Chief Judge Moore, the story about the investigation and the surrounding events began to be reported in the press, academic, and legal community. In response to these reports, the Judicial Council confirmed the existence of an investigation into Judge Newman and published the March 24 Order (in a redacted form) and the April 13 Order on the Federal Circuit's website.
33. On May 3, 2023, the special committee issued two orders. The first order ("Gag Order") was in effect a gag order threatening Judge Newman and her counsel with sanctions should any of them publicize the ongoing investigation. The order intimated that even if Judge Newman were to agree to disclose the materials pursuant to Rule 23(b)(7) of the Conduct Rules, Chief Judge Moore would withhold her consent for the same.
34. Commentary to Rule 23 states that "[o]nce the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent *only*

to the extent necessary to protect the confidentiality interests of the complainant or of witnesses.” (emphasis added). Thus, threats to withhold consent to release information even with Judge Newman’s agreement are contrary to the process contemplated by the Conduct Rules.

35. The second order issued on May 3, 2023 (“May 3 Order”) by the special committee denied the request for transfer, without addressing the manifest due process concerns. The May 3 Order again ordered Judge Newman to submit to neurological and neuropsychological examinations before physicians of the special committee’s choosing. The Order also rejected Judge Newman’s suggestions that she and the special committee “enter into an agreement ... as to the scope and use that may be made of the examination results.” Finally, the May 3 Order again required Judge Newman to surrender medical records including for events that have never occurred. The May 3 Order threatened Judge Newman with expanding the scope of investigation unless she indicated her consent to the examination by 9:00 am on May 10, 2023.
36. Though there is no emergency with respect to any investigative proceeding, except to restore an active member of the federal judiciary who has been unlawfully deprived from hearing cases this month (and for the next two months unless and until the calendar is altered), the May 3 Order afforded Judge Newman merely seven days to respond. In contrast, the Federal Rules of Appellate Procedure afford ten days for any party to respond to any motion and the Federal Rules of Civil Procedure permit fourteen days for a response. While investigations into judicial misconduct or disability are not governed by the Federal Rules of Appellate Procedure or Rules of Civil Procedure, both of those documents serve as a useful reference for what the guarantee of due process entails. The undue haste with which the special committee is proceeding is indicative of the denial of due process.

37. Judge Newman does not, in principle, object to undergoing a medical evaluation, if there is a sufficient and sound scientific basis for requesting the same; however, she objects to not being able to select or even participate in the selection of a medical professional to examine her, and to having no input into the scope of the medical investigation. The special committee's refusal to even engage in the process of attempting to define the scope of the examination and selection of a qualified professional, as well as its demand to submit to the examination on an expedited basis, are contrary to the requirements of the Conduct Rules and the guarantees of due process.
38. If and when the special committee proceeds to a hearing as contemplated by Rules 14(b) and 15(c), Judge Newman intends to call, and compel witness testimony from each member of the Judicial Council as is her right under the aforementioned rules.
39. While the special committee has been pursuing its investigation, Judge Newman has issued several opinions in previous cases, even though Chief Judge Moore's actions interfered with the normal operations of Judge Newman's chambers. Thus, on March 22, 2023, Judge Newman wrote an eighteen-page opinion for the Court in *Military-Veterans Advocacy, Inc. v. Sec'y of Veterans Affairs*, \_\_\_ F.4th \_\_\_, No. 20-1537 (Fed. Cir. 2023). On March 6, 2023, Judge Newman delivered a seven-page dissenting opinion in *May v. McDonough*, \_\_\_ F.4th \_\_\_, No. 22-1803 (Fed. Cir. 2023). On March 31, 2023, Judge Newman filed a four-page dissenting opinion from the Court's opinion in *Roku Inc. v. Univ. Elecs., Inc.*, \_\_\_ F.4th \_\_\_, No. 22-1058 (Fed. Cir. 2023), and on April 6, 2023, Judge Newman filed a fifteen-page dissenting opinion in *SAS Inst. v. World Programming Ltd.*, \_\_\_ F.4th \_\_\_, No. 21-1542 (Fed. Cir. 2023). These opinions have been praised by the various members of the bar, and nothing therein even hints at any mental disability.

40. Judge Newman has also continued to participate in *en banc* decisions of the Court with no indication of any mental or physical disability. Thus, she joined the *en banc* portion of the opinion in *Moore v. United States*, \_\_\_ F.4th \_\_\_, No. 22-1475 (Fed. Cir. 2023). Judge Newman also participated in the poll to take up the matter *en banc*. There appears to have been no objections to this participation by any members of the Federal Circuit bench or bar.
41. As recently as late 2022 or early 2023, Chief Judge Moore effusively praised Judge Newman’s abilities and insight, writing in the American Intellectual Property Association Quarterly Journal that “Among patent practitioners, Judge Newman is particularly well-known for her insightful dissents, which have often been vindicated by the Supreme Court.” Chief Judge Moore then listed several cases where the Supreme Court, in reversing the Federal Circuit, “adopt[ed] essentially the reasoning of Judge Newman’s dissent.”
42. An empirical study, attached hereto as Exhibit A, shows that in “the three-year period of January 1, 2020 to December 31, 2022,” Judge Newman’s deviation from the average productivity and timeliness among the active judges of the Federal Circuit was not statistically significant. These data also show that there has been no difference in Judge Newman’s timeliness or productivity between 2020 and late 2022. This is noteworthy because Chief Judge Moore’s original “identification of the complaint” is predicated in large part on Judge Newman’s alleged lack of sufficient output as compared to her colleagues. The empirical data stand in sharp contrast to these false allegations.

### **CLAIMS FOR RELIEF**

#### **Count I: Improper Removal, Violation of Separation of Powers**

43. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.
44. The Constitution provides that “Judges, both of the supreme and inferior Courts, shall hold

their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. Const. art. III, § 1. The Constitution also provides that “[t]he House of Representatives ... shall have the sole Power of Impeachment,” and that “[t]he Senate shall have the sole Power to try all Impeachments.” U.S. Const. art. I, §§ 2, 3. In light of these provisions, no executive or judicial agency or body may exercise, in form or in substance, the impeachment power reserved by the Constitution to the House and Senate. Nor may any executive or judicial agency or body be delegated—or arrogate to itself—the impeachment power which the Constitution reserves to the House and Senate.

45. Defendants’ orders and threats constitute an attempt to remove Plaintiff from office—and already have unlawfully removed her from hearing cases—without impeachment and in violation of the Constitution, in substance if not form, by, *inter alia*, (a) refusing to assign Plaintiff any new cases and threatening to forbid the assignment of new cases to her; (b) removing, without Plaintiff’s consent, judicial staff Plaintiff is statutorily authorized to retain and refusing authorization to hire replacement staff; (c) interfering with Plaintiff’s abilities to administer her own chambers; (d) ordering Plaintiff to undergo an involuntary mental health examination without a sufficient basis or legal authority for doing so, by physicians unknown to and unapproved by Plaintiff, as set forth in this Complaint; and (e) ordering that the scope of the investigation into Plaintiff’s conduct be expanded, merely because Plaintiff requires time to properly evaluate and answer special committee requests.

46. Plaintiff has been and will continue to be irreparably harmed unless and until (a) Defendants’ orders excluding Plaintiff from regular duties of an Article III judge and their threats to continue with such exclusion are declared to be unconstitutional and enjoined; and (b)

Defendants are enjoined from requiring Plaintiff to refrain from publicizing the proceedings against her and publicly defending herself from the outrageous complaint lodged against her.

47. Plaintiff has no adequate remedy at law.

**Count II: *Ultra Vires* – Improper Removal, Violation of Separation of Powers**

48. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

49. To the extent that the Judicial Disability Act of 1980 is constitutional, it authorizes the Judicial Council, upon *conclusion* of a special committee’s investigation and receipt of a report from such a committee, to “order[] that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint.” 28 U.S.C. § 354(a)(2)(A)(i). Neither the Act nor the Conduct Rules authorize either a Chief Judge acting alone, nor a judicial council of any circuit, to issue any orders or directives which have an effect of precluding an active Article III judge from being assigned cases in regular order while an investigation is still underway. “Sentence first—verdict afterwards” is a notorious and textbook example of deprivation of due process known even to children’s literature.

50. Defendants’ orders excluding Plaintiff from regular duties of an Article III judge and threats to continue with such exclusion constitute an attempt to remove Plaintiff from office, without impeachment and in violation of the Constitution, in substance if not form, by, *inter alia*, (a) refusing to assign Plaintiff any new cases and threatening to forbid the assignment of new cases to her; (b) removing, without Plaintiff’s consent, judicial staff Plaintiff is statutorily authorized to retain and refusing authorization to hire replacement staff; (c) ordering Plaintiff to undergo an involuntary mental health examination without a sufficient basis or legal authority for doing so, by physicians unknown to and unapproved by Plaintiff, as set forth in this Complaint; (d) interfering with Plaintiff’s abilities to administer her own chambers; and

(e) ordering that the scope of the investigation into Plaintiff's conduct be expanded, merely because Plaintiff requires time to properly evaluate and answer special committee requests.

51. Plaintiff has been and will continue to be irreparably harmed unless and until (a) Defendants' orders excluding Plaintiff from regular duties of an Article III judge and their threats to continue with such exclusion are declared to be contrary to statutory law and enjoined; and (b) Defendants are enjoined from requiring Plaintiff to refrain from publicizing the proceedings against her and publicly defending herself from the outrageous complaint lodged against her.

52. Plaintiff has no adequate remedy at law.

**Count III: Fifth Amendment – As Applied Due Process of Law Violation**

53. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

54. Defendants' continued investigation into Plaintiff's conduct violates the fundamental principles of due process because the special committee is composed of witnesses to Plaintiff's alleged disability. The March 24 Order and May 3 Order specifically reference, as basis for the beginning and continuing investigation the "personal observations" of the special committee members and other members of the Judicial Council. It has been established for centuries that one cannot serve as a "judge in his own cause." Permitting the Judicial Council and its special committee to continue the disciplinary proceedings against Plaintiff in a case where all members of the Judicial Council are actual or potential witnesses violates Plaintiff's Fifth Amendment right to due process of law.

55. Plaintiff has been and will continue to be irreparably harmed unless and until Defendants' violation of her Fifth Amendment right to due process of law is declared unconstitutional and Defendants are enjoined from continuing their investigation into Plaintiff, except

insofar as any actions are required to transfer this matter to a judicial council of another circuit.

56. Plaintiff has no adequate remedy at law.

**Count IV: First Amendment Violation – Unlawful Prior Restraint**

57. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

58. The First Amendment guarantees to everyone, including federal judges, freedom of speech and generally prohibits prior restraint on speech. U.S. Const. am. I; *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259 (2022). It is well settled that “gag orders” are prior restraints under the First Amendment, *Alexander v. United States*, 509 U.S. 544, 550 (1993). They thus bear “a heavy presumption against [their] constitutional validity,” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and are subject to strict scrutiny, *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

59. The Gag Order forbids Plaintiff or her attorneys from engaging in any speech that would in any way publicize the ongoing disciplinary proceedings against Plaintiff, thus imposing a prior restraint. Such orders cannot be justified even in judicial proceedings unless there is a likelihood that “publicity, unchecked, would so distort the views of potential jurors that [they could not] fulfill their sworn duty to render a just verdict exclusively on the evidence ... .” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 569 (1976). Because there is no danger that judicial officers with life tenure would be so influenced by any amount of publicity as to be unable to discharge their duties, the Gag Order cannot survive strict scrutiny and thus violates the First Amendment.

60. Plaintiff has been and will continue to be irreparably harmed unless and until Defendants’ Gag Order is declared to be unconstitutional as in violation of her First Amendment right to



free speech and Defendants are enjoined from requiring Plaintiff to refrain from publicizing the proceedings against her and publicly defending herself from the outrageous complaint lodged against her.

61. Plaintiff has no adequate remedy at law.

**Count V: *Ultra Vires* – Unlawful Prior Restraint**

62. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

63. The Conduct Rules, to the extent they are themselves constitutional, permit a judge who is subject to disciplinary proceedings, with consent of the relevant Chief Judge, to publicly disclose all matters related to such proceedings except insofar as “the confidentiality interests of the complainant or of witnesses” are at issue. *See* Commentary to Rule 23.

64. Plaintiff has consented to such a disclosure; however, the Gag Order states that Chief Judge Moore is under no obligation to do so, despite the Commentary to the relevant rule stating that “[o]nce the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent *only* to the extent necessary to protect the confidentiality interests of the complainant or of witnesses.”

65. Defendant Chief Judge Moore’s refusal to consent to the disclosure of the materials relevant to the disciplinary process against Plaintiff, except insofar as “the confidentiality interests of the complainant or of witnesses” is contrary to the Conduct Rules and *ultra vires*.

66. Plaintiff has been and will continue to be irreparably harmed unless and until Defendants’ Gag Order is declared to be *ultra vires* as in violation of her rights under the Conduct Rules and Defendants are enjoined from requiring Plaintiff to refrain from publicizing the proceedings against her and publicly defending herself from the outrageous complaint lodged against her.

67. Plaintiff has no adequate remedy at law.

**Count VI: Fifth Amendment – Unconstitutional Vagueness of the Act’s Disability Provision**

68. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

69. Plaintiff has liberty and property interests in the outcome of any misconduct or disability proceeding against her. She also has liberty and property interests in not being subjected to an involuntary medical or psychiatric examination and further liberty and property interests in not being stigmatized as having committed misconduct and having her mental health questioned, as well as having her status as an Article III judge altered by ordering her to undergo a compelled medical or psychiatric evaluation by physicians not chosen by her and who are unknown to her. Under the Fifth Amendment to the United States Constitution, Plaintiff cannot be deprived of her liberty and property interests without due process of law.

70. Plaintiff further has liberty and property interests in her private medical records, and those interests may not be invaded by requiring her to surrender these same records to an investigative authority absent due process of law.

71. The Act is unconstitutionally vague and violates the Due Process Clause of the Fifth Amendment because, *inter alia*, it fails to provide adequate notice of what constitutes a mental disability that renders a judge “unable to discharge all the duties of office.” It also is unconstitutionally vague and violates the Due Process Clause because it lacks minimal enforcement guidelines identifying when an Article III judge may be subject to a disability investigation, and, accordingly, when an Article III judge may be disciplined for objecting in good faith to undergoing a compelled medical or psychiatric examination or surrendering private medical records as part of an investigation into whether she suffers from a disability rendering her unable to discharge her duties.

72. Defendants' enforcement of the Act's unconstitutionally vague disability provisions against Plaintiff has caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until the Act is declared unconstitutional and Defendants are enjoined from a) enforcing any orders excluding Plaintiff from regular duties of an Article III judge; (b) requiring Plaintiff to refrain from publicizing the proceedings against her and publicly defending herself from the outrageous complaint lodged against her; and c) requiring Plaintiff to undergo a compelled medical or psychiatric examination and/or surrendering private medical records and disciplining Plaintiff for objecting in good faith to these demands.
73. Plaintiff has no adequate remedy at law.

**Count VII: *Ultra Vires*, Unconstitutional Examinations**

74. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.
75. Neither the Act nor the U.S. Constitution authorizes compelling an Article III judge to undergo a medical or psychiatric examination or to surrender to any investigative authority her private medical records in furtherance of an investigation into whether the judge suffers from a mental or physical disability that renders her unable to discharge all the duties of office.
76. As Defendants have neither statutory nor constitutional power to compel Plaintiff to undergo an involuntary medical or psychiatric examination, or to compel Plaintiff to surrender her private medical records, the imposition of these requirements on Plaintiff are *ultra vires* and unconstitutional, as is disciplining Plaintiff for objecting to the same.
77. Defendants' *ultra vires* and unconstitutional acts have caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until they are declared unconstitutional and Defendants are enjoined from requiring Plaintiff to undergo a compelled

medical or psychiatric examination and/or surrendering private medical records and disciplining Plaintiff for objecting in good faith to these demands.

