No. 01-1778

In the Supreme Court of the United States

JOHN H. MCBRYDE, JUDGE,
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS, PETITIONER

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT
AND DISABILITY ORDERS OF THE JUDICIAL
CONFERENCE OF THE UNITED STATES, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The brief for the United States will address the following question:

Whether the disciplinary provisions of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. 372(c), are facially constitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 264 F.3d 52. The opinion of the district court (Pet. App. 52a-120a) is reported at 83 F. Supp. 2d 135.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2001. A petition for rehearing was denied on February 1, 2002 (Pet. App. 302a-304a). On April 16, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 1, 2002, and the petition was filed on June 3, 2002 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of a disciplinary proceeding brought under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (Act), 28 U.S.C. 372(c). Petitioner is a federal district judge who was disciplined under the Act for "intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others." Pet. App. 160a. Petitioner sued the judicial bodies involved in the disciplinary proceeding, contending that the Act is unconstitutional on its face and that the defendants had applied the Act to him in a manner that was both unconstitutional and unauthorized by the statute. The United States intervened to defend the facial constitutionality of the Act. The district court held that review of petitioner's non-constitutional claims was precluded by the Act; it rejected petitioner's facial constitutional challenge to the Act and all but one of petitioner's as-applied constitutional claims. *Id.* at 52a-120a. Petitioner appealed. The court of appeals affirmed in part and vacated in part. *Id.* at 1a-51a.

1. Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 in order to "provide[] a simple and clear procedure for the resolution of alleged disability or misconduct of a Federal judge." S. Rep. No. 362, 96th Cong., 1st Sess. 2 (1979) (Senate Report). The Act is grounded in the principle of judicial self-administration. Acting in consultation with members of the federal Judiciary, Congress sought to devise "a fair and proper procedure whereby the judicial branch of the Federal Government can keep its own house in order." *Id.* at 11; see H.R. Rep. No. 512, 101st Cong., 2d Sess. 10 (1990) (sum-

marizing judicial participation in development of the Act).

The Act's disciplinary procedures are triggered when a judge is alleged to have "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." 28 U.S.C. 372(c)(1).[1] That standard is intended to reach "willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, and other conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Senate Report 9. Any person who believes that a judge has engaged in misconduct within the scope of the Act may file a written complaint setting forth "a brief statement of the facts constituting such conduct." 28 U.S.C. 372(c)(1). Alternatively, the Chief Judge of the Circuit may issue a written order identifying a complaint. *Ibid.*

A complaint is subject to dismissal by the Chief Judge if, *inter alia*, it is frivolous or is "directly related to the merits of a decision or procedural ruling." 28 U.S.C. 372(c)(3)(A). The Chief Judge also may conclude the proceeding if he finds that corrective action has been taken or that intervening events have made action on the complaint unnecessary. 28 U.S.C. 372(c)(3)(B). Otherwise, the Act directs the Chief Judge to convene a special committee, comprising the Chief Judge himself and equal numbers of circuit and district judges, to "investigate the facts and allegations contained in the complaint." 28 U.S.C. 372(c)(4)(A).

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[1] The Act also applies to situations in which a judge is "unable to discharge all the duties of office by reason of mental or physical disability." 28 U.S.C. 372(c)(1). This case does not present any question regarding the disability provisions of the Act.

The special committee is empowered to "conduct an investigation as extensive as it considers necessary." 28 U.S.C. 372(c)(5). At the conclusion of the investigation, the special committee "shall expeditiously file a comprehensive written report" with the Judicial Council of the Circuit. *Ibid.* The report presents the findings of the investigation and the special committee's recommendations for "necessary and appropriate action" by the Judicial Council. *Ibid.*

Following receipt of the special committee's report, the Judicial Council may conduct "any additional investigation which it considers to be necessary." 28 U.S.C. 372(c)(6)(A). If the Judicial Council determines that no action is required, it may dismiss the complaint. 28 U.S.C. 372(c)(6)(C). Otherwise, the Act authorizes the Judicial Council to take "such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit." 28 U.S.C. 372(c)(6)(B). The Judicial Council may, *inter alia*, (1) request that the judge voluntarily retire; (2) censure or reprimand the judge, either privately or publicly; (3) order that the judge not be assigned further cases, but only "on a temporary basis for a time certain"; or (4) order "such other action as it considers appropriate under the circumstances." 28 U.S.C. 372(c)(6)(B)(iii)-(vii).[2]

