No. 25-1101

In the Supreme Court of the United States

PAULINE NEWMAN, JUDGE, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT,
Petitioner,
v.
KIMBERLY A. MOORE, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, ET AL.,
Respondents.

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

AMICI CURIAE BRIEF OF THE BUCKEYE INSTITUTE, MANHATTAN INSTITUTE, AND COMMITTEE FOR JUSTICE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does 28 U.S.C. § 357(c)'s bar on judicial review of previously issued "orders" and "determinations" apply to ultra vires acts that exceed the scope of authority conferred by the Disability Act and the Constitution?

2. Does 28 U.S.C. § 357(c)'s bar on judicial review of previously issued "orders" and "determinations" deprive a court of jurisdiction to consider claims that seek forward-looking relief to enjoin future unlawful actions?

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INTEREST OF AMICI CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The **Manhattan Institute** (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. MI has historically sponsored scholarship and filed briefs arguing for the importance of fidelity to the Constitution's structure.

The **Committee for Justice** (CFJ) is a nonprofit legal and policy organization founded in 2002 and dedicated to promoting the rule of law and preserving the Constitution's system of enumerated powers and limited government. CFJ seeks to preserve its

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

structural protections for individual liberty and property rights, including intellectual property rights. Consistent with this mission, CFJ participates as amicus curiae in cases that present significant questions concerning the independence of the federal judiciary, the separation of powers, and the proper interpretation of constitutional text and structure. CFJ also works to educate policymakers and the public about the importance of maintaining the Constitution's carefully calibrated system of checks and balances.

Amici have a strong interest in this case because it implicates foundational principles governing the tenure and independence of Article III judges and the proper constitutional framework for addressing judicial conduct. The decision below raises important questions concerning these principles and their role in preserving the judiciary's status as a separate branch of government and maintaining public confidence in the decisions it makes.

SUMMARY OF THE ARGUMENT

This case presents a matter of great importance to the independence and authority of our federal judges and the Constitution's checks and balances. It merits the Court's review.

First, the Federal Circuit's suspension of Judge Newman amounts to a de facto impeachment. Article I of the Constitution vests the "sole Power to try all Impeachments" in the Senate, a principle reaffirmed by *Nixon* v. *United States*, 506 U.S. 224 (1993). By stripping Judge Newman of her judicial duties while leaving her nominally in office, the Judicial Council of the Federal Circuit has exercised a removal power the Constitution assigns exclusively to Congress. Historical objections—from the Framers' debates to Justice Hugo Black's dissent in *Chandler* v. *Judicial Council of the Tenth Circuit of the U.S.*, 398 U.S. 74 (1970)—underscore that such internal judicial discipline cannot be used to strip a judge of all her duties without impeachment.

This de facto impeachment circumvents the Constitution's structural safeguards. Impeachment requires bicameral action, supermajority agreement in the Senate, and public, deliberative proceedings. These protections reflect the Framers' judgment that removing a federal judge demands broad political accountability and careful deliberation. The Federal Circuit's unilateral action evades those safeguards entirely, consolidating investigative, prosecutorial, and adjudicative functions within the judiciary itself.

Second, the secretive nature of the proceedings independently violates core constitutional principles. The tradition of open judicial proceedings—recognized in *Richmond Newspapers, Inc*. v. *Virginia*, 448 U.S. 555 (1980)—serves as a critical check on abuse of power. Here, proceedings were conducted largely in secret, despite Judge Newman's request for transparency, undermining public confidence and denying meaningful scrutiny. A process that functionally mirrors impeachment should, at a minimum, provide the openness and accountability that judicial proceedings require.

Finally, this Court's intervention is necessary to preserve judicial independence and constitutional structure. Allowing judges to sideline their colleagues indefinitely without impeachment invites future abuses and erodes the carefully calibrated balance between the branches. The Court should grant review to reaffirm that Article III judges may be removed from the exercise of their office only through the Constitution's prescribed impeachment process—and to ensure that no branch, including the judiciary itself, may circumvent that command.

ARGUMENT

I. Framers, congressmen, and members of the Court have recognized that the Constitution ought to—and does—require impeachment to remove federal judges.

If the Federal Circuit's Chief Judge's suspension of Judge Newman continues, "Judge Newman would remain an Article III judge in name only. To put it bluntly, [the] Chief Judge . . . is engaging in a stealth impeachment of Judge Pauline Newman." Josh Blackman, *The Stealth Impeachment of Judge Newman in the Federal Circuit*, The Volokh Conspiracy (Apr. 22, 2023), https://tinyurl.com/jby742dw.

The Framers did not take the removal of federal judges lightly.

> The Framers labored over the question of where the impeachment power should lie. Significantly, in at least two considered scenarios the power was placed with the Federal Judiciary. Indeed, James Madison and the Committee of Detail proposed that the Supreme Court should have the power to determine impeachments. Despite these proposals, the Convention ultimately decided that the Senate would have "the sole Power to try all Impeachments."

Nixon v. *United States*, 506 U.S. 224, 233 (1993) (quoting Art. I, § 3, cl. 6). In *Nixon*, the Court noted that the word "'sole' indicates that this authority is

reposed in the Senate *and nowhere else*." *Id.* at 229 (emphasis added).

The *Nixon* court's view on impeachment is further supported by "[j]urists and constitutional scholars from the Federalist and antebellum periods [who] uniformly agreed with the conclusions of Brutus and Hamilton" that impeachment is the exclusive method for removing federal judges from office. James E. Pfander, *Removing Federal Judges*, 74 U. Chi. L. Rev. 1227, 1232 (2007). And during the constitutional debates, "Gouverneur Morris and others explicitly defended the use of a trial-type proceeding as the most proper mode of determining whether a judge had violated the good behavior standard, and the framers' eventual choice of impeachment guaranteed a trial in the Senate." *Id.* at 1244.

In a controversial pre-*Nixon* disciplinary case, Justice Black expressed his discomfort and constitutional objections to the de facto impeachment of Judge Chandler outside the protections of the impeachment process. *Chandler* v. *Jud. Council of Tenth Cir. of U.S.*, 398 U.S. 74, 141–42 (1970) (Black, J., dissenting). Although the Court ultimately declined to address the merits of Judge Chandler's objection to the Judiciary Council taking away his judicial responsibilities, *id.* at 89, Justice Black provided a full-throated defense of the independence of Article III judges, even from their own colleagues:

> Judge Chandler, duly appointed, duly confirmed, *and never impeached by the Congress*, has been barred from doing his work by other judges. . . . This case must be viewed for what it is—a long history of

> harassment of Judge Chandler by other judges who somehow feel he is "unfit" to hold office. Their efforts have been going on for at least five years and still Judge Chandler finds no relief. What is involved here is simply a blatant effort on the part of the Council through concerted action to make Judge Chandler a "second-class judge," depriving him of the full power of his office and the right to share equally with all other federal judges in the privileges and responsibilities of the Federal Judiciary.

Id. at 142 (Black, J., dissenting) (emphasis added).

Similarly, when Congress was considering the Judicial Conduct and Disability Act of 1980, Pub. L. 96–458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 351–64) (JCDA)—which the Judicial Council relies on to de facto impeach Judge Newman—several members of Congress objected to the bill because it exceeded Congress's power:

> [T]he members of this committee, as well as legal scholars throughout the country, have been equally divided on the issue of whether Congress can constitutionally establish a mechanism of judicial accountability short of a constitutional amendment. I am persuaded by those who feel that impeachment is the sole method of judicial discipline that this bill, as written, is unconstitutional. It is

> for this reason that I am opposed to this bill.

S. Rep. No. 96-362, at 20 (1979) (additional views of Senator Howell Heflin on the Judicial Conduct and Disability Act of 1980).

Arguing for a plain reading of Article I, Senator Heflin drew from Hamilton's exegesis in Federalist 79:

> [T]he precautions for (judges') responsibility are comprised in the article respecting impeachment. . . . This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.

Id. at 21 (statement of Senator Heflin) (quoting The Federalist No. 79, at 448–49 (Alexander Hamilton) (Fall River Press ed., 2021)).

But the Senator was not done. He argued that Article III's command that judges "shall hold their offices" must be given meaning:

> I consider it a serious mistake to merely gloss over the phrase . . . "shall hold their offices. . . ." It would seem that any bill creating a court that has the power to take away a judge's caseload, even on a temporary basis, would certainly indirectly violate this provision of the constitution. . . . I do not feel that any

> judge who has been stripped of his [or her] duties and responsibilities is "holding office" in the spirit of public service that pervades the constitution.

Id. at 22. And the JCDA itself eschews the removal of a judge's duties other than via impeachment: "Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior." 28 U.S.C. § 354(a)(3)(A).

Yet Senator Heflin's and Justice Black's concerns have converged in this case. Indeed, the essence of a judge is judging. Taking away the essence leaves but a shell, a person with a title, but nothing else. And not only did the Judicial Council strip Judge Newman of her essence as a judge, but it also publicly denigrated her, accusing her of "significant mental deterioration including memory loss, confusion, lack of comprehension, paranoia, anger, hostility, and severe agitation." Associated Press, *A 96-year-old federal judge was barred from hearing cases in a fight over her fitness*, NPR (Sept. 20, 2023), https://tinyurl.com/4yh83cm3. Just as harassing an employee can constitute constructive discharge, see, *e.g.*, *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 143 (2004) (constructive discharge when the employer creates intolerable working conditions), such harassment of a judge can also be characterized as a constructive impeachment. Whether it is called a de facto impeachment or a constructive impeachment, the result is the same—the Judicial Council acted outside the formal impeachment process to remove Judge Newman from judging.

II. The de facto impeachment of Judge Newman violates the constitutional procedure for removing federal judges by omitting Congress.

Impeachment requires action by Congress, and a lot of it. Constitutionally prescribed impeachment has safeguards. The standard for removal is high, and the process is deliberative. As officers of the United States, judges "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4. The United States House of Representatives has "the sole Power of Impeachment." U.S. Const. art. I, § 2, cl. 5. Then the Senate has "the sole Power to try all Impeachments," and may only convict upon "concurrence of two thirds of the Members present." U.S. Const. art. I, § 3, cl. 6. That requires a lot of deliberation by elected legislators.

The Framers saw the deliberations and vote of a broad swath of legislators as a key component of the process to relieve a federal judge of the judge's duties. Cf. *INS* v. *Chadha*, 462 U.S. 919, 948–49 (1983) ("By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."). They "believed the Court was too small in number" for this task. *Nixon*, 506 U.S. at 234. Further, "the Constitution explicitly provides for two separate proceedings. The Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent

judgments . . . ." *Id*. (citing U.S. Const. art. I, § 3, cl. 7).

According to the Constitution, only after such deliberation and process could Judge Newman be removed from her judicial duties. Her colleagues could have recommended to the United States House of Representatives that Judge Newman be removed from her duties through the constitutional impeachment process, but they declined to do so. Justice Black's fears from the last century have come back to haunt us: "[I]t appears that the language [the Framers] used and the protections they thought they had created are not sufficient to protect our judges from the contrived intricacies used by the judges of the [Federal Circuit] to uphold what has happened to Judge [Newman] in this case." *Chandler*, 398 U.S. at 143, (Black, J., dissenting).

III. Assuming the Federal Circuit can conduct a de facto impeachment trial, it should be held in public; the JCDA's secret process violated Judge Newman's rights.

Constitutional impeachment trials are open to the public. The Constitution requires an impeachment trial in the Senate. Although the Constitution does not dictate specific procedures regarding *how* an impeachment trial should be conducted, the Senate has extensive procedural rules, and "Rule XX states that a Senate impeachment trial is to be conducted in open session, except for when the doors shall be closed for deliberation." Elizabeth Rybicki & Michael Greene, Cong. Rsch. Serv., R46185, *The Impeachment Process in the Senate* 18 (2024), https://www.congress.gov/crs-product/R46185. By contrast, Judge Newman's

suspension—essentially a de facto impeachment trial—was conducted in secret, despite her demand for openness.

"[O]pen trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'" *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 592 (1980) (Brennan, J., concurring in the judgment) (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)). And "[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *In re Oliver*, 333 U.S. at 271 (quoting 1 J. Bentham, *Rationale of Judicial Evidence* 524 (1827)). Thus,

> [i]t is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should *always* act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes *as to the mode in which a public duty is performed*.

Cowley v. *Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.) (emphasis added).

Open access to the judiciary "stems from the deep roots of the common law" and was established long

before this Nation. *United Press Associations* v. *Valente*, 123 N.E.2d 777, 786 (N.Y. Ct. App. 1954) (Froessel, J., dissenting). The public's right to observe judicial proceedings is not unlike the right of an accused defendant to a public trial. *Id.* (Froessel, J., dissenting). "There is a strong suggestion of this public right concept in Sir Edward Coke's analysis of the phrase 'In curia domini regis', as used in Statutum de Marleberge enacted in the year 1267, fifty-two years after Magna Charta." *Id.* (Froessel, J., dissenting) (citations omitted). Coke noted that "[t]hese words are of great importance, for all causes ought to be heard, ordered, and determined before the judges of the kings courts openly in the kings courts, [sic] whither all persons may resort . . . ." 2 E. Coke, *Institutes of the Laws of England* 103 (6th ed. 1681).

In the early 1600s, civil rights activist John Lilburne was imprisoned by the English Court of Star Chamber for his refusal to plead to an unknown charge. *United States* v. *Gecas*, 120 F.3d 1419, 1450 (11th Cir. 1997). Linburne's imprisonment continued until he acquiesced to the court's demands. In 1649, at his trial for treason, Lilburne exclaimed "[t]hat by the laws of this land all courts of justice always ought to be free and open for all sorts of peaceable people to see, behold and hear, and have free access unto." *The Trial of John Lilburne*, 4 How. St. Tr. 1270, 1273–1274 (1649).

These ideals, naturally, made their way to the colonies. During that same decade, the Massachusetts Bay Colony's General Court embraced the open court principle in the Massachusetts Body of Liberties: "Every man whether Inhabitant or forreiner, free or

not free shall have libertie to come to any publique Court, Councell, or Towne meeting." See *United Press Associations*, 123 N.E.2d at 786 (Froessel, J., dissenting) (citation omitted). The 1676 Charter of the Fundamental Laws of New Jersey stated that

> in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert.

The Charter of Fundamental Laws, of West New Jersey, Agreed Upon-1676, *reprinted in The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 2551 (Francis Newton Thorpe ed., 5th ed. 1909) ("Thorpe"). In 1682, William Penn's Frame of Government of Pennsylvania explicitly stated that "all courts shall be open, and justice shall neither be sold, denied nor delayed." Frame of Government of Pennsylvania (1682), *reprinted in* Thorpe, *supra*, at 3060. Other state constitutions contained similar provisions. See generally Thorpe, *supra*.

In England, "the inspection and exemplification of the records of the King's courts [was] the common right of the subject." 1 Simon Greenleaf, *A Treatise on the Law of Evidence* 623 (16th ed. 1899). "The exercise of this right does not appear to have been restrained, until the reign of Charles II" in the mid-1600s. *Id.* at 624. At that time, the courts restricted this right for

felony indictments if not properly supported, apparently to reduce an increase in malicious prosecutions. *Id.*

> But in the United States, no regulation of this kind is known to have been expressly made; and any limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions.

Id. (emphasis added).

Set in light of America's history of open courts and other judicial proceedings, this case illustrates the dangers of secrecy used in judicial disciplinary proceedings that can result in a de facto impeachment. Judge Newman reportedly explained it this way: "The Judicial Council of the Federal Circuit removed me from all new appeals, in secret proceedings." Hugh C. Hansen, *There's No Excuse. 39 Years of Judicial Excellence Rewarded with Degrading Judicial Abuse*, Emily C. & John E. Hansen IP Institute, https://tinyurl.com/3w6ddem3 (last visited Apr. 8, 2026).

Without an open proceeding, the public can never know if there is an adequate trial-like proceeding. Indeed, an open proceeding is the very crux of a trial-like proceeding. "Normally, one would assume the chief judge's motivations are proper: simply to protect the court and litigants before it. But the mere appearance of bias is regarded as being just as harmful to justice as actual bias." Judge Paul Michel,

Judge Newman's Suspension by the CAFC Has Marred Public Faith in the Federal Judiciary, IP Watchdog (Dec. 2, 2024), https://tinyurl.com/marred-public-faith-judiciary. And without open proceedings, the appearance of bias cannot be refuted. Secrecy breeds even more problems. Judge Newman asserts that accusations against her were "based on a collection of anonymous defamatory" statements. See Hansen, *supra*.

Judge Newman's counsel requested public access to her hearings. Letter from Gregory Dolin to The Honorable Kimberly A. Moore (June 28, 2024), https://tinyurl.com/3excxkkc ("June 28 letter"); see also Response to the Special Committee's Report & Recommendation of July 31, 2024 at 13 n.3, *In re Complaint No. 23-90015* (Aug. 14, 2024) (noting that "Judge Newman requested the release of *all* materials that do not impact "confidentiality *interests of the complainant or of witnesses*"). The commentary for Rule 23 of the Rules for Judicial-Conduct and Judicial Disability Proceedings states that "[o]nce the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses . . . ." Rules for Judicial-Conduct and Judicial-Disability Proceedings R. 13 cmt. (Judicial Conference of the United States 2019). Even though the committee's proceedings are customarily disclosed if the accused judge so requests, with Judge Newman's request to make the secret proceedings public, the Chief Judge—Judge Newman's chief accuser—refused.

Indeed, at one point, the committee issued two orders, and

> [t]he first order ("Gag Order") was in effect a gag order threatening Judge Newman and her counsel with sanctions should any of them publicize the ongoing investigation. The order intimated that even if Judge Newman were to agree to disclose the materials pursuant to Rule 23(b)(7) of the Conduct Rules, Chief Judge Moore would withhold her consent for the same . . . .

First Am. Compl. at ¶ 37. While there was some cooperation later on in the process, as noted in the June 28 letter, despite two requests for the release of certain documents, the Judicial Committee did not authorize the release of the requested documents—"nor even so much as acknowledged the requests." June 28 letter at 1.

"Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part and dissenting in part) (quoting *United States* v. *Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)). "Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice." *Richmond Newspapers, Inc.*, 448 U.S. at 595 (Brennan, J., concurring in the judgment) (citing *Gannett Co.*, 443 U.S. at 428–29 (Blackmun, J.,

concurring and dissenting)). But here, public access continues to be denied—eliminating any public confidence in the disciplinary proceedings.

Impeachment trials are public. The stealth impeachment of Judge Newman illustrates the Framers' wisdom in insisting on a full airing of the grounds for, and evidence supporting, impeachment. Judge Newman is entitled to no less.

CONCLUSION

Is a judge without the ability to judge still a judge? This Court should take this case to clarify whether judges can remove fellow judges without the process required by Article I of the Constitution. Accordingly, amici respectfully urge the Court to grant certiorari.

Respectfully submitted,

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