78. Plaintiff has no adequate remedy at law.

**Count VIII: Fifth Amendment – Unconstitutional Vagueness of the Act’s Investigative**

**Authority**

79. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

80. The Act is unconstitutionally vague to the extent it purports to authorize compelled medical or psychiatric examinations of Article III judges or demands from special committees for Article III judges to surrender their private medical records. Section 353(c) of the Act, which authorizes a special committee to conduct an investigation “as extensive as it considers necessary,” lacks minimal enforcement guidelines identifying the circumstances under which an Article III judge may be compelled to undergo a medical or psychiatric examination or surrender her private medical records. It vests virtually complete discretion in the hands of a special committee to determine when the compliance with such demands may be compelled. Consequently, the Act violates the due process protections of the Fifth Amendment and impermissibly intrudes on judicial independence.

81. Defendants’ enforcement of the Act’s unconstitutionally vague investigative provision against Plaintiff has caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until the Act is declared unconstitutional and Defendants are enjoined from requiring Plaintiff to undergo a compelled medical or psychiatric examination and/or surrendering private medical records and disciplining Plaintiff for objecting in good faith to these demands.

82. Plaintiff has no adequate remedy at law.

**Count IX: Fourth Amendment – Unconstitutional Search**

83. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.
84. Plaintiff enjoys the right to be secure in her person and effects against unreasonable search and seizures, as guaranteed by the Fourth Amendment to the U.S. Constitution.
85. A compelled medical or psychiatric examination constitutes a search and seizure for purposes of the Fourth Amendment and therefore must satisfy minimum standards of constitutional reasonableness to be lawful.
86. The Act violates the Fourth Amendment to the extent it authorizes a compelled medical or psychiatric examination of an Article III judge without a warrant based on probable cause and issued by a neutral judicial official or a demonstration of constitutional reasonableness.
87. Defendants' enforcement of the unconstitutional Act against Plaintiff has caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until the Act is declared unconstitutional and Defendants are enjoined from requiring Plaintiff to undergo a compelled medical or psychiatric examination and disciplining Plaintiff for objecting in good faith to these demands.
88. Plaintiff has no adequate remedy at law.

**Count X: Fourth Amendment – Unconstitutional Search**

89. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.
90. Plaintiff enjoys the right to be secure in her person and effects against unreasonable search and seizures, as guaranteed by the Fourth Amendment to the U.S. Constitution.
91. A compelled surrender of private medical records constitutes a search and seizure for purposes of the Fourth Amendment and therefore must satisfy minimum standards of constitutional reasonableness to be lawful.

92. The Act violates the Fourth Amendment to the extent it authorizes a compelled surrender of medical records belonging to an Article III judge without a warrant based on probable cause and issued by a neutral judicial official or a demonstration of constitutional reasonableness.

93. Defendants' enforcement of the unconstitutional Act against Plaintiff has caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until the Act is declared unconstitutional and Defendants are enjoined from requiring Plaintiff to surrender her private medical records and disciplining Plaintiff for objecting in good faith to these demands.

94. Plaintiff has no adequate remedy at law.

**Count XI: Fourth Amendment – As Applied Challenge**

95. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

96. Defendants lack either a warrant issued on probable cause by a neutral judicial official or a constitutionally reasonable basis for requiring Plaintiff to submit to an involuntary medical or psychiatric examination. Accordingly, compelling Plaintiff to undergo an involuntary medical or psychiatric examination violates Plaintiff's Fourth Amendment rights.

97. Defendants' enforcement of the unconstitutional Act against Plaintiff has caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until the Act is declared unconstitutional and Defendants are enjoined from requiring Plaintiff to undergo a compelled medical or psychiatric examination and disciplining Plaintiff for objecting in good faith to these demands.

98. Plaintiff has no adequate remedy at law.

**Count XII: Fourth Amendment – As Applied Challenge**

99. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

100. Defendants lack either a warrant issued on probable cause by a neutral judicial official or a constitutionally reasonable basis for requiring Plaintiff to surrender her private medical records none of which bear on her fitness to continue serving as an Article III judge. Accordingly, compelling Plaintiff to surrender her private medical records violates Plaintiff's Fourth Amendment rights.

101. Plaintiff has been and will continue to be irreparably harmed unless and until Defendants' violation of her Fourth Amendment rights is declared unconstitutional and Defendants are enjoined from requiring Plaintiff to surrender her private medical records and disciplining Plaintiff for objecting in good faith to these demands.

102. Plaintiff has no adequate remedy at law.

#### **RELIEF REQUESTED**

**WHEREFORE**, Plaintiff respectfully requests that the Court: (1) declare the Act to be unconstitutional, either in whole or in part and enjoin Defendants from enforcing the Act to the extent it is unconstitutional; (2) declare any continued proceedings against Plaintiff by the Judicial Council of the Federal Circuit to be unconstitutional as violative of due process of law and enjoin Defendants from continuing any such proceedings, except to the extent necessary to transfer the matter to a judicial council of another circuit; (3) order the termination of any further investigation of Plaintiff by the Judicial Council of the Federal Circuit; (4) declare any decisions by any and all Defendants authorizing a limitation of Plaintiff's docket or other special restrictions on her actions as a federal judge, including, but not limited to the reduction in statutorily authorized number of staff to be unconstitutional and/or not in accordance with the law, and enjoin Defendants from continuing any such actions; (5) declare any orders precluding Plaintiff from publicizing or otherwise speaking about the ongoing disciplinary proceedings to be unconstitutional and/or not

in accordance with the law and enjoin Defendants from enforcing the foregoing unconstitutional orders; (6) declare any orders of the special committee requiring Plaintiff to undergo a compelled medical or psychiatric examination and/or disciplining Plaintiff for objecting in good faith to these demands to be unconstitutional and enjoin Defendants from enforcing the foregoing unconstitutional orders; (7) declare any orders of the special committee requiring Plaintiff to surrender her private medical records and/or disciplining Plaintiff for objecting in good faith to these demands to be unconstitutional and enjoin Defendants from enforcing the foregoing unconstitutional orders; (8) award Plaintiff reasonable attorneys' fees and costs; and (9) grant Plaintiff such other relief as the Court deems just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury of any triable issues.

May 10, 2023

Respectfully submitted,

/s/ John J. Vecchione

JOHN J. VECCHIONE (DC Bar No. 431764)

Senior Litigation Counsel

GREGORY DOLIN, *Pro Hac Vice Forthcoming*

Senior Litigation Counsel

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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

THE HON. PAULINE NEWMAN,  
Circuit Judge  
United States Court of Appeals for the Federal Circuit  
717 Madison Place, NW  
Washington, DC 20005,

*Plaintiff,*

v.

THE HON. KIMBERLY A. MOORE,  
in her official capacities as  
Chief Judge of the U.S. 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,  
717 Madison Place, NW  
Washington, DC 20005,

THE HON. SHARON PROST,  
in her official capacity as  
Member of the Special Committee of the Judicial Council of the  
Federal Circuit,  
717 Madison Place, NW  
Washington, DC 20005,

THE HON. RICHARD G. TARANTO,  
in his official capacity as  
Member of the Special Committee of the Judicial Council of the  
Federal Circuit,  
717 Madison Place, NW  
Washington, DC 20005,

and

THE JUDICIAL COUNCIL OF THE FEDERAL CIRCUIT,  
717 Madison Place, NW  
Washington, DC 20005,

*Defendants.*

NO. 1:23-cv-01334-CRC

FIRST AMENDED COMPLAINT

**INTRODUCTION**

Plaintiff, The Honorable Pauline Newman, brings this action for declaratory and injunctive relief against Defendants The Hon. Kimberly A. Moore, 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, The Hon. Sharon Prost, in her official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit, The Hon. Richard G. Taranto, in his official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit, and the Judicial Council of the Federal Circuit. As grounds therefor, Plaintiff alleges as follows:

### **JURISDICTION AND VENUE**

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

### **PARTIES**

3. Plaintiff Pauline Newman is a Presidentially-appointed, Senate-confirmed active federal Circuit Judge of the United States Court of Appeals for the Federal Circuit (“Federal Circuit”).
4. Defendant Kimberly A. Moore serves as Chief Judge of the Federal Circuit and, in that capacity, is chair of the Federal Circuit’s Judicial Council. Chief Judge Moore became the Chief Judge of the Federal Circuit pursuant to operation of law, 28 U.S.C. § 45(a), on May 22, 2021. In addition to these roles, Chief Judge Moore chairs a “Special Committee” investigating the complaint against Judge Newman—a complaint which Chief Judge Moore herself initiated under Rule 5 of the Rules of Judicial Conduct and Judicial Disability Proceedings (“Conduct Rules”). Chief Judge Moore is being sued 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.
5. Defendant Sharon Prost serves as Circuit Judge of the Federal Circuit and was appointed by Chief Judge Moore to be one of the members of the Special Committee investigating the complaint

against Judge Newman. Judge Prost is being sued in her official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit.

6. Defendant Richard G. Taranto serves as Circuit Judge of the Federal Circuit and was appointed by Chief Judge Moore to be one of the members of the Special Committee investigating the complaint against Judge Newman. Judge Taranto is being sued in his official capacity as Member of the Special Committee of the Judicial Council of the Federal Circuit.
7. Defendant Judicial Council of the Federal Circuit (“Judicial Council”) is the administrative body of the U.S. Court of Appeals for the Federal Circuit and consists of all active-duty judges of that Court. The Judicial Council is responsible for, *inter alia*, receiving and reviewing reports by Special Committees charged with investigating complaints of judicial misconduct and/or disability filed under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-64 (“the Act”). The Judicial Council derives its authority from §§ 332 and 352-54 of the Act and Rules 18-20 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.
8. The Judicial Council is unique among all circuit judicial councils because unlike the other circuit judicial councils which consist of a rotating mixture of circuit and district judges, the Judicial Council of the Federal Circuit consists exclusively of the active judges of the Federal Circuit who serve as members of the Judicial Council throughout their tenure on that Court.
9. By statute, the Federal Circuit is required to adopt “a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases.” 28 U.S.C. § 46(b).

#### **STATEMENT OF FACTS**

10. Judge Newman was the first-ever judge appointed directly to the Federal Circuit, by President Ronald Reagan on January 30, 1984. She was confirmed to the seat less than a month later by a voice vote. She received her commission as a Circuit Judge on February 28, 1984.

11. Since 1984, Judge Newman has continued to faithfully, diligently, and meticulously exercise the duties of her office, to recognition and acclaim. In 2018, she was named “one of the 50 most influential people in the IP world” by Managing IP Magazine.
12. At all relevant times, Judge Newman has been and is in sound physical and mental health. She has authored majority and dissenting opinions in the whole range of cases before her Court, has voted on petitions for rehearing *en banc*, and has joined in the *en banc* decisions of the Court.
13. In the course of her continuing service as an active-status Circuit Judge, Judge Newman has authored hundreds of majority, concurring, and dissenting opinions. Judge Newman’s dissenting opinions are often adopted by the Supreme Court in its frequent reversals of the Federal Circuit.
14. At all relevant times, Judge Newman has been willing and able to fully participate in the work of the Court and, consistent with the Court’s internal practice and procedures for active-status judges, she has requested and expected to be assigned to the regular panel sittings of the Court.
15. Judge Newman’s medical records reveal no disability, condition, or set of conditions, physical or mental, that would prevent her from carrying out the duties of an Article III judge.
16. A recent examination by Ted L. Rothstein, MD—a qualified neurologist and a full Professor of Neurology and Rehabilitation Medicine at the George Washington University School of Medicine & Health Sciences—revealed no significant cognitive deficits and led that expert to conclude that Judge Newman’s “cognitive function is sufficient to continue her participation in her court’s proceedings.” Exh. Y (filed under seal).
17. In early March 2023, Chief Judge Moore met with Judge Newman and attempted to convince Judge Newman to retire. Judge Newman declined Judge Moore’s entreaties.
18. On or about March 17, 2023, Chief Judge Moore drafted an order in which she, pursuant to Rule 5 of the Conduct Rules, “identified a complaint” against Judge Newman alleging that there is a “probable cause to believe that Judge Newman ‘has engaged in conduct prejudicial to the effective

and expeditious administration of the business of the courts’ and/or ‘is unable to discharge all the duties of office by reason of mental or physical disability.’” Exh. A.

19. The March 24 Order alleged that Chief Judge Moore offered not to “docket” the complaint were Judge Newman to agree to an “informal resolution” consisting of retiring from the Court. When Judge Newman declined to submit to this intimidation tactic on or about March 24, 2023, Chief Judge Moore “docketed” the Order (“March 24 Order”) and began the formal investigative process under Rule 11 of the Conduct Rules. Exh. A at 5-6.
20. The March 24 Order, which served as the basis for launching the disciplinary process and purportedly contained “probable cause to believe that Judge Newman ‘has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts’ and/or ‘is unable to discharge all the duties of office by reason of mental or physical disability,’” Exh. A at 1, is riddled with errors. For example, the March 24 Order alleges that “[i]n the summer of 2021, Judge Newman, at the age of 94, was hospitalized after suffering a heart attack and having to undergo coronary stent surgery.” *Id.* During the period (June 2021 through September 2021) when Chief Judge Moore claims that Judge Newman supposedly suffered a heart attack, Judge Newman sat on ten panels and issued at least eight (including majority, concurring, and dissenting) opinions. Had Judge Newman suffered a heart attack, it would be extremely unusual for anyone, let alone a 94-year-old person, to serve throughout that period without skipping a beat (so to speak). Besides which, even were the allegation true, having coronary artery disease is simply irrelevant to one’s ability to be able to carry out judicial functions.
21. Judge Newman’s medical records evince no history of any heart attacks or coronary artery stents.
22. Even more problematic (as these facts were readily available to Chief Judge Moore upon even a cursory inspection) is the allegation in the March 24 Order that “[b]ecause [of] those health issues, [Judge Newman’s] sittings were reduced compared to her colleagues.” Exh. A at 1. To the

contrary, in the summer of 2021, Judge Newman was a member of *ten* different panels of the Court—more than any other colleague but two.

23. Upon the issuance of the March 24 Order, Chief Judge Moore appointed a Special Committee consisting of herself, Circuit Judge Sharon Prost, and Circuit Judge Richard G. Taranto. Chief Judge Moore selected herself to chair the Special Committee to investigate the complaint that she herself “identified” and that as the complaint itself asserts, is predicated, at least in part, on statements by other Federal Circuit judges.
24. Before any evidence was taken, hearings held, or reports written, Chief Judge Moore and/or other Defendants unconstitutionally and unilaterally removed Circuit Judge Newman from all future sittings of the Court. In an email sent on April 5, 2023, and CC’ed to all judges of the Court, Chief Judge Moore confirmed that Judge Newman, though an active-status member of the Court, “will not be assigned any new cases until these [disciplinary] proceedings are resolved.” Exh. B at 4. Chief Judge Moore stated that this was a unanimous decision of Judge Newman’s colleagues. *Id.* No legal basis or precedent for such an action or decision had been provided until June 5, 2023, at which point the justification for the pre-investigatory suspension changed. *See infra*, ¶¶ 54-**Error! Reference source not found.** To the extent that the suspension was a disciplinary measure, the action directly contradicted the Disability Act and Conduct Rules. *See* 28 U.S.C. §§ 353(c), 354(a)(2)(A)(i), Conduct Rules, R. 20(a), (b)(1)(D); *see also* 25(e), cmt. (noting that the Disability “Act[] allow[s] a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge.”).
25. Judge Newman has not been assigned to sit on any panels of the Court, starting with the April 2023 sitting, despite repeatedly requesting such assignments. The Defendants have indicated that they do not intend to assign Judge Newman to any panels in the foreseeable future. *See* Exh. O.

