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**Media Inquiries:** [Joe Martyak](#), 703-403-1111

## **NCLA Explains Federal Circuit May Not Lawfully Exclude Judge Newman from Hearing *en Banc* Case**

*EcoFactor, Inc. v. Google LLC*

**Washington, DC (January 27, 2025)** – The New Civil Liberties Alliance has filed an *amicus curiae* [brief](#) urging the U.S. Court of Appeals for the Federal Circuit to comply with the mandatory statute governing the *en banc* process. The Federal Circuit must either permit the unlawfully suspended Judge Pauline Newman to participate in consideration of *EcoFactor v. Google*, or else vacate the order granting *en banc* rehearing in this case. The Judicial Council of the Federal Circuit has illegally barred Judge Newman from hearing new cases since March 2023, effectively removing her from office in violation of the Constitution. NCLA insists that the Federal Circuit cannot legally act in an *en banc* case without Judge Newman’s full involvement.

The federal statute allowing courts to hear cases *en banc* unmistakably requires an *en banc* court to include all judges in “regular active service” who are not recused. The history and the purpose of the legislative process further confirm that an *en banc* court must comprise all judges. The Federal Rules of Appellate Procedure and the Federal Circuit’s own internal rules point to the same outcome. Despite the Judicial Council’s orders suspending Judge Newman from cases, she remains in “regular active service.” The Supreme Court has defined an “active” judge as one who has not retired “from regular active service,” and Judge Newman has certainly not retired—nor has she recused herself from *EcoFactor v. Google*.

Hence, as *EcoFactor* has argued in its own briefing to the Court, the Federal Circuit must allow Judge Newman to sit on the bench as part of any *en banc* rehearing. The Court’s only other lawful option is to reinstate the panel decision previously issued in this case. Any other approach would violate the governing statute and lead to a judgment by an unlawfully constituted tribunal. Although NCLA represents Judge Newman in the ongoing [Newman v. Moore](#) lawsuit against her suspension, NCLA filed this *amicus* brief in its own capacity and not on Judge Newman’s behalf.

### **NCLA released the following statements:**

“Throughout their proceedings against Judge Newman, her fellow Federal Circuit judges have acted unlawfully. Excluding Judge Newman from the *en banc* Court is another example of such behavior. An *en banc* Court without Judge Newman is an improperly constituted court and as such, should not act.”

— **Greg Dolin, Senior Litigation Counsel, NCLA**

“The Federal Circuit has already improperly heard a prior case *en banc* without Judge Newman’s participation, and it appears poised to do so again. The difference this time is that one of the parties has appropriately raised an objection to proceeding in this unlawful fashion. According to federal law, the Federal Circuit must allow Judge Newman to sit as part of the *en banc* court or cancel the rehearing. It may not legally proceed without her.”

— **Mark Chenoweth, President, NCLA**

**For more information visit the *amicus* page [here](#).**

## **ABOUT NCLA**

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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