It's not the federal circuit. And so defendants' position --

THE COURT: So your view is that the distinction between judicial and administrative functions is formal -- is a formal one, not a practical one?

MR. DOLIN: Correct. It's a formal -- in fact, in *Mistretta*, Supreme Court case, the Court talked about Judicial Council, judicial conference, administrative office of the court, sentencing commission as all-in-one package. *Mistretta* was a challenge to whether federal judges can sit on a sentencing commission. The Court said judges can do other things such as -- and list it, Judicial Council conference, committees, AO, et cetera.

But doesn't mean that -- for example, just yesterday I saw an announcement that another Article III judge was appointed to head the AO. That doesn't mean that in his function as the head of the AO, he is a court. He's a judge, but he's not a court.

And so Judicial Council of the federal circuit is not United States Court of Appeals for the federal circuit. And, therefore, the challenges to the acts of Judicial Council lie here and not in appellate jurisdiction. In essence, defendants want to relitigate *Marbury* because there, essentially, they want Judge Newman to seek in the first instance mandamus relief from the Supreme Court, which the Supreme Court said it's not available in the probably most well-known case, which is why

Judge Newman is here.

I think it's just wrong to assert that this Court doesn't have original jurisdiction.

As to defendants' point that Congress meant to keep the process in-house --

THE COURT: I'm considering this for the first time. Didn't *Chandler* involve actions by the Judicial Council? And I know that there was a split, and Justice Harlan's concurrence in Footnote 7 suggested that the judicial conference or the Judicial Council of whatever circuit was involved in that case was acting as a judicial body, notwithstanding the fact that it's, obviously, not an Article III court.

MR. DOLIN: Again, I think --

THE COURT: I think your colleagues are right that that's dicta. I don't think it's formally controlling, but certainly it's out there.

MR. DOLIN: I think to answer that, first, I think you're right, it's dicta, it's not formally controlling and the court -- the Court never reached this question. This was in Justice Harlan -- with all respect to Justice Harlan, he was just speaking for himself.

Second, the Court actually did not say that they have mandamus jurisdiction. They simply assumed; saying, assuming that this is all correct, would I need to go this far. Because they simply said that Judge Chandler agreed to whatever

sanctions were imposed on him. We don't need to go to these constitutional quagmire. We simply say that, look, he has nothing to complain about. He agreed to whatever that he's now complaining about.

I don't think the Supreme Court actually said that this is a proper vehicle. They simply assumed it without deciding.

Finally, I guess -- well, two points. I think that defendants are not incorrect that Congress meant judiciary to police itself and to keep it in-house, but this Court is part of the judiciary. We're not taking it out of judiciary's house bringing this complaint here. Keeping it in-house doesn't actually mean just keeping it with the federal circuit.

And defendants are simply incorrect to say that this Court can't even hear facial challenges because it has to go through Supreme Court. In fact, *McBryde* itself, one of the issues that survived in *McBryde* and was so clear, was not even appealed to the D.C. Circuit, was a facial challenge on a prohibition to disseminate information once the process was complete.

And it was decided by the District Court for the District of Columbia, and the Department of Justice chose not to appeal that portion of the decision. So *McBryde* itself is pretty clear evidence that this Court can, in fact, hear facial challenges to the statute.

Unless the Court --

THE COURT: That's a good dovetail into the last area. You say that Counts 1 and 5 through 9 are facial.

MR. DOLIN: Yes.

THE COURT: And so by process of elimination, you acknowledge that the others are as-applied?

MR. DOLIN: Yes. In fact, some of them actually have a title as-applied.

THE COURT: Are titled -- okay. Just to get that clear.

Okay. Proceed.

MR. DOLIN: So unless Your Honor has further question on original jurisdiction, I would like to move to constructive impeachment.

Just to -- as an outset, I want to point out and disagree with my learned colleague on the other side about paragraph 82. Paragraph 82 was cited to Your Honor, saying that -- it mentions the various orders and threats of the Judicial Council; and in defendants' interpretation, that means this was as an-applied challenge.

But paragraph 82 simply goes to standing. Judge Newman is just not some freelancing judge saying, look, I read the statute and I don't like it just to show that she was injured by this statute. And so -- but, of course, Count 1 reincorporates everything that came beforehand.

And in paragraph 81, we specifically challenge the ability or congressional authorization of judicial councils to suspend judges.

THE COURT: For however long? A one-day suspension would violate the impeachment clause?

MR. DOLIN: Well, certainly long-term suspensions. So to the point that it has to be unconstitutional in every application.

Certainly, to the extent -- again, that might require Your Honor to construe what the statute means. But, again, it's still a facial challenge. It doesn't involve what Judge Newman went through. That goes to the ultra vires claim.

But, certainly, to the extent that this statute authorizes Judicial Council suspend a judge for 100 years, for 20 years, we're not -- to make it very clear, we're not saying that, look, a suspension for a year was generally okay, but because Judge Newman is 96 and given the actuarial table, it's not okay with respect to her.

We're saying that at some point suspension becomes long enough. And *McBryde* put in Footnote 5, acknowledged that at some point they become long enough to become effective removal.

THE COURT: So you've argued that -- you've hinted in your briefs and you've argued today that Judge Newman's suspension is, in fact, indefinite; and, therefore, at least by

implication, an unconstitutional long-term suspension. I don't see that alleged in the complaint. Is that in the complaint?

MR. DOLIN: It is not in our complaint because the complaint was filed before, of course, the September 20th order.

So like I said earlier at the beginning of my presentation, as we would file a paper with the Court, Judicial Council would take some sort of contrary action. So defendants are at least right in one regard; this is a fast-paced proceeding, and this is difficult to litigate while there's other things going on on the other track.

But nevertheless -- of course, we are happy to amend the complaint if need be. Defendants have not responded yet.

But the Court, certainly, can take cognizance, can take judicial notice of the fact -- the order is publicly available on the federal circuit website -- that Judge Newman is, in fact, suspended for a year with option of renewal. And that is a long-term suspension.

Again, defendants themselves concede in their briefing -- in their final brief that Judge Newman is likely never to hear any cases again, and I think that ought to be enough.

On to Count 5. So the -- I found defendants' argument somewhat odd that, even though they concede it's a facial challenge, they still say it has to be processed as if

it's an as-applied challenge. I, frankly, don't fully understand it, but let me try to parse it as best I can.

THE COURT: Well, let's assume that it's a facial challenge. Why should it not be dismissed?

MR. DOLIN: So the statute says disabled. But it in no way, sort of, defines it. So, for example, the Social Security Act has a definition of what disability is. The Americans with Disabilities Act has a definition of what disability is. But here --

THE COURT: Isn't it framed in terms of whether the disability prevents a federal judge from fulfilling the duties of their office? And don't federal judges know better than anybody else what the duties of their office are?

MR. DOLIN: I would hope so. But that's not how the statute is framed or -- maybe that was the intent of Congress, but that's not what the statute says. I think the history of application of that statute illustrates that.

So step back from Judge Newman's own case and take a look at Judge Adams' case from the Sixth Circuit. Judge Adams was accused of being disabled and ordered to go through various psychiatric examinations because -- again, this is just in papers -- because his colleagues thought that he was overly prickly and issued orders that reflected poorly on the administration of justice.

That may or may not be true, but that hardly sounds

as a disability. Yet, the Sixth Circuit Judicial Council was able to cite it as disability.

Look at Judge Newman. Judge Newman was one of the -- leaving aside from the fact that throughout these proceedings, the Judicial Council kept changing and kept adding, kept subtracting certain allegations. The allegations that were -- one of the, for example, allegations that was cited against Judge Newman showing that she's disabled was that she drafted opinions that nobody on the panel would join.

And, respectfully, I -- with all respect to Judicial Council of the Federal Circuit, I don't think that's evidence of disability. That's evidence of somebody being an idiosyncratic -- maybe even an incorrect -- thinker but not somebody who is disabled. It's not as if in the case she was writing a habeas opinion. That perhaps could be evidence of disability.

So it's one of those situations where I think Congress may have had good intentions, but the way the statute is drafted, it gives this unlimited power to Judicial Council to call anything they want a disability, and they have.

Of course, I think, as Your Honor correctly pointed out, Judicial Council itself cannot say that Judge Newman is disabled. Now, they, of course, say that's because Judge Newman is recalcitrant and refuses to submit to any sort of tests. But, of course, they don't say if she does submit to

tests, they would end the proceedings.

I think it goes to show that it is an entirely amorphous standard. They can call disability anything they want. In fact -- it's not on the record, but in one of the emails to Judge Newman, one of her colleagues said that one of the problems he has with her is that he no longer is -- he no longer thinks that her dissents really make an important point. That's a just a very odd way to think of disability.

So I think that kind of -- that covers most, I think, of what Your Honor laid out.

THE COURT: Okay.

MR. DOLIN: If the Court wishes, I can also talk about our preliminary injunction motion.

THE COURT: I think we've covered the merits. You can touch on the other PI, if you like.

MR. DOLIN: I just want to touch very, very quickly on kind of the balance of harms. First, I think balance of harm tips to Judge Newman. If mere suspicion and even a strong one of disability were enough, the statute would, in fact, authorize suspensions. But it doesn't. In fact, as I mentioned, even actual disability doesn't give Judicial Council power to permanently suspend judges.

So as a result, defendants have zero interest in keeping Judge Newman suspended, especially while JC&D process is still pending. And that's evidenced by the fact that,

again, as I mentioned, that in all their cases no consequences were imposed while review committee process was ongoing.

While harm to Judge Newman is irreparable and ongoing and while I agree that she doesn't have any right to sit on any particular cases, there are -- and that also goes to ultra vires -- there are, for example, pending en banc proceedings where the statute explicitly says that en banc courts shall consist of all active judges, and Judge Newman is an active judge. So she has a right to sit on that court. And yet, her colleagues have prevented her from doing so.

So while she may not have the rights on any particular panel, but, certainly, has a right to sit on an en banc court, I think balance of harm tips towards her.

Finally, she did not unduly delay seeking injunctive relief. This is what defendants allege. She tried to work in good faith with her colleagues to try to resolve it, to try to see what is justification for the March 8th order. And finally, as soon as they entered this new June 5th order, then she sought injunctive relief.

THE COURT: So putting aside Judge Newman, you would agree, though, that if there are credible allegations of disability lodged against any judge that there's a public interest in conducting an expedited, efficient investigation and perhaps, if the allegations are credible enough, keeping that judge from sitting on cases in the public interest pending

the results of that investigation?

If you were a litigant, would you want that judge on your case?

MR. DOLIN: I probably would not want a disabled judge on my case. However, I think, Your Honor, there are procedures to do that. If somebody is disabled, you know, that can be certified to Congress if the judge would not voluntarily retire, and Congress can proceed with impeachment.

And I understand that's a long and cumbersome process, but I think that's a feature, not a bug. Because -- precisely because -- I take your point, if a judge starts exhibiting symptoms of schizophrenia or dementia or things like that, I get that.

But given how amorphous disability can be under the statute, I'm not sure which way the public interest tips when colleagues can simply say, well, we suspect you're disabled and so we're going to keep you off the bench until you do a bunch of things.

I take your point. But I think Judge Newman has been writing opinions. There's no evidence, for example, for that so-called backlog that any of her opinions are somehow bizarre. Supreme Court is currently considering a case where she was one of two judges in dissent, a veterans case. And although it's a fool's errand to predict what the Court will do, but the commentator said it's -- the federal circuit is likely to be

reversed and Judge Newman's opinion is likely to be vindicated. That was written a year ago.

On the facts of this case, there's no allegations that Judge Newman is so disabled as not to be able to hear cases and fairly adjudicate them.

THE COURT: Thank you.

MR. DOLIN: Thank you.

THE COURT: All right. Mr. Ehrlich, brief last word.

MR. EHRLICH: Thank you, Your Honor. I just want to, as you said, be brief and just hit a few highlights here. So I'll start with mootness. I'll start with something that my colleague brought up, which is we exactly foreshadowed this, that the suspension may be vacated when she clears her backlog and not before that.

And I can point you to our brief at page -- if I can read my own writing -- 37, Note 20, and our reply brief at page 23, Note 13, where we explain the reason that we wouldn't vacate the suspension before that was because -- and the June 5th order of the Judicial Council specifically explains, it would exacerbate the problem because she's now getting new cases and can't work through her old cases. We exactly foreshadowed that. This is not a litigation tactic. She cleared her backlog, and the Judicial Council vacated the suspension.

I think my friend on the other side has talked a lot

about the case caption. The reason the June 5th order was on the disability caption is because, as the June 5th order lays out, it arose in the context of the disability proceedings. She requested that. As it says in the June 5th order, she requested a reconsideration for a suspension. As it says in the June 5th order, that was then referred to the Judicial Council through that process. That's why the caption is on that.

That's why in the November 9th there's no caption. It's just from the Judicial Council. It was a sua sponte vacatur. So there's nothing fishy going on here.

To the point -- I think it's a minor point about applying the government actors -- the *Chang* case that I noted to you --

THE COURT: I'm sorry, which one?

MR. EHRLICH: On the voluntary cessation applying to government actors, the *Chang* case that I had cited to you by Judge Walton was just last month, which is, obviously, post *West Virginia v. EPA*, and he also cast serious doubts on that. I don't think we need to win on that. We didn't do it for litigation purposes.

On capable of repetition, I think we don't concede that, obviously. We have some arguments in our brief on why that doesn't apply, including that it's not evading review. If she had gone to, in our view, the proper court to review this,

she could have obtained review before it got mooted. So we don't concede that.

And then on the reasonable expectation, just a couple things, Your Honor. We absolutely never --

THE COURT: I'm sorry. What was that court?

MR. EHRLICH: Well, I think you would have to go to a court with appellate jurisdiction.

THE COURT: So the Supreme Court in this case?

MR. EHRLICH: Yes. I would say Your Honor doesn't have to decide which court that is or what the jurisdiction would be. But I will -- yes, Judge Chandler went to the Supreme Court above the Judicial Council, and they could try that here.

That's as -- we cite the *Ralls* case for this. They say if you had gone directly to the place you should have gone, that wouldn't be evading review. So we would apply that here. But, again, on the --

THE COURT: And the Supreme Court would have mandatory jurisdiction over that case?

MR. EHRLICH: Again, I don't -- Your Honor doesn't have to decide that. All you have to decide is that you don't have original jurisdiction. I don't think it would be mandatory. I think -- I don't want to craft their petition for them. Again, that's not for Your Honor. I think they could make a case, and Judge Chandler, obviously, made his case and

got three justices to go along with him.

On the reasonable expectation for mootness, just to be absolutely clear, we never said that she will never hear cases again. We absolutely never said that. We said that she currently is subject to a separate suspension.

And so even if you enjoin the June 5th order, for a million reasons we say you shouldn't do that, but even if you did, she wouldn't start hearing cases anymore anyway. She wouldn't immediately start sitting. She has a separate suspension.

So that's where we say, obviously, while that suspension is in place, she's not going to be hearing cases. She won't get a backlog and won't be suspended.

And then just to -- I think I touched on this before, but the last point on reasonable expectation is we don't know what the Judicial Council would do if she started sitting -- if she decided to take the test and the Judicial Council decided to reinstate her and she started hearing cases again, it's entirely possible that Judicial Council would set up some sort of system so that she doesn't get a backlog again

THE COURT: But that's all contingent on her taking actions that she challenged in this court that she believes are not only unconstitutional but personally invasive and onerous, et cetera.

MR. EHRLICH: Well, I think there's a couple things

built in there. To the extent -- this is going to my point that there's a separate suspension going on because she's not taking the test, then yes, that is tied to her action. But I'm saying I think, even if she started hearing cases, even if she acceded, even if she started getting cases tomorrow, it's entirely speculative what the Judicial Council would do and how they would handle that.

They might try to handle that as they're allowed to on the front end and sort of maybe do -- you know, piecemeal a sitting. I don't know. I'm completely speculating. But that's, I think, the point, which is that it's pure speculation.

There's nothing to say that an exact same suspension -- certainly not on the same backlog that would arise under the June 5th order, but it would have to be a different backlog, and the Judicial Council would have to take a new action. I don't think -- obviously, we think that's not a reasonable expectation.

Then moving to the 357 bar, I think there was a lot of discussion there. One thing I do want to point out, I think, when you asked for the ultra vires action, I think my friend pointed to the March 8th. The March 8th and the things that they take issue with that was on the Council's 332 authority, not under the act. And we described this.

The Judicial Council -- the 11 circuit judges

unanimously of the Judicial Council described this in the June 5th order and said that was based on her backlog and the concerns have not abated. In fact, they've increased.

So in terms of ultra vires action, they try to push the March 8th order under the act, but you have the 11 circuit judges of the Judicial Council saying that's our 332 authority. We used it on March 8th, and we're using it again on June 5th.

I mean, it's a little bit odd only because the March 8th order is, I would say, doubly irrelevant. It was superseded by the June 5th, which was a de novo determination. The Judicial Council looked fresh on Judge Newman's request and said, backlog is still there, it's not good, you're not making progress. We have another suspension. And then, obviously, the November 9th order vacated that.