26. On or about April 6, 2023, Chief Judge Moore issued a new and virtually unprecedented order (“April 6 Order”) expanding the scope of the Special Committee’s investigation into Judge Newman’s alleged “disability” and “misconduct” to include the questions of internal operations of Judge Newman’s chambers. Exh. B.
27. On April 7, 2023, the Special Committee issued an order (“April 7 Order”) demanding that Judge Newman submit to neurological and neuropsychological examinations before physicians of the Special Committee’s choosing. The order was based in part on the Special Committee’s alleged “direct observations of Judge Newman’s behavior.” The April 7 Order afforded Judge Newman, who at that time was still not represented by counsel, a mere *three days* to comply with the request. Contrary to the Commentary to Rule 13 of the Conduct Rules, no attempt was made to “enter into an agreement with [Judge Newman] as to the scope and use that may be made of the examination results[.]” The April 7 Order did not specify the scope of the requested examination, nor any limits on the use of examination results. Exh. C.
28. On April 13, 2023, Chief Judge Moore, claiming that the failure to respond to the unreasonably short three-day deadline set forth in the April 7 Order constituted “sufficient cause to believe that Judge Newman [engaged in] additional misconduct,” issued an order (“April 13 Order”) further expanding the scope of investigation. Exh. D.
29. On April 17, 2023, the Special Committee entered yet another order, this time demanding that Judge Newman share private medical records regarding medical events alleged in the March 24 Order. The Special Committee once again set an unreasonably short response deadline of *four days*. Exh. E. Furthermore, the events this order alleged (*i.e.*, “heart attack” and “coronary stents”) never transpired. Even if they had, as they are not relevant to any questions pending before the Special Committee or the Judicial Council, these requests constitute a baseless invasion into Judge Newman’s constitutionally and statutorily protected privacy interests.

30. On April 19, 2023, Chief Judge Moore unilaterally reassigned Judge Newman’s judicial assistant/paralegal to another office. *See* Exh. V. For a significant period of time, Defendants refused to permit Judge Newman to hire a replacement judicial assistant, thus leaving her office short-staffed, until at the earliest, June 14, 2023, when Judge Newman was able to obtain a temporary replacement. These delays in replacing her judicial assistant have greatly impaired Judge Newman’s ability to accomplish her judicial duties such as processing her opinions, answering phone calls and emails from her colleagues and the like.
31. On the same date, Chief Judge Moore unilaterally reassigned one of Judge Newman’s law clerks to the chambers of another judge. *See* Exh. V. Given this law clerk’s earlier request made to Judge Newman to seek alternative employment, Judge Newman responded by email that terminating that law clerk’s employment in her chambers was “appropriate.” She, however, did not consent to the law clerk’s being reassigned to another judge’s chambers within the Federal Circuit. Defendants have refused to authorize Judge Newman to hire a replacement law clerk, even though Judge Newman remains an active judge of the Federal Circuit, and she is statutorily entitled to four law clerks and a judicial assistant.
32. On April 20, 2023, Chief Judge Moore issued a new order once again expanding the scope of investigation, this time to cover matters concerning the internal workings of Judge Newman’s chambers. The complaint alleged, *inter alia*, that Judge Newman’s refusal to assign her own law clerk to another judge’s chambers—a highly unusual, if not unprecedented practice—likely constituted misconduct. Exh. F.
33. On April 21, 2023, Judge Newman, now represented by the undersigned counsel, sent a letter to Chief Judge Moore and the remaining members of the Special Committee requesting immediate restoration of Judge Newman to the hearing calendar as well as a transfer of the identified complaint to a different Judicial Council as contemplated by Rule 26 of the Conduct Rules. Judge



Newman explained that basic norms of due process cannot permit the same individuals to be accusers, witnesses, rapporteurs, and adjudicators of a complaint against her. Exh. Q.

34. The letter to Chief Judge Moore cited opinions of leading judicial ethics experts who have unequivocally stated that in these circumstances transfer to another circuit's judicial council is necessary. Exh. Q.
35. The letter to Chief Judge Moore and other members of the Special Committee reiterated that Judge Newman "will not fail to cooperate with any investigation that is conducted consistent with the limits that the Constitution, the Judicial Disability Act of 1980, and the Rules for Judicial Conduct and Judicial Disability Proceedings place on such investigations." Exh. Q at 2.
36. At and around the time the undersigned counsel sent the letter to Chief Judge Moore, the story about the investigation and the surrounding events began to be reported in the press, academic, and legal community. In response to these reports, the Judicial Council confirmed the existence of an investigation into Judge Newman and published the March 24 Order (in a redacted form) and the April 13 Order on the Federal Circuit's website.
37. On May 3, 2023, the Special Committee issued two orders. Exhs. G; H. The first order ("Gag Order") was in effect a gag order threatening Judge Newman and her counsel with sanctions should any of them publicize the ongoing investigation. Exh. G. The order intimated that even if Judge Newman were to agree to disclose the materials pursuant to Rule 23(b)(7) of the Conduct Rules, Chief Judge Moore would withhold her consent for the same, *see id.* at 3, despite commentary to Rule 23 stating that "[o]nce the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent *only* to the extent necessary to protect the confidentiality interests of the complainant or of witnesses." (emphasis added).

38. The second order issued on May 3, 2023 (“May 3 Order”) by the Special Committee denied the request for transfer, without addressing the manifest due process concerns raised therein. Exh. H. The May 3 Order again ordered Judge Newman to submit to neurological and neuropsychological examinations before physicians of the Special Committee’s choosing. *Id.* The Order also rejected Judge Newman’s suggestions that she and the Special Committee “enter into an agreement ... as to the scope and use that may be made of the examination results.” *Id.* at 7-8. Finally, the May 3 Order again required Judge Newman to surrender medical records including records that do not exist for events that have never occurred. *Id.* at 9. The May 3 Order threatened Judge Newman with further expanding the scope of investigation unless she indicated her consent to the examination by 9:00 am on May 10, 2023. *Id.* at 13-14.
39. The Special Committee’s May 3 Order, together with a concurrently issued Judicial Council Order, denied Judge Newman’s request to have the matter transferred to another circuit. Exhs. H; I.
40. Though there was (and is) no emergency with respect to any investigative proceeding, except to restore an active member of the federal judiciary who has been unlawfully deprived from hearing cases for months (with no end in sight), the May 3 Order afforded Judge Newman merely seven days to respond. Exh. H at 13-14. In contrast, the Federal Rules of Appellate Procedure afford ten days for any party to respond to any motion, and the Federal Rules of Civil Procedure permit fourteen days for a response. While investigations into judicial misconduct or disability are not governed by the Federal Rules of Appellate Procedure or Rules of Civil Procedure, both of those documents serve as a useful reference for what the guarantee of due process entails. The undue haste with which the Special Committee is proceeding is indicative of the denial of due process.
41. The Special Committee attempted to justify its extraordinarily short deadlines by citations to S. Rep. No. 96-362 for the proposition that judicial complaints should be resolved within 90 days. *See* Exh. K at 24; Exh. L at 3. However, because Senate Report 96-362 accompanied an earlier

version of the Disability Act that Congress rejected, *see* H. Rep. 96-1313 at 4; Arthur D. Hellman, *An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings*, 32 Geo. J. Legal Ethics 341, 352-54 (2019), it cannot possibly justify the Special Committee's actions.

42. As indicated in several letters to the Special Committee, Judge Newman does not, in principle, object to undergoing a medical evaluation, if there is a sufficient and sound scientific basis for requesting the same; however, she objects to not being able to select or even participate in the selection of a medical professional to examine her, to not having any input into the scope of the medical investigation, and to submitting the results of these evaluations to a body that cannot, consistent with due process requirements, adjudicate the matter. *See, e.g.*, Exh. Q at 2; Exh. R at 4-5; Exh. T at 3. The Special Committee's refusal to even engage in a cooperative process to reach agreement as to the selection of practitioners, as well "as to the scope and use that may be made of the examination results," combined with its demand that Judge Newman submit to the examination on an expedited basis, contravene the requirements of the Conduct Rules and the guarantees of due process.

43. If and when the Special Committee proceeds to a hearing as contemplated by Rules 14(b) and 15(c), Judge Newman intends to call, and compel witness testimony from, each Federal Circuit judge (and hence each Judicial Council member), as is her right under the aforementioned rules.

44. On May 9, 2023, Judge Newman responded to the Special Committee. Exh. R. The May 9 Letter objected to the Special Committee's Gag Order on First Amendment grounds and, as an alternative, formally requested the public release of various orders and letters pursuant to Rule 23(b)(7) of the Conduct Rules. The letter also objected to the request for medical records on the basis that the committee did not (and is unlikely to be able to) explain the relevance of the requested records or the scope of their use. On similar grounds, Judge Newman objected to the request for medical testing. At the same time, Judge Newman indicated that she may be willing

to discuss the request with the Special Committee in a cooperative manner as contemplated by the commentary to Rule 13(a) which instructs “the Special Committee [to] enter into an agreement with the subject judge as to the scope and use that may be made of the examination results.” *Id.* at 4. The May 9 Letter renewed the request for the matter be transferred to the judicial council of another circuit, once again explaining that since Chief Judge Moore was in effect a complainant in this matter and that since all of Judge Newman’s colleagues are potential witnesses to her ability to competently carry out her judicial duties, it is inappropriate for any of them to also serve as adjudicators. *Id.* at 5-6. Finally, the May 9 Letter reiterated Judge Newman’s demand to be immediately restored to the case assignment calendar. *Id.* at 6.

45. In response to the May 9 Letter, on May 16, 2023, the Special Committee issued two new orders. Exhs. J; K. In the first order, though it rejected Judge Newman’s First Amendment arguments, the Special Committee agreed to grant Judge Newman’s request made under Rule 23(b)(7), to disclose (with appropriate redactions) all prior orders entered in this matter. Exh. J. Additionally, the Order clarified that the prior gag order “imposed no restriction on discussion of those orders or other aspects of the proceeding that were already public, as long as no other confidential information is disclosed in such a discussion,” and that “[t]o the extent Judge Newman and her counsel wish to publicly discuss aspects of this proceeding that have already been made public, the [May 3] Confidentiality Order placed no restriction on them.” *Id.* at 3.

46. Nevertheless, the Special Committee instructed “Judge Newman and her counsel [that they] remain bound by Rule 23 and the [May 3] Confidentiality Order with regard to information not publicly disclosed by the Court such as future orders and filings.” Exh. J at 12.

47. In the second order issued the same day (May 16), the Special Committee reiterated the request for medical records, medical testing, and a video-taped interview, and for the first time it explained the relevance and the scope of its demands. Exh. K. Nevertheless, the Special Committee again

rejected Judge Newman’s requests to at the very least participate in the selection of providers or negotiations as to the type and scope of testing. *Id.* at 20-21. The Special Committee also did not explain on what basis the selected medical providers were chosen, nor delineate their qualifications to evaluate Judge Newman’s mental health. The Special Committee once again denied the request for a transfer and entirely ignored Judge Newman’s due process objection to the Judicial Council’s suspension of her pending the outcome of the investigation. *Id.* at 26. The Special Committee set a deadline of 9:00 am on May 23, 2023, to respond to its requests. *Id.* at 25.

48. Also, on May 16, 2023, Judge Newman appealed her interlocutory suspension to the Committee on Judicial Conduct and Disability. Exh. U. Judge Newman provided this Committee with copies of prior Judicial Council Orders.

49. On May 24, 2023, the Committee on Judicial Conduct and Disability found that it has no jurisdiction over an “interim order” that “suspend[ed] [Judge Newman] from being assigned any cases *while the complaint is being investigated and adjudicated.*” Exh. P.

50. On May 20, 2023, Judge Newman responded to the May 16 Orders seeking an extension of time until June 8, 2023. Exh. S. In support of the request, lead counsel for Judge Newman explained that he was out of the country and visiting Israel until June 1, 2023, in order to attend to family and religious obligations. On May 22, 2023, the Special Committee denied the requested extension of time, and instead reset the deadline to 9:00 am on May 26, 2023—a date that coincided with the Jewish festival of Shavuot (“Feast of Weeks.”) Exh. L. As a result, and in order to avoid a conflict with religious obligations, Judge Newman’s counsel was forced to respond a day earlier, by May 25, 2023 (Israeli time). Exh. T.

51. In the May 25 letter, Judge Newman responded to the Special Committee’s May 16 Order, declining the requests but offering

to undergo necessary testing, provide necessary records, and meet with a Special Committee *provided that she is immediately restored to her rights and duties as a judge and further provided that this matter is promptly transferred to a judicial council of another circuit*, which is unmarred by the prior unlawful decisions and which is willing to “work[] or operat[e] *together*” with Judge Newman, including on selecting medical providers and setting the appropriate parameters of any examination.

Exh. T at 3 (emphasis in original).

52. The following day, “the Committee ... requested that the scope of the investigation be expanded to investigate whether Judge Newman has failed to cooperate in violation of the Rules and whether her failure to cooperate constitutes misconduct.” In an order issued the same day, Chief Judge Moore granted the Committee’s request and once again expanded the investigation. Exh. M.

53. Less than a week later, on June 1, 2023, the Committee issued a new order apparently *narrowing* the scope of its investigation. Exh. N. The new order stated that “[i]n light of the practical constraints that Judge Newman’s [alleged] refusal to cooperate places on the Committee’s ability to proceed” it will not, “at this time” pursue the allegations regarding Judge Newman’s mental or physical disability. Instead, the Committee announced that its “investigation will focus on the question whether Judge Newman’s refusal to cooperate with the Committee’s investigation constitutes misconduct,” *id.* at 2, 3. The June 1 Order directed Judge Newman to, by July 5, 2023, “submit a brief limited to addressing the question whether [her] refusal to undergo examinations, to provide medical records, and to sit for an interview with the Committee ... constitute [*sic*] misconduct and the appropriate remedy if the Committee were to make a finding of misconduct ...” *Id.* at 6. The Committee scheduled oral argument on the matter for July 13, 2023. *Id.*

54. Despite repeated attempts by Judge Newman to be restored to the regular rotation of judges assigned to hear cases, and several letters pointing out that neither the Disability Act nor the Conduct Rules (to the extent they are constitutional) authorize a suspension of a judge *prior* to the

completion of all of the procedures outlined in these documents, the Judicial Council, on June 5, 2023, issued an order reaffirming its decision to keep Judge Newman from hearing cases. Exh. O.

55. Bizarrely, the June 5 Order changes the rationale underlying the Judicial Council's actions, yet this hasty attempt to fix errors in Defendants' ill-conceived scheme to remove Judge Newman also fails to rectify the problem. First, the Judicial Council's June 5 Order was issued unlawfully, as Judge Newman, who is a member of the Judicial Council, was not even notified of any meeting of the Judicial Council, much less invited to participate. (The same is true about the alleged meeting of the Judicial Council on March 8, 2023). *See* R. 25(e), cmt. (noting that a judge is not disqualified from membership on the judicial council when there is a complaint pending against her, except insofar as the work of the council involves consideration of the complaint itself).
56. Second, the statements in the Order alleging that Judge Newman's case backlog exceeded the circuit-wide, agreed-upon deadlines are verifiably false.
57. Third, the justifications given for the suspension in the June 5 Order directly contradict Chief Judge Moore's email of April 5, 2023, which explained that the suspension is being imposed not as a result of any delays, but "pending the results of the investigation into potential disability/misconduct." *See supra* ¶ 24.
58. The June 5 Order claims that the initial decision to suspend Judge Newman from hearing cases was made on March 8, 2023, or *more than two weeks prior to* the docketing of the first complaint against Judge Newman (and more than a week prior to Chief Judge Moore's advising Judge Newman that she intended to take this course of action). *Compare* Exh. A at 6, *with* Exh. O at 1. There are several problems with this new claim. First, not only was Judge Newman not invited to participate in the March 8 Judicial Council meeting, but no copy of such an order was ever sent to Judge Newman. Judge Newman's request for the minutes of this meeting has gone unanswered.