A judge or a complainant who is aggrieved by the Judicial Council's disposition of a complaint may peti-

[2] Alternatively, the Judicial Council may refer the complaint, together with the record and recommendations for appropriate action, to the Judicial Conference. 28 U.S.C. 372(c)(7)(A). In the event of a referral, the Judicial Conference may conduct "such additional investigation as it considers appropriate," and may take the same remedial steps that are available to the Judicial Councils. 28 U.S.C. 372(c)(8)(A).

tion the Judicial Conference to review the Council's action. 28 U.S.C. 372(c)(10). The Judicial Conference may review the petition itself or may exercise its review authority through a standing committee appointed by the Chief Justice (Review Committee). 28 U.S.C. 331. Except as expressly provided in the Act, "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. 372(c)(10).

The corrective measures available to the Judiciary under the Act are "designed to deal with those matters which do not rise to the level of impeachable offenses" and to "fill the void * * * between the impeachable offenses and doing nothing at all" about lesser forms of judicial misconduct. Senate Report 3, 5. To protect Congress's authority under the impeachment provisions of Article I, the Act expressly prohibits Judicial Councils or the Judicial Conference from removing any Article III judge from office. 28 U.S.C. 372(c)(6)(B)(vii)(I), 372(c)(8)(A). If a Judicial Council determines that an Article III judge "may have engaged in conduct" that "might constitute one or more grounds for impeachment," the Council is required to certify that determination to the Judicial Conference. 28 U.S.C. 372(c)(7)(B)(i). If the Judicial Conference concurs in the Council's determination, or makes such a determination itself, it is directed to transmit the determination and the record of proceedings to the House of Representatives, which may take "whatever action [it] considers to be necessary." 28 U.S.C. 372(c)(8)(A); see generally *Hastings* v. *Judicial Conference*, 829 F.2d 91, 101-103 (D.C. Cir. 1987) (*Hastings II*) (discussing certification provisions), cert. denied, 485 U.S. 1014 (1988).

2. In 1995, an attorney filed a complaint against petitioner under the Act, alleging that petitioner had engaged in "obstructive, abusive, and hostile conduct" during a trial. Pet. App. 57a. The complaint was presented to the Chief Judge of the Fifth Circuit, who subsequently identified several additional complaints about petitioner. Acting pursuant to 28 U.S.C. 372(c)(4), the Chief Judge appointed a Special Committee to investigate the allegations of misconduct. After conducting an extensive investigation, the Special Committee presented respondent Judicial Council with a report containing its findings and recommendations, as provided by 28 U.S.C. 372(c)(5). Pet. App. 163a-292a.

The report identified numerous episodes in which petitioner had engaged in unwarranted and abusive treatment of lawyers and other court personnel. Pet. App. 173a-264a; see *id.* at 61a-67a (district court opinion) (discussing representative episodes). Taken together, those incidents demonstrated what the Special Committee characterized as "alarming patterns of conduct" by petitioner, including a proclivity to question the integrity of attorneys appearing before him; a tendency to overreact to perceived transgressions and to impose abusive sanctions; an obsessive need for control; and disrespect for his fellow judges. *Id.* at 265a-270a. The Special Committee found that those patterns of conduct had exerted a pervasive chilling effect on the local legal community, deterring attorneys from representing their clients properly and impairing the administration of justice. *Id.* at 270a-275a.

The Special Committee recommended that petitioner be offered the opportunity to retire voluntarily. C.A. App. 3344-3345; see 28 U.S.C. 371, 372(c)(6)(B)(iii). Alternatively, the Special Committee recommended

that the Judicial Council publicly reprimand petitioner; that no new cases be assigned to him for one year; and that, to prevent retaliation and to protect the integrity of the investigatory process, petitioner be disqualified for three years from participating in cases involving attorneys who testified against him in the proceedings or had been listed as potential witnesses. C.A. App. 3345-3352.

