

No. 16-1323

In the Supreme Court of the United States

SUPREME COURT OF NEW MEXICO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Rule 16-308(E) of the New Mexico Rules of Professional Conduct states that a prosecutor shall not “subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes,” among other things, that “the evidence sought is essential to the successful completion of an ongoing investigation or prosecution” and that “there is no other feasible alternative to obtain the information.” That rule purports to bar federal prosecutors from serving subpoenas that would be authorized by and enforceable under federal law. The question presented is:

Whether the court of appeals correctly held that Rule 16-308(E) is preempted as applied to federal prosecutors serving grand jury subpoenas.

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OPINIONS BELOW

The opinion and order of the court of appeals (Pet. App. 1a-93a) is reported at 839 F.3d 888. The opinion and order of the district court (Pet. App. 95a-119a) is not published in the Federal Supplement but is available at 2014 WL 12487697.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2016. A petition for rehearing was denied on December 2, 2016 (Pet. App. 121a-122a). On February 13, 2017, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including April 3, 2017. On March 17, 2017, Justice Sotomayor further extended the time to May 1, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this suit to challenge a provision of the New Mexico Rules of Professional Responsibility that purports to prohibit federal prosecutors practicing before federal grand juries from serving subpoenas that are authorized by federal law.

1. a. Under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, “the activities of the Federal Government are free from regulation by any state” unless Congress clearly authorizes state regulation. *Hancock v. Train*, 426 U.S. 167, 178 (1976) (citation omitted). Before 1998, the Department of Justice, based on that principle, determined that federal prosecutors carrying out their authorized functions were not required to comply with certain state rules of professional conduct. For example, the Department exempted federal prosecutors from rules limiting ex parte contacts with represented parties. 59 Fed. Reg. 39,910 (Aug. 4, 1994).

In 1998, Congress responded by enacting the McDade Act, which is entitled “[e]thical standards for attorneys for the Government.” Pub. L. No. 105-277, Div. A, § 101(b) [Tit. VIII, § 801], 112 Stat. 2681-118. The Act provides that “[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.” 28 U.S.C. 530B(a). Congress did not define the ethics rules covered by the McDade Act or what it means for prosecutors to be subject to those rules “to the same extent” as other attorneys. Instead, Congress specified that “[t]he Attorney General shall make and amend rules of the Department of

Justice to assure compliance” with the Act. 28 U.S.C. 530B(b).

In 1999, pursuant to that authority, the Department promulgated regulations interpreting the statutory phrase “state laws and rules and local federal court rules governing attorneys” to mean “rules enacted or adopted by any State * * * that prescribe ethical conduct for attorneys.” 28 C.F.R. 77.2(h); see 64 Fed. Reg. 19,273 (Apr. 20, 1999). The regulations further specify that the ethics rules covered by the McDade Act do not include “[a]ny statute, rule, or regulation which does not govern ethical conduct, such as rules of procedure, evidence, or substantive law, whether or not such rule is included in a code of professional responsibility for attorneys.” 28 C.F.R. 77.2(h)(1). And the regulations clarify that the Act “should not be construed in any way to alter federal substantive, procedural, or evidentiary law.” 28 C.F.R. 77.1(b).

b. Grand jury subpoenas are governed by federal substantive, procedural, and evidentiary law including Federal Rule of Criminal Procedure 17. A subpoena is a court order commanding a witness to appear and to testify or to produce documents or objects. Fed. R. Crim. P. 17(a) and (c)(1). Signed and sealed subpoenas are issued by district court clerks and completed and served by the parties. Fed. R. Crim. P. 17(a) and (d). In the grand jury context, federal prosecutors obtain and serve subpoenas on behalf of the grand jury. 1 Sara Sun Beale et al., *Grand Jury Law & Practice* § 6:2, at 6-12 to 6-13 (2d ed. 2016) (*Grand Jury Law & Practice*).

Rule 17 implements “the longstanding principle that ‘the public . . . has a right to every man’s evidence,’” a principle that is “particularly applicable to grand jury proceedings.” *United States v. Calandra*,

414 U.S. 338, 345 (1974) (citation omitted). A subpoena cannot override a federally recognized privilege, such as the Fifth Amendment privilege against self-incrimination. *Id.* at 346. In addition, a court may modify or quash a subpoena for documents or objects “if compliance would be unreasonable or oppressive.” Fed. R. Crim. P. 17(c)(2).¹ But absent a valid privilege or a motion to quash, compliance with a subpoena is mandatory. Fed. R. Crim. P. 17(g).