59. Second, the order avers that “the Judicial Council *met* to consider concerns raised about Judge Newman’s mental fitness by court staff and Judge Newman’s abnormally large backlog in cases and her apparent inability to issue opinions in a timely fashion.” Exh. O at 1 (emphasis added). However, no notice of such a meeting was ever provided to Judge Newman who is a member of the Judicial Council. *See* R. 25 (e), cmt. The minutes of this meeting were not provided to Judge Newman.
60. Third, the June 5 Order falsely alleges that Judge Newman was precluded from sitting during the April 2023 session of the Court because at the time of case assignments (which occurred on February 6, 2023), Judge Newman’s “backlog had placed her in violation of Federal Circuit Clerical Procedures #3, ¶ 15.” Exh. O at 2. In fact, on February 6, 2023, Judge Newman had *zero* cases that were subject to the rule.
61. Clerical Procedures #3, ¶ 15 reads: “Any judge who has (1) four or more opinion assignments over six months old, or (2) two or more opinion assignments over a year old (i.e., in which a draft has not been circulated to the panel for more than six months in four or more cases, or in more than one year in two or more cases after submission) will not be assigned to hear additional cases until the judge has reduced the number of such opinion assignments below (1) four over six months, or (2) two over a year,” and “applies to all cases barring exceptional circumstances.” Exh. W at 5-6.
62. The rule further gives examples of “exceptional circumstances” including a situation where a “panel ... decide[s] to hold or stay a case pending en banc or Supreme Court disposition of another matter.” Exh. W at 6, n.\*. The rule is explicit that “[i]n such circumstances, the requirements of [the rule] do not apply.” *Id.*
63. On February 6, 2023, when the paneling memo for the April sitting was circulating, it is true that two cases on Judge Newman’s docket were pending for over one year; however, neither was



subject to the requirements of Clerical Procedures #3, ¶ 15. *Military-Veterans Advocacy, Inc. v. Sec’y of Veterans Affairs*, No. 20-1537 (reported at 63 F.4th 935 (Fed. Cir. 2023)), which at that point had been pending for 424 days, was stayed pending Congress’s consideration of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, Pub. L. 117-168, 136 Stat. 1759 (codified at 38 U.S.C. §§ 1116 and 1710) (signed Aug. 10, 2022 and effective Oct. 1, 2022). Because the case was stayed pending further developments in the law, it was not subject to Clerical Procedures #3, ¶ 15. In fact, the Court requested additional briefing on the impact the newly enacted statute had on the litigation. *See* 63 F.4th at 943. The supplemental briefs were filed on September 14, 2022. The case was resolved on March 22, 2023, roughly six months after the filing of supplemental briefs.

64. The second case that had been pending for more than a year was *SAS Inst. v. World Programming Ltd.*, No. 21-1542 (reported at 64 F.4th 1319 (Fed. Cir. 2023)). The oral argument on that case was had on January 3, 2022. However, Judge Newman was a *dissenting* judge on that case and thus had to wait for the panel to circulate the majority opinion prior to being able to draft her dissent. The majority opinion by Judge Jimmy V. Reyna circulated on October 14, 2022, and the opinion was published on April 6, 2023, *i.e.*, within six months of Judge Reyna’s circulating his draft. In other words, Judge Newman took *three fewer* months to draft her dissent than Judge Reyna took to draft his opinion.
65. No other cases that were over a year old remained with Judge Newman, and only one case that was over six months old was among the cases assigned to her. Thus, despite the bald assertions contained in the June 5 Order, Judge Newman was *not* “in violation of Federal Circuit Clerical Procedures #3, ¶ 15.”
66. These facts were easily ascertainable by the Defendants, yet they instead created a false record and communicated it to the public.

67. Finally, the June 5 Order stated that it “conclude[d] upon *de novo* consideration that Judge Newman is not expeditiously carrying out the work of the Court, that assigning her new cases will only further interfere with expeditious execution of the work of the Court, and that an order precluding Judge Newman from new case assignments is warranted.” Exh. O at 4. The Judicial Council asserted that Judge Newman has a “continued backlog of cases, and [an] inability to clear th[at] backlog.” *Id.* at 1. Not only does the “continued backlog” justification radically differ from the prior “ongoing disciplinary proceedings” justification for Judge Newman’s suspension, but it is also factually false.
68. At the time the order was issued, Judge Newman remained responsible for only nine cases, only one of which was over six months old, and some of which were or are expected to be separate opinions (concurrences and/or dissents). This number is lower than that of several other judges on the Court, yet Judge Newman remains the only judge suspended from the Court’s work. As before, Judge Newman, though a member of the Judicial Council, *see* R. 25(e), cmt., was not notified of its meeting (if one ever took place) or the proposal, nor was she given an opportunity to speak or vote on this matter.
69. No end date for this suspension is listed in the Order. The Council asserted that 28 U.S.C. § 332(d)(1) authorizes it to impose such a restriction on Judge Newman’s duties and further maintained that the order “is not a censure but rather a decision made for the effective and expeditious administration of the business of the court.” Exh. O at 5. This assurance stands in sharp contrast to Chief Judge Moore’s email of April 5, 2023, which states unequivocally that Judge Newman was suspended “pending the results of the investigation into potential disability/misconduct” and further states that suspension will not be lifted “until the[[disciplinary] proceedings are resolved.” Exh. B at 4.

70. Judge Newman has been removed from hearing cases for an indefinite period, which is not a permissible penalty even following an investigation. Additionally, in an order issued on June 1, 2023, Defendants have indicated that they contemplate continued suspension of Judge Newman from “the duties of [her judicial] Office.” *See* Exh. N at 4.
71. The June 5 Order indicates that Defendants believe they have authority to suspend and may continue their suspension of Judge Newman *even in the absence of any finding of misconduct*. *See* Exh. O at 5.
72. While the Special Committee has been pursuing its investigation(s) premised on a changing set of rationales, Judge Newman has written several opinions in previous cases, even though Chief Judge Moore’s actions have interfered with the normal operations of Judge Newman’s chambers. Thus, on March 22, 2023, Judge Newman issued an eighteen-page opinion for the Court in *Military-Veterans Advocacy, Inc. v. Sec’y of Veterans Affairs*, 63 F.4th 935 (Fed. Cir. 2023). On March 6, 2023, Judge Newman delivered a seven-page dissenting opinion in *May v. McDonough*, 61 F.4th 963 (Fed. Cir. 2023). On March 31, 2023, Judge Newman filed a four-page dissenting opinion from the Court’s opinion in *Roku Inc. v. Univ. Elecs., Inc.*, 63 F.4th 1319 (Fed. Cir. 2023), and on April 6, 2023, Judge Newman filed a fifteen-page dissenting opinion in *SAS Inst. v. World Programming Ltd.*, 64 F.4th 1319 (Fed. Cir. 2023). Finally, on June 6, 2023, June Newman filed a twelve-page dissenting opinion in *Dep’t of Transport. v. Eagle Peak Rock & Paving, Inc.*, No. 21-1837, \_\_\_ F.4th \_\_\_, 2023 WL 3829625 (Fed. Cir. 2023). These opinions have been praised by various members of the bar, and nothing in them even hints at any mental disability. *See, e.g.*, Andrew Michaels, *Judge Newman’s Recent Dissents Show She Is Fit For Service*, Law360.com (June 6, 2023).
73. Judge Newman has also continued to participate in *en banc* decisions of the Court with no indication of any mental or physical disability. Thus, she joined the *en banc* portion of the opinion in *Moore v. United States*, 66 F.4th 991 (Fed. Cir. 2023). Judge Newman also participated in the poll

to take up the matter *en banc*. There appear to have been no objections lodged to her participation by any members of the Federal Circuit bench or bar.

74. As recently as late 2022 or early 2023, Chief Judge Moore effusively praised Judge Newman's abilities and insight, writing in the American Intellectual Property Association Quarterly Journal that "Among patent practitioners, Judge Newman is particularly well-known for her insightful dissents, which have often been vindicated by the Supreme Court." Chief Judge Moore then listed several cases where the Supreme Court, in reversing the Federal Circuit, "adopt[ed] essentially the reasoning of Judge Newman's dissent." Kimberly A. Moore, *Anniversaries and Observations*, 50 AIPLA Q. J. 521, 524-25 (2022).
75. One empirical study shows that in "the three-year period of January 1, 2020 to December 31, 2022," Judge Newman's deviation from the average productivity and timeliness among the active judges of the Federal Circuit was not statistically significant. These data also show that there has been no difference in Judge Newman's timeliness or productivity between 2020 and late 2022. Exh. X.
76. Another, more comprehensive empirical dataset shows that from October 1, 2021 to December 31, 2022, Judge Newman authored 25 opinions (including majority, concurring, and dissenting ones), whereas, in the same time period, Judge Raymond Chen authored only 20 opinions. That dataset also shows that over the same time period, when counted from the time of filing of the appeal to its disposition, cases in which Judge Newman authored majority opinions were pending, on average, for 486 days. At the same time, cases assigned to Judge Sharon Prost were pending for 509 days, Judge Todd Hughes for 543 days, and Judge Chen for 549 days. See Ron D. Katznelson, Ph.D., *Is There a Campaign to Silence Dissent at the Federal Circuit?* at 18, available at <https://ssrn.com/abstract=4489143>.

77. These empirical studies are noteworthy because Chief Judge Moore predicated her original “identification of the complaint” in large part on Judge Newman’s alleged lack of sufficient output as compared to her colleagues. The empirical data stand in sharp contrast to these false allegations.
78. This empirical study also reveals that given Judge Newman’s high rate of dissent, removing her from the Federal Circuit bench and replacing her with a judge whose rate of dissent is in line with the Circuit’s average, would reduce the workload of an average Federal Circuit judge by more than 5%. Katznelson, *supra* at 34-35. So, Judge Newman’s colleagues on the Federal Circuit have a personal interest in the outcome of disciplinary proceedings against her.
79. On information and belief, the ongoing proceedings before the Judicial Council of the Federal Circuit, have undermined the ability of judges and clerks to work together in a cooperative fashion, and have undermined the public confidence in that Court and judiciary as a whole.

### **CLAIMS FOR RELIEF**

#### **Count I: Improper Removal, Violation of Separation of Powers**

80. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.
81. The Constitution provides that “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. Const. art. III, § 1. The Constitution also provides that “[t]he House of Representatives ... shall have the sole Power of Impeachment,” and that “[t]he Senate shall have the sole Power to try all Impeachments.” U.S. Const. art. I, §§ 2, 3. In light of these provisions, no executive or judicial agency or body may exercise, in form or in substance, the impeachment power reserved by the Constitution to the House and Senate. Nor may any executive or judicial agency or body be delegated—or arrogate to itself—the impeachment power which the Constitution reserves to the House and Senate.

82. Defendants’ orders and threats constitute an attempt to remove Plaintiff from office unlawfully—and already have removed her unlawfully from hearing cases—without impeachment and in violation of the Constitution, in substance if not form, by, *inter alia*, (a) refusing to assign Plaintiff any new cases and threatening to forbid the assignment of new cases to her; (b) removing, without Plaintiff’s consent, judicial staff Plaintiff is statutorily authorized to retain and refusing authorization to hire replacement staff; (c) interfering with Plaintiff’s abilities to administer her own chambers; (d) ordering Plaintiff to undergo an involuntary mental health examination without a sufficient basis or legal authority for doing so, by physicians unknown to and unapproved by Plaintiff, as set forth in this Complaint; and (e) ordering that the scope of the investigation into Plaintiff’s conduct be expanded, merely because Plaintiff requires time to properly evaluate and answer Special Committee requests.

83. Plaintiff has been and will continue to be irreparably harmed unless and until (a) Defendants’ orders excluding Plaintiff from regular duties of an Article III judge and their threats to continue with such exclusion are declared to be contrary to statutory law and enjoined; (b) Plaintiff is immediately restored to the case argument calendar as a fully-fledged active judge; and (c) Defendants are enjoined from continuing the investigation into Judge Newman except insofar as any actions are required to transfer this matter to a judicial council of another circuit.

84. Plaintiff has no adequate remedy at law.

**Count II: *Ultra Vires* – Improper Removal, Violation of Separation of Powers**

85. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

86. To the extent that the Judicial Disability Act of 1980 is constitutional, it authorizes the Judicial Council, upon *conclusion* of a Special Committee’s investigation and receipt of a report from such a committee, to “order[] that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint.” 28 U.S.C. § 354(a)(2)(A)(i). Neither

the Act nor the Conduct Rules authorize either a Chief Judge acting alone, nor a judicial council of any circuit acting in concert, to issue any orders or directives which preclude an active Article III judge from being assigned cases in regular order while an investigation is still underway. “Sentence first—verdict afterwards” is a notorious and textbook example of deprivation of due process known even to children’s literature.

87. Defendants’ orders excluding Plaintiff from regular duties of an Article III judge, and their threats to continue with such exclusion, constitute an unlawful attempt to remove Plaintiff from office, without impeachment and in violation of the Constitution, in substance if not form, by, *inter alia*, (a) refusing to assign Plaintiff any new cases and threatening to forbid the assignment of new cases to her; (b) removing, without Plaintiff’s consent, judicial staff Plaintiff is statutorily authorized to retain and refusing authorization to hire replacement staff; (c) ordering Plaintiff to undergo an involuntary mental health examination without a sufficient basis or legal authority for doing so, by physicians unknown to and unapproved by Plaintiff, as set forth in this Complaint; (d) interfering with Plaintiff’s abilities to administer her own chambers; and (e) ordering that the scope of the investigation into Plaintiff’s conduct be expanded, merely because Plaintiff requires time to properly evaluate and answer Special Committee requests.

88. Plaintiff has been and will continue to be irreparably harmed unless and until (a) Defendants’ orders excluding Plaintiff from regular duties of an Article III judge and their threats to continue with such exclusion are declared to be contrary to statutory law and enjoined; (b) Plaintiff is immediately restored to the case argument calendar as a fully-fledged active judge; and (c) Defendants are enjoined from continuing the investigation into Judge Newman except insofar as any actions are required to transfer this matter to a judicial council of another circuit.

89. Plaintiff has no adequate remedy at law.

**Count III: *Ultra Vires* – Improper Removal, Violation of Separation of Powers**

90. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.
91. Nothing in Section 332(d)(1) authorizes the Judicial Council of the Federal Circuit, acting without so much as any notice to much less input from one of its members, to indefinitely suspend Judge Newman from her duties as an Article III judge or to reduce her staff as an “administrative” rather than “punitive” measure.
92. Defendants’ orders excluding Plaintiff from regular duties of an Article III judge, and their threats to continue with such exclusion, constitute an attempt to remove Plaintiff from office, without impeachment and in violation of the Constitution, in substance if not form, by, *inter alia*, (a) refusing to assign Plaintiff any new cases and threatening to forbid the assignment of new cases to her; (b) removing, without Plaintiff’s consent, judicial staff Plaintiff is statutorily authorized to retain and refusing authorization to hire replacement staff; (c) ordering Plaintiff to undergo an involuntary mental health examination without a sufficient basis or legal authority for doing so, by physicians unknown to and unapproved by Plaintiff, as set forth in this Complaint; (d) interfering with Plaintiff’s abilities to administer her own chambers; and (e) ordering that the scope of the investigation into Plaintiff’s conduct be expanded, merely because Plaintiff requires time to properly evaluate and answer Special Committee requests.
93. Plaintiff has been and will continue to be irreparably harmed unless and until (a) Defendants’ orders excluding Plaintiff from regular duties of an Article III judge and their threats to continue with such exclusion are declared to be contrary to statutory law and enjoined; (b) Plaintiff is immediately restored to the case argument calendar as a fully-fledged active judge and (c) Defendants are enjoined from continuing the investigation into Judge Newman, except insofar as any actions are required to transfer this matter to a judicial council of another circuit.
94. Plaintiff has no adequate remedy at law.