In December 1997, the Judicial Council issued an order adopting the one-year case assignment and three-year disqualification measures recommended by the Special Committee. C.A. App. 3367-3369. In addition, the Judicial Council publicly reprimanded petitioner "for conduct prejudicial to the effective and expeditious administration of the business of the courts within the Circuit and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Conduct for United States Judges." Pet. App. 159a-160a. The Judicial Council's reprimand stated that petitioner had "engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary." *Id.* at 160a. The reprimand further stated that petitioner had "abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel," and that petitioner's "intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas." *Ibid.*

Petitioner filed petitions for review with respondent Review Committee of the Judicial Conference. The Review Committee modified the one-year suspension of new case assignments, directing that assignments were

to be resumed before the end of the one-year period if "the [Judicial] Council finds that [petitioner's] conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct." Pet. App. 158a. The Review Committee affirmed the Council's order in all other respects. *Ibid.* The one-year suspension of new case assignments took effect in September 1998 and ended in September 1999; the three-year disqualification period began in February 1998 and ended in February 2001. *Id.* at 3a.

3. Following the Review Committee's decision, petitioner brought suit in the District Court for the District of Columbia, naming as defendants the Judicial Council, the Review Committee, the Chief Judge of the Fifth Circuit, and the Chairman of the Review Committee (collectively the judicial respondents). Petitioner contended that the provisions of the Act authorizing the federal judiciary to investigate and correct acts of judicial misconduct violate principles of separation of powers and are therefore facially unconstitutional. Petitioner also argued that the judicial respondents had applied the Act to him in an unconstitutional manner. In addition, petitioner asserted that the disciplinary proceeding had violated various provisions of the Act itself. Pursuant to 28 U.S.C. 2403(a), the United States intervened to defend the facial constitutionality of the Act.

Petitioner presented two related claims of facial unconstitutionality. First, petitioner argued that the principles of judicial independence embodied in Article III of the Constitution, which protect the federal Judiciary from interference by the other Branches of government, also preclude the Judiciary from policing misconduct by its members. Second, petitioner argued

that the impeachment provisions of Articles I and II, under which "all civil officers of the United States" who commit "high Crimes and Misdemeanors" may be removed from office by Congress, disable the Judiciary from taking any other measures to deal with judicial misconduct that falls short of an impeachable offense. Art. II, § 4.

The district court rejected petitioner's principal claims for relief. Pet. App. 52a-120a. The court held that 28 U.S.C. 372(c)(10), which makes "all orders and determinations [of the Review Committee] * * * final and conclusive" and "not * * * judicially reviewable on appeal or otherwise," precluded the court from entertaining petitioner's non-constitutional challenges to the disciplinary proceedings, but did not affect its jurisdiction over petitioner's constitutional claims. Pet. App. 83a-96a. The court then considered and rejected all of petitioner's challenges to the facial constitutionality of the Act and all but one of his as-applied constitutional claims, ruling in his favor only with respect to a claim that the application of the Act's confidentiality provision (28 U.S.C. 372(c)(14)) violated his First Amendment rights. Pet. App. 73a-83a, 96a-120a.

4. The court of appeals affirmed in part and vacated in part. Pet. App. 1a-51a.

a. The court of appeals first addressed the question whether petitioner's claims had been rendered moot by intervening developments. By the time of the court's decision, petitioner's one-year suspension from new case assignments and his three-year disqualification from participating in cases involving witnesses had both ended. The court of appeals held that petitioner's challenges to the suspension and the disqualification were moot. The court of appeals therefore declined to reach the merits of petitioner's constitutional claims

regarding the suspension and disqualification, and it vacated the judgment of the district court insofar as that court had addressed petitioner's challenges to those sanctions. Pet. App. 3a, 4a-5a.

The court next addressed the preclusive effect of 28 U.S.C. 372(c)(10) on the district court's jurisdiction. The court held that Section 372(c)(10) precluded review of petitioner's as-applied constitutional claims as well as of his non-constitutional challenges. Pet. App. 7a-17a. The court of appeals explained that the Act vests the Judicial Conference with authority to entertain as-applied constitutional challenges to disciplinary decisions by Judicial Councils, and the court requested the Judicial Conference to hear petitioner's as-applied constitutional claims. *Id.* at 14a-15a, 24a.

Finally, the court addressed and rejected petitioner's challenges to the facial constitutionality of the Act. The court unanimously held that the Act does not impermissibly trench on judicial independence under Article III and is not inconsistent with the process of impeachment established by Articles I and II. Pet. App. 18a-25a. The court observed that both of petitioner's facial constitutional challenges rest on the "core assumption that judicial independence requires absolute freedom from * * * lesser sanctions" than removal from office, even when the authority to impose those sanctions is placed in the hands of the Judiciary itself. *Id.* at 19a. The court rejected that premise. The court concluded that Article III is designed "to safeguard the [Judicial] branch's independence from its two competitors," not to insulate individual judges from oversight by the Judiciary itself. *Id.* at 18a-19a. The court further held that by vesting Congress with the power to remove federal officials from office for high crimes and misdemeanors, the Constitution did not

thereby preclude intra-Branch discipline for lesser forms of misconduct. *Id.* at 19a-22a. In so holding, the court reserved the question "whether a long-term disqualification from [hearing] cases could, by its practical effect, [e]ffect an unconstitutional 'removal' " of a judge from office. *Id.* at 22a n.5.