In the grand jury context, this Court has instructed that a court considering a motion to quash must tailor Rule 17(c)(2)’s “unreasonable or oppressive” standard in light of the grand jury’s “unique role in our criminal justice system,” which is to “inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred.” *United States v. R. Enters.*, 498 U.S. 292, 297 (1991). Accordingly, the ordinary standard for quashing trial subpoenas “does not apply in the context of grand jury proceedings.” *Id.* at 300.

c. In some circumstances, grand jury subpoenas seek testimony or evidence from attorneys about their current or former clients. The attorney himself may be the target of the grand jury investigation, or may have played a role in the target’s criminal scheme. See, e.g., C.A. App. 84-87 (discussing examples, including attorneys who facilitated their clients’ fraud schemes). In other cases, non-privileged documents or other information in the attorney’s possession may be

¹ Although Rule 17 does not expressly provide for motions to quash subpoenas for testimony, courts “have entertained motions seeking such relief and decided them by reference to comparable principles.” *Stern v. United States Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 17 (1st Cir. 2000), cert. denied, 531 U.S. 1143 (2001).

relevant to establishing a current or former client's guilt. See, *e.g.*, *id.* at 79-82, 83-84 (discussing examples). Like any recipient of a subpoena, an attorney may assert an applicable privilege or move to quash an unreasonable or oppressive subpoena. But "federal courts have ruled that the attorney-client relationship neither immunizes the attorney from the obligation to respond to a grand jury subpoena nor entitles the attorney to any special procedural protection." *Grand Jury Law & Practice* § 6:24, at 6-255.

Although federal law does not require them, the Department of Justice has long imposed restrictions on attorney subpoenas as a matter of policy. In general, such a subpoena must be approved by the Assistant Attorney General for the Criminal Division and will be approved only if, among other things, "[a]ll reasonable attempts to obtain the information" from other sources "have proved to be unsuccessful," "the information sought is reasonably needed for the successful completion of the investigation or prosecution," and the need for the information "outweigh[s] the potential adverse effects upon the attorney-client relationship."²

2. In 2008, the Supreme Court of New Mexico adopted New Mexico Rule of Professional Conduct 16-308(E). Pet. App. 9a. Rule 16-308(E) prohibits prosecutors from serving attorney subpoenas that would be permitted under Department of Justice policy and federal law by providing that a prosecutor shall not:

² U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-13.410 (updated Mar. 2016), <http://www.justice.gov/usam/usam-9-13000-obtaining-evidence#9-13.410>.

subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

- (1) the information sought is not protected from disclosure by any applicable privilege;
- (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
- (3) there is no other feasible alternative to obtain the information.

N.M. R. Prof'l Conduct 16-308(E).

Although the United States District Court for the District of New Mexico generally requires attorneys practicing before it to adhere to the New Mexico Rules of Professional Conduct, the court did not incorporate Rule 16-308(E). Pet. App. 10a. Nonetheless, New Mexico disciplinary authorities declined to disclaim authority to sanction federal prosecutors who serve subpoenas that do not comply with the rule. *Id.* at 21a.

3. In 2013, after Rule 16-308(E) caused federal prosecutors in New Mexico to refrain from subpoenaing attorneys in several cases, the United States filed this suit. Pet. App. 10a-12a. The government argued that Rule 16-308(E) conflicts with federal law and is therefore preempted to the extent it applies to federal prosecutors. The district court held the rule may be enforced against federal prosecutors in the context of trial subpoenas, but agreed with the United States that it is preempted as applied to grand jury subpoenas. *Id.* at 95a-119a.³

³ Like the opinions below, we use “trial subpoena” as a shorthand for all subpoenas outside the grand jury context. Pet. App. 8a & n.4.

With respect to trial subpoenas, the district court concluded that it was bound by *United States v. Colorado Supreme Court*, 189 F.3d 1281 (10th Cir. 1999), which held that the McDade Act rendered a materially identical rule enforceable against federal prosecutors outside the grand jury context. Pet. App. 100a-106a. But grand-jury subpoenas were not at issue in *Colorado Supreme Court*, and the district court held that Rule 16-308(E) is preempted in the grand jury context because it “conflicts with [federal] grand jury procedure.” *Id.* at 118a; see *id.* at 116a-118a.