**Count IV: Fifth Amendment – As Applied Due Process of Law Violation**



95. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.
96. Defendants' continued investigation into Plaintiff's conduct violates the fundamental principles of due process because the Special Committee is composed of complainants about and witnesses to Plaintiff's alleged disability. Furthermore, because the outcome of these proceedings may affect the total amount of work done by other Federal Circuit judges, all members of the Federal Circuit have a personal interest in the outcome of these proceedings. The March 24 and May 3 Orders specifically reference, as a basis for beginning and continuing the investigation, the "personal observations" of the Special Committee members and other members of the Judicial Council. Empirical studies suggest that the work of an average Federal Circuit judge would be reduced by 9% if Judge Newman were replaced with a less dissent-prone judge.
97. It has been established for centuries that one cannot serve as a "judge in his own cause." *See Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). Permitting the Judicial Council and its Special Committee to continue the disciplinary proceedings against Plaintiff in a case where all members of the Judicial Council are either complainants, actual or potential witnesses, interested parties, or all of the above, violates Plaintiff's Fifth Amendment right to due process of law.
98. Plaintiff has been and will continue to be irreparably harmed unless and until Defendants' violations of her Fifth Amendment right to due process of law are declared unconstitutional and Defendants are enjoined from continuing their investigation into Plaintiff, except insofar as any actions are required to transfer this matter to a judicial council of another circuit.
99. Plaintiff has no adequate remedy at law.

**Count V: Fifth Amendment – Unconstitutional Vagueness of the Act's Disability Provision**

100. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.
101. Plaintiff has liberty and property interests in the outcome of any misconduct or disability proceeding against her. She also has liberty and property interests in not being subjected to an

involuntary medical or psychiatric examination and further liberty and property interests in not being stigmatized as having committed misconduct and having her mental health questioned, as well as having her status as an Article III judge altered, by ordering her to undergo a compelled medical or psychiatric evaluation by physicians not chosen by her and who are unknown to her. Under the Fifth Amendment to the United States Constitution, Plaintiff cannot be deprived of her liberty and property interests without due process of law.

102. Plaintiff further has liberty and property interests in her private medical records, which may not be invaded by requiring her to surrender these same records to an investigative authority as a condition of maintaining her status as an active Article III judge.

103. The Act is unconstitutionally vague and violates the Due Process Clause of the Fifth Amendment because, *inter alia*, it fails to provide adequate notice of what constitutes a mental disability that renders a judge “unable to discharge all the duties of office.” It also is unconstitutionally vague and violates the Due Process Clause because it lacks minimal enforcement guidelines identifying when an Article III judge may be subject to a disability investigation, and, accordingly, when an Article III judge may be disciplined for objecting in good faith to undergoing a compelled medical or psychiatric examination or surrendering private medical records as part of an investigation into whether she suffers from a disability rendering her unable to discharge her duties.

104. Defendants’ enforcement of the Act’s unconstitutionally vague disability provisions against Plaintiff has caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until the Act is declared unconstitutional and Defendants are enjoined from (a) enforcing any orders excluding Plaintiff from regular duties of an Article III judge; (b) continuing the investigation into Judge Newman except insofar as any actions are required to transfer this matter to a judicial council of another circuit; and (c) requiring Plaintiff to undergo a compelled

medical or psychiatric examination and/or surrendering private medical records and from disciplining Plaintiff for objecting in good faith to these demands.

105. Plaintiff has no adequate remedy at law.

**Count VI: *Ultra Vires*, Unconstitutional Examinations**

106. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

107. Neither the Act nor the U.S. Constitution authorizes compelling an Article III judge to undergo a medical or psychiatric examination or to surrender to any investigative authority her private medical records in furtherance of an investigation into whether the judge suffers from a mental or physical disability that renders her unable to discharge all the duties of office.

108. As Defendants have neither statutory nor constitutional power to compel Plaintiff to undergo an involuntary medical or psychiatric examination, or to compel Plaintiff to surrender her private medical records, the imposition of these requirements on Plaintiff are *ultra vires* and unconstitutional, as is disciplining Plaintiff for objecting to the same.

109. Defendants' *ultra vires* and unconstitutional acts have caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until they are declared unconstitutional and Defendants are enjoined from requiring Plaintiff to undergo a compelled medical or psychiatric examination and/or surrendering private medical records and from disciplining Plaintiff for objecting in good faith to these demands.

110. Plaintiff has no adequate remedy at law.

**Count VII: Fifth Amendment – Unconstitutional Vagueness of the Act's Investigative**

**Authority**

111. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

112. The Act is unconstitutionally vague to the extent it purports to authorize compelled medical or psychiatric examinations of Article III judges or demands from Special Committees for

Article III judges to surrender their private medical records. Section 353(c) of the Act, which authorizes a Special Committee to conduct an investigation “as extensive as it considers necessary,” lacks minimal enforcement guidelines identifying the circumstances under which an Article III judge may be compelled to undergo a mandatory medical or psychiatric examination or surrender her private medical records. It vests virtually complete discretion in the hands of a Special Committee to determine when compliance with such demands may be compelled. Consequently, the Act violates the due process protections of the Fifth Amendment and impermissibly intrudes on judicial independence which is guaranteed by Article III of the Constitution.

113. Defendants’ enforcement of the Act’s unconstitutionally vague investigative provision against Plaintiff has caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until the Act is declared unconstitutional and Defendants are enjoined from requiring Plaintiff to undergo a compelled medical or psychiatric examination and/or surrendering private medical records and from disciplining Plaintiff for objecting in good faith to these demands.

114. Plaintiff has no adequate remedy at law.

**Count VIII: Fourth Amendment – Unconstitutional Search**

115. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

116. Plaintiff enjoys the right to be secure in her person and effects against unreasonable search and seizures, as guaranteed by the Fourth Amendment to the U.S. Constitution.

117. A compelled medical or psychiatric examination constitutes a search and seizure for purposes of the Fourth Amendment and therefore must satisfy minimum standards of constitutional reasonableness to be lawful.

118. The Act violates the Fourth Amendment to the extent it authorizes a compelled medical or psychiatric examination of an Article III judge without a warrant based on probable cause and issued by a neutral judicial official or a demonstration of constitutional reasonableness.
119. Defendants' enforcement of the unconstitutional Act against Plaintiff has caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until the Act is declared unconstitutional and Defendants are enjoined from requiring Plaintiff to undergo a compelled medical or psychiatric examination and from disciplining Plaintiff for objecting in good faith to these demands.
120. Plaintiff has no adequate remedy at law.

**Count IX: Fourth Amendment – Unconstitutional Search**

121. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.
122. Plaintiff enjoys the right to be secure in her person and effects against unreasonable search and seizures, as guaranteed by the Fourth Amendment to the U.S. Constitution.
123. A compelled surrender of private medical records constitutes a search and seizure for purposes of the Fourth Amendment and therefore must satisfy minimum standards of constitutional reasonableness to be lawful.
124. The Act violates the Fourth Amendment to the extent it authorizes a compelled surrender of medical records belonging to an Article III judge without a warrant based on probable cause and issued by a neutral judicial official or a demonstration of constitutional reasonableness.
125. Defendants' enforcement of the unconstitutional Act against Plaintiff has caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until the Act is declared unconstitutional and Defendants are enjoined from requiring Plaintiff to surrender her private medical records and from disciplining Plaintiff for objecting in good faith to these demands.

126. Plaintiff has no adequate remedy at law.

**Count X: Fourth Amendment – As Applied Challenge**

127. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

128. Defendants lack either a warrant issued on probable cause by a neutral judicial official or a constitutionally reasonable basis for requiring Plaintiff to submit to an involuntary medical or psychiatric examination. Accordingly, compelling Plaintiff to undergo an involuntary medical or psychiatric examination violates Plaintiff's Fourth Amendment rights.

129. Defendants' enforcement of the unconstitutional Act against Plaintiff has caused Plaintiff irreparable harm and will continue to cause Plaintiff irreparable harm unless and until the Act is declared unconstitutional and Defendants are enjoined from requiring Plaintiff to undergo a compelled medical or psychiatric examination and from disciplining Plaintiff for objecting in good faith to these demands.

130. Plaintiff has no adequate remedy at law.

**Count XI: Fourth Amendment – As Applied Challenge**

131. Plaintiff realleges and incorporates the preceding paragraphs as if fully incorporated herein.

132. Defendants lack either a warrant issued on probable cause by a neutral judicial official or a constitutionally reasonable basis for requiring Plaintiff to surrender her private medical records none of which bear on her fitness to continue serving as an Article III judge. Accordingly, compelling Plaintiff to surrender her private medical records violates Plaintiff's Fourth Amendment rights.

133. Plaintiff has been and will continue to be irreparably harmed unless and until Defendants' violation of her Fourth Amendment rights is declared unconstitutional and Defendants are enjoined from requiring Plaintiff to surrender her private medical records and from disciplining Plaintiff for objecting in good faith to these demands.

134. Plaintiff has no adequate remedy at law.

**RELIEF REQUESTED**

**WHEREFORE,** Plaintiff respectfully requests that the Court: (1) declare the Act to be unconstitutional, either in whole or in part and enjoin Defendants from enforcing the Act to the extent it is unconstitutional; (2) declare any continued proceedings against Plaintiff by the Judicial Council of the Federal Circuit to be unconstitutional as violative of due process of law and enjoin Defendants from continuing any such proceedings, except to the extent necessary to transfer the matter to a judicial council of another circuit; (3) order that Judge Newman's ability and authority to hear cases be immediately restored; (4) order the termination of any further investigation of Plaintiff by the Judicial Council of the Federal Circuit, except insofar as necessary to transfer the matter to the judicial council of another circuit; (5) declare any decisions by any and all Defendants authorizing a limitation of Plaintiff's docket or other special restrictions on her actions as a federal judge, including, but not limited to the reduction in statutorily authorized number of staff to be unconstitutional and/or not in accordance with the law, and enjoin Defendants from continuing any such actions; (6) declare any orders of the Special Committee requiring Plaintiff to undergo a compelled medical or psychiatric examination and/or disciplining Plaintiff for objecting in good faith to these demands to be unconstitutional and enjoin Defendants from enforcing the foregoing unconstitutional orders; (7) declare any orders of the Special Committee requiring Plaintiff to surrender her private medical records and/or disciplining Plaintiff for objecting in good faith to these demands to be unconstitutional and enjoin Defendants from enforcing the foregoing unconstitutional orders; (8) award Plaintiff reasonable attorneys' fees and costs; and (9) grant Plaintiff such other relief as the Court deems just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury of any triable issues.



June 27, 2023

Respectfully submitted,

*/s/John J. Vecchione*

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JOHN J. VECCHIONE (DC Bar No. 431764)  
Senior Litigation Counsel

*/s/Gregory Dolin\**

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Senior Litigation Counsel

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*\*Admission Application Pending*

*Counsel for Plaintiff*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

HON. PAULINE NEWMAN,

Plaintiff,

v.

HON. KIMBERLY A. MOORE, *et al.*,

Defendants.

Case No. 1:23-cv-01334-CRC

**DEFENDANTS' MOTION TO DISMISS**

Defendants<sup>1</sup> hereby move to dismiss Plaintiff's First Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). A proposed order is attached.

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<sup>1</sup> The Honorable Kimberly A. Moore, sued solely in her official capacities as Chief Judge of the U.S. Court of Appeals for the Federal Circuit, Chair of the Judicial Council of the Federal Circuit, and Chair of the Special Committee of the Federal Circuit; the Honorable Sharon Prost, sued solely in her official capacity as a Member of the Special Committee of the Federal Circuit; the Honorable Richard G. Taranto, sued solely in his official capacity as a Member of the Special Committee of the Federal Circuit; and the Judicial Council of the Federal Circuit.

DATED: September 1, 2023

Respectfully submitted,

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Principal Deputy Assistant Attorney General

CHRISTOPHER R. HALL  
Assistant Director, Federal Programs Branch

/s/ Stephen Ehrlich

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*Attorneys for Defendants*

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HON. PAULINE NEWMAN, ) Civil Action  
) No. 1:23-CV-1334  
Plaintiff, )  
)  
vs. ) **MOTION HEARING**  
)  
HON. KIMBERLY A. MOORE, )  
et al., ) Washington, D.C.  
) January 25, 2024  
Defendants. ) Time: 10:05 A.M.  
)

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TRANSCRIPT OF MOTION HEARING HELD BEFORE  
THE HONORABLE JUDGE CHRISTOPHER R. COOPER  
UNITED STATES DISTRICT JUDGE

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A P P E A R A N C E S

For Plaintiff: GREGORY DOLIN  
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Court Reporter: Tamara M. Sefranek, RMR, CRR, CRC  
Official Court Reporter  
United States Courthouse, Room 6714  
333 Constitution Avenue, NW  
Washington, D.C. 20001  
202-354-3246

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P R O C E E D I N G S

THE COURTROOM DEPUTY: Your Honor, we're on the record for Civil Case 23-1334, the Hon. Pauline Newman v. Hon. Kimberly A. Moore, et al.

Counsel, please approach the lectern, identify yourself for the record, starting with the plaintiff.

MR. DOLIN: Good morning, Your Honor. Gregory Dolin for Judge Newman.

THE COURT: Good morning, Mr. Dolin.

MR. EHRLICH: Good morning, Your Honor. Stephen Ehrlich from Department of Justice on behalf of the defendants.

THE COURT: Good morning, Mr. Ehrlich. Just give me a minute to get situated.

Okay. I know we're here on cross-motions; we have a preliminary injunction motion by the plaintiff and a motion to dismiss by the defendants. The defendants' motion is dispositive, so why don't we start with the government, if that's okay.

And just before you start, I know there are a lot of moving parts out there. The way that I've sort of organized the case in my own mind is, first, the mootness of the 332(d) claims.

Second, whether the as-applied challenges to the Judicial Conduct and Disability Act are barred by Section 357(c).

1 Third, does the Court otherwise lack original  
2 jurisdiction over at least the as-applied claims. A subset of  
3 that question is which claims are facial as opposed to  
4 as-applied. And then, finally, the merits of the facial  
5 claims.

6 So I don't know if that jibes with what you -- how  
7 you plan to lay it out, but if you could go in that order, that  
8 would be helpful.

9 MR. EHRLICH: Absolutely, Your Honor. I'm happy to  
10 do that.

11 Again, may it please the Court, Stephen Ehrlich from  
12 the Department of Justice on behalf of defendants. Defendants  
13 did not want to be here today, nor should they be. In the last  
14 year, 96-year-old Judge Newman has shown concerning signs that  
15 a possible disability is impeding her ability to perform the  
16 duties of an active circuit judge.

17 From the start, other members of the federal circuit,  
18 who have long served with and value Judge Newman, approached  
19 her in a respectful manner to address the difficult situation,  
20 attempting an informal resolution that would have avoided --

21 THE COURT: Counsel, I'm aware of the background.  
22 What I'd like to do is turn the temperature down a little bit  
23 and focus on the legal issues, okay?

24 MR. EHRLICH: Absolutely. So I'll start with  
25 mootness, as Your Honor mentioned.

1           Obviously, we think the June 5th order under the  
2           Judicial Council --

3           THE COURT: If you could slow down just a little bit  
4           for the benefit of the court reporter.

5           MR. EHRLICH: Apologies, Your Honor. I have an issue  
6           with that.

7           THE COURT: That's all right. I know you have a lot  
8           to say.

9           MR. EHRLICH: So we believe that June 5th order is  
10          moot. I don't think there's any dispute that it's moot; just  
11          an issue of whether either of the mootness exceptions that have  
12          been briefed in the supplemental briefs overcome that. And, of  
13          course, we would say no.

14          So on voluntary cessation, we say that doesn't apply,  
15          first of all, to governmental actors, especially federal  
16          judges. I think as the D.C. Circuit has made clear, you  
17          don't -- they're loath to impute a manipulative intent to other  
18          government actors. I think that's all the more so here when  
19          they're federal judges. Also --

20          THE COURT: I mean, that principle comes from the  
21          *Clarke* case, I believe.

22          MR. EHRLICH: That's right, Your Honor.

23          THE COURT: Has that been consistently applied by the  
24          circuit and other circuits? I mean, certainly, I can envision  
25          scenarios where a federal actor would, if not engage in

1 manipulative conduct, at least strategic conduct. I mean, I  
2 see it all the time. I mean, it's understandable if someone  
3 would withdraw a -- if an agency were to withdraw some sanction  
4 or some course of dealing in order to moot a claim.