The March 8th has absolutely no bearing here. And, of course, Your Honor doesn't have to reach anything about March 8th.

Just moving to original jurisdiction, Your Honor --

THE COURT: Before you get there, address briefly the *Cuozzo* and *SAS* cases which counsel suggested at least do not require that the agency's action violate the statute on its face in order to be ultra vires.

MR. EHRLICH: Yeah. So I guess I don't have a great response because in the two briefs that they submitted of extreme length, they never once raised these cases.

So I would think at that point it's waived, and if Your Honor would like us to submit something extra on that, I think we're happy to, but I don't think that's necessary. Again, they didn't raise this before.

I think *McBryde* just squarely deals with that. I don't have those cases offhand.

THE COURT: We'll take a look at them, and if we want supplemental, we'll --

MR. EHRLICH: Okay. Great. The last thing I would say on that is *McBryde* did the analysis. They did the analysis of the statutory bar and said this -- we need clear evidence that they're trying to bar constitutional claims. We see the clear evidence for as-applied, but facial or not to orders and determinations.

So I don't think what I heard my friend say abrogates that type of analysis, which is just looking at the statute and interpreting it as *McBryde* did. So I didn't hear anything that would cast doubt on the analysis that *McBryde* did. But as Your Honor said, we're happy to submit something on that.

On the original jurisdiction point, I didn't hear any answer to *Pitch* and all the cases we cited. I think I heard them concede that it's judicial. I think there's some confusion. Maybe we're talking past each other in judicial versus administrative.

We don't dispute that there's some actions that the

Judicial Council takes that are administrative. *McBryde* --

THE COURT: As I heard the argument is that this Court does, in fact, have jurisdiction to review orders of bodies even if they are comprised of judges and undertake functionally judicial actions if that body is not an Article III court. So it is a formal distinction between judicial and administrative as opposed to a functional distinction.

MR. EHRLICH: And I don't think that's correct. I mean, we concede that you can do that if there are administrative actions, but once you concede that they're judicial, once you recognize that they're judicial actions in the way that we had talked about before and the way that *Prentis* and *Pitch* and *Feldman* talk about, you're automatically in a judicial action that has to go to an appellate court.

THE COURT: But *Pitch* and *Feldman*, at least, dealt with courts, higher courts. *Chandler* dealt with the judicial conference, if I'm not mistaken.

What's the authority for your position that the distinction is functional and not formal?

MR. EHRLICH: So I think we had agreed on that. Because in their brief they say it's not the nature of the body as a whole, but it's the nature of the proceeding, and we cite this in our reply.

THE COURT: I didn't hear that in counsel's argument.

So maybe there's an inconsistency between what they briefed and what they argued today.

MR. EHRLICH: Right. I think what we say in our brief, which is the way we interpreted their argument before, which was there are some things -- and *McBryde* in the Fifth Circuit -- sorry, the Fifth Circuit in their *McBryde* case says this, which is there's some things that courts do that are administrative, but when it reassigns cases, it acts as a court. And in the Fifth Circuit, they specifically said we can't review the orders of our Judicial Council because those are judicial actions. They specifically said that in *McBryde*.

The reason it ended up in review is because they had a district judge having to implement things and use their discretion to implement the order, and so they had jurisdiction over the district judge. So that's the only scenario where that's come up where they thought they could review judicial actions.

Certainly, Justice Harlan and the two dissenters in *Chandler* didn't say, yes, it's judicial, but we still don't have appellate jurisdiction because it's -- I don't really know what the theory is anymore. It's both judicial and administrative or something. But once it was judicial -- once it was a judicial action in the way we've been talking about, it has to go to a court with appellate jurisdiction.

I think that's what happened in *Chandler* and as the

Fifth Circuit in *McBryde* said, as *Pitch* cited the Fifth Circuit *McBryde*. So I think I would just quibble with whatever analysis that was.

Just the last point on this, Your Honor, as we talk about in our brief, the statute sets out certain things that it thinks are administrative. Obviously, there's the Administrative Office of United States Courts which has specific things, and then there's things they can delegate to a circuit executive that it calls administrative. It's things like space management and security and IT. So, I mean, I think the fact that they've conceded that it's judicial gets you all the way there at this point.

And then just one point on *McBryde*. *McBryde*, as we say in our brief, didn't squarely address this question, didn't decide this jurisdictional issue, and so we cite the *Portland Cement* case in our brief, but that is not a precedent that Your Honor needs to abide by because they didn't directly address the question.

On the constructive impeachment issue, just two quick points. I think we would say it's not -- it's not a forever suspension. It's a one-year renewable suspension depending on what happens with Judge Newman. And the Judicial Council can reconsider every year whether to take further action or not. So it's absolutely not a forever suspension.

Again, just to be absolutely clear, we never said

that she'll never sit on cases again. That has never been our position.

THE COURT: To be fair, it is a forever suspension or it's an indefinite suspension unless she complies with actions that she feels are illegal.

MR. EHRLICH: Well, I don't -- I don't think it's indefinite. It's for one year. And then the Judicial Council --

THE COURT: Or what -- the sooner of one year or compliance?

MR. EHRLICH: Right. And when she -- if she complied, obviously, that would be within the Judicial Council's discretion. Certainly, if she complied, it wouldn't be renewable. I think that's clear from the face of the judicial order -- Judicial Council's order. It's certainly not. I think for the reasons that I discussed before, even if it --

THE COURT: Just to be clear, if a year from now, or however many months from now is left, she still has not complied, the Council would have to upset the current status quo somehow in order for the suspension to lapse.

MR. EHRLICH: The Judicial Council would have to take some action.

THE COURT: Yes.

MR. EHRLICH: Yes. Obviously, in their discretion on

how to do that.

I think the most important thing I took away from my friend's argument was --

THE COURT: And by that time, hopefully, the judicial conference would have taken at least some action.

MR. EHRLICH: Right. There's no timeline, much like our courts; and those are courts, and they can roll whenever they'd like.

I think the most important thing I heard on this from the other side was that they said, well, at some point it becomes an unconstitutional suspension, and I think that's all Your Honor needs to hear because it's a facial challenge. And so they have to show that there's no circumstance in which this could be constitutionally applied.

And I think the fact that they've come out and said it's maybe not this point, maybe not this point, but somewhere down here -- and this is sort of what I was getting at with the -- that Judge Edwards was talking about 15 years seems like too much in his *Hastings I* dissent. I think on a facial challenge, which is the only way you would get to this because of the bar, I think that's all you need to -- that and *McBryde*, obviously, to say that this challenge fails.

And then, just on the vagueness point, I think there was a lot of back-and-forth about the Count 5. Just to be very clear, they did not move on that for their preliminary

injunction. We did not move on that on 12(b)(6) grounds to dismiss, and so we haven't addressed the merits of that.

The only thing, I think, before Your Honor now is the issue of whether it's facial or as-applied for purposes of the bar. Obviously, if it made it past the bar and our other jurisdictional objections, we can brief that on summary judgment for Your Honor.

THE COURT: Well, for any of these claims, if I decide that they are facial and, therefore, I have jurisdiction that they escape *McBryde*, then the question is whether they've stated a claim on a 12(b)(6) standard, right?

MR. EHRLICH: Well, I guess, two things. One is, even if you got past *McBryde*, we still have the original jurisdiction problem. But even past that, we haven't moved on 12(b)(6) on those. We've only 12(b)(6)'d the constructive impeachment and the due process, which they had moved on for their preliminary injunction.

So I don't think you have anything before you to rule on that. We could be prepared to move for SJ quickly, but I don't think that's before you -- the merits of the vagueness challenge is not before you now.

I guess, for your purposes, though, the only thing I would say now is, I think you saw from that discussion, it seems very much like an as-applied challenge because they were discussing how clearly it applies to her; well, maybe if it was

this but not this, you know, if she had -- if she was clearly off the reservation and was trying to decide a different -- I think this is exactly what we were saying in our briefing where we pointed out that that inquiry, even if it's -- you have to do the as-applied first under case law, and so that runs you into the bar.

And then I think, just very quickly, Your Honor, just a couple points on the harms. And I think Your Honor raised a great point about litigants appearing before Judge Newman if she was sitting.

Just to be clear, we don't think you would ever reach this point because there's no likelihood of success on the claims that have been raised. But as we point out in our brief, there's already been a litigant who petitioned the Supreme Court to overturn their case because Judge Newman was sitting on the panel and all of these allegations about the disability came out.

I think that's a serious thing to take into account. I think another serious thing to take into account is what they say in their supplemental brief, which is she's going to continue to operate at an extremely slow pace, and that's a pace that the Judicial Council has found is detrimental to the effective and expeditious administration of justice, which is why they used the 332 authority.

So I think that's a harm to the public and the

federal circuit and its judges and its litigants to take into account, too.

The very last point is, I think it would be extraordinary to enjoin an act of Congress in this posture, especially as we've been talking about when this is up at the JC&D committee. But this is something that Congress considered for a very long time. They wanted to bring this process in-house in 1939 and then 1980, and this has been on the books for decades, obviously -- almost 50 years -- and to enjoin it now would, I think, effectively show that the judiciary is not capable of policing itself. And I think, as this case shows, that should not be true.

The Judicial Council and the special committee before it have operated by the book, everything they needed to do by the statutes, by the JC&D rules, and it's going through that process.

So I think, unless Your Honor has more questions, that's all I have.

THE COURT: Thank you very much. All right. Well-briefed and well-argued on both sides. I had hoped not to be in this position, obviously, but here we are. So the case is under advisement. We'll get something out sooner rather than later. Have a good day.

(The hearing adjourned at 11:40 a.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, TAMARA M. SEFRANEK, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 29th day of January, 2024.

/s/ Tamara M. Sefranek
Tamara M. Sefranek, RMR, CRR, CRC
Official Court Reporter
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HON. PAULINE NEWMAN, Plaintiff, v. **HON. KIMBERLY A. MOORE**, *et al.*, Defendants.	Case No. 23-cv-01334 (CRC)

MEMORANDUM OPINION AND ORDER

Veteran Federal Circuit Judge Pauline Newman has sued Federal Circuit Chief Judge Kimberly A. Moore, along with all the other judges on the court, over their handling of reports from court staff implicating Judge Newman's fitness for office. Judge Newman has been hailed, by Chief Judge Moore no less, as a "trailblazer" and "heroine of the patent system." Kimberly A. Moore, *Anniversaries and Observations*, 50 AIPLA Q. J. 521, 524–25 (2022). After leading the intellectual property department of a major corporation at a time when "female attorneys, particularly female patent attorneys, were rare," id. at 524, Judge Newman became the first judge directly appointed to the Federal Circuit, by President Ronald Reagan in 1984. First Amended Complaint ("FAC") ¶ 10. During her tenure on the court, she has authored hundreds of opinions and been particularly recognized for her "insightful dissents." Id. ¶¶ 13, 74. On multiple occasions when Judge Newman dissented, the Supreme Court reversed the Federal Circuit and "adopt[ed] . . . [her] reasoning." Moore, *supra*, at 525.

In 2021, however, court personnel began reporting "behavior that [] called into question Judge Newman's ability to perform her duties." Mot. Dismiss at 4. Specifically, staff relayed information about Judge Newman "indicative of memory loss, a lack of focus, confusion over simple matters, uncharacteristic paranoia, and an inability to perform simple tasks." Id. These

reports eventually led to Chief Judge Moore convening a Special Committee to investigate a judicial misconduct complaint against Judge Newman; the Federal Circuit Judicial Council suspending Judge Newman from hearing new cases on the recommendation of the Special Committee; and Judge Newman filing this lawsuit against members of the Special Committee and the Judicial Council as a whole ("Defendants"). At the Court's urging, the parties attempted to resolve the dispute through mediation with retired D.C. Circuit Judge Thomas B. Griffith. The mediation proved unsuccessful, however, and litigation resumed.

At the heart of the dispute are two important, but at times competing, priorities: judicial independence and the need for oversight of Article III judges. The Constitution provides for judicial independence through the "great bulwarks" of life tenure and undiminished salary during good behavior. McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S., 264 F.3d 52, 64 (D.C. Cir. 2001); U.S. CONST. Art. III, § 1. But with this independence comes the risk that, should judges falter in performing their duties, there is no means for sanctioning them short of impeachment.

Congress addressed this gap by creating a system for the judiciary to police itself. With the passage of 28 U.S.C. § 332, which created circuit judicial councils, and later the Judicial Conduct and Disability ("JC&D") Act, Congress gave "the judiciary the power to 'keep its own house in order.'" McBryde, 264 F.3d at 61 (citing S. Rep. No. 96-362, at 11); see also Chandler v. Jud. Council of Tenth Cir. of U. S., 398 U.S. 74, 85 (1970). Employing this "housekeeping" power, federal courts created common-sense rules to deal with shortcomings in judges' performance. One such rule, a variant of which Judge Newman's colleagues invoked in this case, provides that "when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his 'backlog.'" Chandler, 398 U.S. at 85. The Supreme Court has blessed these rules. See id. ("These are reasonable, proper, and

necessary rules, and the need for enforcement cannot reasonably be doubted."). And it has rejected the notion that "the extraordinary machinery of impeachment" is the "only recourse" "if one judge in any system refuses to abide by such reasonable procedures." Id.

Cases dealing with this system of oversight thankfully are rare, but they have consistently affirmed the judiciary's authority to police itself. See, e.g., McBryde, 264 F.3d at 61–64; Hastings v. Jud. Conf. of U.S. ("Hastings II"), 829 F.2d 91, 103–05 (D.C. Cir. 1987). Judge Newman now asks the Court to break ranks with higher courts that have upheld this self-regulatory regime. The Court must decline the invitation.

Spanning eleven counts, Judge Newman's First Amended Complaint mounts both facial and as-applied constitutional challenges to the JC&D Act and 28 U.S.C. § 332. Now before the Court are two motions. First, Judge Newman has moved for a preliminary injunction to prohibit Defendants from continuing her suspension from new case assignments and from proceeding with any further disciplinary proceedings until the matter is transferred to the judicial council of another circuit. Second, Defendants have moved to dismiss the case, primarily on jurisdictional grounds. For the reasons explained below, Judge Newman is not entitled to preliminary relief because the Court lacks jurisdiction over most of her claims and she has failed to establish a likelihood of prevailing on the others. Moving to Defendants' motion, the Court will dismiss the claims over which it lacks jurisdiction (Counts II–IV, VI, and X–XI). As for the remaining claims, Defendants have moved to dismiss two (Count I and part of Count VII) under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The Court will grant that relief. Defendants have not, however, sought Rule 12(b)(6) dismissal of the remaining claims over which the Court has jurisdiction (Counts V and VIII–IX and part of Count VII). The Court therefore may not entertain dismissal of the case in its entirety at this juncture. Defendants may seek dismissal of the surviving claims under Rule 12(c) or via summary judgment.

I. Background

A. Statutory Frameworks

Under federal law, each circuit has a judicial council, composed—in most cases—of the chief judge of the circuit and an equal number of district and circuit judges. 28 U.S.C. § 332(a)(1). The Judicial Council for the Federal Circuit, however, is composed of all active judges of the Federal Circuit. See United States Court of Appeals for the Federal Circuit, Judicial Council.[1] Judicial councils have a range of powers, but two sources of authority are of particular relevance here: 28 U.S.C. § 332 and the JC&D Act, 28 U.S.C. § 351 et seq.

Under 28 U.S.C. § 332(d), judicial councils may "make all necessary and appropriate orders for the effective and expeditious administration of justice within [their] circuit." As the Supreme Court explained over fifty years ago, "[t]he legislative history of 28 U.S.C § 332 and related statutes is clear that some management power was both needed and granted." Chandler, 398 U.S. at 85. And courts since have found that § 332 "gives considerable discretion to courts and circuit Judicial Councils to choose how to regulate court business, whether by formal rules, standing orders, or other means." Truesdale v. Moore, 142 F.3d 749, 760 (4th Cir. 1998).

Second, judicial councils may "take [] action" on judicial misconduct complaints filed under the JC&D Act. 28 U.S.C. § 354(a)(1)(C). The act permits any person to file a complaint "alleging that [a] judge is unable to discharge all the duties of office by reason of mental or physical disability." Id. § 351(a). "In the interests of the effective and expeditious administration of the business of the courts," the chief judge may also "identify a complaint" and dispense with the filing of a written complaint. Id. § 351(b). The chief judge then reviews the complaint and takes one of several routes. Id. § 352(a). She may dismiss the complaint (*e.g.*,

[1] https://perma.cc/2AF4-LG8R.

because it is frivolous, relates to the merits of a decision, or lacks any factual foundation), id. §§ 352(b)(1), (b)(1)(A)(ii)–(iii), (b)(1)(B); conclude the proceeding if appropriate action has already been taken, id. § 352(b)(2); or appoint a special committee to conduct "an investigation as extensive as it considers necessary," id. §§ 353(a), (c). On this final avenue, once the committee completes its investigation, it presents its findings and recommendations to the judicial council. Id. § 353(c).