4. The court of appeals affirmed. Pet. App. 3a-93a.

a. The court of appeals explained that *Colorado Supreme Court* established a two-step test for deciding whether a rule of professional conduct is enforceable against federal prosecutors. Pet. App. 57a-58a. First, a court must determine whether the rule “is a rule of professional ethics clearly covered by the McDade Act.” *Ibid.* (citation omitted). Second, even if the rule is a rule of ethics, the court must determine whether it is “otherwise ‘inconsistent with federal law’ and thus preempted.” *Id.* at 58a (citation omitted).

Here, the court of appeals concluded that the first step of the inquiry was controlled by *Colorado Supreme Court*’s holding that a materially identical rule was a rule of ethics. Pet. App. 59a-60a. The court further held that, at the second step, it was bound by *Colorado Supreme Court*’s conclusion that the identical rule “d[id] not conflict with federal law governing trial subpoenas.” *Id.* at 62a. The court therefore affirmed the district court’s holding that Rule 16-308(E) is not preempted “outside of the grand-jury context.” *Ibid.*

The court of appeals also agreed with the district court that Rule 16-308(E) is “preempted in the grand-

jury setting” because the rule “pose[s] ‘an obstacle to the accomplishment and execution of the full purposes and objectives’ of the federal legal regime governing grand-jury practice.” Pet. App. 63a-64a (citation omitted). The court emphasized the constitutional role of the grand jury and this Court’s admonition that, “for federal grand juries to properly carry out their investigative role, there must be no more than minimal limitations placed on the kinds of evidence that they can consider.” *Id.* at 70a (discussing *R. Enters.*, 498 U.S. at 298-301). The court explained that Rule 16-308(E) imposes “far more onerous conditions than those required by federal law.” *Id.* at 73a. And the court concluded that “such heightened requirements for attorney subpoenas would impede the grand jury’s broad investigative mandate.” *Ibid.*

b. Chief Judge Tymkovich dissented in part. Pet. App. 77a-93a. In his view, the court of appeals erred in considering whether Rule 16-308(E) conflicts with federal law governing grand jury subpoenas. Instead, he would have held that the McDade Act requires federal prosecutors to comply with “*all* state ethics rules,” whether or not those rules conflict with other federal law. *Id.* at 79a-80a (emphasis added).

5. Both the government and petitioners sought rehearing en banc. The court of appeals denied the government’s petition without noted dissent, and denied petitioners’ petition over the dissenting votes of Chief Judge Tymkovich and Judges Kelly, Lucero, Hartz, and Gorsuch. Pet. App. 1a-2a, 121a-122a.

ARGUMENT

Petitioners renew their contention (Pet. 16-35) that, under the McDade Act, New Mexico may invoke Rule 16-308(E) to discipline a federal prosecutor, practicing

before a federal grand jury, for serving a subpoena authorized by federal law. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. To the contrary, in the nearly two decades since its passage, the McDade Act has given rise to only a handful of cases, and no other court of appeals has had occasion to address the application of the Act to a state rule like Rule 16-308(E). The petition for a writ of certiorari should be denied.⁴

1. As applied to federal grand jury subpoenas, Rule 16-308(E) conflicts with federal law and interferes with the grand jury’s “constitutionally sanctioned investigative role.” Pet. App. 69a. Accordingly, as the court of appeals held, it is preempted.

a. “[T]he grand jury’s authority to subpoena witnesses is not only historic, but essential to its task.” *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (citation omitted). Therefore, “[a] grand jury ‘may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.’” *United States v. R. Enters.*, 498 U.S. 292, 298 (1991) (citation omitted).

“Of course, the grand jury’s subpoena power is not unlimited.” *United States v. Calandra*, 414 U.S. 338, 346 (1974). A grand jury may not “violate a valid privi-

⁴ The United States has filed a conditional cross-petition presenting the question whether Rule 16-308(E) may validly be applied to federal prosecutors outside the grand jury context. While review of the court of appeals’ decision is not warranted, should the Court grant review, it should have before it both of the decision’s holdings.

lege.” *Ibid.* And a court “may quash or modify a subpoena on motion if compliance would be ‘unreasonable or oppressive.’” *Id.* at 346 n.4 (quoting Fed. R. Crim. P. 17(c)). But courts entertaining motions to quash must ensure that they do not “impair the strong governmental interests in affording grand juries wide latitude” and “preserving a necessary level of secrecy.” *R. Enters.*, 498 U.S. at 300.