5 MR. EHRLICH: Yeah. I think courts have consistently  
6 recognized that this causes -- there's serious doubts about  
7 applying this. What -- they usually, sort of, do both prongs  
8 anyway and end up finding no voluntary cessation. And I would  
9 point to the *Chang* case from Judge Walton, issued last month,  
10 and he echoed these same concerns that applied in *Alaska*.

11 I think, even more to the point, this exception only  
12 applies if it was done to avoid litigation, and that's clearly  
13 not what we have here. The June -- the November 9th order that  
14 vacated the June 5th order was done for one reason only, which  
15 is she cleared her backlog, which was the basis of the June 5th  
16 order, and so they vacated the order. That was a suspension  
17 due to that backlog. So it wasn't to avoid litigation.

18 We've briefed the merits. We're not avoiding the  
19 issue. I think for those reasons, that exception clearly does  
20 not apply.

21 And then we have, obviously, arguments for --

22 THE COURT: Be that as it may, certainly, the council  
23 could reimpose the sanction at the stroke of a pen, as the  
24 circuit said in *Alaska* was sort of one factor. I know that  
25 that gets more at the capable of repetition yet evading review



1 prong.

2 But should the Court not consider the ease with which  
3 the circuit could reimpose the sanction given the fact that  
4 Judge Newman has indicated that it is likely that she will not  
5 be able to keep up with her cases going forward?

6 MR. EHRLICH: Yes. So I think a couple things on  
7 that, Your Honor. So I think, first of all, there's an  
8 independent -- for both exceptions, she would have to show a  
9 reasonable expectation that it would reoccur, and I think -- so  
10 for both they, sort of, collapse on this prong, in our view.

11 I think both have the same issue, which is -- one is  
12 she has an independent suspension under the act. So even if  
13 you enjoin the June 5th order -- which, obviously, we think is  
14 moot -- it would have no effect. She's not going to begin  
15 hearing cases tomorrow, and so she can't build up a backlog.  
16 And so any backlog from there is purely speculative.

17 But even if she could hear cases, I think it's  
18 entirely speculative that the same exact thing would occur as  
19 June 5th. That backlog took a while to build up. Some of  
20 those cases were 100, 200, 300 days old throughout the  
21 suspension. So there's no -- there's no indication that that  
22 would happen -- it certainly wouldn't happen immediately.

23 Even if it happened, the Judicial Council may take a  
24 different approach. They may act proactively. They may do  
25 something short of suspension. I think we just have no idea.

1 Obviously, it's in the discretion of those 11 circuit judges to  
2 determine how to deal with that situation if and when she  
3 begins sitting again.

4 I think right now, sitting here today, there's no  
5 reasonable expectation that the exact same thing is going to  
6 occur. And when you look at cases like *Alaska*, like the *Usher*  
7 case we cite, like the *Armstrong* case, where it's not a matter  
8 of reviving the exact thing that's going on here, and you have  
9 to speculate about what other actors will do here, other 11  
10 circuit judges who acted unanimously in this case. But once  
11 you have to speculate about that, it doesn't really fit into  
12 these exceptions for mootness. You're speculating about  
13 further actions and what may happen.

14 So I think for those reasons, we are saying neither  
15 of the exceptions would apply.

16 THE COURT: Okay.

17 MR. EHRLICH: One moment, Your Honor. I'm just going  
18 to grab some water.

19 THE COURT: Sure.

20 MR. EHRLICH: So I'm happy, Your Honor, to turn to  
21 the Section 357 bar. I think that's -- unless you have more  
22 questions on mootness.

23 THE COURT: No. Please do.

24 MR. EHRLICH: I think this is fairly laid out in our  
25 briefs. But our position is, basically, *McBryde* covers this.

1 The 357 bar takes care of all as-applied and statutory  
2 challenges under the act. And as pled in the complaint, that's  
3 all we have here. We have, basically, as pled only as-applied  
4 challenges under the act to orders and determinations by the  
5 special committee and the Judicial Council, and so we think  
6 *McBryde* clearly, clearly bars --

7 THE COURT: Your position is that every count in the  
8 complaint is an as-applied challenge?

9 MR. EHRLICH: Yes, I think so. As pled, Your Honor,  
10 I think that's right. I understand my friend on the other side  
11 thinks that some are trying to assert facial challenges, so  
12 he's free to argue that.

13 But as currently pled, as we lay out in our briefs,  
14 there's all sorts of orders and determinations that they're  
15 challenging. So just to put this in relief, I think everybody  
16 agrees that Counts 2, 3, 4, 10, and 11 are --

17 THE COURT: Hold on. Hold on.

18 MR. EHRLICH: Sure.

19 THE COURT: 2, 10, 4, 11?

20 MR. EHRLICH: 2, 3, 4, 10, and 11, Your Honor. And I  
21 think this is plaintiff's reply at 28 where we, sort of, agree  
22 on this.

23 So I think those are clearly barred -- again, not --  
24 there's judicial review, but the judicial review is happening  
25 in the act-related proceedings with those federal judges. So I

1 think we all agree that those are as-applied.

2 So the dispute, I think, plaintiff is honing in on  
3 is, obviously, the remaining counts, which are 1, 5, 6, 7, 8,  
4 and 9. So 1 and 5 through 9.

5 I think these -- again, Judge Newman and -- plaintiff  
6 may have tried to assert a facial challenge, but as pled, we're  
7 talking about orders and determinations. For example, Count 1  
8 is their supposed constructive impeachment claim, and that  
9 talks about defendants' orders and threats constitute an  
10 attempt to remove plaintiff from office unlawfully, and then  
11 talks about -- it lists specific actions of the special  
12 committee.

13 I mean, we can tick through the list, but same thing,  
14 for example, Count 6. The imposition of these requirements for  
15 medical exam and medical records on plaintiff are ultra vires  
16 and unconstitutional. We tick through these in the brief, Your  
17 Honor.

18 But I think, in our view, while she could have tried  
19 to do facial challenges, that may have evaded the bar. It's  
20 just that as pled, it doesn't -- it doesn't get there. It's  
21 challenging orders and determinations that under *McBryde* are  
22 barred.

23 So I think for those reasons, we would say all of the  
24 claims fall under the 357(c) bar and are, therefore, not able  
25 to progress. So that may be the -- one of the easier ways to

1 resolve the case. But, obviously, we have other grounds, and  
2 I'm happy to move to the original jurisdiction point for Your  
3 Honor.

4 I think there's --

5 THE COURT: Why don't you address the plaintiff's  
6 arguments under -- that *Axon* and *Dart*, essentially, contradict  
7 or undermine *McBryde*'s holding that 357 or the predecessor  
8 statute barred as-applied challenges.

9 MR. EHRLICH: Yes. Happy to, Your Honor. So nothing  
10 in *Axon* casts any doubt on the -- on the holding of *McBryde*.  
11 As we say in our brief, *Axon* is about a special statutory  
12 review scheme, where the issue is whether you have to go  
13 through the agency review process before you can come into  
14 federal court, and this is not a special statutory review  
15 scheme. It's a complete bar on judicial review.

16 So *Axon* doesn't really apply at all. But I think the  
17 way this manifests itself is that *Axon* is about, as I said,  
18 whether somebody has to go through the agency process before  
19 they can get to court.

20 And I think the way to think about this, the way we  
21 think about this is that she is already in a court -- she is in  
22 the equivalent of a court. She's going through a judicial  
23 process under the act before 11 circuit judges and then 7  
24 judges of the JC&D committee. So in that sense, it doesn't  
25 really apply with *Axon*.

1           When you try to apply the *Axon* factors, it just  
2           doesn't really compute. So if you look at the -- *Axon/Thunder*  
3           *Basin* factors. So whether meaningful judicial relief is  
4           foreclosed, obviously, we would say no; she's getting judicial  
5           relief now through the act-related review.

6           Whether it's a collateral claim in *Axon*, it was that  
7           the agency was unconstitutionally structured, but we don't have  
8           anything like that here. The claims are how the Judicial  
9           Council and the special committee used their powers, which  
10          could be remedied at the end.

11          And then, obviously, the last factor is whether the  
12          agency has any expertise in deciding the question at issue.  
13          And, obviously, they're federal judges, so they have quite a  
14          bit of expertise in deciding constitutional questions.

15          When you tick through those *Axon* factors, I think  
16          it's pretty clear that the *Axon* framework doesn't really apply  
17          here and *McBryde* is, obviously, still good law. It doesn't  
18          change the plain text of 357, which says that all orders and  
19          determinations are barred from judicial review. So I think  
20          nothing in *Axon* does anything to those.

21          And just one last point on *Axon*, which, even if you  
22          can go outside of the act -- out of the bar into federal court  
23          here, it doesn't solve which court you need to go to. And so  
24          it doesn't solve our issue that you have to go to a court with  
25          appellate, not original jurisdiction.

1           The *Dart* and I think *Leedom* are, sort of,  
2           interrelated and plaintiff makes those. We have a few reasons  
3           in our briefs, a reply at page 8. But let me start with  
4           *McBryde* itself, which says *Leedom* was merely an application of  
5           the familiar requirement that there be clear and convincing  
6           evidence of legislative intent to preclude judicial review.  
7           That's a quote from *McBryde*.

8           Obviously, *McBryde* then found that there was clear  
9           intent to bar everything but facial challenges. And the same  
10          thing with *Dart*. They expressly addressed *Dart* and said *Dart*  
11          stands for the exceedingly narrow proposition that a statute  
12          precluding review is limited by its language. It doesn't mean  
13          that every -- the bar is ineffective any time plaintiff asserts  
14          a legal error.

15          So I think *McBryde* dealt with these exact arguments  
16          and rejected them. And then we have the reasons we give as  
17          well in our brief, Your Honor, which is --

18                 THE COURT: So while there -- I will inquire with  
19          plaintiff as to where on the face of the statute or how, if at  
20          all, the circuit violated the face of the statute. But there  
21          is a rule governing the disability proceedings that says  
22          matters should be transferred under -- to a different Judicial  
23          Council in extraordinary circumstances.

24          What if I were to conclude that the committee  
25          violated or -- let me ask you. Did the committee violate that

1 rule by not transferring the matter to a different circuit? It  
2 is somewhat difficult to imagine more extraordinary  
3 circumstances than those presented here.

4 MR. EHRLICH: Sure.

5 THE COURT: And would that be sort of an ultra vires  
6 act consistent with what the agency did in *Dart*?

7 MR. EHRLICH: I think it would be an as-applied --  
8 as-applied aspect of this. I think Your Honor's question sort  
9 of builds that in because you have to examine the extraordinary  
10 circumstances that would apply. So by definition, I think  
11 you're under the 357(c) bar to even get there.

12 Obviously, we have our other threshold issues, which  
13 is original jurisdiction. So I'm not sure how you would ever  
14 get to that situation. But if you were, I think we would say  
15 absolutely the Judicial Council did not do anything wrong on  
16 transfer.

17 I mean, this is laid out in the Judicial Council's  
18 September 20th order, and I would point Your Honor to -- at  
19 page 43 of that order where they explain all the reasons they  
20 didn't transfer. And it certainly makes no sense to transfer  
21 now, which is at the end of the proceedings.

22 It's a narrow proceeding about her misconduct in  
23 failing to cooperate. That proceeding is, essentially, done at  
24 the Judicial Council level. It's before review at the JC&D  
25 committee.



1 THE COURT: What's the status of the committee's work  
2 at this point? Have they taken any action?

3 MR. EHRLICH: They have not taken any public action.  
4 It is fully submitted and ready for their decision. So it is  
5 up to them to decide, and I think it -- at this point, under  
6 Rule 26, transfer wouldn't even be allowed. Rule 26 is before  
7 it gets to that point. So, obviously, they didn't misapply  
8 that there.

9 I think, as they've said throughout the process,  
10 there's no case that they can find where -- and plaintiff has  
11 never pointed to any -- about a transfer for disability. And I  
12 think, as the Judicial Council lays out in the citation I gave  
13 Your Honor, there's great reasons for keeping it in the federal  
14 circuit.

15 A lot of these things were happening in real time.  
16 And as you can see from the record, from the Judicial Council's  
17 order that chronicles this, I mean, plaintiffs -- excuse me,  
18 not plaintiffs -- witnesses were coming forward in real time to  
19 give more information about this happened with Judge Newman and  
20 now this happened with Judge Newman; so it accumulated. And  
21 that's simply not possible if you transfer it to another  
22 circuit that is not immediately available for witnesses.

23 And so I think for that and the other reasons  
24 explained in the Judicial Council's order, it was, obviously,  
25 not an abuse of discretion or -- I don't even know what

1 standard you would apply. But if you ever reached this to try  
2 and override the 11 circuit judges who decided this --

3 THE COURT: And it's a should, not shall.

4 MR. EHRLICH: Correct, Your Honor. It also says  
5 should.

6 Just one last thing on this, which is it's not their  
7 decision to transfer. They can request transfer from the chief  
8 justice, but it's not their call.

9 So that the most you could order them to do is to ask  
10 for a transfer, and then there may be some redressability  
11 problems with that. Obviously, we think you should never reach  
12 that. But even if you did, obviously, we think they did  
13 everything properly, as they lay out in the order.

14 And I think -- I'm happy to move to the original  
15 jurisdiction point, Your Honor.

16 THE COURT: Please do.

17 MR. EHRLICH: And I think this is, obviously, fairly  
18 laid out in our briefs. I think there seems to be no dispute,  
19 as I interpret it from the briefing, that the act-related  
20 proceedings are judicial in nature. There's almost no argument  
21 in the opposition about that. It's mostly about the 332  
22 authority and the June 5th suspension which, obviously, we say  
23 is now moot.

24 But there's, obviously, a lot of reasons why it's  
25 judicial. Even the statute in 357 says it's judicial review.

1 It calls it judicial review. It's, obviously, made up of  
2 exclusively federal judges who have the power to issue  
3 subpoenas and hold hearings. It's akin to attorney  
4 disciplinary proceedings, as courts have repeatedly held.

5 I think, if I could point you to one place on this, I  
6 would say Judge Pryor's opinion in *Pitch*, which was joined by a  
7 majority of the 11th Circuit en banc, lays out exactly all of  
8 the reasons why this is a judicial proceeding. It's in a  
9 slightly different context. He's analyzing the Federal Rules  
10 of Criminal Procedure.

11 But he lays out exactly, in applying the standard  
12 that I take both of us to be applying, which is mainly the  
13 application of existing policies to present or past facts,  
14 that's sort of the formulation from --

15 THE COURT: It's also formulated in terms of  
16 adjudication of present rights. So the question is, does  
17 Judge Newman have a right to hear cases. I mean, you seem to  
18 suggest -- correct me if I'm wrong -- in the due process area  
19 that there is no right. Does she have a right to hear cases?  
20 If so, or if not, how are present rights being adjudicated?

21 MR. EHRLICH: I think she has -- I think -- excuse  
22 me, Your Honor. I think we concede that this is an  
23 adjudication of a present right, which is her hearing of cases.  
24 And this is why we didn't challenge standing, for example.

25 We don't think that's irreparable harm, as we later

1 say, because she doesn't have an interest in hearing specific  
2 cases; that is, the cases she would have heard but for the  
3 suspension. So we don't think it rises to that level.

4 But I think it's certainly her present right to hear  
5 cases, and I don't take -- I mean, you can ask plaintiff, but I  
6 don't take them to be disputing that. So I think, in our view,  
7 this falls exactly within -- exactly what *Pitch* said for  
8 judicial proceedings for all of those factors. You know, Judge  
9 Pryor ticks through, obviously, the Supreme Court precedent on  
10 this in terms of *Feldman* and applying that standard that Your  
11 Honor just articulated.

12 And then -- so I think the act-related proceedings  
13 are pretty clearly judicial. That only leaves the Judicial  
14 Council order that we think is moot.

15 THE COURT: Just counting heads, if you go to  
16 *Chandler*, there were at least five justices that did not agree  
17 with Justice Harlan's concurrence that the Judicial Council  
18 exercised judicial functions. Your position is that that was  
19 not part of the holding?