The judicial council, in turn, may conduct an additional investigation, dismiss the complaint, or "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." Id. § 354(a)(1)(C). One possible action is 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." Id. § 354(a)(2)(A)(i). A judge aggrieved by an action of a judicial council may petition the Judicial Conference of the United States' Committee on Judicial Conduct and Disability for review. Id. § 357(a).[2] The Judicial Conference, in turn, "after consideration of the prior proceedings and such additional investigation as it considers appropriate" may take the same actions available to a judicial council. Id. § 355(a). Or, if the Judicial Conference deems impeachment warranted, it may certify and transmit that determination to the House of Representatives. Id. § 355(b)(1).

[2] Created by Congress, the Judicial Conference of the United States, through an executive committee and nineteen topic-related subcommittees, establishes and implements policies for the administration of the federal judiciary. United States Courts, About the Judicial Conference, https://perma.cc/A9XB-9C8F. Though Judicial Conference review of complaints is discretionary, see JC&D R. 21(a), the D.C. Circuit found it "fair to suppose that both houses of Congress realistically expected that the Judicial Conference would hear all *serious* claims," McBryde, 264 F.3d at 61.

B. Proceedings against Judge Newman

In 2021, according to Defendants, Federal Circuit court personnel began reporting "behavior that [] called into question Judge Newman's ability to perform her duties." Mot. Dismiss at 4. These reports included "information indicative of memory loss, a lack of focus, confusion over simple matters, uncharacteristic paranoia, and an inability to perform simple tasks." Id. In early March 2023, Chief Judge Moore allegedly met with Judge Newman and "attempted to convince [her] to retire." FAC ¶ 17. After she refused, the Federal Circuit Judicial Council proceeded along two separate, but overlapping, tracks: It pursued action under both § 332(d) and the JC&D Act.

Starting with § 332, on March 8, 2023, the Judicial Council convened without Judge Newman present to consider "concerns raised about [her] mental fitness" and "her abnormally large backlog in cases." FAC, Ex. O at 1. Though the Council did not issue a written order or identify the source of its authority, it voted on March 8 to preclude the assignment of new cases to her. Id. After Judge Newman asked to be restored to the case calendar, the Judicial Council reconsidered its March 8 opinion "*de novo*." Id. at 2. In a June 5 order, the Council concluded that "precluding Judge Newman from new case assignments [wa]s warranted" under the Council's § 332 authority. Id. at 4. The Council cited Judge Newman's "continued backlog of cases, and her inability to clear the backlog despite the absence of new cases." Id. Specifically, the June 5 order noted that Judge Newman still "ha[d] a backlog of seven opinions, three of which [were] pending for over 200 days and all of which [we]re pending for over 100 days." Id. at 3.

The June 5 order remained in effect until November 9, 2023. On November 8, the seventh and final case in Judge Newman's backlog issued. The following day, the Judicial Council "*sua sponte* vacate[d]" the June 5 order. Defs.' Reply, Ex. 4 at 2.

Separately, the Judicial Council proceeded along the track laid by the JC&D Act. On March 24, 2023, Chief Judge Moore initiated a complaint against Judge Newman under the act. FAC, Ex. A. She did so pursuant to Rule 5 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings ("JC&D Rules"), which permits a chief judge to "identify" a complaint upon a finding of "probable cause to believe that misconduct occurred or that a disability exists." JC&D R. 5(a); see also 28 U.S.C. § 351(b). In the order initiating the complaint, Chief Judge Moore cited several factors as providing probable cause, including Judge Newman's delay in issuing opinions and voting on other judges' opinions, reports that she had made statements indicating a lack of awareness about the issues in cases, and reports that she had inappropriately managed staff. FAC, Ex. A.

Chief Judge Moore then appointed a special committee, consisting of herself and Federal Circuit Judges Sharon Prost and Richard G. Taranto, to investigate the allegations in the complaint. FAC ¶ 23. Throughout the spring, the Special Committee issued a series of orders affecting the scope of its investigation and seeking cooperation from Judge Newman. Among them, the Special Committee expanded the investigation to include alleged misconduct in Judge Newman's management of staff, FAC, Exs. B, E; ordered Judge Newman to submit to neurological and neuro-psychological testing by physicians of the committee's choosing, FAC, Exs. C, K; and directed Judge Newman to provide the Committee with medical records related to incidents described in the complaint, FAC, Exs. E, K.

When Judge Newman refused to undergo testing by doctors chosen by the Special Committee or share her medical records, the Committee changed course. It decided to narrow the investigation to focus only on "whether Judge Newman's refusal to cooperate with the Committee's investigation constitute[d] misconduct." FAC, Ex. N at 3; see also JC&D R. 4(a)(5) ("Cognizable misconduct includes . . . refusing, without good cause shown, to cooperate

in the investigation of a complaint. . . ."). In early May, the Judicial Council also denied Judge Newman's request to transfer her complaint to the judicial council of another circuit. FAC, Exs. H–I. The Council denied the transfer request without prejudice to re-filing after Judge Newman complied with its orders for her to undergo the specified testing and provide relevant medical records. FAC, Ex. H at 9.

As part of its investigation, the Special Committee interviewed more than twenty court employees, reviewed case-processing records, and consulted with a physician experienced in judicial-disability matters. Mot. Dismiss at 13. Judge Newman's counsel countered with several letters raising objections to the Special Committee's investigation and orders. See FAC, Exs. Q–T. Counsel also provided the Committee with medical records from one of Judge Newman's own doctors. FAC ¶ 16; id., Ex. Y (filed under seal). On July 31, the Special Committee released its Report & Recommendation to the Judicial Council. Mot. Dismiss at 15; id., Ex. 1. The report concluded that "there is, at a minimum, a reasonable basis for concluding that Judge Newman may suffer from a disability that renders her unable to perform the duties of her office" and that her "failure to cooperate with the Committee's orders constitutes misconduct." Mot. Dismiss, Ex. 1 at 31, 60. The Special Committee recommended that Judge Newman not be permitted to hear new cases "for the fixed period of one year or at least until she ceases her misconduct and cooperates such that the Committee can complete its investigation, whichever comes sooner." Id. at 110–11.

After receiving Judge Newman's response, the Judicial Council adopted the Special Committee's recommendations. Pl.'s Opp'n, Exs. A–B. The Council found that the Committee had a reasonable basis to order Judge Newman to undergo medical examinations and submit medical records, and that her refusal to comply "was not excused by good cause." Pl.'s Opp'n, Ex. B at 37, 40. The Council therefore concluded that her "refusal, without good cause"

"constitute[d] serious misconduct." Id. at 72. The Council ordered that she not be permitted to hear any cases "for a period of one year," "subject to consideration of renewal if [her] refusal to cooperate continues after that time and to consideration of modification or rescission if justified by an end of the refusal to cooperate." Id. at 72–73.

Judge Newman petitioned the Judicial Conference of the United States for review of the Judicial Council's order, and the Judicial Conference affirmed the order on February 7, 2024. Defs.' Notice of JC&D Comm. Order [ECF No. 40] at 14. The Judicial Conference found that (1) the Chief Circuit Judge and Judicial Council had not abused their discretion by refusing to request transfer of the complaint to another circuit's judicial council, (2) Judge Newman had not shown good cause for refusing to cooperate with the Special Committee's investigation, and (3) the sanction imposed by the Judicial Council did not exceed its statutory authority. Id. at 14–29.

While the Judicial Council proceedings were still ongoing, Judge Newman filed this federal lawsuit. Compl. She subsequently amended her complaint and now brings eleven counts against the three judges on the Special Committee (Chief Judge Moore and Judges Prost and Taranto) in their official capacities and the Judicial Council of the Federal Circuit. FAC ¶¶ 4–7. (The Court will elaborate on the specific claims later.) Judge Newman also moved for a preliminary injunction, asking the Court to enjoin the Defendants "from suspending [her] from, or otherwise interfering with, the duties and functions of the judicial office to which [she] was confirmed." Prelim. Inj. at 2. At the Court's suggestion, the parties agreed to informal mediation with retired D.C. Circuit Judge Thomas B. Griffith.[3] See Joint Statement on Notice of Mediation [ECF No. 17]; Mediation Referral Order [ECF No. 18]. Despite Judge Griffith's best efforts, the mediation proved unsuccessful. See Joint Status Report [ECF No. 21] at 1.

[3] The Court thanks Judge Griffith for his volunteer service.

Defendants followed with a motion to dismiss. Both motions are fully briefed, and the Court heard argument on the motions on January 25, 2024.

II. Legal Standards

A. Motion for Preliminary Injunction

"A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion." Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004). To obtain a preliminary injunction, the moving party must show: (1) that she is likely to succeed on the merits of his claim; (2) that she is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in her favor; and (4) that a preliminary injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). An absence of irreparable injury is fatal to a preliminary injunction motion. Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006). The D.C. Circuit has suggested, without holding, that failure to establish a likelihood of success on the merits also categorically forecloses preliminary relief. Sherley v. Sebelius, 644 F.3d 388, 393 (D.C. Cir. 2011); see also Changji Esquel Textile Co. v. Raimondo, 40 F.4th 716, 726 (D.C. Cir. 2022).

B. Motion to Dismiss

Defendants challenge this Court's subject matter jurisdiction and argue that certain counts fail to state a claim. The Court will therefore apply Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

As "[f]ederal courts are courts of limited jurisdiction," Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994), a court must ensure it has subject matter jurisdiction over a claim before proceeding to the merits, Moms Against Mercury v. FDA, 483 F.3d 824, 826 (D.C. Cir. 2007). On a motion to dismiss for lack of subject matter jurisdiction, the plaintiff

bears the burden of establishing jurisdiction. Knapp Med. Ctr. v. Hargan, 875 F.3d 1125, 1128 (D.C. Cir. 2017). The Court must "accept all well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor," but need not "assume the truth of legal conclusions" in the complaint. Williams v. Lew, 819 F.3d 466, 472 (D.C. Cir. 2016) (cleaned up). The Court also "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." Jerome Stevens Pharms., Inc. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

To survive a Rule 12(b)(6) motion, a complaint must contain sufficient factual allegations, accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is plausible on its face if it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A court evaluating a Rule 12(b)(6) motion will "construe the complaint 'liberally,' granting plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" Barr v. Clinton, 370 F.3d 1196, 1199 (D.C. Cir. 2004) (quoting Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994)). However, a "court need not accept a plaintiff's legal conclusions as true, . . . nor must a court presume the veracity of legal conclusions that are couched as factual allegations." Alemu v. Dep't of For-Hire Vehicles, 327 F. Supp. 3d 29, 40 (D.D.C. 2018) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2009)).

III. Analysis

A. Judge Newman's Challenges to Judicial Council Action Taken Pursuant to 28 U.S.C. § 332(d) Are Moot

Defendants' first line of attack asserts that Judge Newman's challenges to Judicial Council action taken pursuant to 28 U.S.C. § 332(d) are moot. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues

presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (cleaned up). Even where claims presented a live controversy when filed, the mootness doctrine "requires a federal court to refrain from deciding it if events have so transpired that [a judicial] decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc) (cleaned up); see also Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." (cleaned up)).

The Judicial Council's November 9 order rendered Judge Newman's § 332(d) challenges moot. Recall that on June 5, citing its authority under § 332(d), the Judicial Council excluded Judge Newman from new case assignments because she had accumulated a backlog of opinions that had been pending for more than one hundred days. FAC, Ex. O at 3–4. On November 9, the Judicial Council *sua sponte* vacated the June 5 order because Judge Newman's final backlogged opinion had issued the day before. Defs.' Reply, Ex. 4 at 2. Because the Judicial Council vacated the June 5 opinion, any challenge based on § 332(d) is moot.[4] See Freeport-McMoRan Oil & Gas Co. v. FERC, 962 F.2d 45, 46 (D.C. Cir. 1992) (finding a case "plainly moot" when the agency's "challenged orders . . . were superseded by a subsequent [] order"); Am. Wild Horse Pres. Campaign v. Salazar, 800 F. Supp. 2d 270, 271 (D.D.C. 2011) ("[Because] [the] administrative decision [] was rescinded after the filing of the complaint, . . . the action is now moot.").

[4] Any challenge based on the March 8 order is also moot for similar reasons. In the June 5 order, the Judicial Council reviewed the March decision "*de novo*" and voted to suspend Judge Newman from case assignments.

Indeed, Judge Newman does not contest that the June 5 order is moot; she instead contends that an exception to the mootness doctrine rescues her § 332(d) claims. See Pl.'s Sur-reply at 1. First, she argues her claims are "capable of repetition, yet evade[] review." City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983). And second, she contends the Court retains jurisdiction because "voluntary cessation of allegedly illegal conduct does not deprive a court of power to hear and determine the case." Am. Bar Ass'n v. F.T.C., 636 F.3d 641, 648 (D.C. Cir. 2011) (quoting County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)). Neither mootness exception applies.

The first exception requires two circumstances to be "simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." Lewis v. Cont'l Bank Corp., 494 U.S. 472, 481 (1990) (cleaned up). The June 5 order satisfies the first requirement as courts assume "orders of less than two years' duration ordinarily evade review." McBryde, 264 F.3d at 55–56. But it flunks the second because there is no reasonable expectation that Judge Newman will be subject to the same action again. "When considering the likelihood that an injury will be repeated, the Supreme Court has in general 'been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.'" Id. at 56 (quoting Honig v. Doe, 484 U.S. 305, 320 (1988)). The Court must therefore presume that Judge Newman will not repeat the "misconduct" that led to the imposition of the June 5 order—that is, accumulate a "backlog of cases." FAC, Ex. O at 4.

Judge Newman attempts to sidestep this presumption by declaring it "unlikely" that her "speed in issuing opinions will change." Pl.'s Sur-reply at 2. But her speed in issuing opinions is a factor within her control. Indeed, she was able to clear her recent backlog, leading to the

vacatur of the June 5 order. Defs.' Reply, Ex. 4 at 2. And the Supreme Court has declined to find the case or controversy requirement satisfied "where, as here, the litigant[] simply 'anticipate[s] violating'" a valid rule. See United States v. Sanchez-Gomez, 584 U.S. 381, 394 (2018) (quoting O'Shea v. Littleton, 414 U.S. 488, 496 (1974)); see also id. at 393 ("Our decisions in [prior] civil cases rested on the litigants' inability, for reasons beyond their control, to prevent themselves from transgressing and avoid recurrence of the challenged conduct."). The analysis might be different if Judge Newman were seeking to challenge the Judicial Council's authority to issue case-backlog rules in the first instance.[5] See, e.g., O'Shea, 414 U.S. at 497 ("[We] are [] unable to conclude that the case-or-controversy requirement is satisfied by general assertions . . . that in the course of their activities respondents will be prosecuted for violating *valid* criminal laws." (emphasis added)). But she is not. She rather challenges the *punishment* the Judicial Council imposed (or might impose) for violations of the rules.

The voluntary cessation exception does not save Judge Newman's § 332(d) claims either. "As a general rule, a defendant's 'voluntary cessation of allegedly illegal conduct does not deprive'" a court of jurisdiction. Am. Bar Ass'n v. F.T.C., 636 F.3d at 648 (quoting Davis, 440 U.S. at 631). But that general rule does not apply here for two reasons. First, the D.C. Circuit has characterized the voluntary cessation exception as "focused on preventing a private defendant from manipulating the judicial process." Clarke, 915 F.2d at 705 (D.C. Cir. 1990). And it has expressed "doubt" about whether courts should "impute such manipulative conduct" to Congress, a non-private defendant and a coordinate branch of government. Id. Defendants therefore contend that the voluntary cessation exception does not apply to them as government actors. Defs.' Resp. to Sur-Reply at 2. The Court hesitates to adopt a bright-line rule that the

[5] Of course, such a challenge would be unlikely to succeed given the Supreme Court's explicit endorsement of "backlog" rules. See Chandler, 398 U.S. at 85.

exception can never be applied against public-sector defendants. But Defendants' point is well taken in this context. Though separation-of-powers concerns do not animate the analysis as in Clarke, "it would seem inappropriate" for this district court "to impute [] manipulative conduct" to the entire roster of Federal Circuit judges save one. Clarke, 915 F.2d at 705; see also Chandler, 398 U.S. at 94 (Harlan, J., concurring) ("[D]irect review by a district judge of the actions of circuit judges would present serious incongruities and practical problems.").

