No. 16-1323

IN THE

Supreme Court of the United States

SUPREME COURT OF NEW MEXICO, THE DISCIPLINARY BOARD OF NEW MEXICO, AND OFFICE OF THE DISCIPLINARY COUNSEL OF NEW MEXICO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONERS

Of Counsel

MICHAEL S. GRECO
JOHN LONGSTRETH
K&L GATES LLP

LINDA A. KLEIN
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5000
abapresident@americanbar.org

Counsel for American Bar Association

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QUESTION PRESENTED

This *amicus* brief is filed in support of the question presented by the Petition:

Federal law provides that attorneys for the federal government are "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).

Rule 16-308(E) of the New Mexico Rules of Professional Conduct provides 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" it.

The question presented is whether Rule 16-308(E) is preempted with respect to federal prosecutors in the context of grand jury proceedings.

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I. INTEREST OF *AMICUS*[1]

With more than 400,000 members from all 50 states, the American Bar Association (ABA) is the largest voluntary professional membership organization, and the leading organization of legal professionals, in the United States. Its members include attorneys in private law firms, corporations, nonprofit organizations, government agencies, prosecutor and public defender offices, and judges, legislators, law professors, law students, and nonlawyer "associates" in related fields.[2]

Since its founding in 1878, the ABA has worked to promote the competence, ethical conduct, and professionalism of all lawyers. To assist this effort the ABA developed and adopted CANONS OF PROFESSIONAL ETHICS in 1908. Continuously reviewed and updated through the efforts of ABA members; national, state, and local bar organizations; academicians, practicing lawyers, and the judiciary, the Canons are now the ABA MODEL RULES OF PROFESSIONAL CONDUCT (ABA Model Rules). Long

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[1]Counsel for petitioners and for respondent each received timely notice under Rule 37.2(a) of the ABA's intent to file this brief and each consented to the filing. *Amicus* certifies that this brief was authored in whole by counsel for *Amicus* and no part of the brief was authored by any attorney for a party. No party, nor any other person or entity, made any monetary contribution to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief; nor was it circulated to any member of the Judicial Division Council before filing.

accepted as a national framework for standards of professional conduct, these serve as models for the ethics rules adopted by all states but California. New Mexico's Rule 16-308(E), at issue in the petition the ABA supports in this brief, is identical to ABA Model Rule 3.8(e).

The ABA also actively supported the legislation that became 28 U.SC. § 530B (Section 530B), which provides that federal government attorneys practicing in a state shall be subject to that state's ethical laws and rules "to the same extent and in the same manner as other attorneys in that State." The ABA believes Section 530B requires that authority to regulate the ethical conduct of federal prosecutors practicing in New Mexico remain with the State of New Mexico, including as to when they may be subject to discipline for issuing grand jury subpoenas to attorneys. The ABA thus respectfully submits that the Tenth Circuit panel majority erred in concluding that federal law preempts the full application of New Mexico Rule of Professional Conduct 16-308(E) to federal prosecutors, and that Judge Tymkovich's dissenting opinion correctly concluded that Section 530B resolves by its express terms the preemption claims the United States has advanced in this case.

The ABA believes that the petition presents a question of exceptional importance. The ethical issues addressed by the rule have been the subject of consideration at the highest levels of the association over a long period of time. Amended Model Rule

3.8(e) has been adopted by 31 states.[3] Four of those states are within the Tenth Circuit -- Colorado, Kansas, New Mexico, and Oklahoma -- and their considered judgments to adopt the rule in the grand jury context are directly affected by the Tenth Circuit's decision. Rules in other states may now be called into question as well.

II. ARGUMENT

A. Model Rule 3.8(e) Is The Result Of Careful Consideration By The ABA And Other Bar Associations Of The Ethical Problems Raised By Grand Jury Subpoenas To Defense Counsel.