20 MR. EHRLICH: Well, yeah. I think Your Honor is  
21 referring to Footnote 7 of *Chandler* where they, sort of, glaze  
22 over this. I think, first, we would say that's dicta. I would  
23 say -- I believe it was four justices in the majority. But the  
24 three justices, both Justice Harlan and the two dissenting  
25 justices, the only three to directly address and analyze this

1 question, all found that it was a judicial action. So I think  
2 that pretty clearly says that.

3 But then you get cases like the Fifth Circuit *McBryde*  
4 decision, which was analyzing a 332 order and said, while a  
5 Judicial Council may act administratively sometimes, it acts as  
6 a court when it reassigns cases. This was square in the Fifth  
7 Circuit decision. It was cited in *Pitch*, again, for these  
8 act-related things as well.

9 So I think all of those things combined paint a  
10 pretty clear picture that this is judicial, and I think Justice  
11 Harlan, obviously, goes most in-depth on this, and I think he  
12 has a great opinion. He lays out, obviously, reassigning cases  
13 or stopping the flow of cases is, as he says, an integral  
14 aspect of the cases from beginning to end of the case, just as  
15 if Your Honor transferred a case to another court for venue or  
16 other reasons.

17 So in that sense, he says it's similar to mandamus  
18 and similar to other orders, like setting a time for trial. So  
19 I think in that sense, we would say it's pretty clearly  
20 judicial on both fronts.

21 And I think, just to put a fine point on it, I think  
22 we reference this in our brief from the *Hohn* case. But to hold  
23 otherwise, to say that they're administrative actions, would  
24 mean that nonjudicial actors can review them, which would  
25 raise, one, serious constitutional questions that should be

1 avoided, as Justice Kennedy says in *Hohn*; but it would also  
2 defeat the entire purpose of the statutory scheme that Congress  
3 enacted going back to 1939.

4 They specifically enacted this to take it away from  
5 the political branches, to have a completely in-house mechanism  
6 for policing the efficient and effective administration of  
7 justice under 332 and for acts in 1980. They wanted that  
8 in-house in the judiciary. So setting aside the grave  
9 constitutional questions --

10 THE COURT: Yet, they stopped short of creating a  
11 court, in effect.

12 MR. EHRLICH: They did stop short of creating a  
13 separate court, but I think, as the D.C. Circuit said in  
14 *McBryde*, there's functionally not really a difference between  
15 that and the JC&D committee review that they ended up settling  
16 on that came through the House bill.

17 It's the same idea, which is that -- I mean, even in  
18 the court aspect, it would be Article III judges deciding. I  
19 think it was the same aspect. As *McBryde* says, that was  
20 probably more cosmetic than anything.

21 So either way, they wanted this in-house in the  
22 judiciary; and to hold that it's administrative and perhaps  
23 people in the executive branch could review it, I think, would,  
24 again, raise constitutional questions and completely defeat the  
25 purpose.

1 I think the second piece of this, Your Honor, is,  
2 obviously, once you find that they're judicial, I think it's  
3 very clear that that has to go to a court with appellate  
4 jurisdiction, not original jurisdiction like this court.  
5 That's why Judge McBryde went straight to the Supreme Court,  
6 and that's why the three justices who addressed the question  
7 said, hey, we have jurisdiction to deal with this. That was  
8 the point of figuring out whether it was judicial.

9 And that's -- the Fifth Circuit and *McBryde*, again,  
10 corroborates this where they had -- they said they had no  
11 jurisdiction to review Judicial Council orders of their own  
12 circuit. And, obviously, it came up through the district  
13 court, so they were able to review it. But, obviously, no  
14 district judges are involved here.

15 So I think it's pretty clear, once you do judicial,  
16 this court has no appellate jurisdiction. You have only  
17 original jurisdiction and, therefore, can't hear the case.

18 So I think with that, Your Honor -- I think those are  
19 mainly our threshold issues that Your Honor had ordered. We  
20 have another one that we have in our briefs -- excuse me --  
21 about these principles of comity and exhaustion which plaintiff  
22 never responded to, and I think, therefore, has, essentially,  
23 conceded.

24 But we make the point that -- in *Hastings I* about how  
25 they talk -- they say, you know, you're going through the act

1 process; let that process play out. It has to go through these  
2 layers upon layers of review. And to enjoin it in the middle  
3 of the process would cause great harm.

4 And so I think, obviously, relying on that and the  
5 other arguments we make in that section and we, sort of,  
6 analogize it to, for example, the First-Filed Rule where two  
7 courts should not simultaneously be deciding the same question.

8 THE COURT: Right. But now that it's at the judicial  
9 conference level, aren't those sort of comity and prudential  
10 arguments weaker because there's nothing at the Judicial  
11 Council level to enjoin at this point?

12 MR. EHRLICH: I wouldn't say weaker. I would say  
13 they've shifted. They're not -- maybe I would say weaker.  
14 They're not as strong as they were when we were at the  
15 beginning of the process when this started in June.

16 But I think the principles still hold, and I think in  
17 *Hastings I* they specifically talked about the JC&D committee  
18 review and said they can interpose constitutional challenges at  
19 the conference level. So I think that -- of course, I mean, as  
20 we point out in our reply brief, the judicial conference is not  
21 a party here. So that's the wrong defendant if you were trying  
22 to enjoin something.

23 But I think more to the point, the judicial  
24 conference could side with Judge Newman and reverse the  
25 Judicial Council, in which case your injunction would be,



1 essentially, advisory opinion.

2 I think for those reasons, Your Honor could go that  
3 route if you want to. I think, in our view, it's a prudential  
4 doctrine, and so that would be up to Your Honor. But I think  
5 if you cleared all of those hurdles, I think you would end up  
6 at the two claims that we move to dismiss --

7 THE COURT: Just one last point on original  
8 jurisdiction.

9 MR. EHRLICH: Sure.

10 THE COURT: I take it your position is that we would  
11 still have jurisdiction over facial challenges consistent with  
12 *McBryde*?

13 MR. EHRLICH: No. I don't -- that's not right, Your  
14 Honor, and I'll tell you why. It's because the -- because of  
15 the judicial bar, obviously, everything other than -- only  
16 facial challenges make it through. When those courts are  
17 deciding it, when the Judicial Council and the JC&D committee  
18 are reviewing them, they're performing judicial acts.

19 If we get to the end of that process and facial  
20 challenges need to be brought, the place to bring them is in a  
21 court with appellate jurisdiction over those judicial entities,  
22 which still would not be here. So for --

23 THE COURT: Isn't that inconsistent with *Feldman*,  
24 where the Supreme Court said that, to the extent there are  
25 claims, general challenges to the constitutionality of the bar

1 admission rule that was at issue in that case, they could still  
2 be brought in the district court?

3 MR. EHRLICH: I mean, *Feldman* is a little bit  
4 different because it was coming from the equivalent of a state,  
5 and here we're dealing with parallel federal judges. I think  
6 the things that Your Honor is seeing from *McBryde*, the  
7 statements on this are really doing -- there's really three  
8 different aspects of this.

9 One is whether facial challenges can be brought  
10 outside of the act; that is, whether the bar bars facial  
11 challenges. *McBryde* says no, and we're not disputing that.  
12 The second is where they should be brought. And our view is  
13 they have to be brought in a court of appellate jurisdiction.  
14 And that's true under the act, the same as it's true in 332.  
15 And that's, again, why Judge McBryde --

16 THE COURT: But the challenge is not to any action of  
17 the judicial conference or to higher-level Article III judges.  
18 The challenge, if it's a true facial challenge, is to Congress.  
19 And why wouldn't a district court have original jurisdiction  
20 over that challenge, putting aside *McBryde*?

21 MR. EHRLICH: Yes. I think the answer is the reasons  
22 that we've been discussing, which is the actions by -- first of  
23 all, the actions that we're talking about, the orders and  
24 determinations would fall under the bar. So, obviously, we  
25 think that's all there is here.

1 But setting that aside, if there's a true facial  
2 challenge, we think that's a judicial action by the Judicial  
3 Council, by the judicial conference who can decide these  
4 questions. And so a review of those --

5 THE COURT: But if it's a true facial challenge, it's  
6 a challenge to the statute in all of its applications, and  
7 that's a challenge to congressional action, and it has nothing  
8 to do with a lower-level court second-guessing the decisions or  
9 application of a law by a higher-level court.

10 MR. EHRLICH: But I think it does because, again,  
11 those courts can address that. And so, you know, if you, for  
12 example, reached a contrary conclusion to the 11 circuit judges  
13 on the Judicial Council on a facial constitutional challenge,  
14 you have -- I don't really even know. You have dueling, sort  
15 of, determinations.

16 So I think the way we would envision this, there's  
17 sort of two tracks. So on the 332 track, it would be a  
18 Judicial Council determination, which you would take directly  
19 to an appellate court like Judge Chandler did. For the act, I  
20 think you would -- because of the bar, you would go up through  
21 the act process, raising your constitutional challenges, and  
22 then go to an appellate court if you're dissatisfied with that.  
23 I think that's how these two tracks work out in our view.

24 But, again, I think -- I'm happy to move beyond  
25 the -- unless Your Honor has more questions.

1 But moving beyond, even if you surmounted all of  
2 these hurdles -- and I'm happy to take the merits in whatever  
3 order Your Honor would like, but I'll start with the -- what  
4 has been termed the constructive impeachment claim.

5 Again, just to reiterate, we don't think there's a  
6 facial challenge, but assuming for the moment that there is, I  
7 think, again, *McBryde* forecloses this --

8 THE COURT: We're on Count 1. Let's take the counts  
9 that plaintiff submits are facial --

10 MR. EHRLICH: Okay.

11 THE COURT: -- which begin, I believe, with Count 1.

12 MR. EHRLICH: Right.

13 THE COURT: Which is, essentially, no executive or  
14 judicial agency or body may exercise in form or in substance  
15 the impeachment power reserved by the Constitution to the House  
16 and the Senate. That sounds like a facial challenge to me.

17 MR. EHRLICH: Well, again, I think, Your Honor -- I  
18 mean, we would quibble with that only because of the way it's  
19 pled. It talks about -- I'm looking specifically at  
20 paragraph 82, for example, defendants' orders and threats  
21 constitute an attempt to remove plaintiff from office  
22 unlawfully, and then it lists specific actions taken against  
23 Judge Newman. I mean, that, to us, looks like orders and  
24 determinations. Again, maybe inartful pleading, but things  
25 matter.

1 I think even if you reached it, I think, in our view,  
2 it wouldn't matter. I think *McBryde* pretty squarely forecloses  
3 this constructive impeachment argument. It says that things  
4 short of full disqualification and removal from office are  
5 allowed; interbranch discipline is allowed. As it says, the  
6 Constitution doesn't speak to discipline generally. It, in  
7 fact, allows criminal prosecutions.

8 So I think in that sense, we would say *McBryde*  
9 controls. I guess the only thing -- unless Your Honor has  
10 questions, the only other point I would make on this is if  
11 you're at this point in the analysis, it's by definition a  
12 facial challenge. So you would have to show that no set of  
13 circumstances exist where there could be discipline short of  
14 impeachment.

15 Obviously, *McBryde* says that that's not accurate;  
16 rejects that argument. But even if you wanted to say, okay,  
17 suspensions, just suspensions specifically, you'd have to say  
18 that there's no set of circumstances where a judge could be  
19 suspended. So a one-day suspension, a one-sitting suspension,  
20 I mean, all -- none of the courts to address this have taken it  
21 that far.

22 And so if you look at, for example, Judge Edwards in  
23 dissent in *Hastings I* talks about, he takes issue with 15  
24 years, and you have the district court in *McBryde* saying a  
25 one-year suspension doesn't approximate removal. And so,

1 because of the nature of a facial challenge, I don't think  
2 there's any way to overcome *McBryde*.

3 In addition to the bigger problem here, which is that  
4 suspensions of a judge just simply don't equate to removal, I  
5 think plaintiff's counsel in their briefs cite to the 1994  
6 commission report. It says in there, as long as judges hold  
7 office, receive their undiminished salary and then can exercise  
8 the judicial power once they're restored, there hasn't been a  
9 removal.

10 And when you look at the cases that *McBryde* --  
11 obviously, *McBryde*, we think, settles this. They cite, for  
12 example, the Ninth Circuit case, which was a criminal  
13 prosecution against the judge, and the judge made the same  
14 argument and said, hey, look if I'm imprisoned, I'm removed,  
15 and I can't exercise my judicial functions.

16 And the Ninth Circuit rejected that, in line, by the  
17 way, with what the Supreme Court did in *Burton* that it  
18 references in that Ninth Circuit decision, the *Claiborne*  
19 decision, where a senator -- this is at the Supreme Court --  
20 senator made the same argument, said I'm being criminally  
21 prosecuted, and that's going to be the equivalent of an  
22 expulsion from the Senate, which can only be done by two-thirds  
23 of the Senate.

24 And the Supreme Court said no, that doesn't affect  
25 your office. It's about your criminal imprisonment, and you

1 still have your office. Maybe you'll be expelled after that,  
2 but that's a different issue. I think Your Honor doesn't have  
3 to ever get there. I think you can just say *McBryde* handles  
4 this. I think -- more broadly, I think that's the reason this  
5 would fail.

6 THE COURT: Okay. Move to Count 5, which is the --  
7 at least one of the vagueness counts. Section 351(a) fails to  
8 provide adequate notice of what constitutes a mental disability  
9 and renders a judge unfit to perform duties. And Section  
10 355 -- 353(c) authorizes a special committee to conduct an  
11 investigation as extensive as it considers necessary, lacks  
12 minimum enforcement guidelines.

13 Now, those sound like challenges in all of their  
14 applications.

15 MR. EHRLICH: Yes. So I think we would agree with  
16 that, except for the reasons that we give in our brief at  
17 pages 22 to 23 and in our reply, page 10, Footnote 5, which is  
18 that under vagueness law, you have to first see whether it's  
19 vague as applied to the particular plaintiff. And once you're  
20 doing that, you're in the area that the act bars.

21 So I think this is -- I think we say in our brief,  
22 this is the closest they come to asserting a facial challenge.  
23 But because of the way that vagueness law would apply -- and we  
24 cite the *Hoffman Estates* case and some others -- it necessarily  
25 runs into the as-applied challenge bar.

1 THE COURT: How can you say that those provisions  
2 clearly apply to Judge Newman when the special committee did  
3 not reach a conclusion as to whether the, sort of, mental  
4 disability provision applied to her or not?

5 MR. EHRLICH: Well, I guess there's a couple things  
6 built in there, Your Honor. But I think the first thing I  
7 would say is we haven't briefed the merits of this because,  
8 obviously, we have these threshold issues.

9 We're happy to -- if anything made it through our  
10 motion to dismiss, we're happy to brief the merits of that.  
11 But I think we would -- I mean, this is what the -- so I'm a  
12 little bit loath to --

13 THE COURT: I understand.

14 MR. EHRLICH: -- sort of riff on that. I guess I  
15 would say here that this is what this was meant for. 351 lays  
16 out the reasons for actions under the act, and if a judge has  
17 lost their faculties, in a sense, so that they can't -- the  
18 things against Judge Newman are true, which as Your Honor  
19 points out, we haven't been able to get to the bottom of  
20 because she's refused to take the tests.

21 If that were true, I think we would say that clearly  
22 falls within -- that is a disability that is exactly within  
23 what Congress was envisioning.

24 THE COURT: We're at the pleading stage now. I have  
25 to take plaintiff's allegations as true, right?



1 MR. EHRLICH: Right. But I think -- again, we  
2 haven't briefed that on a 12(b)(6) ground. For -- the only  
3 ones we've briefed on the merits are the constructive  
4 impeachment and the due process because that's the only ones  
5 they raised in their preliminary injunction motion. We're  
6 happy to do that at the appropriate time. But, again, we don't  
7 think you would ever get there because of the jurisdictional  
8 issues.

9 So I think that that would bring us to the other  
10 claim that they briefed in their preliminary injunction motion,  
11 which is the due process claim, and then -- I don't think  
12 there's a ton to say on this, Your Honor. I mean, I don't want  
13 to completely reiterate our briefing.