Second, regardless whether the voluntary cessation exception applies to government defendants, "[t]he established law of this circuit is that the [] exception . . . has no play when the [defendant] did not act in order to avoid litigation." Alaska v. U.S. Dep't of Agric., 17 F.4th 1224, 1229 (D.C. Cir. 2021) (cleaned up). Judge Newman opines that the "Defendants vacated the June 5 Order strategically and solely to avoid risking an unfavorable judicial decision." Pl.'s Sur-reply at 3. But the timeline of events tells a different story. The Judicial Council initially suspended Judge Newman from hearing new cases on March 8, 2023. FAC, Ex. O at 1. On May 10, Judge Newman filed her complaint and challenged—among other actions—her case suspension. Compl. ¶¶ 20, 45, 50. On June 5, reviewing its March 8 order *de novo*, the Judicial Council doubled down and again voted to suspend Judge Newman from hearing cases. FAC, Ex. O at 2. If the Judicial Council had wanted to avoid "an unfavorable judicial decision," it seems a poor choice to dig itself a deeper hole by reaffirming its decision. Then on November 9, the Judicial Council vacated the June 5 order. Though Judge Newman disputes how the Judicial Council calculated the number of cases on her backlog and adjudged the backlog to have been cleared, see Pl.'s Sur-reply at 3 n.2, there is no question that the Council vacated the order *the day after* the final backlogged opinion issued, see Defs.' Reply, Ex. 4 at 2. The record thus suggests that Judge Newman's own conduct, rather than this litigation, precipitated the Judicial

Council's decision to vacate the order. Accordingly, the voluntary cessation doctrine has "no play."

B. 28 U.S.C. § 357(c) Precludes Judge Newman's As-Applied Challenges

Because Judge Newman's challenges to the Judicial Council's § 332(d) orders are moot, the Court now turns to the second track along which the Judicial Council proceeded: the JC&D Act. Judge Newman has raised both facial and as-applied challenges based on the act. Before parsing out which claims are facial and which are as-applied, the Court must examine the scope of its jurisdiction to hear challenges to the act.

1. 28 U.S.C § 357(c), as in interpreted in McBryde, precludes district courts from reviewing as-applied challenges to the JC&D Act

The Court lacks jurisdiction to review Judge Newman's as-applied challenges to the JC&D Act. Section 357 of the act, titled "No Judicial Review," precludes district court review of judicial council action. It states, "[e]xcept as expressly provided in this section and section 352(c), all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. § 357(c). The enumerated exceptions create avenues for review *within* the framework of the JC&D Act. Under 352(c), judges may petition judicial councils for review of certain final orders by the chief judge. Id. § 352(c). And, under § 357(a), judges may petition the Judicial Conference for review of judicial council action. Id. § 357(a). But neither exception allows for district court review of judicial council action.

The D.C. Circuit confirmed as much in McBryde. The court held that *facial* challenges to the constitutionality of the JC&D Act—*i.e.*, "challenges to the decisions of Congress"—are

not precluded by § 357(c).[6] McBryde, 264 F.3d at 58; see also id. ("This interpretation . . . avoid[s] the 'serious constitutional question' that would be posed 'if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.'" (quoting Webster v. Doe, 486 U.S. 592, 603 (1988)). But it found that § 357(c) precludes review in a district court for as-applied claims, including as-applied claims that invoke the Constitution. Id. at 59, 62–63. Only the Judicial Conference can review those challenges. Id. at 62. The circuit explained that members of Congress, "[p]ut ultimately to a choice between review by an Article III 'Court' and review by a committee of Article III judges chosen by and from the Judicial Conference, [] chose the latter." Id. at 63.

2. McBryde remains good law and applies to this case

Judge Newman attempts to circumvent McBryde's holding that § 357(c) bars district-court review of as-applied claims. She offers three theories, but none succeeds. See Pl.'s Opp'n at 33–36. First, Judge Newman contends that McBryde is no longer good law in the wake of the

[6] When McBryde was decided, the judicial-review provision was codified in § 372(c)(10) of the JC&D Act. See 28 U.S.C. § 372(c)(10) (2000). Congress reorganized the statute in 2002 and relocated the relevant part of 28 U.S.C. § 372(c)(10), without material changes, in § 357(c). See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107–273, § 357(c), 116 Stat. 1758, 1853 (2002). Judge Newman contends that the addition of a severability clause in the 2002 reorganization rendered McBryde's holding on as-applied challenges no longer good law. See Prelim. Inj. at 30. The severability clause provides that if "any provision of this subtitle, an amendment made by this subtitle, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of [the JC&D Act] . . . shall not be affected." 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107–273, § 11044, 116 Stat. 1758, 1856 (2002) (codified as Note to 28 U.S.C. § 351). According to Judge Newman, the "only circumstance where an *application* of a provision of the Disability Act could be held unconstitutional is in a proceeding before a district court (and any subsequent appeals)." Prelim. Inj. at 30. This reading, however, ignores the judicial-review procedure established by § 357(c) (formerly § 372(c)(10)) and endorsed by the D.C. Circuit in McBryde. Via the appeal right created in § 357(c), Congress "enabled a sanctioned judge to seek review by . . . the Judicial Conference of all claims except (presumably) facial attacks on the statute." McBryde, 264 F.3d at 62. The Judicial Conference is thus empowered to find unconstitutional an application of the JC&D Act.

Supreme Court's recent admonition in Axon Enterprises Inc. v. Federal Trade Commission that "agency adjudications are generally ill suited to address structural constitutional challenges." Pl.'s Opp'n at 34 (quoting Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 195 (2023)). In McBryde, the Judicial Conference had "disclaimed" any authority to rule on constitutional challenges on the grounds that it was "not a court" and had "no competence to adjudicate the facial constitutionality of the [JC&D Act] or its constitutional application to the speech of an accused judge." 264 F.3d at 62. The D.C. Circuit rejected the Judicial Conference's disavowal of authority. Id. Treating the Conference as an agency, the Circuit held that "agencies [] have an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress." Id. (cleaned up). Judge Newman contends that Axon repudiated this element of McBryde.[7]

But this argument overlooks the fact that McBryde allows facial challenges to the JC&D Act to proceed in district court. The kinds of "structural constitutional challenges" that Axon found agencies are "ill suited to address" are exactly the claims McBryde funnels to Article III courts. See McBryde, 264 F.3d at 58 ("[T]he wording of § 372(c)(10) [now § 357(c)] does not withhold jurisdiction over Judge McBryde's claims that the *Act* unconstitutionally impairs

[7] In response to the Judicial Conference order affirming her suspension, Judge Newman filed a notice indicating that the Conference "declined to evaluate [her] constitutional claims, thus leaving these matters to properly constituted Article III courts." Pl.'s Notice [ECF No. 41] at 2. As neither party filed in this Court a copy of Judge Newman's petition to the Conference, the Court is unable to assess which, if any, claims the Conference declined to address. In any event, as noted above, McBryde rejected the notions that Congress intended for the Conference to "disclaim[] authority to rule on as applied . . . constitutional challenges," or that a disavowal of authority by the Conference confers jurisdiction on Article III courts. See McBryde, 264 F.3d at 62–63 ("[T]he statutory mandate to the [Judicial Conference JC&D] committee appears to contain no language justifying a decision to disregard claims that a circuit judicial council has violated a judge's constitutional rights in application of the Act. . . . [W]e find the evidence clear and convincing that Congress intended [§ 357(c)] to preclude review in the courts for as applied constitutional claims."). This Court is bound by the D.C. Circuit's pronouncements in this regard.

judicial independence and violates separation of powers."). Though it is perhaps a stretch to say McBryde was prescient (and, indeed, Axon is in many ways an application of Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994), a case predating McBryde), McBryde's holding accords fully with Axon and its line of cases.[8]

Judge Newman's second theory is that McBryde does not govern because—unlike the judges involved in Judge McBryde's discipline—the members of the Federal Circuit Judicial Council are all her colleagues and were witnesses to her alleged disability. Pl.'s Opp'n at 34. Due to this difference, she contends her challenge is permitted under Dart v. United States, where the D.C. Circuit held that a statute's bar on judicial review of agency decisions does not apply "when [the] agency is charged with acting beyond its authority." 848 F.2d 217, 221 (D.C. Cir. 1988). But, as the circuit noted in McBryde, Dart's exception does not stretch so far as to negate a statute's judicial-review bar "whenever the complainant asserts legal error." 264 F.3d at 63. Rather, Dart's "narrow exception" applies when "agency action on its face violate[s] a statute." Dart, 848 F.2d at 221–22 (quoting Griffith v. FLRA, 842 F.2d 487, 492 (D.C. Cir. 1988) (cleaned up)). The make-up of the Federal Circuit Judicial Council does not violate the JC&D Act on its face. The JC&D Act's default framework charges judges with reviewing

[8] In any case, the jurisdictional provisions in Axon, dubbed "special statutory review schemes" by the Supreme Court, functioned differently than § 357(c). The Securities Exchange Act and Federal Trade Commission ("FTC") Act, which supplied the review schemes at issue, required litigants to pursue challenges in federal courts of appeal, not district courts, following exhaustion of the administrative process. Axon, 598 U.S. at 180–81. The plaintiffs in Axon, however, sued in district court while their administrative petitions were pending, alleging that "fundamental aspect[s] of the [agencies'] structure violate[d] the Constitution." Id. at 182. Unlike the Exchange and FTC Acts, the JC&D Act does not create a "special statutory review scheme" that simply bypasses district court review. It bars Article III review—in district and circuit courts alike—of all as-applied challenges. See 28 U.S.C. § 357(c).

complaints about other judges in their circuit. See 28 U.S.C. §§ 352–53.[9] In fact, the JC&D Rules mandate that special committees from the Federal Circuit "be selected from the judges serving on the subject judge's court." JC&D R. 12(a); see also 28 U.S.C. § 363. And JC&D Rule 26 instructs that complaints should be transferred out-of-circuit only "[i]n exceptional circumstances." JC&D R. 26. The composition of the Federal Circuit Judicial Council thus did not "on its face violate[]" the JC&D Act.

Finally, at the motions hearing, Judge Newman's counsel suggested for the first time that two related Supreme Court cases—Cuozzo Speed Technologies, LLC v. Lee, 579 U.S. 261 (2016), and SAS Institute, Inc. v. Iancu, 138 S.Ct. 1348 (2018)—have superseded McBryde. Tr. at 36–38. In both cases, the Supreme Court considered whether 35 U.S.C. § 314's bar on judicial review precluded federal court review of challenges to certain determinations by the Director of the U.S. Patent and Trademark Office. Specifically, § 314 allows third parties, through a procedure known as "inter partes review," to challenge previously issued patents in an adversarial process before the Patent Office. SAS Institute, 138 S.Ct. at 1350. The statute's "No Appeal" clause provides that "[t]he determination by the Director [of the Patent Office] whether to institute an inter partes review under this section shall be final and nonappealable." 35 U.S.C.

[9] The JC&D Act's framework also contemplates that, in some cases, the members of a judicial council will have personal knowledge about the facts underlying complaints. For this reason, it is not evident that 28 U.S.C. § 455—which mandates that judges recuse from "any proceeding[s]," among others, where their "impartiality might reasonably questioned" or where they have "personal knowledge of disputed evidentiary facts"—applies to judicial council proceedings. 28 U.S.C. §§ 455(a)–(b). Moreover, § 455 defines "proceeding" as including "pretrial, trial, appellate review, or other stages of litigation." Id. § 455(d)(1). None of those terms maps onto the actions of a judicial council, and—it would seem—for good reason. A judicial council's activities fall outside of the normal rubric of judicial activity. See also McBryde, 264 F.4d at 58, 62–63 (holding the district court was precluded from reviewing Judge McBryde's due process claim, which alleged that the whole investigation "arose out of a conflict between [Judge McBryde] and Chief Judge Politz . . . [and] Chief Judge Politz refused to recuse himself" (cleaned up)).

§ 314(d). In both cases, the Supreme Court began by noting that to overcome "the 'strong presumption' in favor of judicial review, . . . th[e] Court's precedents require 'clear and convincing' indications that Congress meant to foreclose review." SAS Institute, 138 S.Ct. at 1359 (quoting Cuozzo, 579 U.S. at 273). In SAS Institute, which clarified Cuozzo, the Court held that § 314(d) did not preclude judicial review of challenges to *how* the Director conducted the inter partes review. 138 S.Ct. at 1359. Rather, because of § 314(d)'s plain text and the presumption in favor of judicial review, the Court found "§ 314(d) precludes judicial review only of the Director's 'initial determination'" to institute inter partes review. Id. (quoting Cuozzo, 579 U.S. at 273).[10]

Neither case upsets McBryde's holding. If anything, they reinforce it. In McBryde, the circuit noted the presumption in favor of judicial review, see 264 F.3d at 59, and undertook a painstaking review of the congressional record before finding "the evidence clear and convincing that Congress intended § 372(c)(10) [now § 357(c)] to preclude review in the courts for as-applied constitutional claims," id. at 59–63. Moreover, § 357(c)'s bar on judicial review does not contain the kind of limiting language present in § 314(d). Section 357(c) bars review of "all orders and determinations, including denials of petitions for review," and not just a sub-set of decisions (as § 314(d) does). 28 U.S.C. § 357(c).

[10] Both cases reviewed Federal Circuit decisions. True to form, Judge Newman authored a dissent in each case. See In re Cuozzo Speed Techs., LLC, 793 F.3d 1268, 1283 (Fed. Cir. 2015) (Newman, J., dissenting); SAS Inst., Inc. v. ComplementSoft, LLC., 825 F.3d 1341, 1353 (Fed. Cir. 2016) (Newman, J., concurring in part and dissenting in part). In Cuozzo, the Supreme Court rejected her interpretation of § 314(d)'s bar on judicial review. 579 U.S. at 273. In SAS Institute, Judge Newman did not address § 314(d), but the Supreme Court largely adopted her interpretation of other parts of the statute. 138 S.Ct. at 1354–57.

The Court thus finds no basis in Supreme Court or D.C. Circuit case law to question McBryde's binding interpretation of § 357(c). The Court therefore lacks jurisdiction over Judge Newman's as-applied challenges to the JC&D Act.

3. 28 U.S.C. § 357(c), as interpreted in McBryde, bars this Court from exercising jurisdiction over six of Judge Newman's claims

Having found that it lacks jurisdiction over as-applied challenges to the JC&D Act, the Court must assess which counts in the First Amended Complaint mount as-applied, as opposed to facial, challenges to the act. A facial challenge alleges that "no set of circumstances exists under which" a statute is valid. United States v. Salerno, 481 U.S. 739, 745 (1987). The "plaintiffs' claim and the relief that would follow" must "reach beyond the particular circumstances of [individual] plaintiffs." John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010). An "as-applied challenge, by contrast, asks a court to assess a statute's constitutionality with respect to the particular set of facts before it." Hodge v. Talkin, 799 F.3d 1145, 1156 (D.C. Cir. 2015).

The Court concludes that six counts of the amended complaint raise as-applied challenges. Section 357(c) therefore bars this Court from exercising jurisdiction over those claims. Because some of the counts are related, the Court will take them up in batches.

First, Counts II and III allege that neither the JC&D Act nor § 332(d) permit the Judicial Council to suspend Judge Newman from her cases, reduce her staff, or force her to submit to a mental health examination, among other restrictions. FAC ¶¶ 86–87, 91–92. The complaint does not distinguish between Judicial Council action taken pursuant to the JC&D Act and that taken pursuant to § 332(d). See id. ¶¶ 87, 92 (listing the same conduct as violations of both statutes). But the Court need not disentangle the two. As explained above, challenges to the Judicial Council's orders under § 332(d) are moot. And the challenges to the JC&D Act are as-

applied. Indeed, Count II begins with a tip off that its challenge is as-applied. See id. ¶ 86 ("To the extent that the Judicial Disability Act of 1980 is constitutional . . ."). The Court is thus precluded from reviewing any parts of Counts II and III that remained live controversies after the Judicial Council's November 9 order.

Second, Count IV, titled "As Applied Due Process of Law Violation," contends that Defendants' continued investigation "violates the fundamental principles of due process because the Special Committee is composed of complainants about and witnesses to Plaintiff's alleged disability." Id. ¶ 96. As Judge Newman concedes, this count raises an as-applied challenge to the Special Committee's conduct as the claim is premised on the particular membership of the committee. See Pl.'s Opp'n at 28.

Third, Count VI alleges that "[n]either the [JC&D] 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." FAC ¶ 107. The count further alleges that because "Defendants have neither statutory nor constitutional power to compel" Judge Newman to comply with these requirements, their imposition is "*ultra vires* and unconstitutional." Id. ¶ 108. Though she does not identify a specific provision of the JC&D Act, § 353(c) allows a special committee to "conduct an investigation as extensive as it considers necessary." 28 U.S.C. § 353(c). This count therefore boils down to an allegation that, in ordering Judge Newman to undergo a medical examination and produce medical records, the Special Committee acted beyond the scope of its § 353(c) authority. This is a prohibited as-applied challenge. McBryde interpreted § 357(c) as barring district courts from considering challenges that "reduce[] to arguments as to the exact reach of the [JC&D Act's] provisions." McBryde, 264 F.3d at 64. Count VI makes exactly that kind of argument. Judge Newman does not contend that every application of § 353(c) is unlawful; instead she alleges that the provision

does not permit the orders levied against her. And, to the extent Judge Newman intends to raise a facial challenge to § 353(c), she has done so in other counts of the complaint (*i.e.*, Counts V, VII–IX).