Judge Tatel filed an opinion concurring in part and dissenting in part. Pet. App. 25a-51a. Judge Tatel "agree[d] with the [panel majority] * * * that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 is not facially unconstitutional." *Id.* at 25a. He also agreed that the Act precludes judicial review of petitioner's statutory claims. *Ibid.* Judge Tatel would have held, however, that the Act does not bar review of petitioner's as-applied constitutional challenges, and with respect to one of those claims he would have reversed the judgment of the district court. *Ibid.* Judge Tatel had "no doubt that several of [petitioner's] actions were clearly sanctionable" as "flagrant abuses of judicial power." *Id.* at 50a. He expressed the view, however, that the Special Committee had also "included in its Report many actions and incidents which either seem to be entirely appropriate or involve conduct that might have been appropriate under some circumstances." *Ibid.* Judge Tatel would have "remanded the case to the Council with instructions to limit its Report to evidence that, when viewed objectively, demonstrates a pattern of conduct that amounts to a *clear* abuse of judicial power, or a pattern of conduct *clearly* prejudicial to the adversarial process." *Ibid.*

ARGUMENT

The court of appeals held that the disciplinary provisions of the Judicial Councils Reform and Judicial

Conduct and Disability Act of 1980, 28 U.S.C. 372(c), are not facially unconstitutional. That holding is correct and does not conflict with any decision of this Court or of any other court of appeals. With respect to Question 3 presented by the petition, further review is not warranted.[3]

1. The court of appeals correctly rejected petitioner's argument that the Act unconstitutionally infringes on judicial independence. The Tenure and Compensation Clauses of Article III "were incorporated into the Constitution to ensure the independence of the Judiciary from control of the Executive and Legislative Branches of government." *Mistretta* v. *United States*, 488 U.S. 361, 410 n.32 (1989); see *United States* v. *Will*, 449 U.S. 200, 218 (1980) (Compensation Clause ensures that "claims [are] decided by judges who are free from potential domination by other branches of government"); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 15-16 (1955) ("The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."); *O'Donoghue* v. *United States*, 289 U.S. 516, 531 (1933).

The Act is entirely consistent with that constitutional requirement. Under the Act, the authority to investigate alleged judicial misconduct, and to "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts

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[3] The United States intervened in the district court pursuant to 28 U.S.C. 2403 to defend the Act against petitioner's facial constitutional challenge. This response is confined to that issue. The Solicitor General has authorized the judicial respondents to submit their own response to the petition through private counsel, and their response addresses the other questions presented by the petition.

within the circuit" when misconduct is discovered (28 U.S.C. 372(c)(6)(B)), is placed in the hands of the Judicial Branch itself. Because "the judicial disciplinary system * * * is administered by the judiciary itself, not by the legislature or the executive," it is "a manifestation of the independence of the judicial branch, rather than a limitation upon it." Hon. Stephen G. Breyer, *Judicial Independence in the United States*, 40 St. Louis U. L.J. 989, 990 (1996).

Petitioner's argument rests on the premise that Article III is designed not only to insulate the Judiciary from the Executive and Legislative Branches, but also to insulate individual judges from oversight by other members of the Judiciary. That premise is fundamentally at odds with the structure of Article III itself. The "judicial Power" created by Article III is vested not in individual judges, but in courts—"one supreme Court, and * * * such inferior Courts as the Congress may from time to time ordain and establish." And as the court of appeals observed, "what Article III creates [is] not a batch of unconnected courts, but a judicial *department*." Pet. App. 18a (quoting *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995)).

In *Chandler* v. *Judicial Council*, 398 U.S. 74 (1970), this Court held that "no constitutional obstacle prevent[s] Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit." *Id.* at 86 n.7 (internal quotation marks omitted). The Court explained that individual judges are not entitled to choose their own "manner of conducting judicial business" (*id.* at 84) free from direction and control by other judges. Two dissenting Justices expressed the view that "[o]nce a federal judge is

confirmed by the Senate and takes his oath, he is independent of every other judge." *Id.* at 136 (Douglas, J., joined by Black, J., dissenting). But the Court rejected that view, stating:

> There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business.