14 But I would just -- just to level-set, I think  
15 everyone agrees that the due process is as-applied. That would  
16 be, I think, squarely under the bar. Obviously, we would then  
17 say there's no original jurisdiction, so there's that problem.

18 Then you have the problem for both this and  
19 constructive impeachment that we lay out in our brief, which is  
20 they've, essentially, conceded by not responding to any of our  
21 arguments. And we lay out all the case law on this at reply  
22 brief pages 11 to 12. So I think those are threshold issues.

23 But even if you got to the due process, again, this  
24 is squarely taken care of by *Hastings II*, which said the  
25 combination of investigative and adjudicative authority under

1 the act does not offend due process. I mean, I think that  
2 squarely takes care of that.

3 Just one last point on that, Your Honor. Just, even  
4 if that were all -- even if there were an issue with that,  
5 which *Hastings* says there's not, the point that *Hastings* makes,  
6 too, is that there's review by the JC&D committee and the  
7 judicial conference which is, obviously, not by judges of the  
8 circuit, which is drawn from judges around the country. So  
9 there's no risk of bias or actual bias in the proceedings.

10 So I think that, essentially, takes care of our  
11 entire motion. I don't know if Your Honor wants me to address  
12 the merits of the June 5th and the 332 authority or --

13 THE COURT: Let's hear from the plaintiffs [sic].  
14 Thank you.

15 MR. EHRLICH: Thank you, Your Honor.

16 THE COURT: The plaintiff, I should say. Mr. Dolin.

17 MR. DOLIN: Good morning, Your Honor.

18 THE COURT: Good morning. How are you?

19 MR. DOLIN: I'm doing well. Thank you. I will  
20 endeavor to proceed in the same order as my friend on the other  
21 side. So I'll begin with mootness.

22 THE COURT: Yes.

23 MR. DOLIN: First, I disagree that voluntary  
24 cessation doesn't apply to federal actors or government actors  
25 or federal judges. In fact, just last term -- maybe two terms

1 ago, the Supreme Court in the EPA case applied -- government  
2 argued that, because EPA vacated its clean power plant rule,  
3 the case is moot, and the Supreme Court declined to hold it  
4 moot saying that it is capable of repetition, yet evading  
5 review, despite the fact that the EPA voluntarily chose to --

6 THE COURT: Let's assume I agree with you. What  
7 evidence in the record is there that the Judicial Council  
8 vacated the June 5th order in order to manipulate the judicial  
9 process somehow? I mean, didn't the vacatur occur the day  
10 after she cleared her backlog?

11 What other evidence is there in the record other than  
12 that as to why that order was vacated?

13 MR. DOLIN: First, I would point out, Your Honor,  
14 that the June 5th order itself was strategic. If you recall,  
15 initially, judgment was suspended by this unrecorded,  
16 unreported order of March 8th, and throughout -- between  
17 March 8th and June 5th, throughout that time, Chief Judge  
18 Moore, in her emails, which were then incorporated into orders  
19 by the special committee -- so there's not just informal  
20 emails; they became formal orders -- throughout said that  
21 Judge Newman is suspended pending investigation.

22 After we sued and pointed out that there's no such  
23 authority, only that June 5th order came into being, citing an  
24 entirely new provision. Then when Judge Newman fell below the  
25 federal circuit's own guidelines as to what constitutes

1 backlog, the June 5th order was not vacated. And only after we  
2 again pointed that out in our briefing to this Court, only  
3 then, ten days after we completed the briefing, was the order  
4 vacated.

5 Yes, it was vacated the day after. But, again, if  
6 you look at -- just small details, even in the order itself,  
7 the June 5th order has a disciplinary complaint number on it  
8 even though it says it's under 332. While we pointed out that  
9 that makes us question whether it was truly under 332, the  
10 November 9th order takes out that number.

11 So throughout this process, every time we would point  
12 out an error, the defendants would do something to undermine  
13 this Court's jurisdiction. So I think the entire history of it  
14 shows the November 9th order was strategically entered.

15 On top of that, to address opposing counsel's point  
16 that, in order to see whether it's capable of repetition and  
17 evading review, I take it that opposing counsel concedes that  
18 it's evading review because under D.C. Circuit law, anything  
19 that lasts for less than two years is presumptively evading  
20 review.

21 So the only issue is, is it capable of repetition,  
22 and opposing counsel says, well, injunction may not be  
23 appropriate because you don't know what Judge Newman will do,  
24 you don't know how the Judicial Council will react. And I have  
25 a couple of points to that. One --

1 THE COURT: First, she would have to show that  
2 there's a reasonable expectation that she would be subject to  
3 the same action again. She says it's likely that she would  
4 fall behind again and, therefore, be subject to similar action.  
5 But yet, she just cleared her backlog.

6 What evidence is there in the record that she would  
7 be likely to fall behind again? Isn't that within her own  
8 power to control?

9 MR. DOLIN: Well, so the -- Judge Newman's --  
10 contrary to defendants' assertions, Judge Newman's speed of  
11 production has not varied in years. And so we've put that  
12 evidence before the Judicial Council.

13 We've done an analysis to how fast was she writing  
14 opinions three years ago versus how fast was she writing  
15 opinions now. I know it's not in the record, but as her former  
16 clerk, I can tell you 15 years ago it was no faster. This is  
17 just how Judge Newman works.

18 So if that's -- that's enough to suspend her --

19 THE COURT: I mean, if she's concerned about  
20 maintaining or not increasing her backlog, couldn't she go to  
21 the Chief Judge and say, you know, can I take a 20 percent  
22 reduction and wouldn't that -- I suspect that the answer would  
23 be sure.

24 MR. DOLIN: Sure. And I want to make it clear. So  
25 the federal circuit has its own internal rules, which is in the

1 record -- Clerical Procedure 3, paragraph 5, I believe -- that  
2 says that if you have a certain number of cases that are overly  
3 old, four cases over six months old or two cases over a year  
4 old, you don't get to do the next sitting. Judge Newman  
5 doesn't object to this general rule that applies to all judges.  
6 So if she falls behind where she has these many cases, she  
7 would be skipping a sitting or two sittings, or however  
8 appropriate.

9 What she suspects will happen, given how she's been  
10 treated since February of 2023 through the present day, is that  
11 you -- and defendants, by the way, don't dispute that. In  
12 their briefing they said Judicial Council can do whatever it  
13 wants whenever it wants. They literally say that Judicial  
14 Council of the Federal Circuit can force Judge Newman to travel  
15 somewhere where the Court never sits and stay there even though  
16 no cases are ever heard there. That's not my speculation.  
17 That's in their briefing.

18 So it's not speculative that if Judge Newman gets  
19 back on the bench, Judicial Council will once again suspend her  
20 even if she doesn't fall behind as defined by some proceedings.

21 On top of that, I think, Your Honor, injunction is  
22 not, of course, the only remedy available to this Court. We've  
23 asked in our complaint for all other relief as the Court deems  
24 just and proper. For example, declaratory judgment; that  
25 treating Judge Newman differently from all other judges, having

1 her jump through different hoops than what are provided by  
2 clerical procedures, whatever those rules might be, is  
3 improper; whether or not injunction is appropriate. So I  
4 think --

5 THE COURT: That still requires a case or  
6 controversy.

7 MR. DOLIN: Correct. But I think, because it's  
8 highly unlikely that Judge Newman's speed will change -- it  
9 hasn't changed in decades -- and given the fact how she's been  
10 treated thus far, it is not speculative -- and, again, given  
11 defendants' own briefing -- it's not speculative that another  
12 round of sanctions will be imposed on Judge Newman, and I think  
13 this Court can take cognizance of that.

14 THE COURT: All right.

15 MR. DOLIN: On 357(c) -- unless Your Honor has any  
16 questions?

17 THE COURT: No.

18 MR. DOLIN: On the 357(c) bar, I think Your Honor  
19 correctly queried the defendants as to whether all statutory  
20 challenges are barred. I think defendants are simply  
21 incorrect.

22 In two cases with which defendant should be  
23 particularly familiar with, because there are cases in which  
24 Supreme Court took cases and reversed the federal circuit, are  
25 *Cuozzo* and *SAS Institute* -- *Cuozzo v. Lee* and *SAS Institute*.

1 THE COURT: I'm sorry. What's the first one?

2 MR. DOLIN: *Cuozzo*.

3 THE COURT: Spell that.

4 MR. DOLIN: C-u-o-z-z-o. That is at 579 U.S. 261.

5 And *SAS Institute v. Iancu*. And that's at 138 S.Ct. 1348.

6 THE COURT: Thank you.

7 MR. DOLIN: In those cases the court addressed a  
8 similar provision barring judicial review that appears at  
9 35 U.S.C. 314(d), which exclusively said that certain decisions  
10 of the PTO director are, quote, final and unappealable.

11 In *Cuozzo*, the Supreme Court said, yes, that  
12 absolutely means that Congress clearly meant to withdraw  
13 judicial review from certain decisions of the director; much  
14 like defendants argue Section 357(c) does here.

15 However, in both *Cuozzo* and *SAS Institute*, the Court  
16 says -- said whenever director does something that the statute  
17 authorizes -- so in that case it was whether director grants or  
18 doesn't grant certain re-examination petitions -- but it turns  
19 out, for example, in *SAS* the court said he cannot grant them in  
20 part. He can either grant them or not grant them. When he  
21 grants them in part, even though there's this bar in judicial  
22 review, the court says we can review these ultra vires actions,  
23 actions that are not authorized by the statute.

24 And those cases, of course, came after *McBryde*. And  
25 to the extent *McBryde* is inconsistent with those cases, of



1 course, the Supreme Court cases control.

2 THE COURT: I will look at those. The one that you  
3 emphasized most in your pleadings, however, is *Dart*. And *Dart*  
4 made clear that the agency's ultra vires actions must be clear  
5 based on the face of the statute.

6 And here, that would beg the question, what actions  
7 has the Judicial Council taken that are on the face of the act  
8 ultra vires?

9 MR. DOLIN: At the very least two. At the very  
10 least, suspending Judge Newman before -- so on March 8th --  
11 before completion of any proceedings, and, in fact, current  
12 suspension that she's serving on, it's unique. For example, in  
13 the *McBryde* case -- and it's referenced in the opinion  
14 itself -- Judge McBryde -- leaving aside the fact that he  
15 wasn't suspended in total; he was only told not to handle  
16 certain kinds of cases.

17 But leaving that aside, Judge McBryde had no sanction  
18 imposed upon him until the process ran through the JC&D  
19 committee. Judge John Adams from the Sixth Circuit, same  
20 situation. So this is unique and unprecedented that a judicial  
21 council suspended Judge Newman before any -- reaching any  
22 conclusion and before letting the appellate process run.

23 That, by the way, goes to defendants' comity and  
24 exhaustion argument. The defendants themselves did not pay any  
25 comity and exhaustion through the process.

1 THE COURT: Okay. Correct me if I'm wrong, the  
2 sanction here is based only on her alleged failure to cooperate  
3 with the investigation, which was in the past.

4 MR. DOLIN: Well, it's a failure to cooperate.  
5 There's still a question whether there's a reason to raise --  
6 it's an unreasonable failure to cooperate, as the rules say.  
7 But, again, so they've suspended her before the JC&D  
8 committee's opined on whether or not Judge Newman had a reason  
9 or not.

10 But, more importantly, is that the statute explicitly  
11 says that one of the sanctions available to the Judicial  
12 Council is temporary suspension, and in case that wasn't  
13 listed -- as temporary suspension for time certain. Defendants  
14 admit that it's possible that this will be a permanent  
15 suspension in their final brief; in their surreply they say  
16 it's quite possible that Judge Newman will never hear cases  
17 again because they don't intend to restore her.

18 They specifically say in the September 20th order  
19 that this is a renewable suspension, and they intend to renew  
20 it as they see fit. That is simply ultra vires. This is not  
21 what the statute authorizes. They authorize a suspension for a  
22 certain period. It has to be temporary, and it has to be for a  
23 time certain; not for a year and possibly another year and  
24 possibly another year. That is not what the statute  
25 authorizes.

1           The statute authorizes Judicial Council to do five  
2 things: private reprimand, public reprimand, asking for  
3 voluntary retirement, certifying Judge Newman as disabled, and  
4 temporary suspension. And, by the way --

5           THE COURT: But she could end the suspension tomorrow  
6 if she were to comply with their requests, correct?

7           MR. DOLIN: Actually, Your Honor, that's not clear.  
8 Because even if she were to comply, at no point -- and this is  
9 clear from the Judicial Council order. At no point did  
10 Judicial Council say that if the physician that we chose or you  
11 chose -- again, leaving aside who she choose the physician is,  
12 who they should be -- at no point do they say that if any  
13 physician or if all physicians certified Judge Newman as being  
14 capable to perform the work, that is the end of the matter.  
15 They simply said that's going to be an aid of their own  
16 decision whether or not Judge Newman is or not disabled.

17           In fact, in the June 5th order, the Court said we  
18 reserve the question of whether or not we have the power to  
19 suspend Judge Newman on suspicion of disability while the  
20 process is running. They said we don't have to reach it now  
21 because we're going to use the 332 provision. But they  
22 explicitly reserved it.

23           So if, for example, she gets certified, gets a clean  
24 bill of health, there's nothing to prevent -- again, under  
25 defendants' own view of the case, there's nothing that would

1 prevent defendants to say that we still have suspicions given  
2 what our staff reported to us that we still need to investigate  
3 some more. And so it doesn't actually -- it's not obvious that  
4 she could end her suspension.

5 But even if it were obvious, Your Honor, I think  
6 that's somewhat irrelevant because the act, assuming it is  
7 constitutional, does allow some punishment for recalcitrance.  
8 But it doesn't allow the Judicial Council to hold Judge Newman,  
9 essentially, in contempt.

10 There's a provision for contempt proceedings.  
11 Judicial Council has to come here and ask this Court to hold  
12 Judge Newman in contempt. They can do their own contempt  
13 proceedings under the guise of the disability provision.

14 And as to disability, the point that I wanted to  
15 make, that is one of the powers given to Judicial Council. But  
16 even there -- and I think it's worth noting -- if Judicial  
17 Council were to declare Judge Newman disabled, the statute  
18 doesn't actually say she stops hearing cases. It merely says  
19 that she becomes -- from most senior judge, she becomes most  
20 junior judge, and her seat at the present can appoint someone,  
21 basically a 13th member of the federal circuit and -- but Judge  
22 Newman retains her office, and nothing in the statute said that  
23 even as a disabled person she does not get to hear cases. So I  
24 think that's worth noting. It cannot be that noncooperation  
25 gets her more penalty than actual disability.

1           The *Cuozzo* and *SAS Institute* and *Dart* trilogy do show  
2           that the Court needs to at least examine whether or not the  
3           actions Judicial Council took are within the authorizing  
4           statute. It cannot be that, for example, Judicial Council  
5           orders Judge Newman to pay a million dollars fine, say see  
6           disability act, and then say that's entirely insulated from  
7           review. That's just not one of the things that's open to them.

8           THE COURT: Okay. Move on to the original  
9           jurisdiction.

10          MR. DOLIN: On to the original jurisdiction. Judge  
11          Newman doesn't dispute that the actions that Judicial Council  
12          took are judicial in nature. But actions that are judicial in  
13          nature did not mean that the council was exercising judicial  
14          power of the United States. Those are two separate issues.

15          And, for example, in extradition proceedings, judges  
16          will hear extradition cases, exercise judicial functions that  
17          are judicial in nature. They determine present rights, they  
18          did apply facts to the law, but as the courts have held for a  
19          long time -- and Second Circuit, most explicitly in a case  
20          called *LoDuca*, that is not a -- these are cases held by -- held  
21          by judges but not by courts. There's a distinction.

22          The fact that somebody is confirmed to an Article III  
23          position doesn't mean that in every action that that person  
24          takes, he's exercising the function of a court. So Judicial  
25          Council, while staffed by Article III judges, is not the court.