Finally, Counts X and XI raise as-applied Fourth Amendment challenges. The counts claim Judge Newman's rights were violated because Defendants lacked "either a warrant issued on probable cause" or "a constitutionally reasonable basis" for requiring her "to submit to an involuntary medical or psychiatric examination" (Count X) or "to surrender her private medical records" (Count XI). FAC ¶¶ 128, 132. Judge Newman does not contest that these counts present as-applied attacks. See Pl.'s Opp'n at 28, 33. And, even though the challenges invoke the Constitution, McBryde still precludes their review. "[T]he evidence [is] clear and convincing that Congress intended [§ 357(c)] to preclude review in the courts for as applied constitutional claims." McBryde, 264 F.3d at 62–63; see also id. at 59 (classifying Judge McBryde's similar claim that the Judicial Council's "use of psychiatrists" was "fundamentally destructive of judicial independence" as an as-applied challenge).

For those keeping track, Counts II–IV, VI, and X–XI mount as-applied attacks precluded by McBryde. Defendants contend that the remaining counts also pose as-applied challenges, see Mot. Dismiss at 21–23, but the Court disagrees. Even though Counts I and VII–IX reference or allude to specific orders of the Judicial Council, they challenge the underlying provisions of the JC&D Act authorizing the Judicial Council to issue those orders. See Pl.'s Opp'n at 33 ("Judge Newman does not seek review of orders issued pursuant to the statute, but rather challenges the authorization to issue such orders in the first place."). In other words, the counts contend that "no set of circumstances exists under which" the Judicial Council could validly apply those parts of the statute. Salerno, 481 U.S. at 745. Of course, that is a demanding standard, and one the Court will hold Judge Newman to later in assessing the merits of her facial challenges.

Count V also mounts a facial attack. It alleges that the JC&D Act is unconstitutionally vague in that it fails to "provide adequate notice of what constitutes a mental disability" and "lacks minimum enforcement guidelines." FAC ¶ 103. Defendants contend this too is a disguised as-applied challenge. They begin by correctly noting that a plaintiff "to whose conduct a statute clearly applies may not successfully challenge it for vagueness," Parker v. Levy, 417 U.S. 733, 756 (1974), and that, as a result, courts must "examine the complainant's conduct before analyzing other hypothetical applications of the law," Vill. of Hoffman Ests. v. Flipside, Hoffman Ests. Inc., 455 U.S. 489, 495 (1982). Judge Newman's challenge, they then argue, requires the Court "to perform the very inquiry . . . that Congress placed off limits in § 357(c)"—decide "an as-applied challenge to the Act." Mot. Dismiss at 23.

This argument falters at its initial premise. Judge Newman is not "clearly" someone to whom the JC&D Act's standard of disability applies because none of the complaints about her potential disability have been substantiated. Defendants have acknowledged as much. In April, the Special Committee ordered "Judge Newman to undergo [medical examinations] to *determine* whether she suffers from a disability." FAC, Ex. H at 1 (emphasis added). In a May 16 order, the Special Committee again explained that its "sole purpose regarding the disability inquiry" was to "*determin*[*e*] whether Judge Newman has a disability and if so the nature and scope . . . ." FAC, Ex. K at 23 (emphasis added). And in its final Report and Recommendation, the Special Committee did not reach a conclusion about whether the JC&D Act's disability standard applied to Judge Newman. See Mot. Dismiss, Ex. 1 at 22 (explaining that "the Committee's ability to make an informed assessment of whether Judge Newman suffers from a disability" was "significantly impaired"). Because Judge Newman is not someone to whom the JC&D Act's definition of disability clearly applies, she may raise a vagueness challenge to that definition.

In sum, § 357(c) permits this Court to exercise jurisdiction over Counts I, V, and VII–IX.

C. Original Jurisdiction and Comity

According to Defendants, § 357(c) is not the only limitation on this Court's jurisdiction. They also raise two additional jurisdictional arguments: (1) as a Court with original—not appellate—jurisdiction, this Court cannot review decisions of the Federal Circuit Judicial Council, and (2) prudential concerns of comity and exhaustion should cause the Court to decline jurisdiction.

1. This Court has original jurisdiction to hear Judge Newman's facial challenges to the JC&D Act

Defendants contend that this Court lacks appellate jurisdiction to review the Judicial Council's actions. See Mot. Dismiss at 24. The argument goes like this. When the Judicial Council, acting pursuant to the JC&D Act, suspended Judge Newman from hearing cases, it performed a "judicial" function. Id. at 24–26; see also Chandler, 398 U.S. at 102 (Harlan, J., concurring) ("[I]n the issuance of orders to district judges to regulate the exercise of their official duties, the Judicial Council acts as a judicial tribunal[.]"); Pitch v. United States, 953 F.3d 1226, 1245 (11th Cir. 2020) (en banc) (Pryor, J., concurring) ("The ordinary meaning of 'judicial proceeding' plainly include[s] the process required by the Judicial Conduct and Disability Act."). Because the Judicial Council's actions were judicial in nature, only a court with appellate jurisdiction over the Council can review its actions. Mot. Dismiss at 26. And, because the Judicial Council functions as a court of appeals, the only court that might be able to don that mantle is the Supreme Court. Id. at 27. (Defendants acknowledge that the Supreme Court in Chandler left unresolved "the knotty jurisdictional problem" of whether it could review Judicial Council actions. Id. at 27 (quoting Chandler, 398 U.S. at 88–89)).

But while the Federal Circuit Judicial Council may have been performing a "judicial" function when it suspended Judge Newman (more on that below), it is not a court of appeals.

That is, it is not equivalent to the Federal Circuit. Even though their membership is the same, they are created by different sections of the United States Code. See 28 U.S.C. §§ 41 (Federal Circuit), 332 (Judicial Council). And they have different jurisdiction and different powers. See 28 U.S.C. §§ 1295 (Federal Circuit), 332 (Judicial Council). It is therefore not clear where, if anywhere, the Federal Circuit Judicial Council sits within Article III's hierarchy of courts.

The better analog for a judicial council—and the one the D.C. Circuit has used—is an administrative body. See Hastings v. Jud. Conf. of U.S. ("Hastings I"), 770 F.2d 1093, 1102 (D.C. Cir. 1985) ("The [Judicial] Councils, in short, are essentially administrative bodies." (cleaned up)); see also McBryde, 264 F.3d at 62 (treating the Judicial Conference as an agency). Thus, instead of trying to place the Federal Circuit Judicial Council within Article III's hierarchy, the Court will look to the framework for judicial review of agency adjudications. And that framework varies by agency—and by statute. Certain statutes grant district courts jurisdiction to review agency adjudications. See, e.g., 42 U.S.C. § 405(g) (social security benefit determinations); 42 U.S.C. § 1395ff(b)(2)(C) (certain Medicare claim determinations). But other statutes bypass the district courts and channel review directly to the courts of appeal. See, e.g., 29 U.S.C. § 160(f) (National Labor Relations Board decisions); 15 U.S.C. § 78y(a)(1) (Securities & Exchange Commission decisions). Here, the relevant review scheme is laid out in the JC&D Act. And, as noted above, the JC&D Act bypasses both district and circuit courts for as-applied claims and channels review to the Judicial Conference. 28 U.S.C. §§ 357(a), (c); see also McBryde, 264 F.3d at 63. But the act directs facial challenges to the district court. McBryde, 264 F.3d at 58.

In sum, then, though Judge Newman's as-applied challenges to the Judicial Council's actions do not require the Court to exercise jurisdiction over a superior Article III court, judicial

review is nonetheless foreclosed by § 357(c). Her facial challenges, however, fall within the Court's original jurisdiction.

Even if the Federal Circuit Judicial Council sat above district courts within the Article III hierarchy, the Court would not lose jurisdiction over all of Judge Newman's claims because only some of her claims challenge "judicial" actions. These are the same claims that mount as-applied challenges to the Judicial Council's orders. Her other claims, *i.e*, the ones challenging the facial validity of the JC&D Act, do not require the Court to review "judicial" determinations by the Judicial Council; they instead require review of an act of Congress.

The Supreme Court considered the nature of judicial proceedings in District of Columbia Court of Appeals v. Feldman, where two D.C. bar applicants challenged a D.C. Court of Appeals bar-admission rule. 460 U.S. 462 (1983). "A judicial inquiry," the Court held, "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." Id. at 477 (quoting Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908)). Judicial inquiries often involve "legal arguments," but their "essence" is an "adjudicat[ion]" of a "present right." Id. at 480–81. See also In re Summers, 325 U.S. 561, 567 (1945) (In a judicial proceeding, "[a] declaration on rights as they stand must be sought, not on rights which may arise in the future, and there must be an actual controversy over an issue, not a desire for an abstract declaration of the law." (cleaned up)).

When the Federal Circuit Judicial Council or its Special Committee chose to preclude Judge Newman from new case assignments, investigated her conduct, and ordered her to undergo medical examinations and produce medical records—*e.g.*, the basis for the allegations in Counts II–IV, VI, and X–XI—they acted as part of a "judicial inquiry." Starting with the initiation of the complaint against Judge Newman, the Defendants "investigate[d]," see, e.g., Mot. Dismiss, Ex. 1 at 12 (the Special Committee "interview[ed] [] court staff" and retained a

physician consultant); "declare[d]" id. at 64 (the Special Committee concluded that Judge Newman's refusal to cooperate "constitute[d] a serious form of misconduct"); and "enforce[d] id. at 110 (the Special Committee recommended imposing a "sanction" of "temporary suspension of all case assignments") "liabilities as they st[ood] on present or past facts," Feldman, 460 U.S. at 470 (cleaned up). Moreover, throughout the proceeding, the "court [] had before it legal arguments against the validity of [its actions]." Id. at 480; see also FAC, Exs. Q–U (letters from Judge Newman's counsel). See also Chandler, 398 U.S. at 102 (Harlan, J., concurring) ("[A]t least in the issuance of orders to district judges to regulate the exercise of their official duties, the Judicial Council acts as a judicial tribunal . . . ."). [11] Thus, to the extent Judge Newman's claims challenge the Judicial Council's application of the JC&D Act to her, those claims challenge a "judicial inquiry."

But that is not the end of the story. The Feldman Court went on to hold that "[t]o the extent [the plaintiffs] mounted a general challenge to the constitutionality of [the D.C. bar-admission rule], . . . the District Court did have subject matter jurisdiction over their complaints." 460 U.S. at 482–83. That was so because "state supreme courts may act in a non-judicial

[11] In Chandler, four justices "decline[d]" to decide whether a "challenged action of the Judicial Council was a judicial act or decision by a judicial tribunal." 398 U.S. at 86. In dicta, however, they "[found] no indication that Congress intended to or did vest traditional judicial powers in the Councils." Id. at 86 n.7. Justice Harlan responded to this footnote with a lengthy concurrence, where he examined the legislative history of the act establishing judicial councils and considered relevant Supreme Court precedent. See id. at 96–112. Based on this analysis, he concluded that "at least in the issuance of orders to district judges to regulate the exercise of their official duties, the Judicial Council acts as a judicial tribunal for purposes of this Court's appellate jurisdiction." Id. at 102 (Harlan, J., concurring). In dissent, Justices Douglas and Black agreed with Justice Harlan that the Judicial Council was "under the circumstances an inferior judicial tribunal." Id. at 135 (Douglas, J., dissenting). Since Chandler, other circuits have adopted Justice Harlan's concurrence and concluded that judicial councils, in certain settings, conducted "judicial proceedings" or "judicial inquir[ies]." See, e.g., Pitch, 953 F.3d at 1245 (Pryor, J., concurring); In re McBryde, 117 F.3d 208, 221 (5th Cir. 1997). This Court does the same and applies the standard set out in Feldman to determine when the Federal Circuit Judicial Council acted as a judicial tribunal.

capacity in promulgating rules regulating the bar." Id. at 485. Likewise here, Congress acted in a non-judicial capacity when it enacted the JC&D Act. See Prentis, 211 U.S. at 226 ("Legislation, [as opposed to a judicial inquiry], looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some parts of those subject to its power."). Thus, consistent with § 357(c), the Court may exercise jurisdiction over Judge Newman's challenges to the constitutionality of the act—in other words, her facial challenges.

2. *Prudential concerns do not mandate dismissal*

Defendants raise two prudential doctrines as final barriers to this Court's jurisdiction. In a brief filed before the Federal Circuit Judicial Council finalized, and the Judicial Conference affirmed, the order suspending Judge Newman from new case assignments for one year, Defendants urged this Court to decline jurisdiction because neither body had rendered a final decision. See Mot. Dismiss at 46–48. Defendants suggested that the "prudential concern[]" of comity and the "complementary" doctrine of exhaustion counseled against this Court "rendering judgment on the constitutionality of proceedings *while* the proceedings themselves are going on." Id. at 47 (cleaned up). In no small part because circumstances have changed since Defendants raised this argument, the Court declines to stand down on this basis.

Principles of comity and exhaustion do not preclude this Court from exercising jurisdiction where, as here, the Judicial Council has already imposed a sanction on Judge Newman. The D.C. Circuit's treatment of Judge Alcee Hastings's federal lawsuit explains why. Judge Hastings, a former district judge in the Southern District of Florida, sued various judges on the Judicial Conference and the Eleventh Circuit's Judicial Council after a JC&D complaint was initiated against him. Hastings I, 770 F.2d at 1095. A judge of this court refused to enjoin the investigation into Judge Hastings that was underway by an Eleventh Circuit special committee. Id. On appeal, the D.C. Circuit agreed. Id. at 1097. It declined to reach the merits of Judge

Hastings's challenges to the JC&D Act because, at the time of the district court's decision, the Special Committee was "still at work" and "[n]o report had issued from the [c]ommittee with recommendations for disposition of the complaint." Id. Because of the misconduct proceeding's nascency, "the possible outcomes under the [JC&D] Act"—*e.g.*, that the Judicial Council or Conference might reject the committee's recommended penalties, adopt them, or impose different penalties all together—were "only *possibilities*." Id. at 1100. The D.C. Circuit therefore concluded that "the [judicial] councils and Conference are entitled to a measure of comity sufficient to preclude disruptive injunctive relief by federal courts absent a showing that serious and irremediable injury will otherwise result." Id. at 1102.

Unlike in Hastings I, the outcomes in Judge Newman's case are no longer mere possibilities. The Special Committee submitted its report and recommendation, Mot. Dismiss, Ex. 1; the Judicial Council imposed a sanction suspending Judge Newman from hearing new cases, Pl.'s Opp'n, Ex. B; and—just days ago—the Judicial Conference affirmed the Judicial Council's order, Defs.' Notice of JC&D Comm. Order at 14. Judge Newman is therefore already subject to a "serious and irremediable injury." Thus, to the extent the Court retains jurisdiction over Judge Newman's claims, it will not decline to exercise that jurisdiction because of prudential factors.[12]

[12] Defendants also cite Chandler as support for their suggestion the Court bow to the principles of comity and exhaustion. In Chandler, however, the Supreme Court did not decline to interfere with a judicial council's orders due to prudential concerns. Instead, the Court declined to issue the "extraordinary relief of mandamus or prohibition" because Judge Chandler had not, in the first instance, sought relief directly from the Judicial Council. 398 U.S. at 87, 89. Indeed, Judge Chandler had acquiesced in the Judicial Council's decision to assign new cases to judges other than himself. Id. at 79, 87.

D. Merits of Facial Challenges

After facing several obstacles to the exercise of its jurisdiction, the Court is left with jurisdiction over Counts I, V, and VII–IX. The only two counts presently at issue, however, are Count I and part of Count VII.[13] That is so because Judge Newman does not seek a preliminary injunction based on the likelihood of prevailing on the other counts, see Prelim. Inj. at 39–51, and Defendants do not challenge these counts on Rule 12(b)(6) grounds, see Tr. at 66.[14] The Court will therefore address the merits of only Count I and part of Count VII.

1. Count I: Improper Removal and Violation of Separation of Powers

As with much of this case, McBryde forecloses Count I. But this time, on the merits. "Count I challenges the Disability Act's authorization to suspend Article III judges from office." Pl.'s Opp'n at 29. Judge Newman contends that the JC&D Act unconstitutionally "delegate[s]"

[13] A note on how the Court reads Count VII. The count makes three allegations: (1) the JC&D Act is "unconstitutionally vague to the extent it purports to authorize compelled medical or psychiatric examinations . . . or demands for . . . Article III judges to surrender their private medical records"; (2) § 353(c), "which authorizes a Special Committee to conduct an investigation 'as extensive as it considers necessary' lacks minimal enforcement guidelines"; and (3) the act "vests virtually complete discretion in the hands of a Special Committee" in violation of due process and Article III. FAC ¶ 112. To the extent the Court can consider the first allegation, see McBryde, 264 F.3d at 64 (barring the Court from considering provisions that "reduce[] to arguments as to the exact reach of the [JC&D Act's] provisions"), the allegation collapses into the second. The provision purportedly authorizing the Special Committee to compel medical examinations and the production of records is § 353(c). As Defendants acknowledged at the motions hearing, they challenge only the third allegation on 12(b)(6) grounds. Tr. at 66.