Attorneys are not exempt from those principles. An attorney may withhold information protected by the attorney-client privilege or another valid privilege. See *Calandra*, 414 U.S. at 346. In addition, “[i]n determining whether a subpoena of [a] lawyer is ‘unreasonable or oppressive,’ [a] district court may properly consider, among other factors, whether compliance would likely destroy the attorney-client relationship, and whether the information sought from the lawyer is already available from other sources.” *United States v. Bergeson*, 425 F.3d 1221, 1225 (9th Cir. 2005); see, e.g., *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 250 (2d Cir.) (en banc) (*Doe*), cert. denied, 475 U.S. 1108 (1986).

Courts have consistently held, however, that federal law does not justify “requirements that the government show its need for the information sought and that the attorney is the only source for that information.” *Doe*, 781 F.2d at 248. Indeed, “[n]o circuit court has found a right to force the government to show a need or lack of another source for the information” sought in an attorney subpoena. *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1496 (10th Cir. 1990); see *ibid.* (collecting cases); see also *Grand Jury Law & Practice* § 6:24, at 6-255 to 6-256. Such heightened showings, courts have explained, would “hamper severely the

investigative function of the grand jury.” *Doe*, 781 F.2d at 248; see *In re Grand Jury Subpoena*, 913 F.2d 1118, 1129 (5th Cir. 1990), cert. denied, 499 U.S. 959 (1991).

Rule 16-308(E) purports to impose the very limits that courts have held to be foreclosed by federal law and inconsistent with the grand jury’s investigative function. As the First Circuit observed, the rule’s “‘essentiality’ and ‘no feasible alternative’ requirements are substantially more onerous (and, thus, more restrictive) than the traditional motion-to-quash standards.” *Stern v. United States Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 18 (2000), cert. denied, 531 U.S. 1143 (2001). The rule is derived from an American Bar Association (ABA) proposal that was designed “to limit the issuance of lawyer subpoenas.” Pet. App. 4a (citation omitted). And in New Mexico, the rule had its intended effect by deterring federal prosecutors from serving subpoenas that would have been authorized by federal law. *Id.* at 11a-12a, 18a. The rule thus limits the information available to grand juries and “impe[s] [their] investigation[s].” *Id.* at 73a (quoting *R. Enters.*, 498 U.S. at 299). Accordingly, it is preempted.⁵

b. Rule 16-308(E) is also preempted because it conflicts with the principles of grand jury secrecy reflected in Federal Rule of Criminal Procedure 6(e). Cf. Pet. App. 70a n.27 (noting but not reaching this issue). In *R. Enterprises*, this Court held that “[r]equiring the Government to explain in too much detail the particu-

⁵ As discussed below, see pp. 12-14, *infra*, the fact that New Mexico has framed its rule as one of ethics does not avoid preemption. The McDade Act does not authorize the States to displace federal law regulating grand jury procedure.

lar reasons underlying a subpoena” to defeat a motion to quash would “threaten[] to compromise ‘the indispensable secrecy of grand jury proceedings.’” 498 U.S. at 299 (citation omitted). Rule 16-308(E) would have exactly the same impermissible effect. To respond to ethics complaints, federal prosecutors would have to establish to the satisfaction of state disciplinary authorities that “the evidence sought [wa]s essential to the successful completion of an ongoing investigation” and that “there [wa]s no other feasible alternative to obtain the information.” N.M. R. Prof’l Conduct 16-308(E)(2) and (3). They could not do that without breaching grand jury secrecy.

2. Petitioners offer no sound reason to question the court of appeals’ conclusion that Rule 16-308(E) is preempted as applied to federal grand jury subpoenas.

a. Petitioners first echo (Pet. 18-19) Chief Judge Tymkovich’s conclusion that the McDade Act subjects federal prosecutors to *all* state ethics rules, even if those rules conflict with other federal law—a result that would appear to allow States to use ethics rules to effectively nullify wide swaths of federal substantive, procedural, and evidentiary law. That reading is unsupported by the McDade Act’s text and foreclosed by background principles of interpretation.

By its terms, the McDade Act does not unconditionally subject federal prosecutors to all state ethics rules. Instead, it provides that federal prosecutors are subject to those rules “to the same extent and in the same manner as other attorneys.” 28 U.S.C. 530B. And under basic preemption principles, *no* attorney can be required to comply with a state rule that conflicts with—and is thus preempted by—federal law. For example, this Court has held that a State may not

apply its attorney-licensing requirements to prohibit non-lawyers from engaging in conduct authorized by the United States Patent and Trademark Office. *Sperry v. Florida*, 373 U.S. 379, 385 (1963).⁶

Attorneys other than federal prosecutors are thus not required to comply with state ethics rules “when compliance with both state and federal law is impossible, or when the state [rule] ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *California v. ARC Am. Corp.*, 490 U.S. 93, 100-101 (1989) (citations omitted). And because federal prosecutors are subject to state ethics rules only “to the same extent” as other attorneys, 28 U.S.C. 530B(a), they, too, are not required to comply with rules that conflict with federal law.

Two background rules of statutory interpretation confirm that view. First, state regulation of federal officials is authorized “only when *and to the extent* there is ‘a clear congressional mandate.’” *Hancock v. Train*, 426 U.S. 167, 179 (1976) (emphasis added; citation omitted). The McDade Act clearly authorizes *some* state regulation of federal prosecutors. But in adopting the Act, Congress gave no indication that it “meant to empower states * * * to regulate government attorneys in a manner inconsistent with federal law,” *Stern*, 214 F.3d at 19—much less the clear mandate that this Court’s decisions require.

⁶ See, e.g., *United States v. Sindel*, 53 F.3d 874, 877 (8th Cir. 1995) (federal reporting requirement preempted nondisclosure obligation in state rule of professional conduct); *Rand v. Monsanto Co.*, 926 F.2d 596, 600 (7th Cir. 1991) (Easterbrook, J.) (Federal Rule of Civil Procedure 23 precluded the enforcement of an ABA rule of professional conduct in class actions).

Second, the Department of Justice's implementing regulations provide that the McDade Act "should not be construed in any way to alter federal substantive, procedural, or evidentiary law." 28 C.F.R. 77.1(b). Those regulations were adopted contemporaneously with the Act and pursuant to the Act's specific grant of rulemaking authority. 28 U.S.C. 530B(b); cf. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). The regulations thus "dispel the notion that [S]ection 530B grants states * * * the power, in the guise of regulating ethics, to impose strictures that are inconsistent with federal law." *Stern*, 214 F.3d at 20.

That interpretation does not deprive the McDade Act of its intended effect. Section 530B makes clear that federal prosecutors do not enjoy special immunity from state ethics rules and that the Department of Justice lacks statutory authority to exempt federal prosecutors from state ethics rules by regulation. But it does not follow that Congress intended to subject federal prosecutors to state ethics rules that conflict with other federal laws.

b. Petitioners also assert (Pet. 19) that the legislative record shows that "Congress intended to subject federal prosecutors to ethics rules regarding their issuance of attorney subpoenas during grand jury proceedings." But the three scattered pieces of legislative history that petitioners muster do not support that assertion. First, petitioners invoke (Pet. 20) a committee report that sheds no light on the McDade Act because it was issued eight years before the Act's enactment. See H.R. Rep. No. 986, 101st Cong., 2d Sess. (1990). Second, petitioners cite (Pet. 20) a floor statement by Representative McDade, which included an "appendix" listing cases purportedly involving mis-

conduct by federal prosecutors. 144 Cong. Rec. 2761-2764 (1998). One of those cases—out of more than 100—involved a grand jury subpoena issued to an attorney. *Id.* at 2761. But Representative McDade did not suggest that his proposed legislation would address all of the examples in the appendix, much less that it would allow state ethics rules to regulate grand jury subpoenas.⁷ Third, petitioners note (Pet. 20) that one of the McDade Act’s opponents predicted that it would allow state regulation of “matters before a grand jury.” 144 Cong. Rec. at 27,472 (Sen. Hatch). But as the First Circuit explained in rejecting the same argument, courts should not “ascribe much weight to the dire predictions of broader applicability made by *opponents* of [the Act].” *Stern*, 214 F.3d at 20 n.8; see *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981).

c. Finally, petitioners assert (Pet. 23-30) that the court of appeals was wrong to conclude that Rule 16-308(E) conflicts with federal law. But petitioners do not and could not dispute that Rule 16-308(E) imposes limits on grand jury subpoenas that are inconsistent with those in federal law. Instead, they argue only that Rule 16-308(E) “does not conflict with the *constitutional core* of traditional federal grand jury practice.” Pet. 23 (capitalization altered; emphasis added). That more modest claim would not save Rule 16-308(E) from preemption even if it were correct. And in any event, petitioners’ arguments lack merit.

⁷ To the contrary, Representative McDade referred to the appendix only in passing and did so in connection with a never-enacted provision of his proposed legislation that would have established *federal* “standards of conduct for Department of Justice employees.” 144 Cong. Rec. at 2761.

First, relying on *Whitehouse v. United States District Court for the District of Rhode Island*, 53 F.3d 1349 (1st Cir. 1995), petitioners assert that Rule 16-308(E) does not impede the functioning of the grand jury because it is “aimed at, and principally affects, *prosecutors*” and “does not affect subpoenas sought by the grand jury acting independently.” Pet. 23-24 (brackets omitted) (quoting *Whitehouse*, 53 F.3d at 1357). But the First Circuit itself has now “eschew[ed] this component of [*Whitehouse*’s] reasoning” because “grand jury subpoenas are almost universally issued by and through federal prosecutors.” *Stern*, 214 F.3d at 16 n.4.

The First Circuit was correct to abandon that aspect of *Whitehouse*. As this Court has explained, a grand jury “depends largely on the prosecutor’s office to secure the evidence or witnesses it requires.” *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 430 (1983). Indeed, it is unclear how a grand jury would subpoena a witness without a prosecutor’s involvement, because Rule 17 only provides for the issuance of subpoenas to a “party.” Fed. R. Crim. P. 17(a); see *Grand Jury Law & Practice* § 6:2, at 6-13 (grand jury subpoenas are “issued and served by representatives of the federal prosecutor’s office”).

Second, petitioners contend (Pet. 26-28) that “the grand jury’s investigative authority has always been limited by constitutional, statutory, and common-law rights and privileges.” But the privileges that limit federal grand jury subpoenas are those recognized by federal law. See *Calandra*, 414 U.S. at 346; see also Fed. R. Evid. 501; *United States v. Gillock*, 445 U.S. 360, 374 (1980). A state law that purports to prohibit the disclosure of information sought by a federal grand

jury is preempted, regardless of its purpose. See *Grand Jury Law & Practice* § 6:8, at 6-76 to 6-77.

Finally, petitioners dismiss (Pet. 29-30) concerns about grand jury secrecy because they assert that state disciplinary hearings provide “safeguards * * * to avoid inappropriate disclosure.” But New Mexico disciplinary proceedings may “become matters of public record” upon the filing of charges. N.M. R. Prof’l Conduct 17-304(A)(1). And in any event, disclosure in a disciplinary proceeding would itself be inconsistent with the “indispensable secrecy of grand jury proceedings.” *R. Enters.*, 498 U.S. at 299 (citation omitted); see Fed. R. Crim. P. 6(e)(2) and (3) (prohibiting disclosures except as specifically authorized).

3. For the foregoing reasons, the court of appeals correctly held that even if Rule 16-308(E) is a rule of ethics under the McDade Act, it may not be applied to federal grand jury subpoenas because it conflicts with federal law. But Rule 16-308(E) may not be applied to federal prosecutors for an additional, more fundamental reason: It is not properly classified as a rule of ethics under the McDade Act in the first place.

The McDade Act focuses on rules “governing attorneys,” 28 U.S.C. 530B, and its title—“Ethical standards for attorneys for the Government”—confirms that it is limited to rules of ethics. In *United States v. Colorado Supreme Court*, 189 F.3d 1281 (1999), the Tenth Circuit articulated a three-part test to identify the rules of ethics covered by the Act. First, “a rule of professional conduct would bar conduct recognized by consensus within the profession as inappropriate.” *Id.* at 1287. Second, an ethics rule “is like a commandment dealing with morals and principles” and is often

“quite vague.” *Ibid.* And third, “a rule of ethics is directed to the attorney herself.” *Ibid.*

Rule 16-308(E) does not satisfy even that test.⁸ But more importantly, the Tenth Circuit failed to recognize that the McDade Act should not be construed to encompass “rules of procedure, evidence, or substantive law,” even if those rules are “included in a code of professional responsibility for attorneys.” 28 C.F.R. 77.2(h)(1). The McDade Act would not, for example, authorize a State to impose on federal prosecutors a rule of professional conduct providing: “A prosecutor shall not seek to introduce into evidence a confession obtained by trickery.” Such a rule would properly be viewed as a rule of evidence or procedure even though it is framed as a commandment, is no less general than Rule 16-308(E), and aims at the attorney himself. “Substance, not form, must control” the determination whether a rule is a rule of ethics under the McDade Act. *Stern*, 214 F.3d at 20.

For the same reason, Rule 16-308(E) functions as a rule of evidence or procedure notwithstanding its label. Its purpose and effect is to alter the evidence that a prosecutor presents—as the court of appeals recognized when it observed that “prosecutors’ efforts to avoid sanctions” under the rule would lead to a “reduction in available evidence in grand-jury and other criminal proceedings.” Pet. App. 18a. And in seeking to deter prosecutors from serving subpoenas that do not satisfy its standards, Rule 16-308(E) functions much like an expanded attorney-client privilege or a modification to Rule 17(c)(2)’s standard for quashing a sub-

⁸ The rule is highly specific, lacks a consensus in ethical rules, and aims only at prosecutors, leaving civil litigants and defense counsel free to subpoena attorneys without heightened restrictions.

poena. The McDade Act does not authorize States to impose such requirements, whatever their labels.

4. The court of appeals' decision neither conflicts with any decision of another court of appeals nor otherwise warrants this Court's review.

a. Petitioners are wrong to assert (Pet. 31) that the decision below "cannot be reconciled with the First Circuit's decision in *Whitehouse*," which rejected a challenge to a rule requiring judicial pre-approval of attorney subpoenas. 53 F.3d at 1352. *Whitehouse* could not create a conflict over the meaning of the McDade Act because it was decided in 1995, three years before the McDade Act became law. Moreover, unlike this case, *Whitehouse* involved no Supremacy Clause issue. It upheld a local rule adopted by a federal district court, but specifically declined to decide whether a state rule of professional conduct like Rule 16-308(E) could have imposed the same requirement. *Id.* at 1365. And, critically, the First Circuit emphasized that its decision rested on the understanding that rule at issue in *Whitehouse* made "no change in substantive law" because it "merely authorize[d] district courts to reject a prosecutor's attorney-subpoena application for the traditional reasons justifying the quashing of a subpoena." *Id.* at 1357.⁹ Rule 16-308(E), in contrast, imposes "far more onerous conditions than those required by federal law." Pet. App. 73a.

If anything, the First Circuit's decisions support the court of appeals' holding that Rule 16-308(E) is

⁹ See *Whitehouse*, 53 F.3d at 1358 (the rule "merely changes the timing with respect to motions to quash"); *ibid.* ("[T]he grounds upon which a district court may reject an attorney-subpoena application mirror those for quashing a subpoena."); *id.* at 1359 ("[T]he Rule has no effect on the evidence ultimately presented.").

preempted because its stringent restrictions conflict with federal standards governing grand jury subpoenas. In *Whitehouse* itself, the First Circuit suggested that a federal district court could not, under its local rulemaking authority, impose heightened standards like those in Rule 16-308(E) because “federal district courts cannot effect substantive changes in the law through local rulemaking.” 53 F.3d at 1358 n.12. And in its subsequent decision in *Stern*, the First Circuit squarely held that a district court could not adopt a local rule that combined a judicial pre-approval requirement like the one at issue in *Whitehouse* with heightened standards like those in Rule 16-308(E). 214 F.3d at 7-9. *Stern* explained that *Whitehouse* had “rested squarely on the panel’s determination that the particular local rule worked no substantive change in the governing law because judicial preapproval would be granted or denied under traditional motion-to-quash standards.” *Id.* at 16. And *Stern* then held, consistent with the court of appeals’ decision in this case, that a local rule purporting to impose heightened substantive standards on grand jury subpoenas was invalid—and was not authorized by the McDade Act—because it “impermissibly interfere[d] with grand jury proceedings.” *Ibid.*; see *id.* at 20-21.

b. Petitioners do not claim that the court of appeals’ decision conflicts with any decision other than *Whitehouse*. And they do not cite *any* decision applying the McDade Act in the 17 years since *Stern*. Cf. Pet. 33. Particularly in the absence of a circuit conflict, a question that has given rise to so little litigation does not warrant this Court’s review.

In arguing otherwise, petitioners state (Pet. 11-12 & n.6, 31-32) that 30 States in addition to New Mexico

have adopted rules similar to Rule 16-308(E). But petitioners have not cited any instance in which a State has sought to enforce a rule like Rule 16-308(E) against a federal prosecutor, and the Department of Justice’s Professional Responsibility Advisory Office is unaware of any such case.