Id. at 84. *Chandler* thus "reject[s] any fixed notion * * * that courts are mere collections of individual judges, each of whom is a complete law unto himself or herself." *In re Certain Complaints*, 783 F.2d 1488, 1505 (11th Cir.), cert. denied, 477 U.S. 904 (1986).

Every court that has addressed the issue has concluded that the Act does not on its face violate constitutional principles of judicial independence. In *In re Certain Complaints*, the Eleventh Circuit squarely rejected a facial challenge essentially identical to the one presented here. See 783 F.2d at 1507-1508. The court explained:

> [T]he fact that [the Act] places the investigation, and the determination of what actions to take, entirely within the hands of judicial colleagues makes it likely that the rightful independence of the complained-against judge, especially in the area of decision-making, will be accorded maximum respect. Because of their own experience, other judges can be expected to understand the demands unique to their profession; and as each is a decision-maker himself, these other judges may be expected to refrain from applying sanctions that could chill the

> investigated judge's freedom to decide cases as he sees fit, since such sanctions could be a precedent that could be turned against any judge. Above all, judges will certainly be reluctant to take any action that would predictably inhibit the free and independent functioning of the courts.

Id. at 1508; accord *Hastings* v. *Judicial Conference*, 593 F. Supp. 1371, 1379-1381 (D.D.C. 1984), aff'd in part and vacated in part on other grounds, 770 F.2d 1093 (D.C. Cir. 1985).

2. a. The court of appeals was also correct in rejecting petitioner's claim that the Act's provisions for addressing judicial misconduct are inconsistent on their face with the impeachment provisions of Articles I and II. Congress—which, of course, has a profound institutional interest in preserving, rather than diluting, its own impeachment power—took pains to ensure that the terms of the Act did not interfere with the impeachment mechanism. See Senate Report 4-5. Although the Act gives the Judicial Councils and the Judicial Conference broad latitude to take "appropriate" actions in response to judicial misconduct, it expressly prohibits the "removal from office of any judge appointed to hold office during good behavior." 28 U.S.C. 372(c)(6)(B)(vii)(I). And where a judicial investigation produces evidence of potentially impeachable conduct, the Act calls for the Judiciary to bring the relevant information to the attention of the House of Representatives, which has "the sole Power of Impeachment" under Article I. Art. I, § 2, Cl. 5; 28 U.S.C. 372(c)(7)(B)(i), 372(c)(8)(A); *Hastings II*, 829 F.2d at 101-103. The Act's disciplinary provisions are designed not to provide a statutory alternative to impeachment, but instead to address judicial misconduct that does not

rise to the level of impeachable offenses; the Act provides for sanctions that do not involve Article I's remedy (removal from office) for conviction by the Senate after impeachment by the House of Representatives, and do not trench on the tenure and compensation guarantees of Article III. See Senate Report 3 (Act "is a supplement to, but not a substitute for," the impeachment process, "and is designed to deal with those matters which do not rise to the level of impeachable offenses").

Nothing in the text, history, or structure of the Impeachment Clauses suggests an intent to immunize federal judges from all discipline for misconduct not rising to the level of an impeachable offense. As the court of appeals recognized (Pet. App. 21a-22a), moreover, the impeachment provisions apply equally to "all civil Officers of the United States" (Art. II, § 4) and were directed at least at much at the Executive Branch as at the Judiciary. See The Federalist No. 65, at 396, 397 (Alexander Hamilton) (C. Rossiter ed. 1961) (characterizing impeachment as "a bridle in the hands of the legislative body upon the executive servants of the government"). If the bare existence of the impeachment mechanism, together with the absence of any other explicit constitutional mechanism for sanctioning official misconduct, were enough to demonstrate an intent that impeachment be an exclusive remedy, that inference would apply with equal force to all "civil Officers of the United States." Yet the impeachment provisions can hardly be thought to furnish the only constitutionally permissible means of punishing misconduct on the part of Executive Branch officers. The only other courts to address the issue have likewise concluded that the impeachment provisions of the Constitution do not render the Act's disciplinary pro-

visions facially unconstitutional. See *In re Certain Complaints*, 783 F.2d at 1506-1507; *Hastings*, 593 F. Supp. at 1381.