The ABA House of Delegates first adopted the policy on which Model Rule 3.8(e) is based in 1986, after receiving a report on the increasing use by federal prosecutors of grand jury subpoenas issued to attorneys for testimony related to their clients. That policy was based on a report and recommendation from the ABA's Criminal Justice Section to its House of Delegates. The Criminal Justice Section includes judges, prosecutors, private criminal defense attorneys, public defenders, academics, and other professionals -- in other words, a diverse membership

[3] A chart showing the adoption of the rule by state is available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.authcheckdam.pdf . Massachusetts and Rhode Island have adopted the rule with the preapproval requirement.

that represents all of the legal professionals involved in the criminal justice system.

The Criminal Justice Section's 1986 report addressed the "alarmingly increasing frequency" of grand jury subpoenas issued to opposing counsel in criminal matters. *See* Recommendation with Report #111D, at 2 (policy adopted Feb. 1986) ("ABA 1986 Report").[4] It warned that the "unregulated discretion to subpoena attorneys threatens the relationship of trust and confidence which must exist between every client and his or her attorney," and cited judicial decisions expressing great concern that the government could, by unilateral action, create a conflict between client and counsel and raise doubts in the client's mind as to the attorney's devotion to his or her interests. *Id.* at 4-5 (citing, e.g., *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 945-46 (E.D. Pa. 1976)).

In the mid-1980's, criminal defense attorneys increasingly received grand jury and trial subpoenas from federal prosecutors that called for information about their clients and former clients.[5] This practice

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[4] The 1986 Recommendation and Report are available in full as Attachment A at the following link: https://www.americanbar.org/content/dam/aba/administrative/amicus/aba_new_mexico_amicus_brief_as_filed.authcheckdam.pdf. Like the ABA Model Rules, a Recommendation, but not the Report, becomes ABA policy only if it is adopted by vote of the ABA House of Delegates.

[5] During this period, various federal agencies also attempted to promulgate rules for admission to practice and grounds for discipline of attorneys and others who appeared before them. In opposing these actions, the ABA adopted as policy a recommendation from the ABA's Administrative Law

raised concern that these subpoenas would damage the trust and confidence critical to the attorney-client relationship. For example, a two-year study released in 1985 by the Committee on Criminal Advocacy of the Bar Association of the City of New York, titled "The Issuance of Subpoenas Upon Lawyers In Criminal Cases By State and Federal Prosecutors: A Call For Immediate Remedial Action," concluded that the overbroad use of such subpoenas "threatens both the integrity of the criminal justice system and the ability of large classes of defendants to obtain representation." *See* ABA Recommendation with Report #122B (policy adopted Feb. 1988), Report at 5-6 ("ABA 1988 Report"), available as Attachment B at the link in note 4, *supra*.

In 1985, the Massachusetts Supreme Judicial Court, on the advice of the Massachusetts Bar

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Section, chaired by the future Justice Scalia. As noted in the recommendation's supporting report:

> For over two centuries our tradition has been that federal forums will generally defer to state authorities with regard to the qualification of attorneys to appear before them. Except in those areas where no state authority exists, there is no federal bar examination, no special code of professional conduct for "federal" attorneys, [and] no distinctively "federal" grounds for disbarment from practice.

ABA Recommendation with Report #123 (policy adopted Aug. 1982), Report at 11. Available from the ABA archives.

Association (MBA), responded by adopting an ethical rule titled Prosecutorial Function 15 ("PF 15") that stated: "It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness." The proposal was based on the recommendation of a special commission that was chaired by a future judge on the state's highest trial court, and that included respected and experienced criminal defense lawyers and prosecutors from the MBA's Criminal Law Section, and civil litigation attorneys. Its unanimous report was accepted by the MBA House of Delegates, also by unanimous vote.

PF 15 was explicitly an ethical rule governing the conduct of prosecutors, as it was added to Massachusetts Supreme Judicial Court Rule 3:08, which contains "Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer." The U.S. District Court for the District of Massachusetts amended its local rules to include PF 15, and the United States and several prosecutors of the U.S. Department of Justice (DOJ) challenged the rule. The district court upheld the rule and an equally divided *en banc* First Circuit affirmed in *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987). DOJ sought no further review.[6]

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[6] The *Klubock* dissenters believed that PF 15 was beyond the federal courts' local rule authority, particularly given the absence of any form of congressional authorization for the rule. *See, e.g.,* 832 F.2d at 663-64 (Campbell, J., dissenting

In February 1986, the ABA House of Delegates embraced the reasoning in *Klubock*. Recognizing the need to balance "(1) the public's interest in maintaining a grand jury with broad investigative power and the right to every man's evidence and (2) the public's interest in full protection of the attorney-client relationship from the threat posed by subpoenas directed to attorneys," the report concluded that the unregulated use of these subpoenas "intrudes abruptly on the entire relationship which an attorney must have with his client if the adversary system is to function as it should." ABA 1986 Report, at 4, 7.

The ABA House of Delegates adopted as policy a proposal very similar to PF 15 that a "prosecuting attorney shall not subpoena nor cause a subpoena to be issued to an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness," with the approval based on a finding that the information sought is not privileged and is "relevant to an investigation within the jurisdiction of the grand jury," that the subpoena was not issued to harass, and that there "is no other feasible alternative to obtain the information sought." *Id.* at 1.

In the 13-month period following adoption of the 1986 policy approximately 525 federal subpoenas

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from panel opinion) ("If a rule like PF 15 is required, Congress . . . acting at the national level, should promulgate it."). As discussed more fully below, Congress provided such authority by enacting Section 530B.

to lawyers were issued, at the rate of almost two per working day and 40 per month. ABA 1988 Report, at 3. The ABA therefore determined that a new policy was required to strengthen the existing one by requiring, among other things, that the information sought be "essential" to the investigation and not merely "relevant" to it, and that the prosecutor have actually attempted feasible alternatives to the attorney subpoena to obtain desired information. *Id.* at 3-5.

In 1990, the issuance of attorney subpoenas continued unabated, and the ABA concluded that a model ethical rule was required to limit such subpoenas to situations of genuine need to intrude into the attorney-client relationship. The ABA accordingly adopted Model Rule 3.8(e),[7] which embodied the principles of the 1988 policy. *See* ABA Recommendation with Report #118 (Policy adopted Feb. 1990), available as Attachment C at the link in note 4, *supra*.

In 1995, following litigation as to the prior form of the rule that required prior judicial approval of grand jury subpoenas to defense counsel, *see Baylson v. Disciplinary Bd.*, 975 F.2d 102, 112 (3d Cir. 1992), the ABA amended Model Rule 3.8(e) to remove that preapproval requirement. *See* http://www.americanbar.org/content/dam/aba/directories/policy/1995 am 101.authcheckdam.pdf. That same year the First Circuit upheld the prior version of the rule as enacted by Rhode Island, noting that the rule

[7] Adopted as Rule 3.8(f), it was redesignated as Rule 3.8(e) in 2002.

is "aimed at, and principally affecting, prosecutors, not the grand jury" and that the "attorney-to-attorney ethical concerns that the Rule was designed to mitigate are not implicated when the grand jury, acting independently, seeks to subpoena counsel." Wielded by prosecutors, grand jury subpoenas had been widely viewed, including by other courts, "as a tool of prosecutorial abuse and as an unethical tactical device". *Whitehouse v. U.S. Dist. Ct. for the Dist. of Rhode Island,* 53 F.3d 1349 (1st Cir. 1995).

In sum, the ethical rule that ultimately became Model Rule 3.8(e) was considered and developed over a decade of consideration by the ABA and other bar associations. It received substantial judicial attention as well. Throughout its consideration of this issue, the ABA has consistently seen the matter as an important ethical issue that concerns the proper relations between opposing counsel and between counsel and client.

B. In Enacting Section 530B, Congress Rejected DOJ's Well-Publicized Position That State Ethical Rules Should Not Apply Fully To Federal Prosecutors.

In challenging New Mexico's Rule 16-308(E) as it applies to grand jury practice, DOJ ignores the historical setting in which Congress, in enacting Section 530B, expressly rejected the position that federal prosecutors should not be fully subject to state ethical rules. The ABA believes that this history also demonstrates why Rule 16-308(E) and Model Rule 3.8(e) that it adopts were, and continue to be, necessary.

As set out above, the issue of grand jury subpoenas to defense counsel had received substantial attention from bench and bar in the decade leading to the adoption of Model Rule 3.8(e) in its current form. That attention continued at the time Section 530B was enacted in October, 1998. A challenge to Colorado's adoption of Model Rule 3.8(e) was pending, *see United States v. Colorado Sup. Ct.,* 189 F.3d 1281, 1282 (10th Cir. 1999)(case pending in 1997, when Colorado amended the rule, and resolved in 1999), and DOJ had begun a new challenge to Massachusetts' Rule PF 15. *See Stern v. U.S. Dist. Ct. for the Dist. of Mass.*, 214 F.3d 4, 7-8 (1st Cir. 2000)(case filed in May, 1998).

The applicability of state ethical rules to federal prosecutors became widely publicized in another context in 1989 when the U.S. Attorney General issued an internal memorandum (Thornburgh Memorandum) purporting to define circumstances in which federal prosecutors were free to ignore any state ethical rule modelled upon ABA Model Rule 4.2 (the "no contact" rule). This attempt to exempt federal prosecutors from state ethical rules was protested by the ABA, state, regional, and city bar associations, the Judicial Conference of the United States, the Conference of Chief Justices, and the Federal Bar Association, among many others. *See United States v. Tapp*, 2008 WL 2371422, at *6-7 (S.D. Ga. Jun. 4, 2008) (describing widespread opposition to DOJ policy). Notwithstanding the resulting harm to the attorney-client relationship, the DOJ adhered to its position and issued a final rule that permitted its attorneys to contact persons represented by counsel. *See* Communications with

Represented Persons, 59 Fed. Reg. 39,910 (1994) (codified at 28 C.F.R § 77) (Aug. 4, 1994) (Reno Regulation).

The ABA opposed the DOJ's position because it "impinge[d] impermissibly on the right to counsel," and substituted the Attorney General's regulation of lawyers for the "control and supervision that has historically been the province of the state and federal judiciary."[8] The DOJ also faced a rocky reception in the courts. *See, e.g., United States v. Lopez,* 765 F. Supp. 1433, 1438 (N.D. Cal.1991), *vacated on other grounds,* 4 F.3d 1455, 1463-64 (9th Cir. 1993) (holding Thornburgh Memorandum inconsistent with law, and that the no contact rule applied to federal prosecutors); *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) (invalidating Reno Regulation as beyond Attorney General's statutory authority).

In sum, by the middle to late 1990s, state ethical regulation of federal prosecutors when issuing grand jury and trial subpoenas, and when contacting represented parties, had been the subject of substantial activity by the legal community and had been actively litigated in a number of cases. At this point, and with these well-publicized issues in mind, Congress stepped in and came down decisively on the side of state ethical regulation of federal prosecutors. Over the DOJ's strong opposition, Congress enacted Section 530B to provide, without exception in the

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[8] *See* Letter from R. William Ide, III to The Honorable Janet Reno, August 5, 1994, at 1. A copy of the letter is available as Attachment D to the link in note 4, *supra*.

grand jury context or otherwise, that a state's ethical rules apply fully to federal prosecutors practicing in that state.

If the Tenth Circuit's decision stands, DOJ will, in essence, have obtained judicial reversal of Congress' decisive and explicit repudiation of the Department's position when it enacted section 530B. As discussed more fully below, the ethical issues surrounding the issuance of grand jury subpoenas to defense counsel were an express part of the debate around the adoption of Section 530B. Congress was also repeatedly made aware of DOJ's opposition to the provision, and refused to provide any limitations on the application of state ethical rules to federal prosecutors. As Congress has declined DOJ's requests to jettison the statute or to rewrite it to DOJ's liking, the courts are not free to rewrite the statute themselves.

C. Section 530B Expressly And Plainly Expresses Congress' Determination That Federal Prosecutors Are Fully Subject To State Ethical Rules.

1. Section 530B by its plain terms admits of no exception for grand jury subpoenas

Section 530B (a) 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*." (emphasis added). "[T]he starting point in any case

involving the meaning of a statute [ ] is the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). In the absence of a statutory definition, courts should "construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The "ordinary meaning of 'shall' is 'must,'" and a court or an agency has no discretion to avoid the statutory mandate. *Cook v. FDA*, 733 F.3d 1, 7 (D.C. Cir. 2013) (citing, e.g., *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.").

Section 530B does not provide for exceptions, either in the grand jury context or otherwise, to its command that all federal prosecutors and other federal government attorneys are subject to state laws and rules governing attorney conduct. Nor does it allow federal prosecutors to excuse themselves from compliance with state ethical rules based on asserted interference with a federal interest. In seeking a different result through this lawsuit, the DOJ argues for exceptions and limitations to the statute that it does not contain.

2. The legislative history of Section 530B confirms its applicability to grand jury proceedings.

Section 530B's legislative history confirms Congress' intent that federal prosecutors be fully subject to the ethical rules of the state in which they practice, with no exception for grand jury practice.

Indeed, many if not all of the arguments that DOJ has put forward to challenge the applicability of the statute to grand jury practice were considered and rejected in the enactment process.

First, the legislative history confirms that Section 530B was intended to have a broad scope that includes applicability to grand jury proceedings. The legislation's sponsor, Rep. McDade, explained on its introduction that it was intended to ensure that the DOJ "cannot exempt its lawyers from the same rules of ethics that govern the professional conduct of all other attorneys. These rules are currently enforced, and must continue to be enforced, by the state supreme courts." 144 Cong. Rec. at E301 (daily ed. March 5, 1998). To illustrate the conduct that would be addressed by the legislation, Rep. McDade listed "specific instances of prosecutorial misconduct." Expressly among these were grand jury matters, including "[u]sing grand jury subpoenas directed against the attorney of the target of the investigation to disrupt [the] attorney-client relationship and otherwise harass the attorney and his client." *Id.* at E301-02 (citing *In re Grand Jury Matters,* 593 F. Supp. 103 (D.N.H. 1984) (order quashing grand jury subpoenas issued to defense attorneys), *aff'd,* 751 F.2d 13 (1st Cir. 1984)).

In addition, the chairman of the Senate Judiciary Committee explicitly acknowledged in opposing the bill that passage of Section 530B would make "the conduct of matters before a grand jury . . . subject to state bar review." 144 Cong. Rec. at S12799 (daily ed. October 21, 1998) (statement of Sen. Hatch). Another opposing senator, referring to "rules requiring prior judicial approval of subpoenas

of attorneys," which at the time had been controversial almost exclusively in the grand jury context, stated that "we have established as a matter of federal law that six months from now [when Section 530B takes effect], rules like this will indeed govern federal prosecutors' conduct." *See id.* at S12996 (daily ed. Nov. 12, 1998) (statement of Sen. Abraham). These senators correctly read Section 530B as making no exception for grand jury matters, exactly as it is written.[9]

Though its opinion was extensive and wide-ranging, the Tenth Circuit panel majority did not address this or any other legislative history. As noted above, the ABA was directly involved in the legislative efforts that resulted in enactment of Section 530B and is not aware of anything in that history that supports the panel majority's conclusion that the provision was not intended to apply to grand jury proceedings. To the contrary, all of that history directly undercuts the panel majority's conclusion.

Judge Reggie B. Walton, an experienced district judge with direct experience in federal law enforcement, reviewed this history in a case brought by the ABA and a state bar association seeking to affirm the primacy of state regulation of lawyers. He concluded that Section 530B "was enacted in direct response to the DOJ's attempt to exempt its lawyers

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[9] *See also* 144 Cong. Rec. at H7234 (statement of Rep. Fowler) (DOJ attorneys "should be held accountable to the same standards set by the State Supreme Court that granted each lawyer his or her license to practice law in that State. . . . Should the Department of Justice be above the State laws of ethics? I do not see any reason why they should.").

from state ethical rules" and "reflects the respect Congress has for the right of the states to regulate the ethical conduct of lawyers who practice law in their jurisdictions." *New York State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110, 133 (D.D.C. 2003), *aff'd sub nom. American Bar Ass'n v FTC,* 430 F.3d 457 (D.C. Cir. 2005). Judge Walton went on to note that the "events that preceded the enactment of [Section 530B] are also noteworthy because they represent a rebuff by both the legislative and judicial branches of attempts by the executive branch to regulate in an area that has been left exclusively in the hands of the states." *Id.* Again, the proper forum for DOJ to address that "rebuff" is the Congress, not the courts.[10]

Congress provided a delayed effective date of 180 days for Section 530B, *see* 28 U.S.C. § 530B note; Pub. L. 105-277 § 801(c), 112 Stat. 2681-119, "to allow the Department of Justice sufficient time to

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[10] Other courts have similarly noted that Congress, in enacting Section 530B, rejected arguments that state ethical rules should not apply to federal prosecutors, or should be trumped by allegedly superior federal law enforcement objectives. S*ee, e .g., United States v. Talao*, 222 F.3d 1133, 1139-40 (9th Cir. 2000) (Thornburgh Memorandum "created serious problems by excusing federal attorneys from compliance with state ethics rules," but "[t]he conflict that developed was dissipated when the Congress adopted what is now 28 U.S.C. § 530[B], and made state ethics rules applicable to government attorneys."); *In re Crossen*, 450 Mass. 533, 567 & n.44, 880 N.E.2d 352, 378 & n.44 (Mass. 2008) (while earlier cases "indicate some contemporaneous uncertainty regarding whether State ethical rules applied to Federal prosecutors," Congress "ended this uncertainty with passage of the McDade Amendment in 1998.").

express any concerns it may have to the Congress about the application of this legislation." 144 Cong. Rec. at H11653 (statement of Rep. Rogers). Congress did so even though the DOJ had generally declined to provide specific examples of conduct that should be excluded from the legislation, and had preferred instead to challenge the legislation as a whole. *See id.* at H11653; *id*. at S12799.[11]

DOJ and congressional opponents of Section 530B later offered amendments to limit the provision, including a proposal that would have preempted any state ethical rule that was "inconsistent" or "interferes" with federal law or policy. *See* S. 250, 106th Cong. 1st. Sess., 145 Cong. Rec. S704 (daily ed. Jan. 19, 1999) (statement of Sen. Hatch). None were enacted. DOJ now again seeks by litigation what it tried and failed to achieve when Section 530B was enacted.

3. The Tenth Circuit improperly refused to apply Section 530B as written.

Under traditional rules of statutory construction Rule 16-308 (E) should be applied in full to federal prosecutors, including in the grand jury

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[11] *See, e.g.,* 144 Cong. Rec. at H7229 (statement of Rep. Murtha) ("we have said to the Justice Department, if you have individual situations that you would like us to look at, we would be glad to look at that. They have not come back with anything. They just want to take this out."); *id*. at H7245 (statement of Rep. Delahunt) (noting that opponents of the bill did not "seek to remedy any particular shortcomings of the measure; instead, [they] seek[] to delete it entirely.")

context. Rather than apply the statute as written, however, the Tenth Circuit panel majority embarked on an extensive general discussion of the history and importance of the grand jury, Pet. App. 63a-71a, even though as *Whitehouse* noted, 53 F.3d at 1357, the rule at issue does not apply to the grand jury itself but to prosecutors, whose role has historically been defined as quite distinct from that of the grand jury. The Tenth Circuit majority's approach is even more perplexing given that it expressly declined to even suggest that there was any constitutional issue that might warrant overriding the plain language and intent of the statute. *See* Pet. App. 71a (noting that Rule 16-308(E) does not even approach the "danger zone" or "nullifying effect" of congressional enactments that might conceivably interfere with the grand jury in a constitutional sense.)

Nonetheless the panel majority decision, which the entire court declined to review by a 6-5 *en banc* vote, the barest of margins, concluded that Congress was required to "speak more clearly than it has in the McDade Act" to apply Section 530B in grand jury proceedings. *Id.* at 72a. The decision cites no authority, either in the grand jury context or otherwise, for the proposition that legislation of broad applicability does not apply to a specific case unless Congress expressly names that case, and the law is in fact directly to the contrary. *See Freytag v. Commissioner,* 501 U.S. 868, 874 (1991)("courts 'are not at liberty to create an exception where Congress has declined to do so.'")

DOJ correctly argued to the Tenth Circuit, citing *Hancock v. Train*, 426 U.S. 167 (1976), that Congress must clearly state its intent that state

regulations apply to federal officials. Courts may not, however, invent new principles of statutory construction in determining whether Congress has done so. *Hancock* itself held that following enactment of a statute requiring federal entities to comply with state air pollution requirements "to the same extent that any person is subject to such requirements," language that is quite similar to that in Section 530B, "there is no longer any question whether federal installations must comply with established air pollution control and abatement measures." *Id*. at 172. Similarly, after enactment of Section 530B there can be no legitimate question of Congress' intent that federal prosecutors must fully comply with state ethical rules.[12]

Courts accordingly have held that Section 530B requires DOJ to comply with state ethical rules, with some of those decisions coming in the grand jury context.[13] Commentators have agreed.[14] As noted

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[12] *Hancock* noted that it was a separate question "how their compliance is to be enforced," *id.,* just as Section 530B makes ethical rules applicable to federal attorneys but does not, for example, mandate exclusion of evidence obtained in violation of an ethical rule. *See, e.g., Tapp* at *18 (holding Section 530B applicable in the grand jury context, but noting that exclusion of evidence is a separate issue, citing *United States v. Lowery*, 166 F.3d 1119 (11th Cir. 1999)).

[13] *See United States v. Colorado Supreme Court,* 189 F.3d at 1284 (Section 530B "conclusively establish[es] that a state rule governing attorney conduct is applicable to federal attorneys practicing in the state."); *United States v. Koerber,* 966 F. Supp. 2d 1207, 1242 (D. Utah 2013)(applying Section 530B in the grand jury context and noting that "a prosecutor's failure to comply with the applicable no contact rule is now also a violation of a federal statute."); *Tapp, supra,* (federal prosecutor

above, rules similar to Rule 16-308(E) were upheld in *Klubock* and *Whitehouse,* and an identical rule was upheld outside the grand jury context in *United States v. Colorado Sup. Ct.* As also noted above, the Third Circuit in *Baylson* addressed the prior version of the rule and invalidated it due to the judicial approval requirement, but the New Mexico rule, like Model Rule 3.8(e) as amended, does not include that requirement. The *Lowery* decision, *see* n.12, *supra*, dealt only with the question of exclusion of evidence as a remedy and expressly declined to decide if the state ethical rule at issue was applicable.

The *Stern* decision did adopt DOJ's position, but the ABA respectfully suggests that the decision gave inadequate consideration to Section 530B, which had not yet been enacted when the *Stern* case was

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violated state ethical rules in calling a witness to the grand jury without notifying his counsel). *See also United States v. Williams*, 698 F.3d 374, 392 (7th Cir. 2012) (Hamilton, J., concurring in part and dissenting in part) (Ill. S. Ct. R. 3.8(e) applied to federal prosecutors in Illinois by virtue of 28 U.S.C. § 530B and "embodies a very old norm against non-essential testimony from the opposing party's lawyer. *See, e.g., Berd v. Lovelace*, 21 Eng. Rep. 33 (1577)(excusing solicitor from testifying about his client)."); *Stern,* 214 F.3d at 22 (1st Cir. 2000)(Torruella, Stahl, and Lipez, Js., dissenting)("A prosecutor is not immunized from ethical considerations because his or her conduct takes place in connection with grand jury proceedings.").

[14] *See, e.g.,* Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2088 (2000) ("the law subjects federal prosecutors to all state ethics rules [and] affords no exceptions for federal prosecutors when state ethics rules impinge on federal law enforcement interests").

first filed. *Stern* announces, without textual warrant or any discussion of the legislative history, that "it simply cannot be said that Congress, by enacting section 530B, meant to empower states (or federal district courts, for that matter) to regulate government attorneys in a manner inconsistent with federal law." 214 F.3d at 19-20. As set forth above and not addressed in *Stern*, however, Congress's intent in passing Section 530B was precisely to resolve a purported conflict raised by the DOJ between state ethical rules and asserted federal law enforcement needs by directing that federal prosecutors "shall be subject" to state laws and rules governing attorneys within their jurisdictions.[15]

In sum, nothing in Section 530B supports DOJ's claim that prosecutors should be exempt from New Mexico Rule 16-308(E) when federal grand jury subpoenas are involved. Even if the DOJ were to provide instances in a developed record where federal prosecutors declined to subpoena attorneys because

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[15] *Stern* also cited a DOJ regulation, 28 C.F.R. 77.1(b), directing that Section 530B "should not be construed in any way to alter federal substantive, procedural, or evidentiary law." However, if that regulation were read to exempt federal prosecutors from state laws governing attorney conduct on the basis of alleged conflict with federal enforcement interests, the regulation would be void as contrary to Section 530B. *See, e.g.*, *American Airlines, Inc. v. TSA*, 665 F.3d 170, 176 (D.C. Cir. 2011) ("a regulation contrary to a statute is void.") (quoting *Orion Reserves Ltd. P'ship* v. *Salazar,* 553 F.3d 697, 703 (D.C. Cir. 2009) (citing *Manhattan Gen. Equip. Co.* v. *Comm'r of Internal Revenue,* 297 U.S. 129, 134 (1936))). *See also* pp.16-17, *supra*, showing that opponents of Section 530B were unsuccessful in their attempt to amend Section 530B to provide such an exemption.

of a fear of running afoul of Rule 16-308(E), as it asserted to the district court, this would not establish a basis for excusing compliance with Congress' express direction in Section 530B that prosecutors, without exception, "shall be subject" to a state's laws and rules governing attorneys within the state in which they practice. As set out above, DOJ unsuccessfully made these very arguments to Congress.

The ABA agrees that the needs of federal prosecutors are at least as critical today as when the issue of their compliance with state ethics rules became active over three decades ago. The ABA also believes, however, that the need to protect against prosecutorial ethical misconduct in the grand jury context likewise remains as critical today as when Congress passed Section 530B and required that prosecutors comply—including in the grand jury context—with the ethical rules of the state in which they practice. DOJ's allegation that Rule 16-308(E) materially affects the proper functioning of grand juries is unsupported, but even if it had some basis Congress has mandated that the value of protecting against prosecutorial ethical misconduct requires the application of the rule, and the Tenth Circuit provided no sound basis for ignoring that mandate.

III. CONCLUSION

For the reasons stated, *amicus curiae* American Bar Association respectfully requests that the petition for certiorari be granted.

Of Counsel

MICHAEL S. GRECO
JOHN LONGSTRETH
K&L GATES LLP

LINDA A. KLEIN
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5000
abapresident@americanbar.org

Counsel for American Bar Association

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