Furthermore, it is unclear whether and to what extent other States would purport to apply their rules of professional conduct to federal prosecutors practicing before federal grand juries. The majority of States—including 26 of the 30 States petitioners identify—apply choice-of-law rules based on the ABA’s Model Rule of Professional Conduct 8.5(b)(1), which specifies that “for conduct in connection with a matter pending before a tribunal,” the rules of professional responsibility to be applied are “the rules of the jurisdiction in which the tribunal sits, *unless the rules of the tribunal provide otherwise.*”¹⁰ ABA Model R. Prof’l Conduct 8.5(b)(1) (emphasis added). The ABA rule is intended to ensure that a lawyer’s conduct is “subject to only

¹⁰ See Alaska R. Prof’l Conduct 8.5(b)(1); Ariz. R. Prof’l Conduct ER 8.5(b)(1); Colo. R. Prof’l Conduct 8.5(b)(1); Del. Lawyers’ R. Prof’l Conduct 8.5(b)(1); Ga. R. Prof’l Conduct 8.5(b)(1); Idaho R. Prof’l Conduct 8.5(b)(1); Ill. R. Prof’l Conduct 8.5(b)(1); Ind. R. Prof’l Conduct 8.5(b)(1); Iowa R. Prof’l Conduct 32:8.5(b)(1); Ky. Sup. Ct. R. 3.130(8.5(b)(1)); La. R. Prof’l Conduct 8.5(b)(1); Minn. R. Prof’l Conduct 8.5(b)(1); Mo. R. Prof’l Conduct 4-8.5(b)(1); Neb. R. Prof’l Conduct 3-508.5(b)(1); N.H. R. Prof’l Conduct 8.5(b)(1); N.J. R. Prof’l Conduct 8.5(b)(1); N.C. R. Prof’l Conduct 8.5(b)(1); N.D. R. Prof’l Conduct 8.5(c)(1); Ohio R. Prof’l Conduct 8.5(b)(1); Okla. R. Prof’l Conduct 8.5(b)(1); S.C. R. Prof’l Conduct 8.5(b)(1); S.D. R. Prof’l Conduct 8.5(b)(1); Tenn. R. Prof’l Conduct 8.5(b)(1); Vt. R. Prof’l Conduct 8.5(b)(1); Wash. R. Prof’l Conduct 8.5(b)(1); Wis. R. Prof’l Conduct 20:8.5(b)(1).

one set of rules of professional conduct.” *Id.* 8.5(b)(1) cmt. [3].

It is thus unclear whether other States would purport to apply their rules of professional conduct to a federal prosecutor’s service of a subpoena in a grand jury proceeding, or would instead leave such matters to be regulated by the relevant district court’s rules. Cf. *In re Grand Jury Proceedings*, 616 F.3d 1172, 1186 (10th Cir. 2010) (expressing “considerable doubt” that state rules of professional conduct “apply to federal prosecutors’ practice before a federal grand jury”); *Stern*, 214 F.3d at 9 (noting that state bar counsel had “vouchsafed that he would not wield [an analogous state rule] against federal prosecutors”). This case is unusual because New Mexico is one of the few States that has not adopted a choice-of-law rule like Rule 8.5 and because New Mexico’s disciplinary authorities have declined to disavow the enforcement of Rule 16-308(E) against federal prosecutors. See N.M. R. Prof’l Conduct 16-805; Pet. App. 21a.

Petitioners also state (Pet. 12 & n.7, 32) that “approximately 39” of the 94 federal district courts require attorneys practicing before them to comply with rules of professional conduct that include provisions similar to Rule 16-308(E). But again, petitioners have not cited any instance in which a district court has sought to enforce a rule like Rule 16-308(E) against a federal prosecutor, and the Department of Justice’s Professional Responsibility Advisory Office is unaware of any such case.

Furthermore, district courts applying state ethics rules incorporated into their local rules must do so in a way that is not “inconsistent with or antithetical to federal interests.” *Grievance Comm. for the S. Dist. of*

N.Y. v. Simels, 48 F.3d 640, 646 (2d Cir. 1995); see, e.g., *In re Congoleum Corp.*, 426 F.3d 675, 687 (3d Cir. 2005) (“State precedents as to professional responsibility should be consulted when they are compatible with federal law and policy and do not ‘balkanize federal law.’”) (citation omitted). It is thus unclear whether the district courts in question would apply state rules of professional conduct to discipline federal prosecutors for serving subpoenas that are authorized by federal law.

c. If other States or district courts assert the authority to enforce rules like Rule 16-308(E) against federal prosecutors serving grand jury subpoenas, and if a circuit conflict develops over whether such enforcement is authorized by the McDade Act, there will be ample opportunity for this Court to resolve any disagreement. But unless and until such a conflict arises, the question presented does not warrant this Court’s review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2017