b. Petitioner suggests in particular (see Pet. 25) that 28 U.S.C. 372(c)(6)(B)(iv), which authorizes a Judicial Council to discontinue the assignment of new cases to a judge "on a temporary basis for a time certain," conflicts with Congress's constitutional authority to impeach and remove judges from office. That provision authorizes a remedy not contemplated by the Impeachment Clauses, and otherwise presents no conflict with Congress's impeachment and removal powers. Moreover, the propriety of petitioner's own one-year suspension from new case assignments is not presented by the decision below. The court of appeals held that the expiration of the suspension had mooted petitioner's claim relating to that sanction. Pet. App. 3a, 4a-5a. The court therefore reserved the question "whether a long-term disqualification * * * could, by its practical effect, [e]ffect an unconstitutional 'removal'" of a judge from office. *Id.* at 22a n.5. Absent a decision by the court of appeals on the merits of petitioner's constitutional challenge to his suspension, that claim does not warrant review by this Court. And petitioner does not contend that the mootness holding itself presents a question of broad and recurring importance.

In any event, the court of appeals' ruling on mootness is correct. Although petitioner originally sought a temporary restraining order to prevent the suspension of new case assignments from going into effect, the district court denied injunctive relief, and the suspension thereafter ran its course. As a result, it is far too late for an injunction to forestall the effects of the

suspension.[4] Petitioner asserts that he would "be better off if the temporary impeachment blot were removed from his record," presumably through the issuance of a declaratory judgment. Pet. 21. But even if a court declared that the Act's provision regarding suspension of case assignments conflicts with Congress's impeachment powers, such a declaration would not vindicate petitioner's reputational interests, since it would speak only to the power of the Judicial Council and would say nothing about the blameworthiness of petitioner's own conduct. See Pet. App. 7a.

Petitioner also suggests that the controversy between him and the judicial respondents over the suspension issue is capable of repetition because he "could again find himself subject to similar proceedings based on his exercise of proper judicial functions in the manner in which he customarily carries them out." Pet. 21-22. That suggestion assumes that petitioner cannot or will not conform his behavior to the standards of judicial conduct relied on by the Judicial Council—an

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[4] Petitioner asserts that his docket "still suffers from the loss of hundreds of cases that were diverted to other judges because of the case suspensions." Pet. 21. But even if that is so, it is highly doubtful that the district court hearing this case could meaningfully address that situation. Authority over the assignment of cases in a judicial district is vested by statute in the district court and its chief judge (see 28 U.S.C. 137), and neither the District Court for the Northern District of Texas nor the chief judge of that court is a party to this suit. Moreover, it is far from obvious that a judge's desire to have particular cases (or a particular number of cases) assigned to his docket is a cognizable interest for Article III purposes. Cf. *Moore* v. *U.S. House of Representatives*, 733 F.2d 946, 959-960 (D.C. Cir. 1984) (Scalia, J., concurring in the result) (for standing purposes, officers of the United States have no "judicially cognizable private interest" in the powers of their office), cert. denied, 469 U.S. 1106 (1985).

assumption that (as the court of appeals pointed out, see Pet. App. 4a-5a) this Court has declined to accept. And even if there were a "reasonable expectation" (*Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)) that petitioner will be subject to further disciplinary proceedings, it would remain highly speculative whether those proceedings would result in the suspension of new case assignments.

Finally, even if the constitutional issue pressed by petitioner were a live one, and even if it had been reached and decided by the court of appeals, there would be no merit to petitioner's suggestion that the Act's provision for temporary suspension of new case assignments is facially unconstitutional. In order to prevail on a facial challenge to a statutory provision, "the challenger must establish that no set of circumstances exists under which the [provision] would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Even if it were assumed that a sufficiently long suspension of new case assignments would be tantamount in its practical impact to a removal from office, nothing on the face of the Act compels such extended suspensions as a matter of course. To the contrary, the Act demands that any suspension of new case assignments be "temporary," and it identifies no minimum suspension period. Accordingly, under the temporary suspension provision, a Judicial Council is free to limit a suspension to a matter of months or even weeks if it sees fit. Petitioner does not seriously suggest that a suspension of new case assignments would be equivalent to removal from office even if it were so brief that it did not significantly affect the size of the judge's docket or the nature of his judicial activities. The mere possibility that the suspension provision could be

misapplied in a particular case does not call the facial constitutionality of the provision into question.

CONCLUSION

With respect to Question 3 presented by the petition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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