[14] Should Defendants wish to argue that the remaining counts fail to state a claim, they may do so in a motion for judgment on the pleadings or a motion for summary judgment. See Fed. R. Civ. P. 12(g)(2) ("Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion."); Fed. R. Civ. P. 12(h)(2)(B) ("Failure to state a claim upon which relief can be granted . . . may be raised . . . by a motion under Rule 12(c).").

to judges "the impeachment power which the Constitution reserves to the House and Senate." FAC ¶ 81.

The D.C. Circuit considered and rejected this argument in McBryde. Judge McBryde argued that "the clause vesting the impeachment power in Congress [] preclude[d] *all* other methods of disciplining judges." McBryde, 264 F.3d at 64. "On this theory," he contended, the JC&D Act "violate[s] separation of powers doctrine." Id. The circuit disagreed, concluding that the Constitution "sheltered" judges "from removal and salary diminution," absent impeachment, but not "from lesser sanctions of every sort." Id. at 65; see also id. ("Judge McBryde's attempt to fudge the distinction between impeachment and discipline doesn't work. The Constitution limits judgments for impeachment to removal from office and disqualification to hold office . . . . It makes no mention of discipline generally."). The circuit therefore held that the JC&D Act, by permitting discipline short of impeachment or salary diminution, did not violate the Constitution.

Judge Newman attempts to escape McBryde's clutches by casting her challenge as "precisely of the type left open by [McBryde's] Footnote 5," Pl.'s Opp'n at 36, where the D.C. Circuit noted that it did "not decide whether a long-term disqualification from cases could, by its practical effect, affect an unconstitutional 'removal,'" 264 F.3d at 67 n.5. Like the circuit, this Court need not decide that question. Because Count I raises a facial challenge to the JC&D Act, the Court must construe it as alleging that *any* disqualification, no matter its duration, constitutes an "arrogat[ion]" of "the impeachment power." FAC ¶ 81. See Salerno, 481 U.S. at 745 ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). But, as noted above, the D.C. Circuit held that at least some suspensions do not unconstitutionally arrogate Congress's impeachment power. McBryde, 264 F.3d at 65.

Moreover, contrary to Judge Newman's contention, footnote 5 does not create a carve-out to McBryde's bar on as-applied challenges. She claims that "[i]n order to address" "whether a long-term disqualification from cases could . . . affect an unconstitutional 'removal,'" "there first has to exist 'a long-term disqualification' . . . and such disqualification can exist only once the Disability Act is *applied* to a particular judge." Pl.'s Opp'n at 36. But nothing in McBryde, including footnote 5, suggests that the circuit intended for Article III courts to decide as-applied challenges based on long-term disqualifications. To the contrary, the circuit held that the JC&D Act funnels "all" non-facial claims, including constitutional claims, to the Judicial Conference. 264 F.3d at 62.

2. Count VII: Complete Discretion in the Special Committee

Finally, Count VII contends that the JC&D Act violates the Fifth Amendment's due process protection and Article III's guarantee of judicial independence by "vest[ing] virtually complete discretion in the hands of a Special Committee to determine when compliance with [orders] may be compelled." FAC ¶ 112. Though the Court must credit the plaintiff's well-pleaded factual allegations as true, at least on a motion to dismiss, it need not accept the complaint's legal conclusions. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2009). And two related features of JC&D investigations cabin a special committee's discretion. First, the JC&D Act does not vest special committees with the authority to compel compliance with their orders. The act charges special committees with "conduct[ing] an investigation as extensive as [they] consider[] necessary." 28 U.S.C. § 353(c). But the act does not give them enforcement power. Instead, it directs special committees to present a report to the judicial council with "recommendations for necessary and appropriate action by the judicial council." Id. Second, the JC&D Rules erect guardrails around a special committee's investigation. They allow subject judges to refuse to comply with investigations for "good cause." JC&D R. 4(a)(5). And, as was

the case here, the judicial council, and ultimately the Judicial Conference, decide whether the judge had good cause to refuse. See Pl.'s Opp'n, Ex. B at 40–68; Defs.' Not. of Defs.' Notice of JC&D Comm. Order 21–26.

In some cases, a circuit judicial council (or even the Judicial Conference) may choose to conduct its own investigation after receiving a special committee's report and recommendation (or, in the Judicial Conference's case, an appeal from the judicial council). See 28 U.S.C. §§ 354(a)(1), (a)(1)(A) ("The judicial council of a circuit, upon receipt of [the special committee's report] . . . may conduct any additional investigation which it considers to be necessary."): id. § 355 ("Upon referral or certification of any matter . . . , the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate . . . ."). In those cases, the same body would both issue orders as part of an investigation and then determine whether good cause exists to refuse compliance. The D.C. Circuit found no due process concerns with this arrangement in Hastings II, when Judge Hasting's case arrived back at the circuit following its initial remand. The circuit held that the JC&D Act's vesting of both investigative and adjudicatory functions in the same body did not violate due process. 829 F.2d at 104–05. In its view, there was "no [] risk [of actual bias of prejudgment] inherent in the procedures established by the [JC&D] Act." Id. at 104–05. "The fact that federal judges administer the mechanism described by the Act contribute[d] in no small measure to this conclusion. They are called upon every day to put aside considerations not legally relevant to their decisions." Id. at 105.

To be sure, Hastings II presented a due process, and not an Article III, challenge to judicial councils' authority. But the reasoning of McBryde picks up where Hastings II left off. As noted above, in McBryde, the circuit rejected the notion that Article III's grant of "judicial independence" gives judges "absolute freedom from" discipline or sanctions that fall short of

removal or salary diminution. 264 F.3d at 65–66. The circuit also held that the Constitution does not "exclude[] discipline of judges *by* judges." Id. at 66. Surely if the Constitution permits judges to subject other judges to discipline or sanction, it also tolerates judicial councils determining when compliance with orders may be compelled. In fact, in many cases, there may be no difference between seeking compliance with an order and imposing a sanction.

Accordingly, the Court grants Defendants' motion to dismiss as to Count I and part of Count VII. Because Judge Newman has not shown a likelihood of prevailing on the merits of these counts, the Court also denies her motion for a preliminary injunction. See Changji Esquel Textile Co., 40 F.4th at 726.

IV. Conclusion

For these reasons, it is hereby

ORDERED that [ECF No. 12] Judge Newman's Motion for a Preliminary Injunction is DENIED. It is further

ORDERED that [ECF No. 24] Defendants' Motion to Dismiss is GRANTED in part and DENIED in part. It is further

ORDERED that Defendants shall file an answer to the remaining counts by March 13, 2024.

SO ORDERED.

CHRISTOPHER R. COOPER
United States District Judge

Date: February 12, 2024

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

ANSWER

Defendants hereby submit their Answer to Plaintiff's complaint. Am. Compl., ECF No. 10. Defendants note that all factual allegations in the complaint are relevant only to Plaintiff's as-applied challenges (Counts I–IV, VI, part of VII, X–XI), which this Court dismissed along with several of Plaintiff's facial challenges. *See Newman v. Moore*, --- F. Supp. 3d ---, 2024 WL 551836, at *1 (D.D.C. Feb. 12, 2024). The remaining counts (Counts V, part of VII, VIII–IX) are facial challenges to the Judicial Conduct and Disability Act of 1980. *See id.* at *11–18. None of Judge Newman's factual allegations are material to these remaining challenges, and Defendants therefore object to their continued inclusion in the complaint. *See* Fed. R. Civ. P. 12(f) (allowing the Court to strike any "immaterial" matters "on its own"). Nonetheless, for the sake of completeness, Defendants respond to Plaintiff's allegations. Defendants generally deny all allegations, except as specifically provided below. *See* Fed. R. Civ. P. 8(b)(3).

1. Denied.
2. Admitted.
3. Admitted.

4. Defendants deny that Chief Judge Moore is the chair of either the Federal Circuit's Judicial Council or the Special Committee, but admit that Chief Judge Moore presides over meetings of the Judicial Council, *see* 28 U.S.C. § 332(a)(1). Defendants further deny that Chief Judge Moore "initiated"—rather than "identified"—a complaint under Rule 5. The allegations of this paragraph are otherwise admitted.

5. Admitted.

6. Admitted.

7. The allegations of this paragraph are denied, except to admit that the Judicial Council of the Federal Circuit generally consists of all active-duty judges of the U.S. Court of Appeals for the Federal Circuit; 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; and some of its authorities and processes are described in 28 U.S.C. §§ 332 and 352–54 and Rules 18–20 of the Rules for Judicial Conduct and Judicial Disability Proceedings.

8. The allegations of this paragraph are denied, except to admit that the Judicial Council generally consists of active judges of the Federal Circuit, and that judges who are the subject of an investigation under the Judicial Conduct and Disability Act are not permitted to serve upon a judicial council. *See* 28 U.S.C. § 359(a).

9. Admitted.

10. Admitted.

11. Defendants deny "[s]ince 1984, Judge Newman has continued to faithfully, diligently, and meticulously exercise the duties of her office, to recognition and acclaim. Defendants lack knowledge or information sufficient to form a belief about the truth of the remaining allegations in this paragraph and therefore deny.

12. Defendants admit that Judge Newman has authored majority and dissenting opinions, voted on petitions for rehearing *en banc*, and joined in *en banc* decisions of the Court. The allegations of this paragraph are otherwise denied.

13. Defendants admit that Judge Newman is an active-status Circuit Judge who has authored hundreds of opinions, which included majority, concurring, and dissenting opinions. The allegations of this paragraph are otherwise denied.

14. Denied.

15. Defendants lack knowledge or information sufficient to form a belief about the truth of these allegations and therefore deny.

16. Denied.

17. Defendants admit that Chief Judge Moore met with Judge Newman around early Mach 2023. The allegations of this paragraph are otherwise denied.

18. Admitted.

19. Defendants admit the March 24, 2023 Order was docketed on March 24, 2023. The allegations of this paragraph are otherwise denied.

20. Defendants admit that the March 24, 2023 Order states "[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" and that between June 2021 and September 2021 Judge Newman sat on ten panels. Defendants lack knowledge or information sufficient to form a belief about the truth of the fourth sentence and therefore deny. The allegations of this paragraph are otherwise denied.

21. Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation and therefore deny.

22. Defendants admit that Judge Newman sat on ten panels from June 2021 to September 2021. The allegations of this paragraph are otherwise denied.

23. Defendants admit upon the issuance of the March 24, 2023 Order, Chief Judge Moore appointed a Special Committee consisting of herself, Circuit Judge Sharon Prost, and Circuit Judge Richard G. Taranto. The allegations of this paragraph are otherwise denied.

24. The allegations of this paragraph are denied, except to admit that Chief Judge Moore sent Judge Newman an email on April 5, 2023, copying all active circuit judges.

25. Defendants admit that Judge Newman has not been assigned to sit on any panels of the Court, starting with the April 2023 sitting, and that she has repeatedly requested to be assigned. The allegations of this paragraph are otherwise denied.

26. Defendants admit Chief Judge Moore issued an order on April 6, 2023. The allegations of this paragraph are otherwise denied.

27. Defendants admit the April 7, 2023 Order ordered Judge Newman to "undergo a neurological and complete neuro-psychological battery of tests to determine whether she suffers from a disability, and if so, its nature and extent." Ex. C at 1. Defendants admit the April 7, 2023 Order identified a qualified neurologist and neuropsychologist to perform the testing. *Id.* at 2. Defendants admit that the April 7, 2023 Order states "[b]ased on its investigation and direct observations of Judge Newman's behavior, the Committee has determined that there is a reasonable basis to conclude she might suffer from a disability that interferes with her ability to perform the responsibilities of her office." *Id.* at 1. Defendants admit the April 7, 2023 order provided Judge Newman three days (or the option of demonstrating good cause for failure to comply with this deadline) in which to indicate whether she would make herself available for the tests to be conducted at a later date. *Id.* at 2. The allegations of this paragraph are otherwise denied.

28. Defendants admit Chief Judge Moore issued an order on April 13, 2023. The allegations of this paragraph are otherwise denied.

29. Defendants admit that the Special Committee issued an order on April 17, 2023. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation that "the events this order alleged (*i.e.*, 'heart attack' and 'coronary stents') never transpired" and therefore deny. The allegations of this paragraph are otherwise denied.

30. Denied.

31. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation Judge Newman's law clerk made an earlier request to Judge Newman

to seek alternative employment and therefore deny. The allegations of this paragraph are otherwise denied.

32. Defendants admit that Chief Judge Moore issued an order on April 20, 2023. The allegations of this paragraph are otherwise denied.

33. Defendants admit that on April 21, 2023 Mark Chenoweth sent a letter to Chief Judge Moore and copied Judges Prost and Taranto requesting immediate restoration of Judge Newman to the regular rotation on the Court's calendar and that the Chief Judge or the Special Committee request the Chief Justice of the United States transfer the investigation to a different judicial council. The allegations of this paragraph are otherwise denied.

34. Denied.

35. Defendants admit the April 21, 2023 letter sent to Chief Judge Moore and copying Judges Prost and Taranto contains the quoted language. The allegations of this paragraph are otherwise denied.

36. Defendants admit a redacted form of the March 24, 2023 Order and the April 13, 2023 Order were published on the Federal Circuit's website. The allegations of this paragraph are otherwise denied.

37. Defendants admit on May 3, 2023 the Special Committee issued two orders. The allegations of this paragraph are otherwise denied.

38. Defendants admit that the Special Committee issued an order on May 3, 2023 that ordered Judge Newman to undergo evaluation and testing by identified medical professionals. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation that certain medical records "do not exist" or that certain events "have never occurred" and therefore deny. The allegations of this paragraph are otherwise denied.

39. Defendants admit the Special Committee's May 3, 2023 Order and the Judicial Council's May 3, 2023 Order denied without prejudice Judge Newman's request for the Chief Judge and/or the Judicial Council to request that the Chief Justice transfer the proceeding. The allegations of this paragraph are otherwise denied.

40. Defendants admit Federal Rule of Appellate Procedure 27(a)(3)(A) provides a response to a motion "must be filed within 10 days after service of the motion unless the court shortens or extends the time." Defendants admit Federal Rules of Civil Procedure 6(c) provides a written motion and notice of hearing must be served at least 14 days before the time specified for hearing absent certain exceptions. The allegations of this paragraph are otherwise denied.

41. Denied,

42. Defendants lack knowledge or information sufficient to form a belief about the propositions to which Judge Newman does or does not object and therefore deny. The allegations of this paragraph are otherwise denied.

43. Defendants lack knowledge or information sufficient to form a belief about the truth of Judge Newman's intent and therefore deny. The allegations of this paragraph are otherwise denied.

44. Defendants admit the May 9, 2023 letter objected to the May 3, 2023 Order on alleged First Amendment grounds and requested "disclosure of materials as authorized by Rule 23(a)(7)." Ex. R at 3. Defendants admit that in the May 9, 2023 letter Judge Newman declined to provide the requested medical records and the letter stated "[t]he special committee has not explained why it believes that these records are relevant to its investigatory and deliberative processes. Given the medical data, it is unlikely to be able to do so." *Id.* at 4. Defendants admit the May 9, 2023 letter renewed the request for a transfer and Judge Newman's demand to be immediately restored to the case assignment calendar. *Id.* at 6. The allegations of this paragraph are otherwise denied.

45. Defendants deny Plaintiff's characterization of the May 3, 2023 Order as a "prior gag order." The allegations of this paragraph are otherwise admitted.

46. Defendants deny Plaintiff's characterization of the Special Committee as having "[n]evertheless" issued certain instructions to Judge Newman and her counsel. The allegations of this paragraph are otherwise admitted.

47. Defendants admit the May 16, 2023 Order ordered Judge Newman to undergo the identified evaluation and testing and participate in a video-taped interview. Defendants admit in the May 16, 2023 order the Special Committee denied Judge Newman's request for the Chief Judge and/or the Judicial Council to request that the Chief Justice transfer the proceeding. Defendants admit page 26 of the Special Committee's May 16, 2023 Order does not mention Judge Newman's due process objection to the Judicial Council's action. The allegations of this paragraph are otherwise denied.

48. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph and therefore deny.

49. Admitted.

50. Defendants admit on May 20, 2023 Judge Newman made a written request for an extension of time to respond to the May 16, 2023 Orders until June 8, 2023, stating that one of her counsel, Gregory Dolin, was in Israel to attend a traditional Jewish baby-naming ceremony, there is a time difference between Israel and Washington, D.C., and Mr. Dolin had "an immovable deadline of May 31, 2023 to submit grades for over 100 students." Ex. S. Defendants admit on May 22, 2023 the Special Committee granted a partial extension. Ex. L at 4. The allegations of this paragraph are otherwise denied.

51. Defendants admit the quote appears in the cited May 25, 2023 letter. The allegations of this paragraph are otherwise denied.

52. Admitted.

53. Defendants admit the June 1, 2023 Order narrowed the focus of the Special Committee's further investigation "in light of the practical constraints that Judge Newman's refusal to cooperate places on the Committee's ability to proceed." Ex. N at 2. Defendants admit the June 1, 2023 Order states "the Committee's investigation will focus on the question of whether Judge Newman's refusal to cooperate with the Committee's investigation constitutes misconduct." *Id.* at 3. Defendants admit the June 1, 2023 Order permitted Judge Newman to "submit a brief limited to addressing the question whether Judge Newman's refusal

to undergo examinations, to provide medical records, and to sit for an interview with the Committee as described in the May 16, Order constitute misconduct and the appropriate remedy if the Committee were to make a finding of misconduct." *Id.* at 6. Defendants admit the June 1, 2023 Order scheduled oral argument on the matter for July 13, 2023. *Id.* The allegations of this paragraph are otherwise denied.

