[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5288

THE HON. JOHN R. ADAMS,

Plaintiff-Appellant,

v.

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT, *ET AL.*,

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT THE HON. JOHN R. ADAMS

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GLOSSARY OF ABBREVIATIONS

Appellees Br.	Appellees' Brief
JA	Joint Appendix
Judicial Council	Judicial Council of the Sixth Circuit
Review Committee	Committee on Judicial Conduct and Disability of the Judicial Conference of the United States
Special Committee	Special Investigating Committee
The Act	Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

SUMMARY OF THE ARGUMENT

The Judicial Council and Review Committee's brief misses its mark because it raises a straw man argument that Judge Adams does not make and misconceives or misconstrues the arguments Judge Adams does make.

The Judicial Council found that Judge Adams committed misconduct "prejudicial to the effective and expeditious administration of the business of the courts" by objecting to undergoing a psychiatric examination demanded by a special committee investigating him, then ordered Judge Adams to undergo the examination and submit to any treatment or counseling deemed necessary. The Review Committee affirmed.

In his opening brief and this reply, Judge Adams demonstrates that the "unexpired and unretracted" misconduct finding caused direct injury to his reputation, establishing that his claims are not moot under this Court's decision in *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders*, 264 F.3d 52 (D.C. Cir. 2001). Judge Adams' lawsuit also is not moot because even though the Judicial Council subsequently asserted that the examination order is "no longer in effect," the order continues to have an adverse, "tangible, concrete effect" on Judge Adams' reputation. A declaratory judgment in Judge Adams' favor will remove the legitimacy and the official imprimatur of the Judicial Council and Review Committee's decisions and grant Judge Adams meaningful relief.

Contrary to the Judicial Council and Review Committee's arguments, declaratory relief is available to Judge Adams because a declaratory judgment in his favor will provide him with meaningful relief. The Court also should decline the Judicial Council and Review Committee's invitation to avoid deciding the important, substantial questions raised by Judge Adam's lawsuit, which include whether a special investigating committee and judicial council have legal authority to require a psychiatric examination of a sitting federal judge, simply because the questions may be questions of first impression.

ARGUMENT

I. Judge Adams' Claims Are Not Moot.

The burden of proving mootness is a heavy one and it lies with the party asserting it. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *United States. v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). As Judge Adams demonstrated in his opening brief and further demonstrates here, the Judicial Council and Review Committee fail to meet this heavy burden.

A. The Misconduct Finding.

The Judicial Council and Review Committee's brief misses its mark in several regards. A significant portion of the brief is devoted to an argument Judge Adams does not make – that the order requiring Judge Adams to undergo the Special Committee's psychiatric examination is capable of repetition. Appellees'

Br. at 19, 20-24, *see id*. at 22 ("there is no reasonable expectation that defendants will resurrect the directive that Judge Adams undergo a mental health evaluation or take any other action that inflicts a future injury"). The Court can disregard the Judicial Council and Review Committee's "repetition" argument because Judge Adams never made such a claim. It is a classic "straw man."

The Judicial Council and Review Committee's brief largely ignores Judge Adams' central argument: the finding that Judge Adams committed misconduct "prejudicial to the effective and expeditious administration of the business of the courts" by declining to undergo the Special Committee's psychiatric examination is unexpired and unretracted government action that directly injures Judge Adams' reputation. The Judicial Council and Review Committee cannot and do not demonstrate that the finding is not official government action or that it has been rescinded, vacated, or withdrawn. They also cannot and do not demonstrate that the misconduct finding has expired or been expunged, retracted, or placed under seal. The Judicial Council and Review Committee's decisions containing the finding are publicly available on their websites where anyone can review them. JA 121 and 123 at ¶¶ 50 and 58. Under *McBryde*, the continuing harm this government action has directly caused to Judge Adams' reputation presents a live case or controversy and defeats the Judicial Council and Review Committee's mootness claim. *McBryde*, 264 F.3d at 56-57. As the Court held in *McBryde*, "the

official characterization of an apparently upstanding federal judge" as having engaged in conduct "'prejudicial to the effective and expeditious administration of the business of the courts' inflicts . . . enough injury" to defeat mootness. *Id.* at 57. Like Judge McBryde, were Judge Adams "to prevail on the merits, it would be within [the Court's] power to declare unlawful the defendants' issuance of the stigmatizing reports and thereby relieve [Judge Adams] of much of the resulting injury."[1] *Id.* at 57.

Instead of focusing on the arguments Judge Adams makes, the Judicial Council and Review Committee repeat over and over the claim that the order requiring Judge Adams to undergo the Special Committee's psychiatric examination and submit to any treatment or counseling deemed necessary has been "withdrawn," as if sheer repetition will convince the Court that the examination order, not the misconduct finding, is the only thing that matters. The examination order is important, especially due to its inseverable tie to the misconduct finding, but it is not correct to assert that the examination order was "withdrawn." The Judicial Council chose not to pursue the order after Judge Adams challenged it in

[1] The continuing, reputational nature of Judge Adams' injury also distinguishes this case – and *McBryde* – from *N.B. ex rel. Peacock v. District of Columbia*, 682 F.3d 77 (D.C. Cir. 2012). The one-time nature of the failure to provide adequate notice at issue in *NB ex rel. Peacock* is distinctly different from the ongoing, reputational damage suffered by Judge Adams as a direct result of the misconduct finding and examination order.

this lawsuit, announcing only that it was "no longer in effect." JA 106. As with the misconduct finding, the Judicial Council never said the examination order has been rescinded, vacated, or withdrawn. Nor did it ever say that the order expired or would be expunged or placed under seal. The examination order continues to injure Judge Adams' reputation, as does the misconduct finding to which it is inseverably tied.

The Judicial Council and Review Committee's effort to distinguish this Court's ruling in *McBryde* also fails. The Judicial Council and Review Committee assert that a specific sanction – a public reprimand – was imposed on Judge McBryde after he, like Judge Adams, was found to have committed misconduct "prejudicial to the effective and expeditious administration of the business of the courts." They note that the reprimand "embodied a specific sanction pursuant to the Act." Appellees Br. at 35. The fact that reprimands are expressly referenced in the Act, but psychiatric examinations are not, has no bearing on whether a judge's reputation has been injured. More to the point, whether a federal judge is publicly found to have committed misconduct or is publicly reprimanded or otherwise sanctioned for that misconduct does not alter the fact that the judge's reputation is directly injured as a result of the finding of misconduct. There can be no sanction for misconduct without a finding of misconduct. The two cannot be divorced. The misconduct finding is as deeply stigmatizing as any sanction for the misconduct.

The same is true with respect to whether any sanction is ultimately enforced. The Judicial Council and Review Committee's argument errs because it focuses only on the punishment and ignores the underlying public finding of wrongdoing.

This Court made no such distinction in *McBryde*. In that case, the Court held that the misconduct finding and resulting reprimand of Judge McBryde presented a live case or controversy. *McBryde*, 264 F.3d at 57. The misconduct finding against Judge Adams is no different. It inflicts on Judge Adams a reputational injury "derive[d] directly from an unexpired and unretracted government action" and therefore satisfies the requirements of Article III standing. *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003).

Nor does it matter that the Judicial Council and Review Committee found Judge Adams committed misconduct by declining to undergo the Special Committee's psychiatric examination but did not issue a public reprimand to him for this particular "misconduct." As the Court declared in *Foretich*:

> Our circuit has joined others, for example, in finding that an attorney charged with misconduct has standing on the basis of reputational injury to appeal a judgment finding the attorney guilty but refraining from imposing any concrete sanctions.

Foretich, 351 F.3d at 1215 (citing *Sullivan v. Comm. on Admissions & Grievances*, 395 F.2d 954, 956 (D.C. Cir. 1967) and *Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997)). Even if the Judicial Council had not issued the examination order and the Review Committee had not affirmed it, *Judge Adams could seek*

relief for the misconduct finding alone. *Id.* It also is irrelevant that Judge Adams was reprimanded for the show cause order issued to the magistrate, something the Judicial Council and Review Committee repeatedly note. Judge Adams acknowledged to the Judicial Council years ago that the show cause order was unwarranted and took responsibility for issuing it. JA 48-49 and 67. Regardless, the standard is whether a judgment will provide Judge Adams with meaningful relief, not restore the status quo before the Judicial Council's February 22, 2016 decision. *Foretich*, 351 F.3d at 1215. As Judge Adams has demonstrated, a judgment will provide him with meaningful relief. *McBryde*, 264 F.3d at 57.

The Judicial Council and Review Committee err when they conflate this Court's analysis of the expired, one-year and three-year suspensions in *McBryde* with the Court's analysis of the misconduct finding and reprimand of Judge McBryde in that same case. *See, e.g.*, Appellees Br. at 29. The *McBryde* court devoted the bulk of its analysis of the expired suspensions to whether the suspensions were capable of repetition. *McBryde*, 264 F.3d at 55-56. But a "capable of repetition" analysis is part of a separate, alternate means of overcoming mootness. It is distinctly different from demonstrating that a live case or controversy exists by showing that an official government action has caused or is causing reputational injury. *Id*. at 56-57. The *McBryde* court referenced the expired suspensions in its analysis of Judge McBryde's reputational injury claim,

but only to note that the effect of the suspensions on Judge McBryde's reputation was merely cumulative: "The legally relevant injury is only the incremental effect of a record of the suspensions (since the fact of the suspensions can no longer be remedied), over and above that caused by the Council's and the Conference's explicit condemnations." *Id.* at 57. Judge McBryde's challenge to the misconduct finding presented a live case or controversy regardless of the fact that the suspensions had expired. *Id.* Judge Adams did not make a "repetition" argument, and his reputational injury argument should not be conflated with a "repetition" claim, as the Judicial Council and Review Committee have done.

The Judicial Council and Review Committee err again when they assert that Judge Adams' reputational injury does not arise directly from government action but instead arises from the secondary, "lingering" effect of government action. Appellees Br. at 19-20, 26-33. The Judicial Council and Review Committee either conflate two concepts or misconstrue Judge Adams' argument. At least two types of reputational injury can defeat mootness – reputational injury flowing from direct government action and reputational injury that is a secondary effect of that action. *McBryde*, 264 F.3d at 57. The latter requires an additional showing. *Id.* The former does not. *Id*. Judge Adams plainly demonstrated that the misconduct finding is direct government action that injured his reputation. No further or additional showing is necessary. It is no different from the misconduct finding and

reprimand in *McBryde*, the designation of foreign films as "political propaganda" in *Meese v. Keene*, 481 U.S. 465 (1987), the congressional determination that the plaintiff was a child abuser in *Foretich*, 351 F.3d at 1213, or the official censure of former Congressman Charles Rangel in *Rangel v. Boehner*, 20 F. Supp. 3d 148, 160 (D.D.C. 2013). No additional showing is required for Judge Adams to state a claim for a reputational injury based on direct government action.

B. The Examination Order.

Judge Adams satisfies this additional showing in any event. He does so as an alternate argument to his "direct government action" reputational injury claim. The Judicial Council and Review Committee offer only a half-hearted, convoluted response. Appellees Br. at 32-33.

It remains a matter of public record that Judge Adams was ordered to undergo a psychiatric examination and that the examination order has never been rescinded, vacated, or withdrawn. Nor has it expired or been expunged or placed under seal. It also remains a matter of public record that Judge Adams is one of only two federal judges in the 232-year history of the federal judiciary ordered by a judicial council to undergo a psychiatric examination. The other was Judge McBryde. *See McBryde v. Comm. to Review Judicial Council & Disability Orders*, 83 F. Supp. 2d 135, 142 & n.5 (D.D.C. 1999).

In addition to showing reputational injury arising from direct government action, *i.e.*, the misconduct finding, Judge Adams also showed that he continues to suffer adverse effects on his reputation as a collateral consequence of the examination order. Specifically, Judge Adams demonstrated that because of the examination order, a litigant in a case before him filed a judicial complaint challenging his competence. JA 121-22 at ¶ 53. He also demonstrated that, on three occasions following the examination order, the Sixth Circuit removed him from sitting on cases on remand. JA 122 at ¶ 54. He had never been removed from a case before the examination order and believes that the removals are causally linked to the order. *Id.* Both examples constitute "some tangible, concrete effect" of the examination order that is "susceptible to judicial correction" if the order is declared *ultra vires* or otherwise unlawful. *Foretich*, 351 F.3d at 1212. A judgment declaring the examination order *ultra vires* or otherwise unlawful will help to remove the "sting" of the order and limit the harm it continues to cause to Judge Adams, granting him meaningful relief. Again, even if not complete, the availability of that relief presents a live case or controversy. *Id.* at 1215.

II. Declaratory Relief Is Available to Judge Adams.

Although they do not say it expressly, the Judicial Council and Review Committee invoke "prudential mootness" for their final argument, effectively

conceding that Judge Adams' lawsuit is not moot for Article III purposes. As this Court explained in *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991), "Where it is so unlikely that the court's grant of declaratory judgment will actually relieve the injury, the doctrine of prudential mootness – a facet of equity – comes into play." "This concept is concerned, not with the court's power under Article III to provide relief, but with the court's discretion in exercising that power." *Id.* "Where it is uncertain that declaratory relief will benefit the party alleging injury, the court will normally refrain from exercising its equitable powers." *Id.* at 1020. "This is especially true where the court can avoid the premature adjudication of constitutional issues." *Id.*

Once again, *McBryde* resolves the question. It is not unlikely or uncertain that declaratory relief will benefit Judge Adams. As in *McBryde*, a judgment declaring the misconduct finding and inexorably intertwined examination order *ultra vires* or otherwise unlawful will remove the legitimacy and the official imprimatur of the Judicial Council and Review Committee's decisions. It will provide meaningful relief to Judge Adams. Accordingly, it cannot be said that the benefit to Judge Adams of a declaratory judgment in his favor is uncertain. This Court already ruled otherwise in *McBryde*.

Nor is it correct that Judge Adams should be denied declaratory relief because his challenge to the authority of a special investigating committee and a

judicial council to order a psychiatric examination presents a matter of first impression. A court should not shirk its duty to decide cases and controversies simply because a question has not been decided previously. Judge Adams' case also is nothing like the "troubling" First Amendment question raised in *Penthouse*, which the Supreme Court had "signaled its reluctance to decide." *Penthouse*, 939 F.2d at 1020. In *Penthouse*, the Court chose to wait until the unique constitutional question raised by that case – the scope of the government speech doctrine where the government's speech "discourages the constitutionally-protected speech of private citizens" – was "squarely presented." *Id.*

The authority of the Judicial Council and Review Committee to require a psychiatric examination under the Act is squarely presented here. It is unlikely to ever be presented more squarely. This Court decides questions of statutory and constitutional authority regularly, and the Supreme Court has never demonstrated a reluctance to decide the particular issues raised by Judge Adams' lawsuit. The Court should decline the Judicial Council and Review Committee's invitation to avoid reaching the question on "equitable mootness" grounds, an issue the District Court did not reach.

CONCLUSION

For the foregoing reasons and the reasons set forth in Judge Adams' opening brief, Judge Adams respectfully requests that the Court reverse the District Court's

order granting the motion to dismiss on mootness grounds and remand this matter for further proceedings.

Dated: June 15, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 2,869 words (using Microsoft Word 2016) and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Paul J. Orfanedes

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June 2021, I filed the foregoing **REPLY BRIEF OF APPELLANT THE HON. JOHN R. ADAMS** with the Clerk of the Court via the Appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

/s/ Paul J. Orfanedes