54. Defendants admit the Judicial Council issued an order on June 5, 2023. The allegations of this paragraph are otherwise denied.

55. Denied.

56. Denied.

57. Denied.

58. Defendants admit that the June 5 Order discusses the Judicial Council's March 8 decision to suspend Judge Newman from hearing cases, and that Judge Newman was not invited to participate in the March 8 Judicial Council meeting. Defendants deny the existence of meeting minutes for the March 8, 2023 meeting of the Judicial Council, and the allegation that "[t]here are several problems with this new claim." The allegations of this paragraph are otherwise denied.

59. Defendants deny the existence of meeting minutes for the March 8, 2023 meeting of the Judicial Council. The allegations of this paragraph are otherwise admitted.

60. Denied.

61. Admitted.

62. Admitted.

63. Defendants admit that *Military-Veterans Advocacy, Inc. v. Sec'y of Veterans Affairs*, No. 20-1537, had been pending for more than one year. Defendants admit that in that case the court requested additional briefing on the impact of Sergeant First Class Heath Robinson Honoring Our Promises to Address Comprehensive Toxics (PACT) Act of 2022 on the case and supplemental briefs were filed on September 14, 2022. Defendants admit the opinion in

that case was issued on March 22, 2023. The allegations of this paragraph are otherwise denied.

64. Defendants admit that *SAS Inst. v. World Programming Ltd.*, No. 21-1542, had been pending for more than a year. The allegations of this paragraph are otherwise denied.

65. Denied.

66. Denied.

67. Defendants admit the June 5, 2023 Order states the "Judicial Council concludes 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." Ex. O at 4. The allegations of this paragraph are otherwise denied.

68. Defendants admit that Judge Newman did not vote on the June 5 Order. *See* 28 U.S.C. § 359(a). The allegations of this paragraph are otherwise denied.

69. Defendants admit that the June 5, 2023 Order states "[t]his action is warranted under the Council's statutory authority . . . 28 U.S.C. § 332(d)(1)." Ex. O. at 4–5. Defendants admit the June 5, 2023 Order states "[t]his is not a censure but rather a decision made for the effective and expeditious administration of the business of the court." Ex. O. at 5. The allegations of this paragraph are otherwise denied.

70. Denied.

71. Admitted.

72. Defendants admit 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 [sic] Newman filed a twelve-page dissenting opinion in *Dep't of Transport. v. Eagle Peak Rock & Paving, Inc.*, [69 F.4th 1367] (Fed. Cir. 2023)." The allegations of this paragraph are otherwise denied.

73. Defendants admit Judge Newman joined the *en banc* portion of *Moore v. United States*, 66 F.4th 991 (Fed. Cir. 2023) and she participated in the poll to take up the matter *en banc*. The allegations of this paragraph are otherwise denied.

74. Defendants admit the first quote in this paragraph appears in Kimberly A. Moore, *Anniversaries and Observations*, 50 AIPLA Q. J. 521, 524-25 (2022), which was published in 2022. The allegations of this paragraph are otherwise denied.

75. Denied.

76. Denied.

77. Denied.

78. Denied.

79. Denied.

80. The Court dismissed Count I of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

81. The Court dismissed Count I of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

82. The Court dismissed Count I of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

83. The Court dismissed Count I of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

84. The Court dismissed Count I of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

85. The Court dismissed Count II of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

86. The Court dismissed Count II of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

87. The Court dismissed Count II of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

88. The Court dismissed Count II of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

89. The Court dismissed Count II of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

90. The Court dismissed Count III of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

91. The Court dismissed Count III of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

92. The Court dismissed Count III of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

93. The Court dismissed Count III of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

94. The Court dismissed Count III of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

95. The Court dismissed Count IV of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

96. The Court dismissed Count IV of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

97. The Court dismissed Count IV of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

98. The Court dismissed Count IV of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

99. The Court dismissed Count IV of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

100. This paragraph contains Plaintiff's repetition and incorporation of preceding paragraphs, to which no response is required. Defendants further restate their objection that none of Plaintiff's preceding factual allegations are material to the remaining facial challenges to the Judicial Conduct and Disability Act, including this Count. To the extent that a response is deemed required, Defendants' responses to those previous paragraphs are incorporated herein by reference.

101. Denied.

102. Denied.

103. Denied.

104. Denied.

105. Denied.

106. The Court dismissed Count VI of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

107. The Court dismissed Count VI of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

108. The Court dismissed Count VI of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

109. The Court dismissed Count VI of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

110. The Court dismissed Count VI of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

111. This paragraph contains Plaintiff's repetition and incorporation of preceding paragraphs, to which no response is required. Defendants further restate their objection that none of Plaintiff's preceding factual allegations are material to the remaining facial challenges

to the Judicial Conduct and Disability Act, including this Count. To the extent that a response is deemed required, Defendants' responses to those previous paragraphs are incorporated herein by reference.

112. The Court dismissed in part Count VII of Plaintiff's Amended Complaint, including part of this allegation, and no response to that part is therefore required. *See Newman*, 2024 WL 551836, at *18. The remaining allegations of this paragraph are denied.

113. Denied.

114. Denied.

115. This paragraph contains Plaintiff's repetition and incorporation of preceding paragraphs, to which no response is required. Defendants further restate their objection that none of Plaintiff's preceding factual allegations are material to the remaining facial challenges to the Judicial Conduct and Disability Act, including this Count. To the extent that a response is deemed required, Defendants' responses to those previous paragraphs are incorporated herein by reference.

116. Admitted insofar as Plaintiff generally possesses Fourth Amendment rights.

117. Denied.

118. Denied.

119. Denied.

120. Denied.

121. This paragraph contains Plaintiff's repetition and incorporation of preceding paragraphs, to which no response is required. Defendants further restate their objection that none of Plaintiff's preceding factual allegations are material to the remaining facial challenges to the Judicial Conduct and Disability Act, including this Count. To the extent that a response is deemed required, Defendants' responses to those previous paragraphs are incorporated herein by reference.

122. Admitted insofar as Plaintiff generally possesses Fourth Amendment rights.

123. Denied.

124. Denied.

125. Denied.

126. Denied.

127. The Court dismissed Count X of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

128. The Court dismissed Count X of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

129. The Court dismissed Count X of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

130. The Court dismissed Count X of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

131. The Court dismissed Count XI of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

132. The Court dismissed Count XI of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

133. The Court dismissed Count XI of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

134. The Court dismissed Count XI of Plaintiff's Amended Complaint, including this allegation, and no response is therefore required. *See Newman*, 2024 WL 551836, at *18.

The remaining allegations following the numbered paragraphs constitute Plaintiff's requests for relief and jury demand, to which no response is required. To the extent a response is deemed required, Defendants deny that Plaintiff is entitled to the requested relief or any other relief and deny that there are any issues triable to a jury.

The section headings used in Plaintiff's complaint are Plaintiff's characterizations of her allegations and claims to which no response is required, but to the extent a response is deemed required, those headings are denied.

DATED: March 8, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

CHRISTOPHER R. HALL
Assistant Director, Federal Programs Branch

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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 FOR JUDGMENT ON THE PLEADINGS

Under Federal Rule of Civil Procedure 12(c), Defendants[1] hereby move for judgment on the pleadings on all remaining claims of Plaintiff's First Amended Complaint: Count V (Am. Compl. ¶¶ 100–105, ECF No. 10), Count VII (*id.* ¶¶ 111–14), Count VIII (*id.* ¶¶ 115–20), and Count IX (*id.* ¶¶ 121–26). A proposed order is attached.

[1] 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: March 8, 2024

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

CHRISTOPHER R. HALL
Assistant Director, Federal Programs Branch

/s/ *Stephen Ehrlich*
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HON. PAULINE NEWMAN, Plaintiff, v. **HON. KIMBERLY A. MOORE**, *et al.*, Defendants.	Case No. 23-cv-01334 (CRC)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that [ECF No. 45] Defendants' Motion for Judgment on the Pleadings is GRANTED. It is further

ORDERED that this case is dismissed.

This is a final appealable Order.

SO ORDERED.

CHRISTOPHER R. COOPER
United States District Judge

Date: July 9, 2024

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HON. PAULINE NEWMAN, Plaintiff, v. **HON. KIMBERLY A. MOORE**, *et al.*, Defendants.	Case No. 23-cv-01334 (CRC)

MEMORANDUM OPINION

In 2021, the Chief Judge of the U.S. Court of Appeals for the Federal Circuit, Kimberly A. Moore, received reports from court staff that raised concerns about whether veteran Federal Circuit Judge Pauline Newman remained fit to carry out her judicial duties. The reports prompted Chief Judge Moore to exercise her authority under the Judicial Conduct & Disability ("JC&D") Act to convene a special committee of the court's judges to conduct an investigation. See 28 U.S.C. §§ 353(a), (c). Judge Newman declined to cooperate with the investigation, however, objecting especially to the committee's requests that she undergo independent neurological testing and provide it relevant medical records. In the face of Judge Newman's recalcitrance, the Federal Circuit Judicial Council, on the recommendation of the special committee, suspended her from receiving new case assignments until she acquiesced to the special committee's demands.

Fighting fire with fire, Judge Newman brought this lawsuit against Chief Judge Moore, the two other members of the special committee, and the Federal Circuit Judicial Council, which is comprised of every member of the court (collectively, "Defendants"). Her eleven-count complaint raised both facial and as-applied challenges to provisions of the JC&D Act, as well as

to 28 U.S.C. § 332, which governs the authority of circuit judicial councils. Following an unsuccessful Court-ordered mediation, the Court denied Judge Newman's request for a preliminary injunction and granted Defendants' motion to dismiss most counts of the complaint. The Court determined that it lacked jurisdiction over Judge Newman's as-applied claims and that two of her facial challenges failed to state a claim. Defendants now move for judgment on the pleadings as to the remaining facial challenges, which allege that certain provisions of the JC&D Act violate the Fourth Amendment and are unconstitutionally vague. Because Judge Newman cannot prevail on these counts either, the Court will grant judgment for Defendants and dismiss the case.

I. Background

The Court has already detailed the background of this case, including the relevant statutory frameworks. See Newman v. Moore, No. 23-cv-01334 (CRC), 2024 WL 551836, at *2–5 (D.D.C. Feb. 12, 2024). It need not replow the same ground here. After dismissing most of the counts in Judge Newman's complaint, the Court directed Defendants to answer the remaining counts: Counts Eight and Nine, which present facial challenges to the JC&D Act under the Fourth Amendment, and Counts Five and Seven, which allege that provisions of the Act are unconstitutionally vague. Defendants did so and simultaneously moved under Federal Rule of Civil Procedure 12(c) for judgment on the pleadings. Judge Newman opposed, and the motion is fully briefed and ripe for review.

II. Legal Standards

A. Motion for Judgment on the Pleadings

Parties may move for judgment on the pleadings after the pleadings are closed but early enough so as not to delay trial. Fed. R. Civ. P. 12(c). Movants are entitled to judgment on the

pleadings under Rule 12(c) if they "demonstrate[] that no material fact is in dispute and that [they are] entitled to judgment as a matter of law." Schuler v. PricewaterhouseCoopers, LLP, 514 F.3d 1365, 1370 (D.C. Cir. 2008) (quoting Peters v. Nat'l R.R. Passenger Corp., 966 F.2d 1483, 1485 (D.C. Cir. 1992)). Though there are some differences between a Rule 12(b) and Rule 12(c) motion, "[t]he appropriate standard for reviewing a motion for judgment on the pleadings is virtually identical to that applied to a motion to dismiss under Rule 12(b)(6)." Maniaci v. Georgetown Univ., 510 F. Supp. 2d 50, 58 (D.D.C. 2007); see also Tapp v. Washington Metro. Area Transit Auth., 306 F. Supp. 3d 383, 391–92 (D.D.C. 2016) (noting that the "focus of a motion to dismiss lies with the plaintiff's inability to proceed on his claim," while "a motion for judgment on the pleadings centers upon the substantive merits of the parties' dispute"). "When evaluating a motion for judgment on the pleadings, the [C]ourt may rely on the pleadings, the exhibits to the pleadings, and any judicially noticeable facts . . . ." Jimenez v. McAleenan, 395 F. Supp. 3d 22, 30 (D.D.C. 2019) (cleaned up) (alteration in original). And while the Court must construe the factual allegations in the light most favorable to the non-moving party, it is not bound by that party's legal conclusions. See Sissel v. U.S. Dep't of Health & Human Servs., 760 F.3d 1, 4 (D.C. Cir. 2014).

III. Analysis

Defendants have moved for judgment as to Counts Five, Seven (in part), Eight, and Nine. Again, Counts Eight and Nine allege that the JC&D Act facially violates the Fourth Amendment of the Constitution, and the other two counts allege that provisions of the Act are unconstitutionally vague. The Court will start with the Fourth Amendment claims before tackling the vagueness challenges.

A. Counts Eight and Nine: Unconstitutional Searches

As detailed in the Court's prior opinion, following receipt of a judicial misconduct or disability complaint, the chief judge of a circuit may convene a special committee to investigate the complaint. See Newman, 2024 WL 551836, at *2; see also 28 U.S.C. §§ 353(a), (c). Here, Chief Judge Moore appointed a special committee to investigate such a complaint against Judge Newman. Id. at *4. Under the JC&D Act's "investigation" provision, the special committee was authorized to "conduct an investigation as extensive as it consider[ed] necessary." 28 U.S.C. § 353(c). Counts Eight and Nine attempt to mount facial attacks to this provision. Specifically, they allege that § 353(c) "violates the Fourth Amendment to the extent it authorizes a compelled medical or psychiatric examination of an Article III judge" (Count Eight) or "a compelled surrender of medical records belonging to an Article III judge" (Count Nine) "without a warrant based on probable cause." FAC ¶¶ 118, 124.

To prevail on a facial attack, Judge Newman must show that § 353(c) "is unconstitutional in all of its applications." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008). Although such a challenge is "the most difficult . . . to mount successfully," in "assessing whether a statute meets this standard," a court must consider "only applications of the statute in which it actually authorizes or prohibits conduct." City of Los Angeles, Calif. v. Patel, 576 U.S. 409, 415, 418 (2015) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

The relevant question therefore is: Does section 353(c) authorize special committees to engage in conduct that does not run afoul of the Fourth Amendment? It does. In "conduct[ing] an investigation as extensive as it considers necessary," a special committee is authorized to undertake action that falls outside the Fourth Amendment. 28 U.S.C. § 353(c). For example, under the aegis of § 353(c), a special committee could interview court employees, request and

receive third-party witness statements, or collect relevant communications from the court's email server, none of which necessarily constitutes a search or seizure. See Florida v. Bostick, 501 U.S. 429, 434 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions . . . . [s]o long as a reasonable person would feel free to disregard the police and go about his business." (cleaned up)); United States v. Miller, 425 U.S. 435, 443 (1976) ("[T]he Fourth Amendment does not prohibit the obtaining of information . . . conveyed by [a third party] to Government authorities . . . ."); United States v. Simons, 206 F.3d 392, 395–96, 398 (4th Cir. 2000) (government employee lacked a reasonable expectation of privacy in the "record or fruits of his [i]nternet use" in light of agency's policy that it would monitor employees' internet use and that internet was for official government business only).

Judge Newman concedes that some of § 353(c)'s "investigative tools" "do not implicate the Fourth Amendment." Pl.'s Opp'n at 7 n.5. She nonetheless maintains that the use of these tools does not defeat her facial claim for two other reasons. First, she argues that § 353(c) does "no work" and "is therefore irrelevant" in the context of interviewing a court employee because "the Chief Judge can always interview the Court's employees even in the absence of any complaint against any other judge." Id. But a *special committee* has no power to interview an employee in the absence of § 353(c)'s grant of authority. Indeed, a special committee exists only once a complaint is initiated against a judge, see 28 U.S.C. § 353(a)(1) (permitting the chief judge to appoint a special committee), and its authority to investigate is wholly derived from § 353(c). Thus, a special committee's power to interview a court employee is an "application[] of the statute in which [the statute] actually authorizes . . . conduct." Patel, 576 U.S. at 418 (cleaned up).

Second, Judge Newman contends that Patel's standard for facial challenges limits the inquiry only to "investigative conduct" that "implicate[s] the Fourth Amendment"—as opposed to all conduct authorized by the statute. Pl.'s Opp'n at 7 n.5. But that approach reads Patel too broadly. In Patel, a group of hotel proprietors challenged a provision of the Los Angeles Municipal Code that compelled "[e]very operator of a hotel to keep a record" of certain information about guests and to make this record "available to any officer of the Los Angeles Police Department for inspection" on demand. 576 U.S. at 412 (alteration in original) (quoting Los Angeles Municipal Code §§ 41.49(2), (3)(a), (4) (2015)). In upholding the plaintiffs' facial challenge, the Supreme Court did not question that the only conduct authorized by this provision constituted a search within the meaning of the Fourth Amendment.[1] The Supreme Court thus characterized the statute as one "authorizing warrantless searches," and explained that, "when addressing a facial challenge to [such] a statute," "the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant"—for example, when "exigency or a warrant justifies an officer's search." Id. at 418. But because § 353(c) authorizes conduct that, as Judge Newman admits, does not implicate the Fourth Amendment, this case presents a different kind of statute. And nothing in Patel suggests that the Court must

[1] Before Patel reached the Supreme Court, the parties disputed—and the lower courts considered—"whether a police officer's non-consensual inspection of hotel guest records under [the provision] constitute[d] a Fourth Amendment 'search.'" Patel v. City of Los Angeles, 738 F.3d 1058, 1061 (9th Cir. 2013) (en banc), aff'd sub nom. City of Los Angeles, Calif. v. Patel, 576 U.S. 409 (2015). The Ninth Circuit sitting *en banc* found that such an inspection did implicate the Fourth Amendment. Id. And, only after having made that determination, the circuit concluded that the searches authorized by the provision were unreasonable and—as the final hurdle for a facial challenge—were unreasonable in "all" instances. Id. at 1064–65 ("Because [the] procedural deficiency affects the validity of all searches authorized by § 41.49(3)(a), there are no circumstances in which the record-inspection provision may be constitutionally applied."). But as this order of analysis suggests, the first step in the inquiry is to determine whether all the conduct authorized by the law is a search or seizure—not whether the searches or seizures authorized by the law are constitutional.

narrow its analysis of a facial challenge to conduct that falls within the Fourth Amendment's ambit when the statute also authorizes conduct beyond the amendment's reach.

The D.C. Circuit confirmed as much in Brennan v. Dickson, which challenged a Federal Aviation Administration ("FAA") rule regulating drones. 45 F.4th 48 (D.C. Cir. 2022). The FAA promulgated a "Remote Identification" rule that required "drones in flight to emit publicly readable radio signals reflecting certain identifying information." Id. at 53. The circuit rejected a facial Fourth Amendment challenge to the rule because it found the rule "generally" did not implicate privacy rights. Id. at 61 ("Brennan's facial Fourth Amendment challenge fails because drone pilots generally lack any reasonable expectation of privacy in the location of their drone systems during flight."). And though the court noted that future applications of the rule might "violate a pilot's constitutionally cognizable privacy interest," the plaintiff's facial challenge failed because he had "not shown that [] data collection offends the Fourth Amendment *in every application of the Rule* to the typically very public activity of drone piloting." Id. at 64 (emphasis added). The same is true for § 353(c). Though some investigative conduct might trigger Fourth Amendment concerns, and even constitute violations of an individual's privacy rights, Judge Newman has not shown that every application of the provision offends the Fourth Amendment. Her facial challenges in Counts Eight and Nine therefore fail.

B. Counts Five and Seven: Vagueness

Counts Five and Seven meet the same fate. In these counts, Judge Newman contends that two sections of the JC&D Act are unconstitutionally vague and violate the Due Process Clause of the Fifth Amendment. Count Five challenges § 351(a), which provides that someone may initiate a JC&D complaint against a judge who "is unable to discharge all the duties of office by reason of mental or physical disability." 28 U.S.C. § 351(a). Judge Newman alleges that this

provision "fails to provide adequate notice of what constitutes a mental disability that renders a judge 'unable to discharge all the duties of office.'" FAC ¶ 103 (citing 28 U.S.C. § 351(a)). And in Count Seven, she claims that § 353(c)—the investigation provision also challenged in Counts Eight and Nine—"lacks minimal enforcement guidelines." Id. ¶ 112 (citing 28 U.S.C. § 353(c)).[2] The Court will take up these two challenges in turn.

1. Count Five

"A vague law denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions." Hastings v. Jud. Conf. of U.S., 829 F.2d 91, 105 (D.C. Cir. 1987). Statutes are not impermissibly vague, however, merely because they "require[] a person to conform his conduct to an imprecise but comprehensible normative standard, whose satisfaction may vary depending upon whom you ask." United States v. Bronstein, 849 F.3d 1101, 1107 (D.C. Cir. 2017) (cleaned up). "Rather, a statute is unconstitutionally vague if, applying the rules for interpreting legal texts, its meaning 'specifie[s]' 'no standard of conduct . . . at all.'" Id. (quoting Coates v. Cincinnati, 402 U.S. 611, 614 (1971)); see also Fed. Express Corp. v. United States Dep't of Com., 39 F.4th 756, 773 (D.C. Cir. 2022) ("The Due Process Clause's fair notice requirement generally requires only that the government make the requirements of the law public and afford the citizenry a reasonable

[2] A reminder on how the Court reads Count Seven. As described in the Court's previous opinion, the count makes three allegations: (1) the JC&D Act is "unconstitutionally vague to the extent it purports to authorize compelled medical or psychiatric examinations . . . or demands for . . . Article III judges to surrender their private medical records," (2) § 353(c), "which authorizes a Special Committee to conduct an investigation 'as extensive as it considers necessary' lacks minimal enforcement guidelines," and (3) the act "vests virtually complete discretion in the hands of a Special Committee." FAC ¶ 112; see also Newman, 2024 WL 551836, at *16 n.13. The Court has already dismissed the third allegation. See id. at *17–18. And the first allegation collapses into the second as the provision purportedly authorizing the Special Committee to compel medical examinations and the production of records is § 353(c).

opportunity to familiarize itself with its terms and to comply." (cleaned up)). As the Supreme Court has cautioned, the vagueness doctrine "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing [] statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." Colten v. Kentucky, 407 U.S. 104, 110 (1972).

Given the text, legislative history, and implementing rules of the JC&D Act, section 351(a) is not unconstitutionally vague. First, the text. Section 351(a) provides that someone may initiate a JC&D complaint against a judge who "is unable to discharge all the duties of office by reason of mental or physical disability." 28 U.S.C. § 351(a); see also id. § 354(2)(A) (providing that judicial councils may impose penalties based on valid complaints). The statute's standard of conduct is thus defined in reference to the "duties of [judicial] office." And judges, the only individuals against whom § 351(a) can be enforced, are well aware of their duties. Indeed, before taking office, all judges must swear an oath to "faithfully and impartially discharge and perform all the duties incumbent upon" them. 28 U.S.C. § 453. Because the provision is pegged to "knowable criteria," it is not impermissibly vague. United States v. Ragen, 314 U.S. 513, 523 (1942) (cleaned up); see also Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 247–48 (2010) (rejecting a vagueness challenge to a Bankruptcy Code provision because the individuals against whom the provision would be enforced—"[a]ttorneys and other professionals who give debtors bankruptcy advice"—"must know" of other provisions in the Code that impose similar standards).

The legislative history of the JC&D Act provides further color to § 351(a)'s standard. See United States v. Poindexter, 951 F.2d 369, 379 (D.C. Cir. 1991) (suggesting that clear legislative history can render a "facially vague" provision constitutional). As the D.C. Circuit

held in the context of an overbreadth challenge to a related provision of the JC&D Act, the "legislative history demonstrates that the Act was directed against serious judicial transgressions." Hastings, 829 F.2d at 106; see also id. at 106 n.59 ("It is worth pointing out that federal judges, the individuals to whom the Act is directed, are unusually well qualified to interpret statutes in light of their legislative history."). The Act "[wa]s not designed," by contrast, "to assist the disgruntled litigant who is unhappy with the result of a particular case." S. Rep. No. 96-362, 96th Cong., 1st Sess., 8 (1979), reprinted in 1980 U.S. Code Cong. & Ad. News 4315, 4323.[3]

Congress also supplied several reference points for interpreting § 351(a). See Arnett v. Kennedy, 416 U.S. 134, 160 (1974) (finding no vagueness issue when a statute "was not written upon a clean slate"). The Senate Report noted that § 351(a) was "a paraphrase of [the] existing statutory language" of 28 U.S.C. 372(b). S. Rep. No. 96-362, 9. Section 372(b), which was enacted in 1957, permits the president to appoint an additional judge when a sitting judge, who is eligible to retire but does not do so, becomes "unable to discharge efficiently" her duties "by reason of permanent mental or physical disability." 28 U.S.C. § 372(b); see also P.L. 85-261, September 2, 1957, 71 Stat. 586. The Senate Report further counseled that the JC&D Act's standards should be informed by the Code of Judicial Conduct and the Canons of Judicial Ethics of the American Bar Association, resolutions of the Judicial Conference related to judicial

[3] Under the version of the statute then before the Senate Judiciary Committee, what is now § 351(a) was located at § 372(c)(1)(a) and had a slightly different formulation. Then-section 372(c)(1)(a) permitted any person to file a written complaint alleging that a "judge is or has been unable to discharge efficiently all the duties of his or her office by reason of mental or physical disability." S. Rep. No. 96-362, 8.

conduct, and acts of Congress about judicial conduct. S. Rep. No. 96-362, 9; see also Hastings, 829 F.2d at 106 (citing same).[4]

Finally, the Rules for Judicial-Conduct and Judicial-Disability Proceedings ("JC&D Rules"), promulgated by the Judicial Conference of the United States, clarify the meaning of disability in § 351(a). See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 504 (1982) (noting that the adoption of "administrative regulations" can "sufficiently narrow potentially vague or arbitrary interpretations" of a local ordinance).[5] The rules list as "[e]xamples of disability" "substance abuse, the inability to stay awake during court proceedings, or impairment of cognitive abilities that renders the judge unable to function effectively." JC&D R. 4(c). Given these definitions, § 351(a) "provides a discernable standard." Bronstein, 849 F.3d at 1107.

Judge Newman offers two main rebuttals. First, she claims that the "history of enforcement of [§ 351(a)]," and in particular the proceedings against her, "illustrate[] how standardless [the provision] is." Pl.'s Opp'n at 19. But at most, her examples suggest that the statute is subject to multiple interpretations. See, e.g., id. at 21 (claiming that aspects of the Federal Circuit's investigation "confirm[] the latent subjectivity at play"); id. 24 ("'[E]ffectiveness' is in the eye of the beholder."). A subjective statute is not an unconstitutional

[4] The commentary to the Code of Judicial Conduct reflects this purpose. It notes that the code "may [] provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980." Code of Conduct for United States Judges, Canon 1, Commentary, https://perma.cc/JW2B-99GU.

[5] Judge Newman claims the "needed clarity" cannot come from the JC&D Act's implementing rules. Pl.'s Opp'n at 23. But neither of the cases she draws on for support concerns a Fifth Amendment vagueness challenge. See Texas Educ. Agency v. United States Dep't of Educ., 992 F.3d 350, 361 (5th Cir. 2021) (state waivers of sovereign immunity); Bennett v. Kentucky Dep't of Educ., 470 U.S. 656, 666 (1985) (limits on state uses of federal funding).

one. See Bronstein, 849 F.3d at 1107 ("[A] statutory term is not rendered unconstitutionally vague because it do[es] not mean the same thing to all people, all the time, everywhere." (cleaned up) (second alteration in original)). Second, she suggests that any subjectivity in § 351(a) is impermissible because it undermines judicial independence. See, e.g., Pl.'s Opp'n at 25 ("[B]ecause an Article III judge is not subject to 'supervision' by any of her colleagues, an Article III judge need not meet any other judge's . . . definition of 'effectiveness.'"). But, as the D.C. Circuit (and this Court) have held, "Article III's grant of 'judicial independence'" does not give "judges 'absolute freedom from' discipline or sanctions that fall short of removal or salary diminution." Newman, 2024 WL 551836, at *18 (quoting McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S., 264 F.3d 52, 65 (D.C. Cir. 2001)). Nor does the Constitution "exclude[] discipline of judges *by* judges." Id. (quoting McBryde, 264 F.3d at 65). Given these accepted limits on judicial independence, there is no reason to believe that Article III imposes a heightened standard of clarity on statutes affecting judicial authority. Accordingly, the Court grants Defendants' motion as to Count Five.

2. Count Seven

Section 353(c) is not unconstitutionally vague either. The vagueness doctrine "prevents the government from imposing criminal and, to a lesser extent, civil penalties if the statute or regulation specifying the prohibited conduct is not sufficiently specific to provide fair notice" or, as Judge Newman alleges with respect to § 353(c), "fair enforcement." Maxwell v. Rubin, 3 F. Supp. 2d 45, 49 (D.D.C. 1998); see also Beckles v. United States, 580 U.S. 256, 265 (2017) ("[T]win concerns underly[] vagueness doctrine—providing notice and preventing arbitrary enforcement."). But "the vagueness doctrine applies only to laws that regulate the primary conduct of private citizens"—*i.e.*, "laws that define crimes," "laws that fix sentences," "laws that

restrict speech," and "laws that regulate businesses." United States v. Matchett, 837 F.3d 1118, 1119, 1122 (11th Cir. 2016) (en banc); see also El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 856 n.4 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring) ("If a statute regulating private conduct provides no discernible standards and therefore insufficient notice of what actions are prohibited, the statute might be void for vagueness under the Due Process Clause."). The Supreme Court has found that a statute can lead to arbitrary enforcement in one of two scenarios: "[I]f it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case, . . . or permits them to prescribe the sentences or sentencing range available." Beckles, 580 U.S. at 266 (cleaned up); see also id. at 262.

The JC&D's investigation provision does not fall into either category. It does not vest a special committee with authority to decide what judicial conduct is or is not permissible, nor does it allow a committee to choose the proper penalty for such conduct. Instead, it merely sets the outer boundaries for how a special committee may investigate once a JC&D complaint has been initiated. It also bears noting that § 353(c) is not unusual. Federal prosecutors and some federal agencies enjoy similarly broad investigative authority. See, e.g., Justice Manual 9-2.001 ("The statutory duty to prosecute for all offenses against the United States (28 U.S.C. § 547) carries with it the authority necessary to perform this duty. The [U.S. Attorney] is invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority."); 15 U.S.C. § 78u ("The [Securities and Exchange] Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter.").

Judge Newman does not address whether the vagueness doctrine applies to § 353(c) as a threshold matter. She does offer two tangential arguments. Neither succeeds. First, she claims that "[b]ecause there is no defined reference point" for § 351(a)'s disability standard, "it necessarily follows that any inquiry into whether that standard has been met will itself be hopelessly vague." Pl.'s Opp'n at 28. As explained above, however, 351(a) has defined reference points. Second, she repackages an argument that she made—and the Court rejected—in the last round of motions. She claims that the "issue" with § 353(c) is that "Defendants can *compel* Judge Newman to turn over private documents and then *directly sanction* her for declining to do so." Pl.'s Opp's at 28 (emphasis in original). It is difficult to see how this is a vagueness challenge. In any event, this point confuses the authority of special committees with that of circuit judicial councils. Though a special committee can issue orders to subject judges, the JC&D Act "does not give [it] enforcement power." Newman, 2024 WL 551836, at *17. Instead, the Act "directs special committees to present a report to the judicial council with 'recommendations for necessary and appropriate action by the judicial council.'" Id. (quoting 28 U.S.C. § 353(c)). The JC&D Rules also divest the special committee of enforcement power. They "allow subject judges to refuse to comply with investigations for 'good cause,'" and empower "the judicial council, [or] ultimately the Judicial Conference [of the United States]," but not the special committee, to "decide whether the judge had good cause to refuse." Id. (quoting JC&D R. 4(a)(5)). Finally, to the extent judicial councils (as opposed to special committees) have the power to both compel and sanction, the D.C. Circuit has found no constitutional defect in that arrangement. See Newman, 2024 WL 551836, at *17 ("[In Hastings,] [t]he circuit held that the JC&D Act's vesting of both investigative and adjudicatory functions in the same body did not violate due process." (citing Hastings, 829 F.2d at 104–05)).

In sum, § 353(c) is not unconstitutionally vague, and Defendants are therefore entitled to judgment on the pleadings as to Count Seven.

IV. Conclusion

For these reasons, the Court will grant Defendants' motion for judgment on the pleadings and dismiss this case as to all remaining claims. A separate Order shall accompany this memorandum opinion.

CHRISTOPHER R. COOPER
United States District Judge

Date: July 9, 2024

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Hon. Pauline Newman
Plaintiff

vs. Civil Action No. 23-cv-01334 (CRC)

Hon. Kimberly Moore, et al.
Defendant

NOTICE OF APPEAL

Notice is hereby given this 9th day of July, 20 24, that the Hon. Pauline Newman, Plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 9th day of July, 20 24 in favor of the Hon. Kimberly Moore, et al., Defendants against said Hon. Pauline Newman, Plaintiff

Gregory Dolin
Attorney or Pro Se Litigant

(Pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure a notice of appeal in a civil action must be filed within 30 days after the date of entry of judgment or 60 days if the United States or officer or agency is a party)

CLERK Please mail copies of the above Notice of Appeal to the following at the addresses indicated: