No. 16-

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

PETITION FOR A WRIT OF CERTIORARI

PAUL J. KENNEDY
ARNE R. LEONARD
PAUL KENNEDY & ASSOCIATES, P.C.
201 12th St., NW
Albuquerque, NM 87102

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007

PAUL R.Q. WOLFSON
Counsel of Record
DAVID M. LEHN
DANIEL WINIK
DEREK A. WOODMAN
HYUN GYO CHUNG*
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

QUESTION PRESENTED

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.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL AND STATUTORY PROVISIONS, REGULATIONS, AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

Page(s)

FEDERAL RULES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATE RULES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

No. 16-

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

PETITION FOR A WRIT OF CERTIORARI

The Supreme Court of New Mexico, the Disciplinary Board of New Mexico, and the Office of the Disciplinary Counsel of New Mexico respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

INTRODUCTION

Congress, the U.S. Department of Justice (DOJ), and the States have for years engaged in a tug of war over the application of state rules of professional conduct to federal prosecutors. After years of DOJ's as-

serting the right to exempt itself from such rules, Congress enacted the McDade Amendment, which provides that federal government lawyers 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).

Congress might have thought that was the end of the matter. But DOJ has continued to try to exempt itself from state rules of professional conduct by seeking to limit the scope of the McDade Amendment. In this case, DOJ took the extraordinary step of suing the Supreme Court of New Mexico, along with its associated disciplinary bodies, to prevent the court from enforcing Rule 16-308(E) of the New Mexico Rules of Professional Conduct against federal prosecutors. That Rule—substantively identical to Rule 3.8(e) of the American Bar Association's Model Rules of Professional Conduct and the rules in force in 30 other States—subjects prosecutors to professional discipline if they subpoena lawyers to provide evidence about current or former clients, without a reasonable belief that the evidence sought is non-privileged, that it is "essential to the successful completion of an ongoing investigation or prosecution," and that "there is no other feasible alternative to obtain" it.

As Chief Judge Tymkovich recognized in dissenting from the decision below, the outcome of this case should have been dictated by the text of the McDade Amendment. As all judges on the Tenth Circuit panel agreed, Rule 16-308(E) is a state rule governing attorneys' professional conduct. And the McDade Amendment expressly provides that federal prosecutors are bound by such rules.

Nonetheless, the panel majority held Rule 16-308(E) preempted on the ground that it conflicts with "federal grand-jury practice." App. 74a-75a. That was error for two reasons. First, the McDade Amendment expressly authorizes any modest change from traditional federal grand jury practice that might result from the application of rules like Rule 16-308(E). Indeed, the background to the McDade Amendment's enactment makes clear that Congress understood and intended that the Amendment would subject federal prosecutors to rules exactly like Rule 16-308(E).

Second, in any event, Rule 16-308(E) does not conflict with the constitutional core of federal grand jury practice. The Rule regulates the conduct of prosecutors, not grand juries. And although grand juries have traditionally had broad latitude to investigate, that power is not unlimited. Many legal ethics experts, including the American Bar Association (ABA) and numerous state courts, have concluded that prosecutors' untrammeled issuance of subpoenas to attorneys for evidence about their clients constitutes overreaching, because it threatens to compromise the attorney-client relationship, which is essential to a fair adversary system.

The split decision below—which five of eleven judges voted to rehear en banc—is the latest in a series of cases that have divided courts of appeals. The First Circuit, for example, has considered three challenges to attorney-subpoena rules—upholding one, invalidating another, and dividing equally while reviewing a third en banc. *Stern* v. *U.S. Dist. Ct. for Dist. of Mass.*, 214 F.3d 4 (1st Cir. 2000); *Whitehouse* v. *U.S. Dist. Ct. for Dist. of R.I.*, 53 F.3d 1349 (1st Cir. 1995); *United States* v. *Klubock*, 832 F.2d 664 (1st Cir. 1987) (en banc) (per curiam). The Third Circuit has invalidated an attorney-subpoena rule, *Baylson* v. *Disciplinary Bd. of Sup. Ct.*

of Pa., 975 F.2d 102 (3d Cir. 1992), while the Tenth Circuit—before rejecting the New Mexico rule in the grand jury context—upheld a similar Colorado rule in the context of trial subpoenas, *United States* v. *Colorado Sup. Ct.*, 189 F.3d 1281 (10th Cir. 1999).

The Tenth Circuit's erroneous decision invalidates rules in four States within that Circuit and casts doubt on similar rules in 27 other States. It also improperly limits the authority of both Congress and the States (as well as federal courts) to regulate the practice of law by federal prosecutors. The Court should grant certiorari to end this confusion and resolve the question of national importance presented by this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-93a) is reported at 839 F.3d 888. The court of appeals' order denying rehearing (App. 121a-122a) is unreported. The district court's opinion on cross-motions for summary judgment (App. 95a-119a) is unreported but available at 2014 WL 12487697.

JURISDICTION

The court of appeals entered judgment on June 7, 2016. The court denied a timely petition for rehearing en banc on December 2, 2016. On February 13, 2017, Justice Sotomayor extended the time for filing this petition to and including April 3, 2017. On March 17, 2017, Justice Sotomayor further extended that time to and including May 1, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

1. The Grand Jury Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury[.]

2. The McDade Amendment, 28 U.S.C. § 530B, titled "Ethical standards for attorneys for the Government," states:

> (a) An 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.
>
> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.
>
> (c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

3. Rule 16-308 of the New Mexico Rules of Professional Conduct, titled "Special responsibilities of a prosecutor," provides that the prosecutor in a criminal case shall

> (E) 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:

> (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[.]

STATEMENT

A. DOJ's Repeated Attempts To Exempt Itself From State Rules Of Professional Conduct

This case is the latest episode in a decades-long struggle between DOJ on one hand and the States, Congress, and the larger legal community on the other, to determine whether and to what extent DOJ lawyers are subject to state and federal-court rules of professional conduct.

In 1989, Attorney General Richard Thornburgh issued a memorandum stating that DOJ litigators are exempt from state and federal-court ethics rules prohibiting lawyers from contacting represented parties. Memorandum from Dick Thornburgh, Attorney General, to All Justice Department Litigators re Communication with Persons Represented by Counsel (June 8, 1989) (Thornburgh Memo), *reprinted in In re Doe*, 801 F. Supp. 478, 489-493 (D.N.M. 1992). The Thornburgh Memo asserted that the States' authority to regulate attorney conduct extends only to regulations that do "not conflict with the federal law or with the attorneys' federal responsibilities." *Id.*

"Almost from the date of its issue, the Thornburgh Memorandum set off a firestorm of criticism," including from the courts. *United States* v. *Tapp*, 2008 WL 2371422, at *6 (S.D. Ga. June 4, 2008). One court declared: "The Department of Justice … seeks to render the court powerless to enforce its own rules and to protect the integrity of the criminal justice system. This court will not allow the Attorney General to make a mockery of the court's constitutionally-granted judicial powers." *United States* v. *Lopez*, 765 F. Supp. 1433, 1463 (N.D. Cal. 1991), *vacated on other grounds*, 4 F.3d 1455 (9th Cir. 1993); *see also Doe*, 801 F. Supp. at 486 ("The idea of placing the discretion for a rule's interpretation and enforcement solely in the hands of those governed by it not only renders the rule meaningless, but the notion of such an idea coming from the country's highest law enforcement official displays an arrogant disregard for and irresponsibly undermines ethics in the legal profession.").

In the face of that criticism, DOJ held firm. In 1994, Attorney General Janet Reno issued a regulation formalizing the core of the Thornburgh Memo. 28 C.F.R. § 77.12 (1995) (Reno Rule). The Reno Rule was "intended to preempt and supersede the application of state laws and rules and local federal court rules" prohibiting communication with represented parties, *id.*; *see also id.* pt. 77 (1995); 59 Fed. Reg. 10,086, 10,088 (Mar. 3, 1994)—even though that prohibition had been followed "'from time immemorial by the Anglo-American bar'" and had been codified in all 50 States and the District of Columbia, *Tapp*, 2008 WL 2371422, at *4.

DOJ's stance continued to draw criticism from state and federal organizations, including the Judicial Conference of the United States, the Conference of

Chief Justices, the ABA, the Federal Bar Association, and state bar associations. For example, in 1994 the Conference of Chief Justices unanimously adopted a resolution respectfully urging "each of its members to continue to enforce the ethical rules upon all members of bars of the various states and jurisdictions." Conference of Chief Justices, *Resolution XII*, *Proposed Rule Relating to Communications with Represented Persons* (Aug. 4, 1994), *quoted in Tapp*, 2008 WL 2371422, at *7.

B. The McDade Amendment

DOJ's attempts to "exempt departmental attorneys from compliance with the ethical requirements adopted by the State bars to which they belong and in the rules of the Federal courts before which they appear" led Congress to consider corrective legislation.[1] A bill proposed in 1996 by Representative Joseph McDade attracted broad support.[2] Legislation was eventually enacted in 1998 with bipartisan congressional support.[3]

---

[1] *See* H.R. Rep. No. 101-986, at 32 (1990); *Exercise of Federal Prosecutorial Authority in a Changing Legal Environment: Hearing Before the Subcomm. on Gov't Info., Justice & Agric. of the H. Comm. on Gov't Operations*, 101st Cong. 418 (1990).

[2] *See* Ethical Standards for Federal Prosecutors Act of 1996, H.R. 3386, 104th Cong.; *Ethical Standards for Federal Prosecutors Act of 1996: Hearing Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 104th Cong. 1-2, 57-92, 97 (1996).

[3] *See* Ethical Standards for Federal Prosecutors Act, Pub. L. No. 105-277, § 801, 112 Stat. 2681, 2681-118 (1998); *see also* H.R. 3396, 105th Cong. (1998) (Citizens Protection Act of 1998); H.R. 3396—Citizens Protection Act, *available at* https://www.congress.gov/bill/105th-congress/house-bill/3396/cosponsors (Citizens Pro-

That legislation—commonly known as the McDade Amendment, and titled "Ethical standards for attorneys for the Government"—provides in relevant part: "An 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).

C. Rules Of Professional Conduct Governing Issuance Of Subpoenas To Attorneys

Along with this increasing concern about federal prosecutors exempting themselves from rules of professional conduct, the American Bar Association became concerned about an "increasing incidence of grand jury and trial subpoenas directed toward attorneys defending criminal cases." ABA Criminal Justice Section, *Report to the House of Delegates No. 122B*, at 2 (1988); ABA Criminal Justice Section, *Report to the House of Delegates No. 111D*, at 2 (1986). Between October 1, 1987, and September 30, 1988, for example, federal prosecutors requested approval to issue 278 grand jury subpoenas and 85 trial subpoenas to attorneys. *Exercise of Federal Prosecutorial Authority in a Changing Legal Environment: Hearing Before the Subcomm. on Gov't Info., Justice & Agric. of the H. Comm. on Gov't Operations*, 101st Cong. 418 (1990).

To "limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations

---

tection Act sponsored by 122 Republicans and 73 Democrats); 144 Cong. Rec. 18,928, 18,965-18,966 (1998) (House voted 345-82 to retain McDade Amendment in appropriations bill).

in which there is a genuine need to intrude into the client-lawyer relationship," Model R. Prof'l Conduct 3.8 cmt. 4, the ABA in 1990 promulgated a model rule of professional conduct now codified as Model Rule 3.8(e). As revised since 1990, the rule 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:
>
> (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.[4]

DOJ had previously adopted guidelines for attorney subpoenas, which remain in place today. *U.S. Attorneys' Manual* § 9-13.410(C); *see Whitehouse* v. *U.S. Dist. Ct. for Dist. of R.I.*, 53 F.3d 1349, 1352 & n.2 (1st Cir. 1995). But the ABA's Model Rule was more stringent than the DOJ guidelines in several respects. Whereas the DOJ guidelines allow attorney subpoenas where "reasonable attempts to obtain the information from alternative sources" have failed, *U.S. Attorneys'*

---

[4] The model rule was originally adopted as Rule 3.8(f), but was redesignated as Rule 3.8(e) in 2002. As initially adopted, the rule included a provision requiring "prior judicial approval" of covered subpoenas. The ABA removed that provision in 1995. ABA Standing Committee on Ethics and Professional Responsibility, *Report to the House of Delegates No. 101* (1995).

Manual § 9-13.410(C), the model rule requires that there be "no other feasible alternative" to the subpoena, Model R. Prof'l Conduct 3.8(e)(3). And whereas the DOJ guidelines require only that the information sought be "reasonably needed for the successful completion of [an] investigation or prosecution," *U.S. Attorneys' Manual* § 9-13.410(C), the model rule requires that it be "essential," Model R. Prof'l Conduct 3.8(e)(2).

By the time Congress enacted the McDade Amendment, eight years after the ABA's initial promulgation of its model rule, ten States had adopted substantively identical rules.[5] Congress accordingly took note that federal prosecutors would be subject to such rules under the McDade Amendment. For example, Representative McDade remarked that, under his bill, federal prosecutors would be subject to state and federal-court ethics rules prohibiting "Abuse of the Grand Jury Process," including rules prohibiting "[u]sing grand jury subpoenas directed against the attorney of the target of the investigation." 144 Cong. Rec. 2761 (1998).

The Supreme Court of New Mexico adopted Rule of Professional Conduct 16-308(E), which is identical to ABA Model Rule 3.8(e), in 2008. Today, similar rules

---

[5] *See* Alaska R. Prof'l Conduct 3.8(e) (effective July 15, 1993); Colo. R. Prof'l Conduct 3.8(e) (effective Jan. 1, 1993); Del. R. Prof'l Conduct 3.8(e) (effective Apr. 1, 1998); La. R. Prof'l Conduct 3.8(e) (effective Jan. 1, 1987); Mass. R. Prof'l Conduct Rule 3.8(e) (effective Jan. 1, 1986); N.C. R. Prof'l Conduct 3.8(e) (effective July 24, 1997); Okla. R. Prof'l Conduct 3.8(e) (effective Oct. 1, 1997); Pa. R. Prof'l Conduct 3.10 (effective Nov. 26, 1988); R.I. R. Prof'l Conduct 3.8(f) (adopted Nov. 1, 1988); S.C. R. Prof'l Conduct 3.8(e) (effective Sept. 1, 1990).

are in force in 31 States (including New Mexico).[6] Such rules are also in force in approximately 39 federal courts that require attorneys practicing before them to comply with the rules of professional conduct adopted by the relevant state bar association, the state supreme court, or the ABA.[7]

---

[6] Alaska R. Prof'l Conduct 3.8(e); Ariz. R. Prof'l Conduct 3.8(e); Colo. R. Prof'l Conduct 3.8(e); Del. R. Prof'l Conduct 3.8(e); Ga. R. Prof'l Conduct 3.8(f); Idaho R. Prof'l Conduct 3.8(e); Ill. R. Prof'l Conduct 3.8(e); Ind. R. Prof'l Conduct 3.8(e); Iowa R. Prof'l Conduct 32:3.8; Kan. R. Prof'l Conduct 3.8(e); Ky. Sup. Ct. R. 3.130(3.8(d)); La. R. Prof'l Conduct 3.8(e); Minn. R. Prof'l Conduct 3.8(e) (without the no-feasible-alternative requirement); Mo. R. Prof'l Conduct 4-3.8(e); Mont. R. Prof'l Conduct 3.8(e); Neb. R. Prof'l Conduct 3-503.8(e); Nev. R. Prof'l Conduct 3.8(e); N.H. R. Prof'l Conduct 3.8(e); N.J. R. Prof'l Conduct 3.8(e) (without the essentiality requirement); N.M. R. Prof'l Conduct 16-308(E); N.C. R. Prof'l Conduct 3.8(e); N.D. R. Prof'l Conduct 3.8(e); Ohio R. Prof'l Conduct 3.8(e); Okla. R. Prof'l Conduct 3.8(e); S.C. R. Prof'l Conduct 3.8(e); S.D. R. Prof'l Conduct 3.8(e); Tenn. R. Prof'l Conduct 3.8(e); Vt. R. Prof'l Conduct 3.8(e); Wash. R. Prof'l Conduct 3.8(e); W. Va. R. Prof'l Conduct 3.8(e); Wis. Sup. Ct. R. 20:3.8. In addition, three States maintain rules requiring judicial preapproval of a subpoena directed at an attorney. Mass. R. Prof'l Conduct 3.8(e)(2); Pa. R. Prof'l Conduct 3.10; R.I. R. Prof'l Conduct 3.8(f).

[7] D. Alaska Civ. R. 83.1(i)(1); D. Ariz. Civ. R. 83.2(e); D. Colo. Att'y R. 2(a); D. Del. Civ. R. 83.6(d); M.D. Ga. R. 83.2.1(A); N.D. Ga. Civ. R. 83.1C; S.D. Ga. Civ. R. 83.5(d); D. Idaho Civ. R. 83.5(a); C.D. Ill. Civ. R. 83.6(D); N.D. Ill. R. 83.50; S.D. Ind. R. 83-5(e); D. Kan. R. 83.6.1(a); E.D. & W.D. Ky. Joint Crim. R. 57.3(c); E.D. La. Civ. R. 83.2.3; M.D. La. Civ. R. 83(b)(6); W.D. La. Civ. R. 83.2.4; D. Minn. R. 83.6(a); E.D. Mo. R. 83-12.02; W.D. Mo. R. 83.6(c)(1); D. Mont. Civ. R. 83.2(a); D. Nev. R. IA 11-7(a); D.N.H. R. 83.5 DR-1; D.N.J. Civ. R. 103.1(a); E.D.N.C. Crim. R. 57.1(j); M.D.N.C. Civ. R. 83.10e(b); N.D. Ohio Crim. R. 57.7(a); S.D. Ohio Model Fed. R. Disciplinary Enforcement IV(B); E.D. Okla. Civ. R. 83.7(a); N.D. Okla. Crim. R. 44.5(a); W.D. Okla. Civ. R. 83.6(b); D.S.C. Civ. R. 83.I.08.IV(B); E.D. Tenn. R. 83.6; W.D. Tenn. R. 83.4(g); D. Vt.

D. This Litigation

1. New Mexico's Office of Disciplinary Counsel has never brought ethics charges against a federal prosecutor for violating Rule 16-308(E). Nonetheless, in 2013 the United States brought this suit against the Supreme Court of New Mexico and its associated attorney disciplinary bodies, seeking declaratory and injunctive relief barring the enforcement of two provisions of Rule 16-308(E) against federal prosecutors. The United States claimed that Rule 16-308(E) is preempted insofar as it applies to subpoenas issued by prosecutors both in the trial context and in the grand jury context.[8] The district court upheld the Rule in the context of trial subpoenas, App. 106a, but held the Rule preempted in the context of prosecutors' subpoenas to attorneys in the grand jury context, App. 110a-119a.

The district court first determined that because Rule 16-308(E) is an ethics rule, it falls within the McDade Amendment's coverage of "[e]thical standards for attorneys for the Government." App. 103a-106a,

---

Att'y Disciplinary R. 2(a); E.D. Wash. R. 83.3(a); W.D. Wash. Civ. R. 83.3(a)(2); S.D. W. Va. Crim. R. 44.7; E.D. Wis. R. 83(d)(1).

Although the U.S. District Court for the District of New Mexico generally adopts New Mexico's rules of professional conduct, D.N.M. R. Crim. P. 57.2, it declined (at the urging of the U.S. Attorney's Office for the District of New Mexico) to adopt Rule 16-308(E). D.N.M. Admin. Order No. 10-MC-00004-9 (Mar. 23, 2010).

[8] The complaint does not challenge Rule 16-308(E)(1), the provision barring attorney subpoenas unless the prosecutor reasonably believes "the information sought is not protected from disclosure by any applicable privilege." For simplicity, this petition (like the court of appeals' opinion) refers to the two challenged provisions as Rule 16-308(E).

109a-110a. The court then considered whether the rule nonetheless impermissibly conflicts with federal law. For trial subpoenas, the court followed Tenth Circuit precedent to hold that Rule 16-308(E) does not conflict with federal law. App. 100a-102a, 106a (citing *United States* v. *Colorado Sup. Ct.*, 189 F.3d 1281, 1288-1289 (10th Cir. 1999)). For prosecutors' subpoenas in the grand jury context, however, the district court held that Rule 16-308(E) conflicts with Federal Rule of Criminal Procedure 6(e), and with federal grand jury practice more broadly, because a prosecutor responding to an ethics complaint might have to "disclose information regarding the grand jury's process and investigation surrounding the issuance of the attorney subpoena," and because "prosecutors will spend additional time and resources" determining whether an attorney subpoena complies with Rule 16-308(E). App. 116a, 117a.

2. The court of appeals affirmed, though in part for different reasons. The panel unanimously agreed that "Rule 16-308(E) is an ethics rule of the sort covered by the McDade Act." App. 60a; *see* App. 61a-62a; *accord* App. 78a-79a, 83a (dissent). The panel also unanimously agreed that, under circuit precedent, Rule 16-308(E) "does not conflict with federal law governing trial subpoenas," and therefore is not preempted in the trial context. App. 61a-62a; *accord* App. 103a n.6 (dissent). But the panel divided over whether federal law preempts the rule with respect to prosecutors' subpoenas requiring attorneys to provide evidence before a *grand jury*.

The majority reasoned that it needed to "determine whether the challenged provisions of Rule 16-308(E), despite being within the purview of the McDade Act, are otherwise inconsistent with (i.e., conflict with) fed-

eral law." App. 60a. On that question, the majority reached the same conclusion as the district court, but by somewhat different reasoning. It held that "Rule 16-308(E)'s challenged provisions are conflict-preempted in the grand-jury setting because the essentiality and no-other-feasible-alternative requirements pose 'an obstacle to the accomplishment and execution of the full purposes and objectives' of the federal legal regime governing grand-jury practice." App. 63a-64a. The majority explained that "Rule 16-308(E)'s rigorous standards" exceed the "minimal limitations" otherwise "placed on the kinds of evidence that [federal grand juries] can consider." App. 70a. Although the majority recognized that "Congress has considerable leeway to authorize states to regulate the ethical conduct of federal prosecutors practicing before grand juries," it held that "the significant burdens that [the challenged] provisions would impose on grand juries' constitutionally authorized investigative functions" require a clearer congressional statement than the McDade Amendment provides. App. 70a-71a, 72a.

Chief Judge Tymkovich dissented from the majority's conclusion that Rule 16-308(E) is preempted in the grand jury context. He reasoned that "the first and only question" the court needed to answer was whether Rule 16-308(E) is a rule "governing ethics." App. 79a. If it is—and all judges on the panel thought so—then "considering its burden on federal interests is unnecessary because Congress has authorized the rule's application to federal prosecutors." *Id.* That conclusion is bolstered, the dissent explained, by "understanding the problem Congress wished to fix by passing the McDade Amendment"—the long history of DOJ's resistance to ethics regulation of federal prosecutors—and recognizing Congress's decision to come "down on the side of a

blanket authorization of any rule deemed to govern attorney ethics." App. 84a, 86a. Chief Judge Tymkovich added, "It would be perverse to say states act in a manner inconsistent with federal law when they act as federal law instructs." App. 87a.

In any event, Chief Judge Tymkovich explained, Rule 16-308(E) does not conflict with the Grand Jury Clause or federal grand jury practice. App. 87a-93a. The text of the Grand Jury Clause does not address the scope of the grand jury's investigative powers, and this Court's analysis of the relevancy standard for grand jury subpoenas (in *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991)) does not rise to the level "of constitutional significance." App. 88a-90a.

The Tenth Circuit denied petitioners' request for rehearing en banc by a six-to-five vote. App. 121a-122a.[9]

REASONS FOR GRANTING THE PETITION

When it enacted the McDade Amendment in 1998, Congress sought to end the long-running controversy over whether federal government attorneys should be subject to state and federal-court rules of professional conduct. Congress's answer was straightforward: They should be. And Congress—aware that several States had promulgated ethical rules exactly like the one at issue here—specifically intended to allow such ethical constraints on prosecutors' issuance of subpoenas to attorneys in the grand jury context. Numerous legal experts had concluded that such subpoenas were

[9] Then-Judge Gorsuch voted to rehear the case en banc. App. 122a.

profoundly disruptive of the attorney-client relationship.

The Tenth Circuit's decision sets all of that work at naught. There can be no serious doubt that the text of the McDade Amendment authorizes the application of Rule 16-308(E) to federal prosecutors. But the panel nonetheless held the rule preempted by vague considerations of traditional "federal grand-jury practice," without addressing whether Rule 16-308(E) poses any serious threat to the constitutional core of the federal grand jury's function. The rule poses no such threat. And the decision adds to confusion about whether state ethics rules may be validly applied to federal prosecutors—the very confusion Congress sought to dispel through the McDade Amendment. Because the decision below defies congressional intent, misconstrues this Court's precedents on preemption and grand jury practice, and reaches a severely flawed conclusion on a question of national importance, this Court should grant review.

I. THE TENTH CIRCUIT HAS ISSUED A SEVERELY FLAWED DECISION THAT DEEPENS CONFUSION ON AN ISSUE OF NATIONAL IMPORTANCE

A. The McDade Amendment Allows The States To Subject Federal Prosecutors To Ethics Rules In The Grand Jury Context

1. Under the Supremacy Clause, "'the federal function'" generally "'must be left free' of regulation" by the States. *Hancock* v. *Train*, 426 U.S. 167, 179 (1976). Congress is nonetheless free to permit direct state regulation of the federal government's activities, as long as it "makes this authorization of state regula-

tion 'clear and unambiguous'" through "'specific congressional action.'" *Id.*

Rarely has Congress authorized state regulation more clearly than in the McDade Amendment. Titled "Ethical standards for attorneys for the Government," the Amendment 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) (emphasis added). That language admits no ambiguity or exception. If a State adopts a rule that "govern[s] attorneys"—*i.e.*, an "[e]thical standard[]"—then federal government lawyers are bound by it, even if the rule would otherwise be preempted.

As the court of appeals recognized (App. 60a), there is no doubt that Rule 16-308(E) "govern[s] attorneys." That should have been the end of the analysis. Under the McDade Amendment, Rule 16-308(E) binds federal prosecutors.

2. The court of appeals nevertheless concluded that the McDade Amendment does not clearly consent to state regulation of federal prosecutors' issuance of grand jury subpoenas to attorneys. App. 70a-72a. As a matter of straightforward statutory construction, that conclusion is mistaken.

First, "courts 'are not at liberty to create an exception where Congress has declined to do so.'" *Freytag* v. *Commissioner*, 501 U.S. 868, 874 (1991). The text of the McDade Amendment is unambiguous; it extends congressional authorization to "State laws and rules … governing attorneys," without exception for specific

kinds of rules or contexts. 28 U.S.C. § 530B(a). That alone is dispositive.

Second, the context in which Congress enacted the McDade Amendment confirms that Congress intended to subject federal prosecutors to ethics rules regarding their issuance of attorney subpoenas during grand jury proceedings. The ABA's 1990 promulgation of Model Rule 3.8(e) attracted widespread attention in the legal community.[10] By the time Congress enacted the McDade Amendment in 1998, ten States had adopted a version of the ABA's model rule. And by that point two federal courts of appeals and a district court in another circuit had decided cases involving challenges to such rules. *See Whitehouse* v. *U.S. Dist. Ct. for Dist. of R.I.*, 53 F.3d 1349 (1st Cir. 1995); *Baylson* v. *Disciplinary Bd. of Sup. Ct. of Pa.*, 975 F.2d 102 (3d Cir. 1992); *United States* v. *Colo. Sup. Ct.*, 988 F. Supp. 1368 (D. Colo. 1998). Congress is presumed to have known about this backdrop when it passed the McDade Amendment. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988).

In fact, the legislative history of the McDade Amendment shows that Congress *actually* knew about the regulatory backdrop and intended to use state and federal-court ethics rules to rein in federal-prosecutor conduct before grand juries, including specifically the practice of issuing attorney subpoenas. Congress be-

---

[10] *See, e.g.*, Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 Minn. L. Rev. 917 (1992); Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 Fordham L. Rev. 355 (1996); *see also* Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. Pa. L. Rev. 1783 (1988).

gan paying close attention to DOJ's attempts to exempt its lawyers from ethics rules and its increasing use of attorney subpoenas in the trial and grand jury contexts, in 1990—exactly when the ABA was promulgating Model Rule Rule 3.8(e). *See* H.R. Rep. No. 101-986, at 5-20, 36 (1990). Then, the principal sponsor of the Amendment said explicitly that the legislation would encompass rules governing federal prosecutors' issuance of attorney subpoenas before grand juries. In remarks introducing his bill, Representative McDade catalogued examples of "prosecutorial misconduct" that his bill was designed to curb by ensuring that federal prosecutors would be governed by state and federal-court ethics rules. 144 Cong. Rec. 2761 (1998). His list included 25 wide-ranging circumstances involving what he termed "Abuse of the Grand Jury Process"—including "[u]sing grand jury subpoenas directed against the attorney of the target of the investigation." *Id.* at 2761-2762 (citing *In re Grand Jury Matters*, 593 F. Supp. 103, 107 (D.N.H.), *aff'd*, 751 F.2d 13 (1st Cir. 1984)). His import was clear; in opposing the bill, the Chairman of the Senate Judiciary Committee noted that it would make "the conduct of matters before a grand jury … subject to state bar review." *Id.* at 27,472 (statement of Sen. Hatch).

3. The panel looked to this Court's decisions in *Goodyear* and *Hancock* to support its conclusion that the McDade Amendment does not expressly authorize the application of Rule 16-308(E) to federal prosecutors in the grand jury context. Its analysis was seriously mistaken.

The panel majority cited *Goodyear* for the proposition that federal activities are immune from state regulation absent "'clear and unambiguous'" authorization from Congress, App. 72a, but it ignored *Goodyear*'s

analysis, which actually confirms that the McDade Amendment supplies sufficiently clear authorization. The statute in *Goodyear* subjected federal premises to state "'workmen's compensation laws … in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State.'" 486 U.S. at 182 (quoting 40 U.S.C. § 290). The government and its contractor argued that the statutory reference to "workmen's compensation laws" excepted the type of workers' compensation provision at issue, *id.* at 183—much as the government argues here that the McDade Amendment's reference to "State laws and rules … governing attorneys" excepts rules governing attorney subpoenas before a grand jury. This Court rejected that attempt to narrow the statute's reach as inconsistent with its "language and history." *Id.*

The text of the statute, the Court explained, "places no express limitation on the type of workers' compensation scheme that is authorized," *Goodyear*, 486 U.S. at 183—just as the McDade Amendment, which subjects federal prosecutors to state and federal-court ethics rules "to the same extent and in the same manner as other attorneys in that State," 28 U.S.C. § 530B(a), does not purport to limit its consent to rules applicable outside grand jury proceedings. The Court also presumed that Congress consciously legislated against the preexisting legal landscape, in which eight States had already adopted the type of workers' compensation law at issue, *Goodyear*, 486 U.S. at 184—and so too, here, Congress should be presumed to have been aware that ten States had already adopted versions of the attorney-subpoena rule at issue. In fact, as discussed above, Congress was specifically aware that the McDade Amendment would authorize the application of such ethical rules to federal prosecutors in the grand

jury context. Rather than supporting the decision below, *Goodyear* thus shows that the court erred in refusing to give effect to the unqualified language of the McDade Amendment.

In *Hancock*, the Court reached a different result, but did so because of a very different statutory context. The statute at issue in *Hancock* specified that certain federal installations "'shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.'" 426 U.S. at 172 (quoting 42 U.S.C. § 1857f). It was undisputed that the statute required federal installations to comply with a state "requirement … intended simply to regulate the amount of pollutants which the federal installations may discharge." *Id.* at 180-183. But the Court declined to interpret the statute as further requiring federal installations to comply with a state "permit requirement," by which the State could "prohibit[] operation of the federal installations" altogether. *Id.* at 180-181. The Court was "unable to find" in the statutory text or "the legislative history … any clear and unambiguous declaration" that Congress intended to confer on the States the significant power to prohibit federal installations from operating at all. *Id.* at 180.

Unlike Kentucky's effort to force the federal government to seek an operating permit in *Hancock*, Rule 16-308(E) does not assert any state authority to prevent federal prosecutors from carrying out any of their functions, including the investigation of cases before a grand jury, without a state permit. The Rule requires only that, when federal government lawyers (like any lawyers) perform their functions, they adhere to certain generally applicable ethical rules—just as the Supreme Court recognized in *Hancock* that federal instal-

lations could be required to comply with the *substance* of state air-pollution regulation. And again, the text, background, and legislative history of the McDade Amendment all make clear that Congress expected and intended that federal prosecutors would have to comply with rules like Rule 16-308(E)—even in the grand jury context.

B. Rule 16-308(E) Does Not Conflict With The Constitutional Core Of Traditional Federal Grand Jury Practice

Even if the McDade Amendment did not expressly authorize any conflict between Rule 16-308(E) and federal grand jury practice, the panel majority independently erred in holding that such a conflict exists. The panel concluded that Rule 16-308(E)'s "requirements of essentiality and no-other-feasible-alternative … clearly create 'an obstacle to the accomplishment and execution of' the federal grand jury's constitutionally authorized investigative function." App. 70a. Drawing on *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991), the panel reasoned 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," and that Rule 16-308(E)'s "rigorous" standards exceed that "minimal" threshold. *Id.* That analysis rests on several fundamental misunderstandings of federal grand jury practice and its interaction with rules of professional conduct.

1. Like the similar rule upheld by the First Circuit in *Whitehouse*, Rule 16-308(E) is "aimed at, and principally affect[s], *prosecutors*, not the grand jury." 53 F.3d at 1357. It "does not impede the grand jury's independence because it does not affect subpoenas

sought by the grand jury acting independently." *Id.* That "distinction is critical," as the First Circuit explained in *Whitehouse*, "because, although the potential damage to the attorney-client relationship exists regardless of who seeks the subpoena, 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." *Id.* Moreover, Rule 16-308(E) is not an exclusionary rule; it cannot be enforced by criminal suspects or defendants seeking to bar evidence from the grand jury. *See In re Grand Jury Proceedings*, 616 F.3d 1172, 1186 (10th Cir. 2010). In short, the rule "does not keep any evidence from reaching the grand jury," and therefore "does not disturb the grand jury's broad investigative powers." *Whitehouse*, 53 F.3d at 1358.[11]

To be sure, it is a common practice for grand juries to receive evidence offered by prosecutors. *See, e.g.*,

---

[11] The First Circuit examined the issue of prosecutors' subpoenas to attorneys again in *Stern* v. *United States District Court for the District of Massachusetts*, 214 F.3d 4 (1st Cir. 2000), and held that a federal-court rule requiring prior judicial approval of such subpoenas impermissibly interfered with grand jury proceedings. *Id.* at 16-17. Notwithstanding its disagreement with parts of *Whitehouse*, *id.* at 16 n.4, the *Stern* panel did not purport to overrule *Whitehouse*, nor could it have done so. Instead, it distinguished *Whitehouse*, noting that the rule in *Stern* created judicial standards for approval of a subpoena, whereas the rule in *Whitehouse* "worked no substantive change in the governing law" for approving or quashing subpoenas and instead subjected prosecutors to professional discipline in certain circumstances. *Id.* at 8, 13-14, 16; *see Whitehouse*, 53 F.3d at 1357-1358 & n.12. *Whitehouse* therefore remains precedential in the First Circuit for rules, like the one here, that govern the professional conduct of prosecutors but do not impose judicially enforceable standards for the issuance of subpoenas.

Beale et al., 1 *Grand Jury Law and Practice* § 6:2 (2d ed. 2016). But that practice does not convert a rule directed at prosecutors' ethical conduct into a regulation of the grand jury itself. This Court has long recognized that "the Fifth Amendment's 'constitutional guarantee presupposes an investigative body acting independently of either prosecuting attorney or judge.'" *United States* v. *Williams*, 504 U.S. 36, 49 (1992) (emphasis omitted); *see also United States* v. *Dionisio*, 410 U.S. 1, 17-18 (1973). In other contexts, courts have recognized that grand juries may obtain evidence that prosecutors cannot. *See, e.g.*, *United States* v. *Larkin*, 978 F.2d 964, 968 (7th Cir. 1992) ("Settled law provides that the grand jury has the sole authority to compel a witness to appear at a lineup, and that the government may not short-circuit the grand jury process by obtaining on its own motion a court order to compel such an appearance."); *In re Melvin*, 546 F.2d 1, 5 (1st Cir. 1976) (grand jury itself must direct witness to appear in a lineup, to the extent such directives are permissible).

Rule 16-308(E) is a regulation of attorneys' professional conduct, not a restriction of the grand jury's own investigative authority. The prosecutor and the grand jury are not the same thing, and prosecutors are often bound by rules that do not govern grand juries. *See Williams*, 504 U.S. at 46 n.6 (stressing that Congress may establish "standards of behavior for prosecutors" practicing before grand jury); *cf. Dionisio*, 410 U.S. at 9 (holding that a grand jury subpoena is not a Fourth Amendment seizure). Rule 16-308(E) reflects the judgment that certain subpoenas issued *by lawyers* present a serious threat of overreaching beyond the lawyer's proper professional role; it says nothing about—and does not diminish—the grand jury's power to pursue an investigation anywhere the evidence leads it.

2. The panel majority also failed to recognize that rules like Rule 16-308(E) present no danger of incursion on any constitutional core of the grand jury's traditional investigative power. The grand jury's investigative authority has always been limited by constitutional, statutory, and common-law rights and privileges. *Williams*, 504 U.S. at 48-49; *United States* v. *Calandra*, 414 U.S. 338, 346 (1974); *see also United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 433 n.17 (1983) (collecting cases addressing limits on grand jury's investigative powers). Congress has the authority to ensure that federal grand jury practice does not impair those rights and privileges, as well as other vital interests needing protection from abuse. *See, e.g.*, 18 U.S.C. § 2515 (prohibiting the use of unlawfully intercepted wire or oral communications, including in grand proceedings).

By holding Rule 16-308(E) preempted by vague notions of "traditional grand jury practice," the court of appeals' decision casts unwarranted doubt on the power of both the States and Congress to curb prosecutorial overreach before federal grand juries. Congress has decided, in the McDade Amendment, that state and federal courts may discipline prosecutors for engaging in practices that threaten the attorney-client relationship and criminal defendants' rights under the Fifth and Sixth Amendments. There is no sound basis for the panel majority's conclusion that this congressional judgment contravenes the role of the grand jury under the Constitution.

To the contrary, the law has long protected the sanctity of the attorney-client relationship, including the duties of competence, loyalty, and confidentiality, in recognition of its central importance to the administration of justice. *See, e.g.*, *Hickman* v. *Taylor*, 329 U.S. 495, 510-511 (1947); *Blackburn* v. *Crawfords*, 70 U.S.

(73 Wall.) 175, 192-193 (1866). Rules of professional conduct are one mechanism for protecting that relationship. *See, e.g.*, Model R. Prof'l Conduct 1.1 to 1.18. Privileges, such as for attorney-client communications and attorney work product, are another. *See, e.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981); *Hickman*, 329 U.S. at 509-511. And in the criminal context—which of course is directly relevant to grand jury subpoenas—the relationship gains constitutional protection through the rights guaranteed by the Fifth and Sixth Amendments.

As the ABA and 31 States have recognized, *see supra* pp. 9-12 & nn.6-7, attorney subpoenas may irreparably damage the attorney-client relationship, and thus may also threaten the constitutional right to counsel. *See Whitehouse*, 53 F.3d at 1358; ABA Criminal Justice Section, *Report to the House of Delegates No. 122B*, at 5-6 (1988). Subpoenas to criminal defense attorneys also present a danger of subverting their clients' Fifth Amendment privilege against self-incrimination. *See Fisher* v. *United States*, 425 U.S. 391, 404-405 (1976). "[W]hatever benefit the government derives from" such subpoenas "comes at the direct expense of the attorney-client relationship," including "the potential loss of a client's choice of counsel should the latter be compelled to testify … and the potential chilling effect upon the client's trust in his counsel's loyalty." *United States* v. *Perry*, 857 F.2d 1346, 1347 (9th Cir. 1988); *see also Baylson*, 975 F.2d at 112. After a subpoena is served on an attorney, the client is forced into a state of limbo, uncertain "whether his attorney will testify against him and perhaps be required to withdraw his representation." *Whitehouse*, 53 F.3d at 1358. "That uncertainty inevitably undermines the trust and openness so important to the attorney-client relationship." *Colorado*

Sup. Ct., 189 F.3d at 1288. An attorney subpoena also forces counsel to divert her time and resources from her client, further undermining the client relationship. *Whitehouse*, 53 F.3d at 1358. "That the defense counsel's adversary [*i.e.*, the prosecutor] can bring about these consequences raises manifest ethical concerns[.]" *Id.* (emphasis omitted).

Congress and the States are not constitutionally disabled from acting to protect the attorney-client relationship, as well as the Fifth and Sixth Amendment rights safeguarded by that relationship, merely because a threat to that relationship arises in the context of a prosecutor's pursuit of a case before a grand jury. *See generally R. Enters.*, 498 U.S. at 300-303 (recognizing that grand jury investigation could be limited by court-made procedural rules and subject to judicial oversight). Indeed, such concerns have led courts to quash attorney subpoenas issued in the context of grand jury proceedings (as Representative McDade noted when introducing his amendment). *See United States* v. *Bergeson*, 425 F.3d 1221, 1225-1226 (9th Cir. 2005); *Grand Jury Matters*, 593 F. Supp. at 107, *aff'd*, 751 F.2d 13 (1st Cir. 1984), *cited in* 144 Cong. Rec. 2761. Even granting that there may be some constitutional core of the grand jury's investigative authority that neither Congress nor the States (with Congress's authorization) may abridge, an ethical rule protecting the attorney-client relationship from overreaching prosecutors' subpoenas does not touch it.

3. The panel majority erroneously relied on this Court's decision in *R. Enterprises* for its conclusion that Rule 16-308(E) "create[s] 'an obstacle to the accomplishment and execution of' the federal grand jury's constitutionally authorized investigative function." App. 70a. *R. Enterprises* in fact sheds little light on

that question. That decision did not (contrary to the panel's suggestion, App. 67a-71a) announce a broad constitutional directive for grand jury practice, mandate that the grand jury have access to any information it seeks, or otherwise suggest that any regulation that may affect the conduct of grand jury proceedings is void. *See, e.g.*, *R. Enters.*, 498 U.S. at 299 ("The investigatory powers of the grand jury are nevertheless not unlimited."). Rather, the "focus" of the Court's "inquiry" was simply "the limit imposed on a grand jury by Federal Rule of Criminal Procedure 17(c)." *Id.* The Court held that, although Rule 17(c) "imposes some reasonableness limitation on grand jury subpoenas," the standards for trial subpoenas announced in *United States* v. *Nixon*, 418 U.S. 683 (1974)—relevancy, admissibility, and specificity—do "not apply in the context of grand jury proceedings." *Id.* at 300. Rule 16-308(E) does not seek to re-impose any of those standards on attorney subpoenas in the grand jury context.

Moreover, the concerns that motivated the Court in *R. Enterprises* are not present here. Applying the *Nixon* standard to grand jury subpoenas, the Court stated, "would invite procedural delays and detours while courts evaluate the relevancy and admissibility of documents sought by a particular subpoena," conflicting with the Court's prior holdings that grand juries should not be "'saddle[d] with minitrials and preliminary showings.'" *R. Enters.*, 498 U.S. at 298-299. In addition, requiring the government "to explain in too much detail the particular reasons underlying a subpoena," in the context of opposing a motion to quash, would "afford[] the targets of investigation far more information about the grand jury's internal workings than the Federal Rules of Criminal Procedure appear to contemplate." *Id.* at 299. Rule 16-308(E), by con-

trast, would occasion no "procedural delays" or "detours" in the grand jury process, because it is not enforceable by a motion to quash. *See Grand Jury Proceedings*, 616 F.3d at 1186. And to the extent a prosecutor might ever be called upon to explain his ethical basis for a subpoena, it would be in the context of a later disciplinary hearing, where safeguards are available to avoid inappropriate disclosure. *See* N.M. R. Prof'l Conduct 17-304(A), -307(A).

As Chief Judge Tymkovich recognized in dissent (App. 89a-91a), the panel majority's loose reliance on federal grand jury practice as described in *R. Enterprises* runs afoul of the established principle that "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). An "[i]mplied preemption analysis does not justify a 'free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Chamber of Commerce of U.S.* v. *Whiting*, 563 U.S. 582, 607 (2011) (plurality opinion); *accord Wyeth* v. *Levine*, 555 U.S. 555, 588 (2009) (Thomas, J., concurring in judgment). The court of appeals' vague invocation of "the Grand Jury Clause of the Fifth Amendment" and "the federal courts' grand-jury jurisprudence" to hold Rule 16-308(E) preempted, App. 68a n.26—in an analysis untethered to the text of the Constitution or any federal statute—is the type of reasoning this Court has long eschewed.

II. THE QUESTION PRESENTED IS DEEPLY IMPORTANT

As discussed above (*supra* pp. 23-24, 27-28), the Tenth Circuit's decision in this case cannot be reconciled with the First Circuit's decision in *Whitehouse*, upholding a similar disciplinary rule. Regardless of any circuit split, however, review is warranted because the question presented by this petition has deep national importance.[12] It implicates fundamental questions of constitutional structure and federalism, and threatens the considered judgments of Congress, 31 States, and the ABA about the need to ensure that federal government attorneys adhere to rules of professional conduct—judgments that DOJ strenuously resists.

First, the court of appeals' ruling seriously threatens the States' traditional and critical role in regulating the practice of law. The States have "an extremely important interest in maintaining and assuring the professional conduct of the attorneys [they] license," and their "interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance." *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982); *see also Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975) ("The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering

[12] This Court regularly agrees to consider issues of national importance even when there may be no direct circuit split on the question presented. S. Ct. R. 10; *see, e.g.*, *United States* v. *Texas*, 136 S. Ct. 2271 (2016); *Fisher* v. *University of Tex. at Austin*, 136 S. Ct. 2198 (2016); *Dollar Gen. Corp.* v. *Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016); *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016); *Sturgeon* v. *Frost*, 136 S. Ct. 1061 (2016).

justice, and have historically been 'officers of the courts.'"). In disregard of this compelling state interest, the decision below invalidates not only New Mexico's Rule 16-308(E) but also the similar rules of Colorado, Kansas, and Oklahoma, *see* Colo. R. Prof'l Conduct 3.8(e); Kan. R. Prof'l Conduct 3.8(e); Okla. R. Prof'l Conduct 3.8(e), and it casts doubt on dozens of substantively identical rules in States outside the Tenth Circuit, *see supra* p. 12 n.6.

Second, the decision below similarly threatens the federal courts' ability to regulate the conduct of prosecutors appearing before a grand jury. The court's conclusion that an ethics rule prohibiting prosecutors from issuing attorney subpoenas interferes with the grand jury's investigative power would seem to apply equally when that rule is established by a federal court rather than a State. The decision below thus also casts doubt on the rules adopted by approximately 39 federal courts that incorporate state rules similar to New Mexico Rule 16-308(E), *see supra* p. 12 n.7.

Third, the ruling undermines Congress's effort to require federal prosecutors—agents of the Executive Branch—to respect ethics safeguards, including those meant to protect the constitutional rights of criminal defendants. Congress decided, over DOJ's vigorous protest, to subject federal prosecutors to state ethics rules. The panel's ruling reverses that congressional decision at DOJ's behest, and the implication of the ruling is that Congress's decision to subject federal prosecutors' pursuit of criminal cases before the grand jury to ethical constraints that prevent prosecutorial overreaching lies beyond Congress's constitutional authority—a proposition for which there is no support in this Court's jurisprudence.

Fourth, the Court should take this occasion to decide the question presented, rather than waiting to see whether it will be presented in another case. As the panel majority recognized, App. 5a-6a, federal courts have struggled for years with the question whether attorney-subpoena rules are preempted by federal law, and have reached differing results. *See Stern* v. *U.S. Dist. Ct. for Dist. of Mass.*, 214 F.3d 4, 16-17 (1st Cir. 2000) (holding that Massachusetts district court rule regarding trial and grand jury subpoenas exceeded local rulemaking authority); *Colorado Sup. Ct.*, 189 F.3d at 1289 (upholding Colorado rule against preemption challenge for trial subpoenas); *Whitehouse*, 53 F.3d at 1365 (upholding Rhode Island district court rule for both trial and grand jury subpoenas); *Baylson*, 975 F.2d at 112 (holding that Pennsylvania rule regarding grand jury subpoenas was preempted); *United States* v. *Klubock*, 832 F.2d 664 (1st Cir. 1987) (en banc) (per curiam) (dividing equally over validity of Massachusetts district court rule regarding grand jury subpoenas).[13]

---

[13] The Court's denial of certiorari in *Stern* and *Baylson* should not be taken as an indication that the issues presented by those cases are not important. *Baylson*—the first authoritative decision in this area by a court of appeals, after the en banc First Circuit failed to reach a majority ruling in *Klubock*—predated the McDade Amendment. *Stern* only barely postdated the McDade Amendment, and as the United States noted in opposing certiorari, it involved only the question "whether the United States District Court for the District of Massachusetts ha[d] the power to promulgate" an attorney-subpoena rule "as a local district court rule"; it did not present an occasion to decide "the independent force or effect of the state bar rule," as this case does. Opp. 18, *Crane* v. *Stern*, Nos. 00-425, 00-444 (U.S. Jan. 5, 2001). Moreover, the importance of the issue has grown considerably since the denial of certiorari in *Stern*, as most States that have adopted attorney-subpoena rules have done so since that time. *See* ABA, *Varia-*

Although there are slight variations among the rules at issue in those cases and their statutory backdrops, the need for clarification by this Court is both present and acute. The States, their judiciaries and attorney regulators, and federal prosecutors alike would benefit from clarity on the important issues presented by this case.

Finally, the federal government's institution of this litigation, even absent any concrete threat of enforcement of Rule 16-308(E) against any federal prosecutor, underscores the importance of the issue. The United States found it necessary to sue the Supreme Court of a State to restrain it from exercising its traditional power of regulating attorney conduct—an extraordinary decision the government undoubtedly took recognizing, and perhaps intending, that the issues in this case might well reach this Court. Given the important dignitary and federalism interests implicated by such suits, this Court should not require other state or federal courts to suffer the burdens of litigation before resolving a question of such manifest importance.

---

tions of the ABA Model Rules of Professional Conduct, Rule 3.8(e) (May 6, 2015), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.authcheckdam.pdf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL J. KENNEDY
ARNE R. LEONARD
PAUL KENNEDY &
ASSOCIATES, P.C.
201 12th St., NW
Albuquerque, NM 87102

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007

PAUL R.Q. WOLFSON
Counsel of Record
DAVID M. LEHN
DANIEL WINIK
DEREK A. WOODMAN
HYUN GYO CHUNG*
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

* *Admitted to practice only in New York. Supervised by members of the firm who are members of the District of Columbia Bar.*

MAY 2017

APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 14-2037 & 14-2049
(D.C. No. 1:13-CV-00407-WJ-SMV)
(D. N.M.)

UNITED STATES OF AMERICA,
Plaintiff—Appellee/Cross-Appellant,

v.

SUPREME COURT OF NEW MEXICO; THE DISCIPLINARY BOARD OF NEW MEXICO; OFFICE OF THE DISCIPLINARY COUNSEL OF NEW MEXICO,
Defendants—Appellants/Cross-Appellees.

THE AMERICAN BAR ASSOCIATION,
Amicus Curiae.

Filed: October 13, 2016

ORDER

Before **TYMKOVICH**, Chief Judge, **HOLMES**, and **BACHARACH**, Circuit Judges.

This matter is before the court on the petition for rehearing filed by the state of New Mexico parties, as well as the United States' petition for rehearing en banc. Upon consideration of the New Mexico petition,

the original panel grants panel rehearing in part and only to the extent of the changes made to page 18, footnote 6, and pages 21-23 of the attached revised opinion. The clerk is directed to file the revised decision *nunc pro tunc* to the original filing date of June 7, 2016.

With respect to the United States' petition, the original panel voted to deny any implicit request for panel rehearing. In addition, that petition was also circulated to all of the judges of the court who are in regular active service and who are not recused. As no judge on the panel or the court called for a poll, the United States' petition is denied.

In granting limited panel rehearing with respect to New Mexico's petition, we note and emphasize that the portion of the request seeking en banc review remains pending. That part of the petition remains under advisement.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 14-2037 & 14-2049

UNITED STATES OF AMERICA,
Plaintiff—Appellee/Cross-Appellant,

v.

SUPREME COURT OF NEW MEXICO; THE DISCIPLINARY BOARD OF NEW MEXICO; OFFICE OF THE DISCIPLINARY COUNSEL OF NEW MEXICO,
Defendants—Appellants/Cross-Appellees.

THE AMERICAN BAR ASSOCIATION,
Amicus Curiae.

Filed: June 7, 2016

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:13-CV-00407-WJ-SMV)

* * *

Before **TYMKOVICH**, Chief Judge, **HOLMES**, and **BACHARACH**, Circuit Judges.

HOLMES, Circuit Judge.

New Mexico Rule of Professional Conduct 16-308(E) ("Rule 16-308(E)") prohibits a prosecutor from subpoenaing a lawyer to present evidence about a past

or present client in a grand-jury or other criminal proceeding unless such evidence is "essential" and "there is no other feasible alternative to obtain the information." In a lawsuit brought against the New Mexico Supreme Court, and the state's Disciplinary Board and Office of Disciplinary Counsel ("Defendants"), the United States claims that the enforcement of this rule against federal prosecutors licensed in New Mexico violates the Supremacy Clause of the U.S. Constitution. U.S. Const., art. VI, § 2. The district court concluded, on cross-motions for summary judgment, that Rule 16-308(E) is preempted with respect to federal prosecutors practicing before grand juries, but is not preempted outside of the grand-jury context. We agree. Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm**.

I

A

The roots of Rule 16-308(E) can be traced to the adoption by the American Bar Association ("ABA") of Model Rule of Professional Conduct 3.8(e) ("Model Rule 3.8(e)"). Faced with what was perceived to be an "increasing incidence of grand jury and trial subpoenas directed toward attorneys defending criminal cases," ABA Crim. Justice Section, Report with Recommendation to the ABA House of Delegates No. 122B, at 2 (Feb. 1988), the ABA issued Model Rule 3.8(e)[1] in 1990 "to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship," Model Rules of Prof'l Conduct r.

[1] Originally adopted as Model Rule 3.8(f), the rule was redesignated as Model Rule 3.8(e) in 2002. We refer to it throughout this opinion as Model Rule 3.8(e) to avoid any possible confusion.

3.8(e) cmt. 4 (Am. Bar Ass'n 2015). As adopted, Model Rule 3.8(e) stated:

> The prosecutor in a criminal case shall: …
>
> ([e]) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:
>
> (a) the information sought is not protected from disclosure by an applicable privilege;
>
> (b) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
>
> (c) there is no other feasible alternative to obtain the information; and
>
> (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

ABA Standing Comm. on Ethics & Prof'l Responsibility, Report with Recommendation to the ABA House of Delegates No. 118, at 1 (Feb. 1990). The rule, as originally adopted, thus consisted of two components. Subsection (e)(1) governed prosecutors' reasonable belief about the content of the information sought—i.e., that it was not privileged, was essential, and could not be obtained from any other feasible alternative. Subsection (e)(2) imposed a judicial preapproval requirement before a prosecutor could obtain an attorney subpoena.

Several states promulgated versions of Model Rule 3.8(e), and legal challenges to these rules produced conflicting outcomes. The Third Circuit, for example, concluded that the judicial preapproval requirement in

Pennsylvania's version of Model Rule 3.8(e) conflicted with federal rules governing the issuance of subpoenas, and held that the enforcement of the rule against federal prosecutors was preempted. *See Baylson v. Disciplinary Bd. of Supreme Court of Pa.*, 975 F.2d 102, 111-12 (3d Cir. 1992). In contrast, the First Circuit found that Rhode Island's version of the rule created "no conflict with the Supremacy Clause." *Whitehouse v. U.S. Dist. Court for Dist. of R.I.*, 53 F.3d 1349, 1365 (1st Cir. 1995).

Before our court, the United States challenged Colorado's adoption of Model Rule 3.8(e). Specifically, we were called upon to review the district court's dismissal of the United States's action on jurisdictional grounds—that is, "[t]he district court dismissed the complaint for lack of subject matter jurisdiction, stating that the United States did not have standing because it did not allege that federal prosecutors had suffered any actual or imminent injury from application of the rules." *United States v. Colo. Supreme Court* ("*Colorado Supreme Court I*"), 87 F.3d 1161, 1163 (10th Cir. 1996). We reversed, however, concluding that, even though no federal prosecutor had been sanctioned under Colorado's rule, the potential that it would "interfere with federal prosecutors in their conduct of criminal proceedings and change the nature of the federal grand jury in Colorado" was a sufficient injury in fact to render the case justiciable. *Id.* at 1165.

The case later returned to us after the district court ruled on the merits of the United States's challenge. *See United States v. Colo. Supreme Court* ("*Colorado Supreme Court II*"), 189 F.3d 1281 (10th Cir. 1999). In the interim, the legal landscape had been altered in two salient ways. First, following the ABA's

lead,[2] the Colorado Supreme Court amended its Rule 3.8(e) in 1997 by removing the judicial preapproval requirement.[3] *Id.* at 1284. Second, in 1998, Congress stepped in and enacted the McDade Act, 28 U.S.C. § 530B, which requires that:

> (a) An 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.
>
> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

---

[2] In 1995, the ABA amended Model Rule 3.8(e) to remove the judicial preapproval requirement. *See Stern v. U.S. Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 9 (1st Cir. 2000).

[3] Thus, by the time of *Colorado Supreme Court II*, Colorado Rule 3.8(e)—and the ABA's Model Rule 3.8(e) on which it was based—only contained the reasonable-belief requirement. It provided:

> The prosecutor in a criminal case shall: …
>
> (e) 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:
>
> (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;
>
> (3) there is no other feasible alternative to obtain the information.

The Attorney General then promulgated regulations, pursuant to § 530B(b), stating that the statute "should not be construed in any way to alter federal substantive, procedural, or evidentiary law." 28 C.F.R. § 77.1(b).

As we framed it in *Colorado Supreme Court II*, the "question whether Rule 3.8 violate[d] the Supremacy Clause now turn[ed] on whether the rule [wa]s a rule of professional ethics clearly covered by the McDade Act, or a substantive or procedural rule that [wa]s inconsistent with federal law." 189 F.3d at 1284. In a nutshell, the essence of the inquiry was whether Rule 3.8 was preempted by federal law. Significantly, we only addressed there, however, the question of whether Colorado's Rule 3.8 was preempted outside of the grand-jury context—*viz.*, the "trial" context.[4] In this regard, in defining the scope of our analysis, we stated: "In its decision on remand, the district court determined that the restriction on grand jury proceedings

[4] In *Colorado Supreme Court II*, we briefly intimated in a footnote that the universe of attorney subpoenas implicated by rules like Colorado's consists of "grand jury and trial subpoenas." 189 F.3d at 1286 n.6; *see also id.* at 1284 n.3 (describing the First Circuit as "holding federal courts could adopt a rule requiring a federal prosecutor at either the *grand jury or trial* stage to obtain judicial approval before serving a subpoena on counsel to compel evidence concerning a client" (emphasis added)). We did not define the term "trial subpoenas" there, and it seems likely that, similar to the First Circuit, we were "us[ing] the term 'trial subpoenas' as a shorthand for *all other subpoenas* (*e.g.*, subpoenas issued in the course of pretrial hearings)"—i.e., all attorney subpoenas issued by federal prosecutors in criminal proceedings other than grand-jury subpoenas. *Stern*, 214 F.3d at 18 n.5 (emphasis added). In any event, we deem this shorthand convention to be helpful. We note that the United States employs it, and Defendants do not object. Accordingly, as needed, we use it here.

violated the Supremacy Clause. Defendants have not appealed that determination and we do not address it here." *Id.*

Turning to the question at hand, we observed that Colorado's Rule 3.8, *inter alia*, prescribed "broad normative principles of attorney self-conduct," and we determined that "the rule in its current incarnation is a rule of ethics applicable to federal prosecutors by the McDade Act." *Id.* at 1288-89. Nevertheless, we proceeded to determine whether this ethics rule was otherwise "inconsistent with federal law" and thus preempted. *Id.* at 1289. We concluded that it was not, and therefore it could be "enforced by the state defendants against federal prosecutors." *Id.*

B

Against this backdrop, in 2008, New Mexico adopted Rule 16-308(E), which provides that:

> A prosecutor in a criminal case shall: …
>
> E. 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:
>
> (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. Rules of Prof'l Conduct, N.M.R.A. 16-308(E). This rule is identical to the Colorado rule that we re-

viewed in *Colorado Supreme Court II*. Though the U.S. District Court for the District of New Mexico has generally adopted the New Mexico Rules of Professional Conduct, *see* D.N.M.LR-Cr. 57.2, it has chosen not to adopt Rule 16-308(E), *see* D.N.M. Admin. Order No. 10-MC-00004-9 (Mar. 23, 2010). Nonetheless, the rule continues to apply to the conduct of federal prosecutors licensed to practice in New Mexico, and a violation of the rule can form the basis for disciplinary sanctions. *See* N.M. Rules Governing Discipline, N.M.R.A. 17-205.

The United States filed suit against Defendants in April 2013, arguing that the second and third requirements of Rule 16-308(E)—i.e., the essentiality and no-other-feasible-alternative conditions—were preempted by federal law. From the outset, these two provisions have been the only ones at issue in this litigation.[5] Defendants moved to dismiss the complaint for lack of subject-matter jurisdiction, arguing that the United States lacked standing and that the case was not ripe in the absence of an actual or threatened disciplinary action against a federal prosecutor. The district court rejected this argument and denied the motion. Relying in large part on our decision in *Colorado Supreme Court I*, it concluded that the complaint sufficiently alleged an

[5] It is undisputed that the United States does not challenge the first provision of Rule 16-308(E)—*viz.*, subsection (E)(1)'s directive that a federal prosecutor must have a reasonable belief that the information sought from an attorney is not protected from disclosure by a privilege. In other words, this subsection is not at issue here. Throughout this opinion, for convenience, we frequently refer in general terms to the United States's challenge to New Mexico's Rule 16-308(E), without segregating out the two provisions of the rule that are actually at issue. Nonetheless, we underscore that a challenge to subsection (E)(1) is not before us.

injury in fact, to the extent that Rule 16-308(E) altered federal prosecutors' attorney-subpoena practice. It also determined that the case was ripe because "the preemption issue is purely a question of law." Aplts.' App. at 152 (Mem. Op. & Order Den. Mot. to Dismiss, filed Nov. 1, 2013).

The United States moved for summary judgment in June 2013, before the parties had engaged in any discovery. Attached to its summary-judgment motion, the United States submitted the affidavit of an Assistant U.S. Attorney in the District of New Mexico. The declaration described several instances in which prosecutors in the U.S. Attorney's Office ("USAO") had issued attorney subpoenas prior to the enactment of Rule 16-308(E); it suggested that, even though "[t]his evidence was obtained in a lawful manner [and] implicated no privilege," had Rule 16-308(E) been in effect, "it is unlikely the prosecutor would have served the subpoena[s]." *Id.* at 80-81 (Decl. of Sasha Siemel, filed June 28, 2013).

Addressing the rule's current effect on the USAO's work, the declarant noted that "Rule 11-308(E) has a 'chilling' effect on prosecutors." *Id.* at 83. After averring that there are "many examples of such situations," the declaration discussed, in general terms—with the aim of preserving grand-jury secrecy—several specific instances in which prosecutors "have already actually [been] hampered … in the performance of their otherwise lawful duties" by concerns that they would be disciplined for violating the essentiality or no-other-feasible-alternative conditions of Rule 16-308(E). *Id.* at 84. The declaration further provided:

> These situations demonstrate that well-meaning prosecutors using legal means of ob-

> taining evidence of criminality are subject to discipline simply for performing their duties. Federal grand juries in the District of New Mexico will continue in the future to need evidence of crimes from lawyers. In many such cases, the most appropriate means of obtaining that evidence will be by subpoena. … If enforced against federal prosecutors, Rule 16-308(E) will interfere directly with efforts of this Office and the Department of Justice to enforce the criminal laws of the United States.

Id. at 88-89.

Defendants filed a motion pursuant to Federal Rule of Civil Procedure 56(d), asking the court to delay ruling on the United States's summary-judgment motion pending the completion of discovery. In the alternative, they moved for summary judgment on the existing record, claiming that Rule 16-308(E) was a permissible ethics rule under the McDade Act and our opinion in *Colorado Supreme Court II*. The district court denied Defendants' Rule 56(d) motion, concluding that further factual development was unnecessary to decide the "purely legal question" of "whether or not Rule 16-308(E) is an ethical rule or a substantive rule." *Id.* at 261 (Order Den. Defs.' 56(d) Request for Extension of Time, filed Nov. 27, 2013).

After further briefing and argument, the court granted partial summary judgment in favor of the United States and partial summary judgment in favor of Defendants. Specifically, it determined that our decision in *Colorado Supreme Court II* compelled the conclusion that Rule 16-308(E) was not preempted by federal law as to criminal proceedings outside of the grand-jury context. However, it determined that the

rule conflicted with "three strong governmental interests in grand jury proceedings of '[(1)] affording grand juries wide latitude, [(2)] avoiding minitrials on peripheral matters, and [(3)] preserving a necessary level of secrecy.'" *Id.* at 321 (Mem. Op. & Order, filed Feb. 3, 2014) (alterations in original) (quoting *United States v. R. Enters., Inc.*, 498 U.S. 292, 300 (1991)). In particular, the court noted that the rule imposed "a higher burden on federal prosecutors that is simply not warranted at the grand jury stage" and threatened grand-jury secrecy by forcing prosecutors to disclose details of confidential investigations in order to avoid disciplinary sanctions. *Id.* at 322.

The district court thus upheld the application of Rule 16-308(E) to federal prosecutors' issuance of attorney subpoenas for criminal proceedings *outside* of the grand-jury context, but enjoined Defendants from "instituting, prosecuting, or continuing any disciplinary proceeding or action against any federal prosecutor for otherwise lawful actions taken in the course of a grand jury investigation or proceeding on the ground that such attorneys violated Rule 16-308(E) of the New Mexico Rules of Professional Conduct." *Id.* at 326-27 (Final J., filed Feb. 3, 2014).

II

Both parties appeal from the district court's judgment. Defendants challenge the district court's subject-matter jurisdiction, its denial of their request for further discovery, its holding that Rule 16-308(E) conflicts with federal law governing grand juries, and the scope of the injunction that the court issued. The United States challenges the district court's conclusion that Rule 16-308(E) is not preempted outside of the grand-jury context. The United States's appellate challenge,

however, is primarily form, not substance. Though it seeks to "preserve [the preemption issue] for possible further review," Aplee.'s/Cross-Aplt.'s Reply Br. ("U.S. Reply Br.") at 12, the United States acknowledges the precedential force of *Colorado Supreme Court II* and thus concedes that Rule 16-308(E) is not preempted by federal law outside of the grand-jury context. Consequently, we resolve the United States's appeal in summary fashion below. The heart of the parties' dispute relates to whether Rule 16-308(E) is preempted relative to federal prosecutors' issuance of attorney subpoenas in the grand-jury context. Consequently, our analysis naturally focuses extensively on this issue. However, before reaching the merits of this question, we must address Defendants' threshold contentions regarding subject-matter jurisdiction and the district court's refusal to allow them further discovery.

A

Defendants claim that the district court lacked subject-matter jurisdiction over this dispute because the United States does not have standing and because the case is not ripe for review. We review questions of justiciability—including standing and ripeness—de novo. *See Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1114 (10th Cir. 2008); *accord Roe No. 2 v. Ogden*, 253 F.3d 1225, 1228, 1231 (10th Cir. 2001). We determine ultimately that there is an adequate legal basis for subject-matter jurisdiction here.

1

Standing, as "a component of the case-or-controversy requirement [of Article III], serves to ensure that the plaintiff is 'a proper party to invoke judicial resolution of the dispute.'" *Habecker v. Town of Estes Park*, 518 F.3d 1217, 1223 (10th Cir. 2008) (quot-

ing *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). In order to demonstrate standing, a plaintiff must show: "(1) that he or she has 'suffered an injury in fact,' (2) that the injury is 'fairly traceable to the challenged action of the defendant,' and, (3) that it is 'likely' that 'the injury will be redressed by a favorable decision.'" *Cressman v. Thompson*, 719 F.3d 1139, 1144 (10th Cir. 2013) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1120 (10th Cir. 2012)).

Defendants challenge the adequacy of the United States's allegations of injury at both the pleading and summary-judgment stages. They also claim that any harm that the United States suffered was self-inflicted—notably, based on a speculative fear of disciplinary sanctions—and is thus insufficient to establish an injury in fact. We reject these arguments, concluding that the United States has standing to bring this lawsuit in federal court.

a

"When evaluating a plaintiff's standing at [the motion to dismiss] stage, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Cressman*, 719 F.3d at 1144 (alteration in original) (quoting *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc)); *accord S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013). While the burden of establishing standing at this stage of the litigation "is lightened considerably," *Petrella v. Brownback*, 697 F.3d 1285, 1292 (10th Cir. 2012), "[t]he injury alleged must be 'concrete and particularized,'" *id.* at 1293 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

The complaint here alleges that (1) Rule 16-308(E) imposes higher substantive standards for grand-jury and trial subpoenas than those established by federal law; (2) approximately seventy federal prosecutors in the District of New Mexico are licensed in New Mexico, and are thus subject to discipline under the New Mexico Rules of Professional Conduct; (3) these federal prosecutors have "changed their practices in criminal investigations" and have been deterred from issuing attorney subpoenas for fear of disciplinary proceedings under Rule 16-308(E), Aplts.' App. at 13 (Compl., filed Apr. 30, 2013); and (4) as a result, the information available to grand juries and courts in the District of New Mexico has been limited—impairing the United States's interest in the "effective conduct of federal criminal investigations and prosecutions," *id.* at 18.

In *Colorado Supreme Court I*, we concluded that an alleged injury of a similar nature—*viz.*, the "delays [in] the presentation of evidence to grand juries" due to the enforcement of a state attorney-subpoena rule—established a "concrete, particularized, and actual injury in fact." 87 F.3d at 1165; *see id.* ("These allegations are sufficient to withstand a motion to dismiss."). Defendants seek to distinguish that decision because the Colorado rule at issue involved a judicial preapproval requirement; such a distinction, however, is not persuasive. We specifically addressed the essentiality and no-other-feasible-alternative conditions—which appear verbatim in New Mexico's Rule 16-308(E)—and concluded that these "require[d] far more from federal prosecutors" and "set a higher standard for obtaining attorney subpoenas" than is required by federal law or internal agency guidelines. *Id.* at 1166. In other words, we held that these two conditions imposed sufficiently

concrete and particularized injuries on the United States to give it standing.

Thus, at the motion-to-dismiss stage, the United States's specific averments—i.e, indicating that Rule 16-308(E) has deterred federal prosecutors from issuing otherwise-permissible attorney subpoenas, thereby limiting the presentation of relevant evidence in grand-jury and other criminal proceedings—"sufficiently allege[] the injury in fact required for standing." *Id.* at 1167.

b

At the summary-judgment stage, mere allegations no longer suffice; instead "the elements of standing must be set forth, through specific facts, by affidavit or other evidence." *Tandy v. City of Wichita*, 380 F.3d 1277, 1284 (10th Cir. 2004); *accord Protocols, LLC v. Leavitt*, 549 F.3d 1294, 1298 (10th Cir. 2008). Defendants claim that the declaration submitted with the United States's motion for summary judgment lacks the requisite specificity because it "does not tie any alleged past injury to the application of the challenged rule" and "does not identify any particular subpoena that is presently at issue." Aplts.'/Cross-Aplees.' Principal Br. ("Aplts.' Opening Br.") at 34.

Contrary to Defendants' assertions, the summary-judgment declaration contains several factual statements demonstrating how Rule 16-308(E) has worked to the detriment of federal prosecutors. In particular, after generally averring that there are "many examples of such situations," the declaration specifically describes several instances in which prosecutors "have already actually [been] hampered … in the performance of their otherwise lawful duties" by concerns that they would be disciplined for violating the essentiality or no-

other-feasible-alternative conditions of Rule 16-308(E). Aplts.' App. at 84. For example, the declaration offered the following:

> The [USAO] investigated an investment fraud scheme perpetrated by a target who, upon learning that he was under investigation, hired a criminal defense attorney. The target used money generated by the scheme to pay for his criminal defense, but he told a witness he had used the money to pay the attorney for legal work related to the supposed investment. Only the target and the attorney were in a position to testify that the victim funds were used for his criminal defense and not for any actual investment-related purposes. The threat of ethical sanctions posed by Rule l 6-308(E) prevented the prosecutor from seeking this important evidence from the attorney. Consequently, had the subpoena been issued, the prosecutor would have risked being accused of seeking evidence that might later have been deemed obtainable by alternative means or not 'essential' under Rule 16-308(E).

Id. at 84-85. This and the other examples offered in the declaration illustrate the United States's alleged injury with adequate particularity.

Furthermore, prosecutors' efforts to avoid sanctions, and the resulting reduction in available evidence in grand-jury and other criminal proceedings, demonstrate sufficient injuries to establish federal-court jurisdiction. *See Cressman*, 719 F.3d at 1145 (concluding that costs "incur[red] to avoid prosecution" could confer standing on the plaintiff); *Colorado Supreme Court I*, 87 F.3d at 1167 ("[E]fforts to avoid litigation do not cast

doubt on standing …. "); *cf. Stern v. U.S. Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 11-12 (1st Cir. 2000) (citing *Colorado Supreme Court I* in addressing ripeness, and noting that "[t]he threat of ethics enforcement is genuine, compliance costs are real and immediate, and the chilling effect on attorney subpoena requests constitutes an injury sufficient to support a justiciable controversy"). Moreover, the declaration discusses a case in which counsel for a criminal defendant sought to quash an attorney subpoena on the basis that the prosecutor had obtained it in violation of Rule 16-308(E). Although this attempt to quash the subpoena failed, the declarant avers that the defense lawyer could have also filed an ethics complaint against the prosecutor. *See generally* N.M. Rules Governing Discipline, N.M.R.A. 17-102(A) (stating that the Disciplinary Board may initiate an investigation "upon complaint by any person").

In sum, we are satisfied that, at the summary-judgment phase, the United States adequately demonstrated standing.[6]

c

However, Defendants maintain that, in the absence of any actual or threatened enforcement action based on a particular subpoena, federal prosecutors have im-

[6] Defendants also claim that they were impermissibly "forced to accept Plaintiff's standing based on … Plaintiff's 'self-description' of federal prosecutors' activities in New Mexico." Aplts.' Opening Br. at 35 (quoting *Summers*, 555 U.S. at 497). However, for purposes of resolving Defendants' cross-motion for summary judgment on the standing issue, the district court appropriately took the position that the nonmovant United States's particularized facts set forth in an affidavit or declaration "will be taken to be true." *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1211 (10th Cir. 2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

permissibly attempted to "manufacture standing merely by inflicting harm on themselves" by voluntarily declining to issue certain attorney subpoenas. Aplts.' Opening Br. at 28 (quoting *Clapper v. Amnesty Int'l USA*, --- U.S. ----, 133 S. Ct. 1138, 1151 (2013)).

i

We do not require "a plaintiff [to] risk actual prosecution before challenging an allegedly unconstitutional … statute." *Bronson v. Swensen*, 500 F.3d 1099, 1107 (10th Cir. 2007). "Standing may still exist even when a plaintiff ends the proscribed behavior, so long as a credible threat remains that such behavior, if taken in the future, would be prosecuted." *Id.* at 1108; *see also D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004) (requiring an "objectively justified fear of real consequences, which can be satisfied by showing a credible threat of prosecution or other consequences following from the statute's enforcement").

The threat of prosecution is generally credible where a challenged "provision on its face proscribes" the conduct in which a plaintiff wishes to engage, and the state "has not disavowed any intention of invoking the … provision" against the plaintiff. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979); *see, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (concluding that plaintiffs had alleged a credible threat of prosecution where the "Government has not argued … that plaintiffs will not be prosecuted if they do what they say they wish to do"); *Cressman*, 719 F.3d at 1145 (holding that the threat of prosecution was credible where state officials had informed the plaintiff that he could be prosecuted for disobeying the challenged statute); *cf. Stern*, 214 F.3d at 10 (concluding that the U.S. Attorney's suit was ripe where the rule im-

posed new substantive and procedural requirements on federal prosecutors and "Bar Counsel ha[d] stated unequivocally that he w[ould] enforce those requirements").

Here, federal prosecutors licensed in New Mexico are bound by the entirety of the New Mexico Rules of Professional Conduct, including the challenged provisions of Rule 16-308(E), and may be disciplined for violating those rules. *See* N.M. Rules Governing Discipline, N.M.R.A. 17-205. Rule 16-308(E) explicitly proscribes the types of attorney subpoenas federal prosecutors under certain circumstances may want to issue—namely, those that are not "essential" to an investigation and for which a feasible alternative might exist. And the federal prosecutor's declaration submitted by the United States provides concrete evidence of ongoing desire and need of prosecutors in carrying out their lawful duties to issue such subpoenas. *Cf. Colo. Outfitters Ass'n v. Hickenlooper*, --- F.3d ----, 2016 WL 1105363, at *7 (10th Cir. Mar. 22, 2016) (concluding that certain organizations had not established standing "[a]bsent any testimony indicating … [they] intended to engage in conduct that might violate" the statute at issue). Notably, Defendants have *not* indicated that the federal prosecutors will not be subject to discipline for disobeying Rule 16-308(E). Thus, even in the absence of any actual enforcement action, Rule 16-308(E) creates a sufficiently credible threat of prosecution to confer standing upon the United States.

ii

Defendants base their self-inflicted-injury argument on *Clapper v. Amnesty International USA*; however, their reliance on this case is misguided. There, the Supreme Court held that precautions taken by the plaintiffs to avoid the interception of their communica-

tions under the Foreign Intelligence Surveillance Act of 1978 were self-inflicted, and did not establish standing, because the statute did "not regulate, constrain, or compel any action on [the plaintiffs'] part." *Clapper*, 133 S. Ct. at 1153. The Court emphasized that any injury to the plaintiffs rested on a "highly attenuated chain of possibilities"—*viz.*, that the government would (1) target specific individuals that the plaintiffs communicated with; (2) invoke its authority under the statutory provision at issue; (3) obtain authorization for the interception from a judge; and (4) actually intercept communications involving the plaintiffs. *Id.* at 1148.

However, in reviewing its standing jurisprudence, the Court recognized that, in contrast, "reasonable efforts [taken] to avoid greater injuries" could be sufficient for standing if the plaintiffs "would be subject to [discipline] *but for* their decision to take preventative measures." *Id.* at 1153 (emphasis added) (discussing *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139 (2010), *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), and *Meese v. Keene*, 481 U.S. 465 (1987)). This scenario—where standing could be found—which *Clapper* used to distinguish the circumstances before it, is actually akin to the scenario of the present case. Thus, far from aiding Defendants, *Clapper* reinforces the view that where federal prosecutors licensed in New Mexico take precautions that significantly hinder them from carrying out their lawful responsibilities to investigate and prosecute crimes, in order to avoid possible disciplinary investigations and sanctions from state ethics officials, then the United States has suffered a cognizable injury for standing purposes.

Lastly, in placing another spin on their self-inflicted injury argument against standing, Defendants draw

our attention to the fact that federal attorneys can practice before the District Court for the District of New Mexico without being licensed in New Mexico. In other words, they point out that the United States Attorney could hire only attorneys without New Mexico law licenses as prosecutors in the District of New Mexico office, or those seeking to be federal prosecutors in that office could forego a New Mexico law licenses in favor of bar membership in another, less restrictive jurisdiction. In view of these alternatives, Defendants argue that the individual choices of federal prosecutors or would-be federal prosecutors to hold New Mexico law licenses—and thus subject themselves to Rule 16-308(E)—amounts to a self-inflicted injury, and not a harm occasioned by, or fairly traceable to, Defendants' conduct relative to Rule 16-308(E).

Defendants' position, however, is unconvincing because it is an injury in itself to avoid lawful conduct—*viz.*, obtaining a New Mexico law license—in order to avoid the application of an allegedly unlawful Rule. *See Meese*, 481 U.S. at 475 (explaining that "the need to take … affirmative steps to avoid the risk of harm … constitutes a cognizable injury"); *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1177 (10th Cir. 2009) (concluding that the plaintiffs "suffered actual injuries because they were forced to move from Denver to avoid the reach of the [arguably unlawful] Ordinance"). Accordingly, we reject this iteration of Defendants' self-inflicted injury argument.

iii

Twenty years ago, we stated that "federal prosecutors need not risk disbarment by violating the Colorado Rules in order to challenge those rules in federal court." *Colorado Supreme Court I*, 87 F.3d at 1167.

Defendants do not persuade us that we should adopt a different position with respect to New Mexico Rule 16-308(E). At both the pleadings and summary-judgment stages of this litigation, the United States has adequately articulated its alleged injury. That injury—e.g., the issuance of fewer attorney subpoenas, resulting in a reduction in otherwise available evidence for law enforcement purposes—is not based on an attenuated alignment of a variety of events. Rather, it stems from, and is traceable to, the higher and conflicting standards imposed by Rule 16-308(E), which restrict federal prosecutors' issuance of attorney subpoenas. And the relevant state authorities have not disavowed an intention to sanction federal prosecutors who run afoul of these standards. In other words, the United States plainly faces a cognizable injury, traceable to Rule 16-308(E),[7] and we conclude that it has standing to challenge Rule 16-308(E).

2

The "[r]ipeness doctrine addresses a *timing* question: *when* in time is it appropriate for a court to take up the asserted claim." *Kan. Judicial Review*, 519 F.3d at 1116 (alteration in original) (quoting *ACORN v. City of Tulsa*, 835 F.2d 735, 738 (10th Cir. 1987)). "Ripeness reflects constitutional considerations that implicate Article III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction." *Awad*, 670 F.3d at 1124 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010)). The requirements of standing and constitutional ripe-

[7] On this point, Defendants again argue that *Clapper* governs this analysis, and squarely defeats the United States's claim of Article III standing. Nevertheless, we find Defendants' reliance upon *Clapper* misplaced for the reasons set forth *supra*.

ness overlap; if an injury "is sufficiently 'imminent' to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied." *Id.* (quoting *ACLU v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999)); *see also Susan B. Anthony List v. Driehaus*, --- U.S.----, 134 S. Ct. 2334, 2341 n.5 (2014). The prudential requirements, however, turn on "both the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'" *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)); *accord United States v. Vaquera-Juanes*, 638 F.3d 734, 737 (10th Cir. 2011).

Defendants invoke prudential considerations, challenging only the fitness of the preemption claim for judicial review. They argue that, in the absence of a pending state enforcement action, the United States's complaint rests on "an abundance of uncertain or contingent future events," including the issuance of a subpoena that violates Rule 16-308(E) and the filing of a disciplinary complaint against the issuing prosecutor. Aplts.' Opening Br. at 31-32. Yet these contingencies would only be relevant if waiting for them to play out would "significantly advance our ability to deal with the legal issues presented []or aid us in their resolution." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978); *accord Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003). But waiting would not have this effect.

While Defendants assert that the preemption claim remains "too abstract and theoretical" in the absence of a specific investigation, Aplts.' Opening Br. at 33, in reality, the claim turns on whether Rule 16-308(E) is an

ethics rule permitted by the McDade Act and, if so, whether it nonetheless conflicts with federal law governing prosecutors' subpoena practices before federal grand juries and federal district courts. These questions are matters of law that can be resolved without further factual development. *See Colorado Supreme Court II*, 189 F.3d at 1284 (noting that "this appeal … presents purely legal questions"); *accord Stern*, 214 F.3d at 10 ("The issue presented can be finally resolved by declaratory judgment, its contours are sharply defined, and additional facts will not affect its resolution."); *see also Awad*, 670 F.3d at 1124 ("[O]n fitness, we 'focus[] on whether determination of the merits turns upon strictly legal issues or requires facts that may not yet be sufficiently developed.'" (second alteration in original) (quoting *Stout*, 519 F.3d at 1118)).

Indeed, several courts—including our own—have resolved challenges to similar state attorney-subpoena rules in the absence of specific applications, suggesting that the United States's claim here is fit for judicial resolution. *See Stern*, 214 F.3d at 9; *Colorado Supreme Court II*, 189 F.3d at 1284; *Whitehouse*, 53 F.3d at 1353-54; *Baylson*, 975 F.2d at 105. Thus, because the question presented in this appeal—*viz.*, whether the challenged provisions of Rule 16-308(E) are preempted by federal law—would not be "better grasped when viewed in light of a particular application," *Texas v. United States*, 523 U.S. 296, 301 (1998), we consider it ripe for judicial review.

B

Having determined that the district court's subject-matter jurisdiction over this case was sound, we turn now to Defendants' claim that the court committed reversible error by denying their Federal Rule of Civil

Procedure 56(d) motion to stay its ruling on summary judgment pending the completion of discovery.

We review the denial of a Rule 56(d) motion for an abuse of discretion—a standard that "implies a degree of '[d]iscretion invested in judges [to render] a decision based upon what is fair in the circumstances and guided by the rules and principles of law.'" *Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd.*, 616 F.3d 1086, 1096 (10th Cir. 2010) (alterations in original) (quoting *In re Bueno*, 248 B.R. 581, 582 (Bankr. D. Colo. 2000)). As such, even though the general rule is that summary judgment should not be entered "where the nonmoving party has not had the opportunity to discover information that is essential to his opposition," *Price ex. rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)), we will not reverse a ruling denying discovery unless it "exceed[s] the bounds of the rationally available choices given the facts and the applicable law in the case at hand," *FDIC v. Arciero*, 741 F.3d 1111, 1116 (10th Cir. 2013) (quoting *Valley Forge Ins. Co.*, 616 F.3d at 1096).

Here, the district court denied the Rule 56(d) motion because it concluded that the case would turn on "whether or not Rule 16-308(E) is an ethical rule or a substantive rule," such that "the wording of the rule itself, not factual circumstances surrounding the enactment or enforcement of the rule" would be determinative. Aplts.' App. at 261. This observation is consistent with our prior conclusion that the issue of whether federal law preempts a state attorney-subpoena rule "presents purely legal questions." *Colorado Supreme Court II*, 189 F.3d at 1284; *see also Stern*, 214 F.3d at 10 (concluding that the issue of an attorney-subpoena rule's validity was "sharply defined,

and additional facts w[ould] not affect its resolution").[8] Indeed, much of the district court's order is devoted to discussing relevant decisions from other circuits addressing preemption claims involving similar state attorney-subpoena rules, and ultimately "[w]ith the guidance of the … cited precedent, the [c]ourt f[ound] that

---

[8] Defendants place much stock in the Fourth Circuit's decision in *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264 (4th Cir. 2013) (en banc). That case—which is from another circuit—is of course not binding on us. Moreover, its holding appears to be rooted in the Fourth Circuit's understanding of the unique requirements of First Amendment claims. Specifically, the Fourth Circuit reversed there a district court's determination that discovery was not necessary to resolve as-applied and facial First Amendment claims: as the court saw it, "[i]n the First Amendment context," it was necessary for the city defendant to have information about how the challenged ordinance affected the plaintiff pregnancy center in order to defend an as-applied challenge, and, in order to make its case to the district court as to the facial attack, the city needed information "concerning the distinctive characteristics of Baltimore's various limited-service pregnancy centers." 721 F.3d at 282. In contrast, in a preemption case like this one, the inquiry is almost entirely a legal one. *See, e.g.*, *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) ("The question of preemption is predominantly legal …."); *H & R Block E. Enters. v. Raskin*, 591 F.3d 718, 723 (4th Cir. 2010) (describing the conflict-preemption analysis as "a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question [of] whether they are in conflict" (alteration in original) (quoting *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981))); *see also Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1125 n.10 (1st Cir. 1989) (concluding that a Rule 56(d) motion seeking to delay summary judgment in order to assess the impact of a challenged regulation on investors and brokers was "beside the point" because it was not directed at the determinative legal question of whether the regulation was preempted). Accordingly, we believe Defendants' reliance on *Greater Baltimore Center for Pregnancy Concerns* is misplaced.

Rule 16-308(E), as applied to grand jury proceedings, violate[d] the Supremacy Clause." Aplts.' App. at 322.

The facts as to which Defendants sought discovery—including whether Rule 16-308(E) actually causes delay and whether there have been any disciplinary proceedings—were not "*essential* to [their] opposition." *Price*, 232 F.3d at 783 (emphasis added). These facts, even if established, would not have affected the district court's central legal conclusion—notably, that Rule 16-308(E) creates a higher and conflicting standard for attorney subpoenas in the federal grand-jury context, and thus impermissibly limits the types of subpoenas prosecutors may issue. As such, the court did not abuse its discretion in denying Defendants' Rule 56(d) motion. *See CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008) ("[W]e have affirmed the denial of Rule 56[(d)] motions … if 'further discovery would not have changed the legal and factual deficiencies.'" (quoting *Maki v. Laakko*, 88 F.3d 361, 367 (6th Cir. 1996))).

C

Turning to the central dispute in this case, the United States argues that Rule 16-308(E)—more specifically, subsections (E)(2) and (E)(3), the essentiality and no-other-feasible-alternative requirements—are preempted under the Supremacy Clause of the U.S. Constitution with respect to federal prosecutors' subpoena practices before grand juries and in other criminal proceedings. *See* U.S. Const., art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land …."). Conversely, Defendants

argue that the rule is not preempted in either context.[9] The district court granted partial summary judgment to the United States, finding that the rule was preempted when applied to federal prosecutors' subpoena practice before grand juries because it conflicted

[9] After oral argument, Defendants submitted a letter, pursuant to Federal Rule of Appellate Procedure 28(j), notifying this court of the Supreme Court's recent decision in *Armstrong v. Exceptional Child Ctr., Inc.*, --- U.S. ----, 135 S. Ct. 1378 (2015), which Defendants argue bars at the threshold the United States's preemption claim. We disagree. The Court in *Armstrong* held that there is no private right of action under the Supremacy Clause. 135 S. Ct. at 1384. The Court held that, in enacting the Medicaid statute at issue, Congress intended to foreclose such private equitable relief by creating broad "judicially unadministrable" standards and explicitly providing a nonjudicial means of enforcement—i.e., the withholding of Medicaid funds. *Id.* at 1385. However, in contrast, nothing in the structure or terms of the McDade Act similarly suggests that Congress sought to override the federal courts' equitable authority to entertain the United States's suit for injunctive relief on preemption grounds. Specifically, the McDade Act's directive is relatively straightforward—attorneys for the federal government are subject to a state's ethics rules to the same extent as attorneys licensed in those states—and the statute provides no alternative means of enforcement. Furthermore, the *Armstrong* Court emphasized that allowing *private* enforcement of the Supremacy Clause would "mak[e] it impossible to leave the enforcement of federal law to federal actors." *Id.* at 1384. This, it noted, would be inconsistent with the "discretion" the Constitution affords Congress "over the manner of implementing its enumerated powers." *Id.* at 1383-84. To the extent that *Armstrong*'s Supremacy Clause holding is motivated by the desire to preserve the federal government's "ability to guide the implementation of federal law," *id.* at 1384, this counsels in favor of—not against—permitting the United States to invoke preemption in order to protect its interest in the use of attorney subpoenas in federal prosecutions. *See Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967) (noting "the general rule that the United States may sue to protect its interests"). Thus, in our view, Defendants' reliance on *Armstrong* is misguided.

with certain governmental interests—e.g., preserving grand-jury secrecy and affording grand juries wide latitude to investigate. However, outside of the realm of grand juries, the district court concluded that it was bound by *Colorado Supreme Court II*, in which we held that an identical Colorado ethics rule was not preempted by federal law governing prosecutors practicing in other criminal proceedings before federal district courts.

"We review the district court's grant of partial summary judgment *de novo*, applying the same legal standards as the district court." *Qwest Corp. v. AT & T Corp.*, 479 F.3d 1206, 1209 (10th Cir. 2007). "Where, as here, we are presented with cross-motions for summary judgment, we 'must view each motion separately,' in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor." *Manganella v. Evanston Ins. Co.*, 702 F.3d 68, 72 (1st Cir. 2012) (quoting *OneBeacon Am. Ins. Co. v. Commercial Union Assurance Co. of Can.*, 684 F.3d 237, 241 (1st Cir. 2012)); *see also Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1030 (10th Cir. 2007) ("Cross motions for summary judgment are to be treated separately; the denial of one does not require the grant of another." (quoting *Buell Cabinet Co. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979))).

1

We begin by inquiring into the nature of the United States's "claim and the relief that would follow." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010); *see Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 248 (2010) ("Our first task in resolving this question is to determine the contours of Milavetz's claim.");

accord United States v. Carel, 668 F.3d 1211, 1217 (10th Cir. 2011). This subject is an important one, and the parties' arguments evince considerable uncertainty and disagreement regarding it.

In *Carel*, we succinctly described the two relevant analytical constructs:

> An appellant may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both. "A facial challenge is a head-on attack [on a] legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007).
>
> In contrast, "[a]n as-applied challenge concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the *particular circumstances* of the case." *Id.* (emphasis added); *see also N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677 n.5 (10th Cir. 2010) ("[An] 'as-applied' challenge to a law acknowledges that the law may have some potential constitutionally permissible applications, but argues that the law is not constitutional as applied to [particular parties].").

Carel, 668 F.3d at 1217 (alterations in original) (citation omitted).[10]

---

[10] We do not have the benefit of an agreement among the parties regarding the nature of the constitutional challenge (i.e., facial or as-applied), like we did in *Carel*. *See* 668 F.3d at 1217 (noting that "at oral argument [defense] counsel stated that his challenge … is an as-applied challenge" and "Counsel for the Government agreed").

As the Supreme Court has recognized, however, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010); *see Reed*, 561 U.S. at 194 (noting as to the parties's disagreement regarding whether the claim at issue "is properly viewed as a facial or as-applied challenge," that "[t]he label is not what matters"); *see also Ctr. for Indiv. Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012) ("[F]acial challenges and as-applied challenges can overlap conceptually."); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1336 (2000) ("Facial challenges are not sharply categorically distinct from as-applied challenges to the validity of statutes."). In other words, "facial" and "as-applied" are not necessarily antipodal rubrics.

Indeed, "the line between facial and as-applied relief is a fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation." *Am. Fed'n of State, Cty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 865 (11th Cir. 2013); *see Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 70 (1st Cir. 2014) ("[T]his case highlights the sometimes nebulous nature of the distinction between facial and as-applied challenges, for Showtime's challenge does not fit neatly within our traditional concept of either type of claim."). This proposition is especially relevant here. The United States's claim "obviously has characteristics of both" a facial and as-applied claim. *Reed*, 561 U.S. at 194; *see Carel*, 668 F.3d at 1217 ("Mr. Carel's claim that [42 U.S.C.] § 16913 is unconsti-

tutional has characteristics of both a facial and as-applied challenge."); *see also Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 426 (5th Cir. 2014) (noting that "the precise boundaries of facial and as-applied challenges are somewhat elusive—certain challenges can have characteristics of both").

The United States contends that Rule 16-308(E) "impermissibly imposes procedural and substantive requirements on federal prosecutors [licensed in New Mexico] that are inconsistent with federal law and therefore violates the Supremacy Clause." Aplee.'s/Cross-Aplt.'s Br. ("U.S. Response Br.") at 7; *see* Aplts.' App. at 7 ("As applied to federal prosecutors, New Mexico Rule of Professional Conduct 16-308(E) … violates the Supremacy Clause …."). Its "claim is 'as applied' in the sense that it does not seek to strike the [New Mexico rule] in all its applications, but only to the extent it covers [federal prosecutors licensed to practice law in New Mexico]. The claim is 'facial' in that it is not limited to [a] particular case [i.e., a particular federal prosecutor's issuance of a specific attorney subpoena], but challenges application of the law more broadly to all [attorney subpoenas issued by all federal prosecutors licensed in New Mexico]." *Reed*, 561 U.S. at 194.

Put another way, the United States's claim has characteristics of a facial challenge because it attacks on purely legal grounds—i.e., under the Supremacy Clause—certain provisions of Rule 16-308(E) and contends that they are per se invalid. In this regard, the claim does not relate to the circumstances of any particular attorney subpoena or any particular trial or grand-jury investigation. But the claim also has characteristics of an as-applied challenge because it focuses solely on the constitutional ramifications of Rule 16-

308(E)'s challenged provisions as they apply to a specific, narrowly defined group—federal prosecutors licensed in New Mexico; it does not seek a determination that the rule is invalid as applied to any other category of prosecutors (e.g., state or local prosecutors), and thus not all applications of the challenged provisions are encompassed by the claim.

The unique duality of the United States's preemption claim has engendered disagreement among the parties, and also some uncertainty—notably, by the claim's proponent, the United States—regarding how to properly characterize it. The United States has emphasized in litigating the jurisdictional, prudential justiciability, and discovery issues that the claim is "facial"; in so doing, it has sought to underscore the legal nature of the claim.[11] *See*, *e.g.*, Aplts.' App. at 116 (Pl.'s Opp. to Defs.' Mot. to Dismiss, filed Sept. 20, 2013) (stating in opposing Defendants' motion to dismiss on standing and ripeness grounds that the "case is a *facial* challenge to the constitutionality of Rule 16-308(E), on grounds that the Rule invades a field completely occupied by federal regulation and conflicts with federal law" (emphasis added)); *id.* at 265 (Pl.'s (Am.) Combined Opp. to Defs.' Mot. for Summ. J. & Reply in Supp. Pl.'s Mot. for Summ. J., filed Dec. 18, 2013) (citing the

[11] The response of the United States's counsel to questioning during oral argument regarding its use of the labels "facial" and "as-applied" bespeaks some of the uncertainty noted above and also specifically sheds light on the United States's intent behind the use of the label "facial." Counsel stated that perhaps the United States "used the wrong term in district court … because facial challenge is a term of art …. [W]hat we meant by that … is facial in the sense of this is a purely legal determination based on Supremacy Clause principles …. What we meant was this is a straight legal challenge …." Oral Argument at 25:40-27:20.

district court's "correct[]" holding "that this matter is ripe for adjudication because facial challenges based upon preemption are fit for review even without additional factual development or actual enforcement of the law").

But, in arguing the merits of the preemption claim, the United States has stressed that it only seeks to invalidate Rule 16-308(E) as applied to a limited subset of prosecutors—i.e., federal prosecutors licensed in New Mexico. *See id.* at 20 (seeking a declaration in its complaint that Rule 16-308(E) was "invalid, null, and void, *as applied to* federal attorneys for otherwise lawful actions" (emphasis added)); *id.* at 33 (Mem. In Supp. of Pl.'s Mot. for Summ. J., filed June 28, 2013) ("If applied to federal prosecutors, the Rule violates the Supremacy Clause of the United States Constitution[.] … Rule 16-308(E) is therefore void as applied to federal prosecutors."); *id.* at 49 ("[A]s applied to federal attorneys, Rule 16-308(E) …. is not in fact an 'ethical' rule, and is invalid as applied to federal attorneys[.] …").

Perhaps not surprisingly, the language of the district court's orders reflects the duality of the claim, and it also uses the labels "facial" and "as-applied" in a manner that approximates the United States's (i.e., the plaintiff's) framing of its case. In its decision denying New Mexico's motion to dismiss for lack of standing and ripeness, for example, the district court described the action as "facially challenging the New Mexico Rule … as it applies to federal prosecutors." *Id.* at 143. The court emphasized what it understood to be the facial nature of the challenge. *See, e.g.*, *id.* at 151 ("The overwhelming majority of courts hold that cases involving facial challenges based upon preemption are fit for judicial review even without specific factual development."). In denying Defendants further discovery, the

court again held that "facial preemption challenges can be decided even in the absence of a detailed factual record.... The determination [of whether Rule 16-308(E) is preempted] is based upon the wording of the rule itself, not factual circumstances surrounding the enactment or enforcement of the rule." *Id.* at 260-61 (Order Den. Pl.'s Mot. to Stay Briefing & Defs.' 56(D) Req. for Extension, filed Nov. 27, 2013). Finally, in its order granting partial summary judgment to both parties, though the court noted that it was addressing a "facial[] challeng[e]" to Rule 16-308(E), it also explicitly recognized that the United States sought to declare the rule invalid only "as it applies to federal prosecutors." *Id.* at 306 (Mem. Op. & Order Granting Partial Summ. J., filed Feb. 3, 2014); *see also id.* at 306 n.2 ("The Court assumes that Plaintiff only intended to bring this suit on behalf of federal prosecutors ....").

2

The unique duality of the United States's preemption claim gives rise to an issue that we must address before resolving the merits: whether the United States is judicially estopped from relying on its version of an "as-applied" argument in attacking on appeal the substantive validity of Rule 16-308(E), given its heavy reliance on "facial" arguments before the district court and the court's acceptance of such arguments. More specifically, Defendants contend that the United States should be judicially estopped on appeal from "switch[ing] to an as-applied challenge for purposes of avoiding the more stringent requirements for prevailing on the merits of a facial preemption challenge" after "[h]aving obtained the benefit of [] rulings from the district court based on a facial challenge." Aplts.'/Cross-Aplees.' Response and Reply Br. ("Aplts.' Reply Br.") at 19-20. They highlight a passage of the United

States's appellate brief, wherein it states that "the United States challenges Rule 16-[3]08(E) only as-applied to federal prosecutors and only to those who seek to take 'otherwise lawful actions' prohibited by the New Mexico rule." U.S. Response Br. at 55 (quoting Aplts.' App. at 20). The United States goes on to argue that certain principles governing facial challenges that the Supreme Court has announced do not apply because of the limited scope of its claim. Specifically, it contends that they "would not apply because the United States is not challenging all of the applications of the New Mexico Rule, but rather a limited set of applications." *Id.* at 56.

Thus, advocating for the application of facial standards, Defendants contend that the United States should be judicially estopped from making such an argument. For two salient, independent reasons, however, we reject this contention. Under the judicial-estoppel doctrine, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). While the circumstances that trigger judicial estoppel are "not reducible to any general formulation," *id.* at 750, "nevertheless[] the Supreme Court has identified three relevant factors," *BancInsure, Inc. v. FDIC*, 796 F.3d 1226, 1240 (10th Cir. 2015), *petition for cert. filed sub nom. McCaffree v. BancInsure*, 84 U.S.L.W. 3433 (U.S. Feb. 1, 2016) (No. 15-982). They are: (1) "a party's later position must be 'clearly inconsistent' with its earlier position"; (2) the party must have "succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in

a later proceeding would create 'the perception that either the first or second court was misled'"; and (3) allowing the party to assert the inconsistent position would result in "an unfair advantage or [would] impose an unfair detriment on the opposing party." *New Hampshire*, 532 U.S. at 750-51 (citations omitted); *accord Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc.*, 767 F.3d 987, 993 (10th Cir. 2014). "[J]udicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'" *New Hampshire*, 532 U.S. at 750 (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)); *accord Kaiser v. Bowlen*, 455 F.3d 1197, 1204 (10th Cir. 2006). "This circuit applies the doctrine of judicial estoppel 'both narrowly and cautiously.'" *BancInsure*, 796 F.3d at 1240 (quoting *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1227 (10th Cir. 2011)). This is because the doctrine is "a powerful weapon to employ against a party seeking to vindicate its rights, and there are often lesser weapons that can keep alleged inconsistent statements in check." *Vehicle Mkt. Research, Inc.*, 767 F.3d at 993; *accord BancInsure*, 796 F.3d at 1240.

First, we reject Defendants' judicial-estoppel argument because the United States's legal arguments in the district court and on appeal are not clearly inconsistent; indeed, they are arguably not inconsistent at all. Our caselaw has set a high bar for estoppel proponents seeking to show that two positions are clearly inconsistent. *See, e.g.*, *Vehicle Mkt. Research*, 767 F.3d at 994-96; *Ellis v. Ark. La. Gas Co.*, 609 F.2d 436, 440 (10th Cir. 1979). And we find validation for our narrow and cautious approach in this regard, *see BancInsure*, 796 F.3d at 1240, in the decisions of our sister circuits. In the words of the Second Circuit, "If the statements can be reconciled there is no occasion to apply an es-

toppel." *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 73 (2d. Cir. 1997) (applying judicial estoppel because plaintiff told the Social Security Administration that he was "unable to work," which was "patently and admittedly contrary to his central claim in this case that he is able to work"); *see United States v. Apple, Inc.*, 791 F.3d 290, 337 (2d Cir. 2015) (noting that its precedent has "emphasized the need to 'carefully consider the contexts in which apparently contradictory statements are made to determine if there is, in fact, direct and irreconcilable contradiction'" and concluding that a party's "facially inconsistent" arguments were not clearly inconsistent because there was a factual basis in the record for distinguishing the arguments (quoting *Rodal v. Anesthesia Grp. of Onondaga, P.C.*, 369 F.3d 113, 119 (2d Cir. 2004))); *see also Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP*, 546 F.3d 752, 757-58 (6th Cir. 2008) (noting that the judicial-estoppel doctrine is applied cautiously and that "there is no inconsistency, and certainly no *clear* inconsistency" in the challenged arguments).

As we read it, the substance of the United States's arguments before the district court and on appeal are not clearly inconsistent. In both settings, the United States has presented a legal preemption challenge to the validity of provisions of Rule 16-308(E), as they apply to a limited subset of prosecutors—that is, federal prosecutors licensed in New Mexico. True, in emphasizing the legal nature of its challenge in litigating the jurisdictional, prudential justiciability, and discovery issues before the district court, it denominated its claim as "facial," whereas on appeal it seems to have avoided this label, but the substance of its argument on appeal is not clearly inconsistent with the argument it made below. *Compare, e.g.*, Aplts.' App. at 116-17 (in oppos-

ing Defendants' motion to dismiss on standing and ripeness grounds, stating that the "case is a *facial* challenge to the constitutionality of Rule 16-308(E)" and that "the complaint has alleged each way in which the Rule is at odds with federal law and therefore violates the Supremacy Clause"), *with* U.S. Response Br. at 18 ("The district court also correctly found that this case is ripe for adjudication. Its resolution requires no further factual development …. The Supremacy Clause challenge here presents purely legal questions …."). And, on appeal—as before the district court—the United States has emphasized that it only seeks to invalidate provisions of Rule 16-308(E) as applied to a limited subset of prosecutors—i.e., federal prosecutors. *Compare, e.g.*, U.S. Response Br. at 55 (stating that "the United States challenges Rule 16-[3]08(E) only as-applied to federal prosecutors"), *with* Aplts.' App. at 49 ("[A]s applied to federal attorneys, Rule 16-308(E) …. is not in fact an 'ethical' rule, and is invalid as applied to federal attorneys ….").

Defendants' argument to the contrary elides the unique duality of the claim and operates on the assumption that the United States's challenge must be either "facial" or "as-applied"; under their reasoning, it *cannot* have characteristics of both. As noted above, however, such an antipodal limitation is not required. *See Reed*, 561 U.S. at 194 (noting that the claim at issue "obviously has characteristics of both" a facial and as-applied claim). And, in fact, the United States's preemption claim has characteristics of both a "facial" and an "as-applied" challenge. In sum, our first reason for rejecting Defendants' judicial-estoppel argument is because the United States's arguments in the district court and on appeal are not clearly inconsistent.

Our second reason is because any ostensible inconsistency would involve solely *legal* arguments; however, under our precedent, "the position to be estopped must generally be one of fact rather than of law or legal theory." *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005); *see also BancInsure*, 796 F.3d at 1240 ("Notably, we have held that judicial estoppel only applies when the position to be estopped is one of fact, not one of law."); *United States v. Villagrana-Flores*, 467 F.3d 1269, 1279 (10th Cir. 2006) ("Even if we were to agree that the government took two clearly conflicting positions, … the existence of a Fourth Amendment violation is a legal position, not a factual one, and therefore the first judicial estoppel factor has not been satisfied."). It cannot be disputed that the facial and as-applied rubrics are legal in nature and form the basis for legal arguments. Therefore, even if the United States has shifted on appeal from the position it held in the district court regarding the nature of its claim—*viz.*, from viewing it as facial to as-applied—that shift would be legal in nature. Consequently, under our precedent, the judicial-estoppel doctrine would be inapposite.[12]

In sum, for these two salient, independent reasons, we reject Defendants' judicial-estoppel contention.

---

[12] Of course, "lesser weapons," *Vehicle Mkt. Research*, 767 F.3d at 993, in the form of the doctrines of waiver or forfeiture might be employed in certain circumstances when a party changes its position on a legal issue on appeal, *see, e.g.*, *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127-28 (10th Cir. 2011). However, Defendants have not sought to invoke either of these weapons in connection with the United States's purported change of position regarding the nature of its claim, and we decline to assay the matter *sua sponte*.

3

Having concluded that the United States's argument with respect to its uniquely dual preemption claim is not barred by the judicial-estoppel doctrine, we must still determine which analytical construct—facial or as-applied—is the appropriate one for purposes of conducting the substantive preemption analysis. The parties' arguments reflect disagreement on this point. Defendants vigorously contend that facial standards should govern the resolution of the United States's preemption claim; in particular, they advocate for the use of the rigorous no-set-of-circumstances test, which is perhaps most closely associated with the Supreme Court's decision in *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is , of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *see also Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 588-89 (1987) ("In the present posture of this litigation, the Coastal Commission's identification of a possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock's facial challenge to the permit requirement."); *Reed*, 561 U.S. at 231 (Thomas, J., dissenting) (citing *Salerno*, and describing the no-set-of-circumstances test as "our most rigorous standard"); *see also* Aplts.' Opening Br. at 54-55 ("All that is required to defeat Plaintiff's *facial* challenge is the conclusion that Plaintiff has not met its burden of proving that Rule 16-308(E) necessarily and irreconcilably conflicts with federal grand jury practice in *all* instances"). The United States appears to generally resist application of a facial standard and, most notably, flatly rejects application of the *Salerno* standard, contending that it "would not ap-

ply because the United States is not challenging all of the applications of the New Mexico Rule, but rather a limited set of applications." U.S. Response Br. at 56.

We conclude, under the parameters defined below, that the standards for a facial claim are appropriate here.

a

As noted, the United States's "claim is 'as applied' in the sense that it does not seek to strike the [Rule 16-308(E)] in all its applications, but only to the extent it covers [federal prosecutors licensed in New Mexico]. The claim is 'facial' in that it is not limited to [a] particular case [i.e., a particular federal prosecutor's issuance of a specific attorney subpoena], but challenges application of the law more broadly to all [attorney subpoenas issued by all federal prosecutors licensed in New Mexico]." *Reed*, 561 U.S. at 194. The Supreme Court's decision in *Reed* is instructive in discerning the appropriate legal standard for resolution of this case because there (as the First Circuit observed) the Court "faced a similar duality in the First Amendment Context." *Showtime Entm't*, 769 F.3d at 70.

The foundation for the lawsuit in *Reed* was the public-records statute ("PRA") of the State of Washington, which "authorize[d] private parties to obtain copies of government documents, and the State construe[d] the PRA to cover submitted referendum petitions." 561 U.S. at 191. The Court succinctly introduced the case's factual background, the legal issue, and its resolution of it:

> This case arises out of a state law extending certain benefits to same-sex couples, and a corresponding referendum petition to put that

> law to a popular vote. Respondent intervenors invoked the PRA to obtain copies of the petition, with the names and addresses of the signers. Certain petition signers and the petition sponsor objected, arguing that such public disclosure would violate their rights under the First Amendment.
>
> The course of this litigation, however, has framed the legal question before us more broadly. The issue at this stage of the case is not whether disclosure of this particular petition would violate the First Amendment, but whether disclosure of referendum petitions in general would do so. We conclude that such disclosure does not as a general matter violate the First Amendment, and we therefore affirm the judgment of the Court of Appeals. We leave it to the lower courts to consider in the first instance the signers' more focused claim concerning disclosure of the information on this particular petition, which is pending before the District Court.

Id.

In the claim at issue in *Reed*, the plaintiffs averred that the PRA "violates the First Amendment *as applied* to referendum petitions." *Id.* at 194 (emphasis added) (quoting Count I of the Complaint). As here, the parties jousted about whether the claim was "properly viewed as a facial or as-applied challenge." *Id.* The Court, however, recognized that facial and as-applied are not mutually exclusive or antipodal constructs, observing that the claim "obviously has characteristics of both." *Id.* Elaborating, the Court said:

> The claim is "as applied" in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is "facial" in that it is not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions.

Id.

Critically for our purposes, the Court then offered guidance on how—in the context of such duality—to determine which analytical construct is most apt for resolution of the underlying substantive claim. It began by observing that "[t]he label [i.e., facial or as-applied] is not what matters." *Id.* "The important point," it said, is whether the "plaintiffs' claim and the relief that would follow … reach beyond the particular circumstances of the[] plaintiffs." *Id.* The Court concluded that this was true in that case, where the plaintiffs sought in the claim at issue "an injunction barring the secretary of state 'from making referendum petitions available to the public,'" not just an injunction barring the public disclosure of the referendum petition involving them, relating to same-sex marriage. *Id.* (quoting Count I of the Complaint). As such, the Court concluded that, irrespective of the "label" that the plaintiffs attached to their claim, "[t]hey must therefore satisfy our standards for a facial challenge to the extent of that reach." *Id.*

We read *Reed* as offering three key lessons for discerning the appropriate analytical lens for conducting a substantive constitutional analysis—lessons that are applicable at least where the claims evince a duality as here: first, the labels the parties attach to claims are not determinative; second, in determining whether to

apply facial standards to the claim, importantly, the court must focus on whether the claim and the relief therein extend beyond the plaintiffs' particular circumstances; and third, if the claim and relief do so, facial standards are applied but only to the universe of applications contemplated by plaintiffs' claim, not to all conceivable applications contemplated by the challenged provision. *See, e.g.*, *Showtime Entm't*, 769 F.3d at 70 (in holding that facial standards apply, stating "[w]e understand the relief sought here to be the invalidation of the zoning bylaws, not merely a change in their application to Showtime[;] …. it is clear that this is a request that 'reach[es] beyond' the precise circumstances of Showtime's license application" (third alteration in original) (quoting *Reed*, 561 U.S. at 194)); *Catholic Leadership Coal.*, 764 F.3d at 426 ("[T]o categorize a challenge as facial or as-applied we look to see whether the 'claim and the relief that would follow … reach beyond the particular circumstances of the [] plaintiffs.' If so, regardless of how the challenge is labeled by a plaintiff, '[t]hey must therefore satisfy our standards for a facial challenge to the extent of that reach.'" (second and third alterations in original) (citation omitted) (quoting *Reed*, 561 U.S. at 194)); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 522 (6th Cir. 2012) ("In this case, Plaintiffs label their claims as both facial and as-applied challenges to the Act, but because the 'plaintiffs' claim and the relief that would follow … reach beyond the particular circumstances of these plaintiffs,' the claims that are raised are properly reviewed as facial challenges to the Act." (quoting *Reed*, 561 U.S. at 194)); *see also Am. Fed'n of State, Cty. & Mun. Emps. Council 79*, 717 F.3d at 862 ("We look to the scope of the relief requested to determine whether a challenge is facial or as-applied in nature.").

Further explication may clarify the contours of the third lesson. As noted, a paradigmatic facial challenge is "a head-on attack [on a] legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." *Carel*, 668 F.3d at 1217 (quoting *Pruitt*, 502 F.3d at 1171). However, where the claim at issue evinces the kind of duality at issue here—that is, reflects characteristics of both facial and as-applied challenges—the facial analysis that *Reed* envisions is more limited in scope than that employed for paradigmatic facial claims.[13] Specifically, the analysis does not attempt to assay the constitutional validity of all or virtually all of the applications of the challenged provision. Instead, it focuses on only the constitutional validity of the subset of applications targeted by the plaintiffs' substantive claim. Consequently, using the language of *Reed*, plaintiffs asserting such a dual claim are obliged to "satisfy our standards for a facial challenge" but only "to the extent of that [claim's] reach"—which means only insofar as the claim is actually facial in character, in that it "reach[es] beyond the particular circumstances of the[] plaintiffs." *Reed*, 561 U.S. at 194.

This third lesson was concretely displayed in *Reed*. The Court concluded that the facial standard should be applied to the plaintiffs' dual claim—a claim that, in part, "obviously ha[d] characteristics of" a facial challenge, *id.*—because their claim attacked the public records statute's disclosure requirements related to "referendum petitions in general," not only the disclosure

[13] Indeed, one of our sister circuits has recognized that these dual claims are qualitatively distinct from paradigmatic facial claims by describing the former as "quasi-facial in nature." *Am. Fed'n of State, Cty. & Mun. Emps.*, 717 F.3d at 863.

requirements as they applied to the particular referendum petition at issue involving same-sex marriage, *id.* at 191. Demonstrating the third lesson, Reed only applied a facial analysis to the public records statute insofar as it was construed to reach referendum petitions—not to the statute as a whole, which applied to other records as well. *See id.* at 194. In other words, *Reed* applied the facial analysis to the public records statute "to the extent [that the claim's] reach" went beyond the disclosure requirements related to the same-sex marriage referendum petitions to include referendum petitions generally—but, critically, no further than that. *See id.* Some of our sister circuits appear to have tacitly recognized and applied *Reed*'s third lesson. *See, e.g.*, *Showtime Entm't*, 769 F.3d at 70-71 (applying facial analysis to claim that extended beyond plaintiff's specific circumstances—that is, a license application—but extending it no further than the zoning ordinance impacting plaintiff and other adjacent landowners engaged in the same business); *Am. Fed'n of State, Cty. & Mun. Emps.*, 717 F.3d at 865 (in the context of a dual claim "conclud[ing] that the district court granted what effectively amounted to facial relief—or, at the very least, relief that had enough characteristics of facial relief to demand satisfaction" of facial standards, and proceeding to apply those standards only to the extent that the challenged executive order reached beyond the particular circumstances of the plaintiffs).

Guided by *Reed* and its three key lessons, we conclude that facial standards should be applied to the United States's preemption claim but only to the extent that the challenged provisions of Rule 16-308(E) impact federal prosecutors licensed in New Mexico and their attorney-subpoena practices. First, because labels are not important, the United States's use of as-applied

verbiage in its complaint, *see* Aplts.' App. at 20 (seeking a declaration in its complaint that Rule 16-308(E) was "invalid, null, and void, *as applied to* federal attorneys for otherwise lawful actions" (emphasis added)), should not deter us from determining whether facial standards actually provide the appropriate touchstone. *See Reed*, 561 U.S. at 194 (applying facial standards, though the count of the complaint at issue alleged that the PRA "violate[d] the First Amendment *as applied* to referendum petitions" (emphasis added) (quoting Count I of the Complaint)). Second, the United States's claim and its desired relief clearly extend beyond the particular circumstances of any particular federal prosecutor issuing an attorney subpoena. The United States has sought to bar enforcement of certain provisions of Rule 16-308(E) relative to all federal prosecutors licensed in New Mexico who issue attorney subpoenas—irrespective, for example, of the evidentiary needs of a particular grand-jury investigation. Accordingly, following *Reed*, we rightly apply facial standards to the resolution of the United States's claim. Finally, applying *Reed*'s third lesson, the facial analysis should extend to a preemption analysis of the challenged provisions Rule 16-308(E), but only insofar as they apply to federal prosecutors licensed in New Mexico who issue attorney subpoenas.[14] We turn now to determine

[14] Indeed, although starting from different places, both parties appear to acknowledge that the relevant universe for analysis is this federal-prosecutor group. *Compare* Aplts.' Reply Br. at 3-4 ("Plaintiff must meet its burden to show that there is no set of circumstances under which Rule 16-308(E) could apply with respect to a prosecutor's conduct in issuing a federal grand subpoena to an attorney."), *with* U.S. Response Br. at 56 (noting that "the United States is not challenging all of the applications of the New Mexico Rule, but rather a limited set of applications" involving "federal prosecutors who issue grand jury subpoenas").

whether *Salerno's* no-set-of-circumstances language or some other rubric is the appropriate one to apply here.

b

i

Defendants argue that, in order to meet the "standard[] for a facial challenge," Aplts.' Reply Br. at 51-52 (quoting *Reed*, 561 U.S. at 194), the United States must demonstrate that "no set of circumstances exists under which [Rule 16-308(E)] would be valid," *Salerno*, 481 U.S. at 745. As noted, the United States contends that *Salerno*'s facial standards are inapplicable here.[15]

---

[15] The United States's resistance to *Salerno*'s no-set-of-circumstances language appears to rest in part on a misunderstanding regarding the universe of possible applications (i.e., circumstances) that would be at issue under that formula as used here. In this regard, the United States says, "The *Salerno* standard would not apply because the United States is not challenging *all of the applications* of the New Mexico Rule, but rather a limited set of applications." U.S. Response Br. at 56 (emphasis added). However, as we noted *supra* in the immediately preceding section discussing the third lesson that we glean from *Reed*, facial standards may be applicable even when plaintiffs challenge only a limited subset of the conceivable applications of a challenged provision—*viz.*, if their claims evince the kind of duality or "quasi-facial" character at issue here, *Am. Fed'n of State, Cty. & Mun. Emps.*, 717 F.3d at 863 (noting that "*Salerno* also applies when a court grants relief that is quasi-facial in nature")—but only to the extent of the challenged subset. *See Reed*, 561 U.S. at 194. Indeed, Defendants do not maintain that the proffered *Salerno* no-set-of-circumstances test should extend beyond the attorney-subpoena practices of federal prosecutors licensed in New Mexico. In any event, for the reasons noted *infra*, we are content to assume that the *Salerno* no-set-of-circumstances language is controlling, and we apply it consistent with *Reed*'s third lesson and our precedent interpreting *Salerno*.

While both the Supreme Court and our court have questioned whether *Salerno*'s no-set-of-circumstances language applies to all facial challenges, *see, e.g.*, *United States v. Stevens*, 559 U.S. 460, 472 (2010); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123 (10th Cir. 2012); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1255 (10th Cir. 2008), the Supreme Court has previously applied this language in at least two preemption cases, *see Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995); *Cal. Coastal Comm'n*, 480 U.S. at 593; *see also Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 564 (5th Cir. 2013) (applying *Salerno* to a facial preemption challenge). We thus are prepared to assume *arguendo* that *Salerno*'s no-set-of-circumstances language does apply here.

Even so, we have construed *Salerno*'s no-set-of-circumstances language "not as setting forth a *test* for facial challenges, but rather as describing the *result* of a facial challenge in which a statute fails to satisfy the appropriate constitutional standard." *Doe*, 667 F.3d at 1127; *see also* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges & the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 386 (1998) ("*Salerno* is best understood, not as a facial challenge 'test' at all, but rather as a descriptive claim about a statute whose terms state an invalid rule of law ...."). A facial challenge is best understood as "a challenge to the terms of the statute, not hypothetical applications," *Doe*, 667 F.3d at 1127, and is resolved "simply by applying the relevant constitutional test to the challenged statute without attempting to conjure up whether or not there is a hypothetical situation in which application of the statute might be valid," *id.* at 1124; *see also City of Los Angeles v. Patel*, --- U.S. ----, 135 S. Ct. 2443, 2451

(2015) (stating that, in resolving a facial challenge, "the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct," and not every hypothetical possibility); Fallon, *supra*, at 1328 ("In a practical sense, doctrinal tests of constitutional validity can thus produce what are effectively facial challenges."). "In other words, where a statute fails the relevant constitutional test … it can no longer be constitutionally applied to anyone—and thus there is 'no set of circumstances' in which the statute would be valid." *Doe*, 667 F.3d at 1127.

ii

In this case, the relevant constitutional test for assaying the facial validity of the challenged provisions of Rule 16-308(E) involves the preemption doctrine. The basic taxonomy of that doctrine—which is based on the Constitution's Supremacy Clause, U.S. Const. art. VI, § 2—is well-established: "Put simply, federal law preempts contrary state law." *Hughes v. Talen Energy Mktg., LLC*, --- U.S. ----, 136 S. Ct. 1288, 1297 (2016); *see, e.g.*, *Arizona v. United States*, --- U.S. ----, 132 S. Ct. 2492, 2500-01 (2012); *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010). More specifically, among the "three types of preemption," *U.S. Airways*, 627 F.3d at 1324, the one relevant here is called conflict preemption.[16] In that species of preemp-

[16] The other two are called express preemption and field preemption. *See, e.g.*, *English v. Gen. Elec. Co.*, 496 U.S. 72, 79-80 (1990) (noting, as to express preemption, that "Congress can define explicitly the extent to which its enactments pre-empt state law"; and, as to field preemption, that "state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively"); *see also U.S. Airways*, 627 F.3d at 1324 (stating, in enumerating the two others, that "1) 'express preemption, which occurs when the language of the federal

tion, a state-law provision will be preempted if it conflicts with federal law, either because (1) "compliance with both federal and state regulations is a physical impossibility," *Arizona*, 132 S. Ct. at 2501 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)), or because the provision (2) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal law, *id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *accord Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65 (2002); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Skull Valley Band of Goshute Indians v. Nielson (Skull Valley)*, 376 F.3d 1223, 1240 (10th Cir. 2004); *see also* Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and The Federal System* 646 (6th ed. 2009) ("Conflict preemption … embraces two distinct situations. In the easier but far rarer case, compliance with both federal and state duties is simply impossible. In the second and more common situation, compliance with both laws is possible, yet state law poses an obstacle to the achievement of federal purposes." (citation omitted)).[17]

---

statute reveals an express congressional intent to preempt state law;' [and] 2) 'field preemption, which occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a State to supplement it ….'" (quoting *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998))). *But cf. Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (noting the Court's "general exhortation not to rely on talismanic pre-emption vocabulary").

[17] Conflict preemption is a form of implied preemption. *See, e.g.*, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (noting the Court's historical recognition of "at least two types of implied pre-emption," that is, "field pre-emption" and "conflict pre-emption"); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 765 (10th Cir. 2010) (noting that "state laws may be impliedly

Generally speaking, "[t]here is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it." *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).[18] Frequently, courts are called upon to discern the preemptive effect of the latter—federal statutes (as well as regulations promulgated under them). *See, e.g.*, *Crosby*, 530 U.S. at 363, 373, 374 n.8 (noting that "[w]e

---

preempted either as a result of conflict or field preemption"); *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 795 (10th Cir. 2000) ("Implied preemption exists when (1) state law regulates conduct in a field Congress intended the Federal Government to occupy exclusively, or (2) when state law actually conflicts with federal law.").

[18] In certain limited settings involving federal interests, the Supreme Court has recognized that federal common law—absent an operative constitutional or congressional text—may still preempt state law. *See Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988) ("[W]e have held that a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" (citation omitted) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981))); *see also Helfrich v. Blue Cross and Blue Shield Ass'n*, 804 F.3d 1090, 1098 (10th Cir. 2015) ("In our view, the analysis in *Boyle* requires the displacement of the Kansas antisubrogation regulation in the context of the Blue Cross claim against Ms. Helfrich."); *N.J. Retail Merch. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 392 (3d Cir. 2012) ("It is undisputed that state law can be preempted by federal common law as well as federal statutes."). This doctrine of federal common law preemption is not at issue here. In particular, as explicated *infra*, as to the primary contested issue of substance in this case—whether Rule 16-308(E)'s challenged provisions are preempted as applied to federal prosecutors in the grand jury context—we predicate our preemption holding on the text of the Grand Jury Clause of the Fifth Amendment of the Constitution, as interpreted by the Supreme Court, not on federal common law.

find that the state law undermines the intended purpose and 'natural effect' of at least three provisions of the federal Act" and "declin[ing] … to pass on the First Circuit's rulings addressing the foreign affairs power and the dormant Foreign Commerce Clause"); *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 791-92 (10th Cir. 2000) ("Congress has the power to preempt state law under … the Supremacy Clause. '[A]n agency's preemption regulations, promulgated pursuant to Congressional authority, have the same preemptive effect as statutes.'" (footnote omitted) (citation omitted) (quoting *Meyer v. Conlon*, 162 F.3d 1264, 1268 (10th Cir. 1998))); *Skull Valley*, 376 F.3d at 1240 ("[I]n order to determine whether the Utah statutes at issue are preempted, we must examine the federal statutes regulating nuclear power."); *see also Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1127 (10th Cir. 2007) ("This case concerns the preemptive scope of the Interstate Commerce Commission Termination Act of 1995 (ICCTA).").

However, as most relevant here, the constitutional text itself may displace conflicting state law. *See Chy Lung v. Freeman*, 92 U.S. 275, 281 (1875) ("In any view which we can take of this [California] statute, it is in conflict with the Constitution of the United States, and therefore void.); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-50 (1st Cir. 1999) (proceeding from the premise that "[t]he Constitution's foreign affairs provisions have been long understood to stand for the principle that power over foreign affairs is vested exclusively in the federal government," in holding that the state law at issue was preempted under "the federal foreign affairs power as interpreted by the Supreme Court"), *aff'd on other grounds sub nom. Crosby*, 530 U.S. at 373, 374 & n.8. *Compare DeCanas v. Bica*, 424

U.S. 351, 355 (1976) (considering the possibility that "the Constitution of its own force" may preempt state law), *superseded by statute on other grounds as recognized by Chamber of Commerce v. Whiting*, 563 U.S. 582, 590 (2011), *with Keller v. City of Fremont*, 719 F.3d 931, 940 (8th Cir. 2013) ("In [*De Canas*,] the Supreme Court addressed the extent to which the Constitution preempts state and local laws ...."). In engaging in our preemption inquiry, we focus on "the terms of [Rule 16-308(E)], not hypothetical applications." *See Doe*, 667 F.3d at 1127; *cf. Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005) ("[W]hat is preempted here is the permitting process itself, not the length or outcome of that process *in particular cases*." (emphasis added)).[19]

4

Having given content to the standards for the facial challenge at play here, we now proceed to apply the preemption test to the terms of the challenged provisions of Rule 16-308(E). Our analysis is guided by our reasoning in *Colorado Supreme Court II*, where we considered the constitutionality of an identical attorney-subpoena rule. *See* 189 F.3d at 1283 n.2. In resolving the preemption claim in that case, we framed the inquiry as follows: "whether [the rule] violates the Supremacy Clause ... turns on whether the rule is a rule of professional ethics clearly covered by the McDade

[19] This approach of applying the preemption doctrine to the terms of Rule 16-308(E) rather than speculating about potential valid applications accords with how other circuit panels—including a panel of our own in *Colorado Supreme Court II*—have addressed preemption challenges to state ethics rules. *See, e.g.*, *Stern*, 214 F.3d at 20-21; *Colorado Supreme Court II*, 189 F.3d at 1288-89; *Baylson*, 975 F.2d at 111-12.

Act, or a substantive or procedural rule that is inconsistent with federal law." *Id.* at 1284. Even though we determined that the rule was an ethics rule, we nevertheless examined whether this ethics rule was otherwise "inconsistent with federal law" and thus preempted. *Id.* at 1289. We apply this analytical framework to the challenged provisions of Rule 16-308(E).[20]

---

[20] Our esteemed colleague in dissent contends that our examination in *Colorado Supreme Court II* of whether Colorado's Rule 3.8—which we had determined was an ethics rule—was "inconsistent with federal law," 189 F.3d at 1289, was "a brief aside at the end of the opinion," Dissent at [82a], without decisional significance. In this vein, the dissent contends that "the first and only question we must answer is: whether the rule is one governing ethics? If it is, considering the burden on federal interests is unnecessary because Congress has authorized the rule's application to federal prosecutors." Dissent at [79a]. We must respectfully disagree. The panel in *Colorado Supreme Court II* effectively engaged in a conflict-preemption analysis—an inquiry into the presence of impermissible inconsistency *vel non* with federal law—*after* determining that Colorado Rule 3.8 was an ethics rule, and expressly rendered a holding on the preemption question. In this regard, we stated there:

> [W]e *hold* that Rule 3.8, in its mandate that a federal prosecutor ought not to disturb an attorney-client relationship without a showing of cause, does not conflict with Fed. R. CIM. P. 17, which details only the procedures for issuing a proper subpoena. Rule 17 does not abrogate the power of courts to hold an attorney to the broad normative principles of attorney self-conduct. Accordingly, we *hold* that Rule 3.8 is not inconsistent with federal law and can be adopted and enforced by the state defendants against federal prosecutors.

Colorado Supreme Court II, 189 F.3d at 1288-89 (emphases added). It is pellucid that we considered our holding regarding the absence of an impermissible inconsistency (i.e., the absence of a conflict) with federal law essential to our conclusion that Colorado could enforce Rule 3.8 against federal prosecutors in the trial (i.e.,

a

The McDade Act explicitly subjects federal attorneys "to State laws and rules … governing attorneys in each State … to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a). In *Colorado Supreme Court II*, we considered whether the Colorado rule could be deemed an ethics rule—notably, a "normative legal standard[] that guides the conduct of an attorney"—such that it fell within the McDade Act's purview. 189 F.3d at 1285. We defined an ethics rule as one that: (1) "bar[s] conduct recognized by consensus within the profession as inappropriate"; (2) is phrased as "a commandment dealing with morals and principles"; (3) is "vague [and] sweeping" rather than highly specific; and (4) is "directed at the attorney herself" rather than "at the progress of the claim." *Id.* at 1287-88. Measured against these criteria, we concluded that the Colorado rule was an ethics rule of the type that the McDade Act contemplates. More specifically, as we saw it, the rule sought to safeguard the attorney-client relationship—which "by general consensus of our profession [is] worthy of protection"—and was phrased as a vague, sweeping commandment "directed at the prosecutor, not at the cause of action." *Id.* at 1288.

This reasoning applies with equal force to Rule 16-308(E). It contains identical language to that found in Colorado Rule 3.8(e), and, as the commentary to the

---

non-grand-jury context). It was not an aside or casual piece of dictum that we may now disregard. Therefore, contrary to the dissent, in applying the rule of *Colorado Supreme Court II*, we do not believe that our analysis can end if we determine that Rule 16-308(E) is an ethics rule. Instead, we must still determine whether Rule 16-308(E) conflicts with relevant federal law.

rule makes clear, it is intended to limit the issuance of attorney subpoenas to only "those situations in which there is a genuine need to intrude into the client-lawyer relationship." N.M. Rules of Prof'l Conduct, N.M.R.A. 16-308(E) cmt. 4. As such, under *Colorado Supreme Court II*, Rule 16-308(E) is an ethics rule of the sort covered by the McDade Act.[21]

b

We must next determine whether the challenged provisions of Rule 16-308(E), despite being within the purview of the McDade Act, are otherwise inconsistent with (i.e., conflict with) federal law. As evident from the analysis in *Colorado Supreme Court II*, the fact that a challenged state rule is determined to be an ethics rule within the McDade Act's ambit does not necessarily mean that Congress intended that rule to trump or impede the effectuation of otherwise applicable federal law. *See Colorado Supreme Court II*, 189 F.3d at 1289 (proceeding to determine whether the ethics rule covered by the McDade Act was otherwise "inconsistent with federal law"); *see also Stern*, 214 F.3d at 19 ("[I]t 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."); *cf. United States v. Lowery*, 166 F.3d 1119, 1125 (11th Cir. 1999) ("When it comes to the admissibility of evidence in federal court, the federal interest in enforce-

[21] In contrast, in *Stern*, the First Circuit concluded that the Massachusetts rule at issue "clearly extend[ed] beyond the shelter that section 530B provides" because it "add[ed] a novel procedural step—the opportunity for a pre-service adversarial hearing." 214 F.3d at 20. New Mexico Rule 16-308(E) contains no such procedural hurdle.

ment of federal law, including federal evidentiary rules, is paramount. State rules of professional conduct, or state rules on any subject, cannot trump the Federal Rules of Evidence.... There is nothing in the language or legislative history of the [McDade] Act that would support such a radical notion."). Indeed, courts have specifically concluded that a Supremacy Clause analysis may still be appropriate and necessary in instances where Congress has granted states regulatory authority through language similar to that employed by the McDade Act (e.g., "to the same extent ... as"). *See Hancock v. Train*, 426 U.S. 167, 173, 182 n.41, 198 (1976) (holding with reference to 42 U.S.C. § 1857f, which requires federal agencies engaged in activities producing air pollution to comply with state "requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements," that Congress did not "evince[] with satisfactory clarity" the intent to "subject[] federal installations to state permit requirements"); *Colo. Dep't of Pub. Health & Env't, Hazardous Materials & Waste Mgmt. Div. v. United States*, 693 F.3d 1214, 1217 (10th Cir. 2012) (noting, where "the federal government and its agencies must comply with an [Environmental Protection Agency] authorized state program regulating hazardous waste" under 42 U.S.C. § 6961 "to the same extent, as any person," that the congressional grant of regulatory authority to the states "does not insulate a state regulation from federal preemption").

i

The United States concedes that *Colorado Supreme Court II* dictates the answer to the otherwise-inconsistent-with-federal-law inquiry with respect to criminal proceedings in the trial (i.e., outside of the grand-jury) context. Specifically, the United States

acknowledges that Rule 16-308(E) does not conflict with federal law governing trial subpoenas; therefore, it is not preempted. In this regard, in *Colorado Supreme Court II*, we determined that a Colorado ethics rule (i.e., Rule 3.8(e)) that had language identical to Rule 16-308(E) was not in conflict with Federal Rule of Criminal Procedure 17—which, generally speaking, governs the process for subpoenaing testimonial and documentary evidence for trial—because Rule 17 was procedural and did "not abrogate the power of courts to hold an attorney to the broad normative principles of attorney self-conduct." 189 F.3d at 1289.[22] The United States wisely acknowledges that this holding is dispositive here. Therefore, we conclude that the district court appropriately determined that the challenged provisions of Rule 16-308(E) are not preempted relative to federal prosecutors' issuance of attorney subpoenas in criminal proceedings outside of the grand-jury context.[23]

---

[22] Notably, we distinguished *Baylson*, in which the Third Circuit held that Pennsylvania's attorney-subpoena rule was preempted in the trial context, because the Pennsylvania rule contained a judicial preapproval requirement and Rule 17 makes "no allowances for the court's intervention in the subpoena procedures." *Colorado Supreme Court II*, 189 F.3d at 1286. Like the Colorado rule, Rule 16-308(E) contains no such preapproval requirement.

[23] We recognize that after we issued *Colorado Supreme Court II*, the First Circuit in *Stern* held that "the 'essentiality' and 'no feasible alternative' requirements [of the largely similar ethics rule at issue there] are substantially more onerous … than the traditional motion-to-quash standards" of Rule 17. 214 F.3d at 18. Specifically, the First Circuit held that essentiality is "a more demanding criterion than relevancy or materiality" and that "Rule 17 jurisprudence contains no corollary to the" no-other-feasible-alternative requirement. *Id.* It thus concluded that these "novel requirements … threaten[ed] to preclude the service of otherwise unimpeachable subpoenas and thus restrict[ed] the flow of relevant, material evidence to the factfinder." *Id.* In substance, the

ii

Though its mode of analysis is still relevant, *Colorado Supreme Court II*'s holding does not speak to the question before us: specifically, the court did not address whether the challenged provisions of Rule 16-308(E) are preempted in the grand-jury context. *See* 189 F.3d at 1284. Resolving this question as a matter of first impression, we conclude that Rule 16-308(E)'s challenged provisions are conflict-preempted[24] in the

---

court concluded that the essentiality and no-other-feasible-alternative provisions conflicted with otherwise applicable federal law relative to trial subpoenas (i.e., subpoenas issued outside of the grand-jury context) and were thus preempted. Notwithstanding the First Circuit's contrary reasoning in *Stern*, we remain bound by our controlling decision in *Colorado Supreme Court II*, which concluded that a rule identical to Rule 16-308(E) did not run afoul of federal law governing trial subpoenas. *See Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1230 n.5 (10th Cir. 2010) ("[T]he precedent of prior panels which we must follow includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law." (alteration in original) (quoting *Mendiola v. Holder*, 585 F.3d 1303, 1310 (10th Cir. 2009), *overruled on other grounds by Contreras-Bocanegra v. Holder*, 678 F.3d 811, 819 (10th Cir. 2012))).

[24] The United States does not argue that state ethics regulation of federal prosecutors practicing before grand juries is expressly preempted. Moreover, it appears to concede that Congress has not occupied the field of ethics regulation of federal prosecutors practicing before grand juries; in this regard, it has noted that, through the McDade Act, "Congress intended to require federal prosecutors to comply with state ethical rules and that those rules would apply to grand jury practice." U.S. Response Br. at 44. Notably, as to the latter (i.e., field preemption), we have previously expressed "considerable doubt" as to whether "Rules of Professional Conduct … apply to federal prosecutors' practice before a federal grand jury." *In re Grand Jury Proceedings*, 616 F.3d 1172, 1186 (10th Cir. 2010). Yet, given the United States's apparent concession regarding the applicability of at least

grand-jury setting because the essentiality and no-other-feasible-alternative requirements pose "an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal legal regime governing grand-jury practice. *Arizona*, 132 S. Ct. at 2501 (quoting *Hines*, 312 U.S. at 67).

The law of the federal grand jury springs from the fertile and robust soil of the Anglo-American legal tradition and the Constitution itself. *See United States v. Williams*, 504 U.S. 36, 47 (1992) ("'[R]ooted in long centuries of Anglo-American history,' the grand jury is mentioned in the Bill of Rights …." (citation omitted) (quoting *Hannah v. Larche*, 363 U.S. 420, 490 (1960) (Frankfurter, J., concurring in result)); *Costello v. United States*, 350 U.S. 359, 362 (1956) ("The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor."). And, significantly, this body of grand-jury law has a firm and explicit footing in the Constitution's text through the Grand Jury Clause of the Fifth Amendment of the Bill of Rights, which "provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries." *Costello*, 350 U.S. at 361-62; *see* U.S. Const. amend. V ("No person shall be held to answer for a capital, or other-

---

some state ethics rules in the grand-jury context, and the clear conflict between the particular challenged provisions of Rule 16-308(E) and federal grand-jury law, we need not (and do not) endeavor to reach any definitive, categorical conclusions on whether state ethics rules are excluded from the field of federal prosecutors' practices before grand juries.

wise infamous crime, unless on a presentment or indictment of a Grand Jury ….").

By the Framers' explicit design, the federal grand jury occupies a uniquely independent space in the constitutional text, apart from the three branches of government. *See Williams*, 504 U.S. at 47 ("It [i.e., the grand jury] has not been textually assigned … to any of the branches described in the first three Articles. It "'is a constitutional fixture in its own right.'" (quoting *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977))); *see also R. Enters., Inc.*, 498 U.S. at 297 ("The grand jury occupies a unique role in our criminal justice system."); *Chanen*, 549 F.2d at 1312 ("[U]nder the constitutional scheme, the grand jury is not and should not be captive to any of the three branches. The grand jury is a pre-constitutional institution given constitutional stature by the Fifth Amendment but not relegated by the Constitution to a position within any of the three branches of the government." (citation omitted)); Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 Cornell L. Rev. 703, 727 (2008) ("Not only is the grand jury independent of the three branches of government, but it serves as a check on them."); *cf. United States v. Kilpatrick*, 821 F.2d 1456, 1465 (10th Cir. 1987) ("The separation of powers doctrine mandates judicial respect for the independence of both the prosecutor *and* the grand jury." (emphasis added)).

By creating this space, the Framers sought to ensure that federal prosecutions for serious crimes are commenced through a fair and thorough process by a body that is free of corrupting influences and vested with the broad investigative powers necessary to find the truth. *See Costello*, 350 U.S. at 362 ("The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against

persons believed to have committed crimes.... Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor."); *Williams*, 504 U.S. at 47 ("[T]he whole theory of its [i.e., the grand jury's] function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people."); Fairfax, *supra*, at 729 ("Just as constitutional structure provides each of the branches with the prerogative to check the others, the grand jury, with its robust discretion, checks the judicial, executive, and legislative branches and represents a structural protection of individual rights." (footnote omitted)); Note, Susan M. Schiappa, *Preserving the Autonomy and Function of the Grand Jury:* United States v. Williams, 43 Cath. U. L. Rev. 311, 330-31 (1993) ("The Framers of the Constitution intended the federal grand jury, like its English forerunner, to act as both a 'sword and a shield.' As a sword, the grand jury has extraordinary power to carry out its investigatory function, and acts free of procedural or evidentiary rules.... As a shield, the grand jury is designed 'to provide a fair method for instituting criminal proceedings.'" (footnotes omitted) (citations omitted)); *see also United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 430 (1983) ("The purpose of the grand jury requires that it remain free, within constitutional and statutory limits, to operate 'independently of either prosecuting attorney or judge.'" (quoting *Stirone v. United States*, 361 U.S. 212, 218 (1960))).

As with most express provisions of the Constitution,[25] the Framers did not bequeath a detailed blueprint in the Fifth Amendment's Grand Jury Clause of how its textual constraint on the prosecution of serious crimes should be effectuated. Federal courts have endeavored, however, to adhere closely to the text and animating purposes of the Fifth Amendment's Grand Jury Clause in clarifying the scope of the grand jury's

---

[25] In 1819, the Supreme Court made clear that "there is no phrase in the [Constitution] which[] … requires that everything granted shall be expressly and minutely described." *M'Culloch v. State*, 17 U.S. 316, 406 (1819); *see also id.* at 406-07 ("The men who drew and adopted [the Constitution] had experienced the embarrassments resulting from the insertion of [certain] word[s] in the articles of confederation, and probably omitted [them], to avoid those embarrassments."). In an informative manner, the Court elaborated:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.

Id. at 407; *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, --- U.S. ---, 132 S. Ct. 2566, 2615 (2012) (Ginsburg, J., concurring in part and dissenting in part) (observing that the Framers "recognized that the Constitution was of necessity a 'great outlin[e],' not a detailed blueprint, and that its provisions included broad concepts, to be 'explained by the context or by the facts of the case.'" 132 S. Ct. at 2615 (alteration in original) (citations omitted)).

investigative power.[26] In this regard, the Supreme Court has recognized that the Framers envisioned that the federal grand jury would possess a broad range of discretion; more specifically, the Court has held that the grand jury's function "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." *R. Enters., Inc.*, 498 U.S. at 297. In carrying out its role in the criminal-justice system, a grand jury "paints with a broad brush," *id.*; unlike federal courts, it is not bound by Article III's case or controversy requirement or by "the technical procedural and evidentiary rules governing the conduct of criminal

---

[26] Indeed, the federal courts' grand-jury jurisprudence reflects a careful, ongoing effort to glean inferences from the text and history of the Constitution's Grand Jury Clause regarding the Framer's conception of the proper scope of the grand jury's investigative powers. For example, in *Costello*, the Court rebuffed a defendant's argument that indictments should be "open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury." 350 U.S. at 363. The Court reasoned that the Fifth Amendment's vision of the proper functioning of the grand jury would not permit such a rule. In this regard, the court observed:

> [T]he resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment.

Id. As *Costello* illustrates, federal grand-jury law is firmly grounded in the text and history of the Grand Jury Clause of the Fifth Amendment. Accordingly, insofar as Rule 16-308(E) is determined to be preempted in the grand-jury context—a conclusion that we reach *infra*—the law effectuating that preemption through the Supremacy Clause would be the Grand Jury Clause of the Fifth Amendment.

trials," *Williams*, 504 U.S. at 66-67 (quoting *United States v. Calandra*, 41 U.S. 338, 343 (1974)); *see also Costello*, 350 U.S. at 362 (noting that grand juries carry out their investigative function "free from technical rules"). Thus, while a grand jury may not "engage in arbitrary fishing expeditions," *R. Enters., Inc.*, 498 U.S. at 299, it has relatively broad power to run down available clues and examine all relevant witnesses to determine if there is probable cause to prosecute a particular defendant, *see Branzburg v. Hayes*, 408 U.S. 665, 701 (1972).

Of particular importance here is the Supreme Court's recognition that, in performing its constitutionally sanctioned investigative role, a grand jury may issue subpoenas that do not meet the stringent requirements imposed on trial subpoenas. Specifically, in *United States v. R. Enterprises, Inc.*, the Court held that the standards for trial subpoenas announced in *United States v. Nixon*, 418 U.S. 683 (1974)—namely, relevancy, admissibility, and specificity—do not apply to grand-jury subpoenas. *See R. Enters., Inc.*, 498 U.S. at 298-99. Instead, where a grand-jury subpoena is challenged on relevancy grounds, it will only be quashed if "there is no reasonable *possibility* that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *Id.* at 301 (emphasis added). The Court concluded that the more restrictive *Nixon* standards "would invite procedural delays and detours while courts evaluate[d] the relevancy and admissibility of documents." *Id.* at 298; *see also In re Grand Jury Subpoenas*, 906 F.2d 1485, 1496 (10th Cir. 1990) (stating that "the government is not required to

make any further showing of need or lack of another source for the subpoenaed information").[27]

In light of the Supreme Court's indication—in construing the mandate of the Grand Jury Clause—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, we believe that Rule 16-308(E)'s rigorous standards—i.e., the requirements of essentiality and no-other-feasible-alternative—clearly create "an obstacle to the accomplishment and execution of" the federal grand jury's constitutionally authorized investigative function. *Arizona*, 132 S. Ct. at 2501 (quoting *Hines*, 312 U.S. at 67). To be sure, generally speaking, we do not question the proposition that Congress has consid-

---

[27] The Court in *R. Enterprises* also focused on the possibility that a higher relevance standard would require prosecutors to "explain in too much detail the particular reasons underlying a subpoena" and would thus "compromise 'the indispensable secrecy of grand jury proceedings.'" 498 U.S. at 299 (quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943)); *see* Fed. R. Crim. P. 6(e) (imposing secrecy requirements on participants in the grand-jury process). In the context of challenges to the validity of state attorney-subpoena rules, some courts—including our own—have taken note of the rules' possible impact on grand-jury secrecy. *See, e.g.*, *Stern*, 214 F.3d at 16 (noting that the rule at issue "undermine[d] the secrecy of [grand-jury] proceedings"); *see also Colorado Supreme Court I*, 87 F.3d at 1166 (concluding that the allegation that the Colorado rule compromised grand-jury secrecy was sufficient to meet the injury-in-fact requirement for purposes of standing). We acknowledge that grand-jury secrecy may be an important consideration in determining whether a state ethics rule is preempted. However, because Rule 16-308(E)'s heightened standards—and the concomitant restriction on evidence available to a grand jury—provide an ample basis for us to conclude that the challenged provisions of Rule 16-308(E) are preempted, we need not definitively opine on the merits of this alternative secrecy rationale.

erable leeway to authorize states to regulate the ethical conduct of federal prosecutors practicing before grand juries. *Cf. In re Grand Jury*, 111 F.3d 1066, 1073 (3d Cir. 1997) ("Just as grand juries must operate within the confines of the Constitution, so too must they comply with the limitations imposed on them by Congress (*as long as those limitations are not unconstitutional*)." (emphasis added) (citation omitted)). However, we remain acutely aware of the fact that, by the Framers' express design, the federal grand jury has an independent constitutional stature and stands apart from all three branches of government. Consequently, it seems safe to reason that Congress's power to authorize states to burden the grand jury's investigative functions is not unbounded. At the very least, we presume that Congress is not free to authorize states to eviscerate the grand jury and render it nugatory. *See Ex parte Wilson*, 114 U.S. 417, 426 (1885) ("The purpose of the [Grand Jury Clause of the Fifth] amendment was to limit *the powers of the legislature*, as well as of the prosecuting officers, of the United States.... [T]he constitution protect[s] every one from being prosecuted, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment[;] no declaration of congress is needed to secure or *competent to defeat* the constitutional safeguard." (emphases added) (citations omitted)); *accord Mackin v. United States*, 117 U.S. 348, 351 (1886).

We do not suggest that Rule 16-308(E)'s rigorous standards tread closely to this danger zone or have the foregoing nullifying effect. However, even assuming (without deciding) that Congress would be free to authorize states to regulate—through provisions like the challenged portions of Rule 16-308(E)—the ethical conduct of federal prosecutors practicing before grand ju-

ries, the significant burdens that such provisions would impose on grand juries' constitutionally authorized investigative functions, compel us to insist that, if Congress is to so act, that it speak more clearly than it has in the McDade Act.[28] *See Hancock*, 426 U.S. at 179 ("Because of the fundamental importance of the principles shielding federal installations and *activities* from regulation by the States, an authorization of state regulation is found only when and to the extent there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'" (emphasis added) (footnotes omitted)); *accord Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) ("It is well settled that the *activities* of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation." (emphasis added) (quoting *EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 211 (1976))); *see also Stern*, 214 F.3d at 19 (insisting, under the authority of *Hancock*, on clear congressional authorization for state ethics rules to regulate federal grand-jury practice, and concluding that the McDade Act does not evince it).

---

[28] Unlike our dissenting colleague, given the unique, independent constitutional stature of the federal grand jury, we believe it would be inappropriate and especially unwise for us to infer from historical events preceding the passage of the McDade Act or the Act's "general reference to ethics rules," Dissent at [92a-93a], Congress's intent to permit states—through ethical rules—to impose such significant restrictions on the grand jury's investigative function. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("[T]he purpose must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires.").

Under Rule 16-308(E), a prosecutor must determine whether there is a reasonable basis to believe that an attorney subpoena is "essential" and that there is "no other feasible alternative" source from which to obtain the information; this is unquestionably a much greater burden than the federal requirement that there be only a "reasonable *possibility* that the [information] … [is] relevant to the general subject of the grand jury's investigation." *R. Enters., Inc.*, 498 U.S. at 301 (emphasis added). Holding federal prosecutors licensed in New Mexico to this higher standard would invariably restrict the information a grand jury could consider, and thus would "impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Id.* at 299 (quoting *United States v. Dionisio*, 410 U.S. 1, 17 (1973)); *see also Stern*, 214 F.3d at 16-17 (concluding that the essentiality and no-other-feasible-alternative requirements would "encroach[] unduly upon grand jury prerogatives," as described in *R. Enterprises*); *Baylson*, 975 F.2d at 109-10 (concluding that substantive restraints on grand-jury subpoenas, including a no-other-feasible-alternative requirement, were inconsistent with *R. Enterprises*).

In sum, we conclude that the challenged provisions of Rule 16-308(E) impose on every federal prosecutor licensed in New Mexico who seeks to issue an attorney subpoena in the grand-jury context far more onerous conditions than those required by federal law. More specifically, because such heightened requirements for attorney subpoenas would impede the grand jury's broad investigative mandate—which the Framers specifically envisioned in enacting the Grand Jury Clause of the Fifth Amendment—the challenged provisions of Rule 16-308(E) conflict with federal law and are preempted.

D

Finally, Defendants challenge the scope of the injunction that the district court issued. We review this question for an abuse of discretion. *See ClearOne Commc'ns, Inc. v. Bowers*, 643 F.3d 735, 752 (10th Cir. 2011); *accord Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs*, 613 F.3d 1229, 1239-40 (10th Cir. 2010). That is, we reverse if the district court's injunction embodies an "arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *ClearOne Commc'ns*, 643 F.3d at 752 (quoting *Rocky Mountain Christian Church*, 613 F.3d at 1239-40).

The district court's injunction in this case prohibits Defendants "from instituting, prosecuting, or continuing any disciplinary proceeding or action against any federal prosecutor for otherwise lawful actions taken in the course of a grand jury investigation or proceeding on the ground that such attorneys violated Rule 16-308(E) of the New Mexico Rules of Professional Conduct." Aplts.' App. at 326-27. Defendants claim that this injunction "is much broader than necessary to remedy the alleged conflict" in two respects. Aplts.' Opening Br. at 55.

First, Defendants argue that the injunction would be better tailored to concerns about grand-jury secrecy if it is limited to "particular instance[s]" where a federal prosecutor is able to make "an adequate showing that the grand jury proceedings [a]re both secret and relevant to the disciplinary charges." *Id.* at 56. On the basis that we resolve this case, this argument is unavailing: regardless of whether disciplinary proceedings would only compromise grand-jury secrecy in *certain* situations—a proposition we consider dubious—the essentiality and no-other-feasible-alternative require-

ments conflict overall with federal grand-jury practice because they impose overly restrictive standards for the issuance of attorney subpoenas in *every* instance. Thus, a broad injunction is appropriate to remedy such a conflict.

Second, Defendants claim that the injunction would also prohibit the enforcement of Rule 16-308(E)(1) against a federal prosecutor who knowingly subpoenas a lawyer for privileged information. While the district court's order does refer generally to "Rule 16-308(E)," *see, e.g.*, Aplts.' App. at 327, the language of the injunction and the context of the order make plain that the enforcement of Rule 16-308(E)(1) is not prohibited. *See Alley v. U.S. Dep't of Health & Human Servs.*, 590 F.3d 1195, 1208 (11th Cir. 2009) ("What the plain text of the … injunction indicates, the context in which that language was written reinforces; much of that context is provided in the opinion issued in tandem with the injunction."); *Youakim v. McDonald*, 71 F.3d 1274, 1283 (7th Cir. 1995) ("[T]he terms of an injunction, like any other disputed writing, must be construed in their proper context.").

Here, the United States has not challenged the constitutionality of Rule 16-308(E)(1)'s requirement that prosecutors possess a reasonable belief that information sought from attorneys by subpoena be non-privileged, and the district court expressly recognized that Rule 16-308(E)(1) was not at issue. Furthermore, the injunction is only limited to "otherwise lawful actions" taken by prosecutors, Aplts.' App. at 327, and the knowing issuance of subpoenas to obtain privileged information is inconsistent with federal law, *see In re Grand Jury Proceedings*, 616 F.3d at 1181-82 (examining whether information sought by subpoena was covered by the attorney-client privilege, which would

"provide legitimate grounds for refusing to comply with a grand jury subpoena"); *In re Impounded*, 241 F.3d 308, 316 (3d Cir. 2001) (recognizing that "[t]he grand jury may not 'itself violate a valid privilege'" and that "courts may quash an otherwise valid grand jury subpoena for an attorney's testimony under the attorney-client privilege" (quoting *Calandra*, 414 U.S. at 346)). The injunction should, therefore, reasonably be read as permitting the enforcement of Rule 16-308(E)(1) where a prosecutor engages in unlawful action by issuing a subpoena to an attorney without a reasonable belief that the information sought is not privileged.

Thus, read in light of "the relief sought by the moving party … and the mischief that the injunction seeks to prevent," *United States v. Christie Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972), we conclude that the district court's injunction did not evince an abuse of discretion because it only bars enforcement of the unconstitutional aspects of Rule 16-308(E)—namely, all applications of subsections (2) and (3) in the grand-jury context—and does not enjoin the enforcement of subsection (1).

III

In sum, we hold that (1) the district court had subject-matter jurisdiction because the United States had standing and the claim was ripe for review; (2) because the United States's preemption claim is a legal one, the district court did not abuse its discretion in denying discovery; (3) the district court correctly concluded that (a) under our decision in *Colorado Supreme Court II*, the challenged provisions of Rule 16-308(E) are not preempted outside of the grand-jury context, but (b) they are preempted in the grand-jury setting because they conflict with the federal-law principles—embodied

in the Grand Jury Clause of the Constitution, as interpreted by the Supreme Court—that govern federal prosecutors' attorney-subpoena practices before grand juries, and thereby stand as an obstacle to the effectuation of the grand jury's constitutionally authorized investigative functions; and (4) the district court's injunction appropriately prohibits the enforcement of Rule 16-308(E)(2) and (3) against federal prosecutors practicing before grand juries, while permitting the enforcement of Rule 16-308(E)(1). We **AFFIRM** the district court's judgment.

* * *

TYMKOVICH, Chief Judge, concurring in part and dissenting in part.

The United States claims it is immunized from following New Mexico's Rule of Professional Conduct 16-308(E),[1] which establishes professional guidelines for prosecutors issuing subpoenas to third-party lawyers in criminal cases. The majority agrees, and finds that to apply the rule to federal prosecutors would violate the

---

[1] Rule 16-308(E) provides,

> The prosecutor in a criminal case shall: …
>
> E. not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonable believes:
>
> (1) the information sought is not protected from disclosure by an applicable privilege;
>
> (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
>
> (3) there is no other feasible alternative to obtain the information ….

Constitution's Supremacy Clause because New Mexico's rule conflicts with federal law governing grand-jury practice and procedure.

But this Supremacy Clause challenge must fail if Congress has authorized the application of this rule—and it has. In 1998, Congress enacted the McDade Amendment, 28 U.S.C. § 530B,[2] instructing federal prosecutors that they "shall be subject" to state rules of ethics "governing attorneys in each State where [they] engage in [their] duties, to the same extent and in the same manner as other attorneys in that State." And in *United States v. Colorado Supreme Court (Colorado Supreme Court II)*, 189 F.3d 1281, 1284 (10th Cir. 1999), we established a method for determining whether a state rule falls within the scope of the McDade Amendment and held that a Colorado rule (identical to New Mexico's rule), requiring compliance with state trial subpoena rules, applied to federal prosecutors. That should end the matter.

---

[2] In full, the Amendment reads,

> § 530B. Ethical standards for attorneys for the Government
>
> (a) An 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.
>
> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.
>
> (c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

The majority, however, holds Rule 16-308(E) does not apply to federal prosecutors because it unduly burdens federal interests when applied in the *grand jury* context. Thus, despite categorizing the rule as one governing "ethics," which Congress clearly intended to apply to federal prosecutors, the majority reads *Colorado Supreme Court II* to also require a conflict preemption analysis. Applying the obstacle-conflict preemption doctrine, the majority holds New Mexico's rule is preempted in the grand jury context because it places more onerous conditions on federal prosecutors issuing subpoenas than required by the Supreme Court in *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991). The majority grounds its preemption analysis not in any congressional mandate—because, indeed, Congress expressly stated federal prosecutors "shall be subject" to state ethics rules—but in the Constitution's text by way of the Fifth Amendment's Grand Jury Clause. But New Mexico's rule is not inconsistent with the Grand Jury Clause's guarantee that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless in a presentment or indictment of a Grand Jury." Instead, the rule merely instructs prosecutors practicing in New Mexico (federal or state alike) of their professional duty when issuing subpoenas to third-party lawyers in criminal cases.

As I see it, the first and only question we must answer is: whether the rule is one governing ethics? If it is, considering its burden on federal interests is unnecessary because Congress has authorized the rule's application to federal prosecutors. And because *Colorado Supreme Court II* classified an identical rule as an ethics rule, the answer is straightfoward. Since the majority's holding departs from Congress's clear intent to

apply all state ethics rules to federal prosecutors, I respectfully dissent.[3]

I. Discussion

A. The McDade Amendment

I begin with the statutory background on which we all agree. No one disputes that "state regulation" of "federal … activities" can be authorized by a "clear congressional mandate" making that "authorization of state regulation clear and unambiguous." *Hancock v. Train*, 426 U.S. 167, 179 (1976). The United States, of course, acknowledges there is no Supremacy Clause problem if federal law unambiguously authorizes the application of the state rules at issue here. *See* Second Br. at 38 ("[I]f Congress has, through the McDade Act, clearly and unambiguously authorized the application to federal prosecutors of [the rule], New Mexico has not violated the Supremacy Clause."). And the Amendment's text is clear: "An attorney for the Government shall be subject to State laws and 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." § 530B(a); *Colo. Supreme Court II*, 189 F.3d at 1284 (noting state laws and rules contemplated by the Amendment are "state professional rules" or "rule[s] of professional ethics").

Indisputably, then, *if* a state rule is an ethics rule, the McDade Amendment clearly and unambiguously authorizes its application to federal prosecutors. No one doubts this is an ethics rule in at least one context.

---

[3] I concur with the majority's conclusions on standing and ripeness. My analysis is the same no matter whether we look at the challenge facially or as-applied.

In *Colorado Supreme Court II*, we created a test for determining whether a rule is an ethics rule and applied the test to hold an identical rule as ethical in all non-grand-jury criminal proceedings.[4] 189 F.3d at 1284, 1288. The question in that case was whether a Colorado rule identical to New Mexico's violated the Supremacy Clause as applied in "criminal proceedings other than a grand jury." *Id.* at 1284. As the majority notes, that question turned on whether the rule was "'a rule of professional ethics clearly covered by the McDade Act, or a substantive or procedural rule that is inconsistent with federal law.'" Majority Op. [8a, 57a] (quoting *Colo. Supreme Court II*, 189 F.3d at 1284).

We first noted the definition of "ethical": "'[o]f or relating to moral action, conduct, motive or character.... Professionally right or befitting; conforming to professional standards of conduct.'" *Colo. Supreme Court II*, 189 F.3d at 1284 (quoting Black's Law Dictionary 553 (6th ed. 1990)); *see also id.* at 1285 (quoting *In re Snyder*, 472 U.S. 634, 645 (1985)) (noting the Supreme Court's definition of unethical conduct as "conduct contrary to professional standards that shows an

---

[4] *Colorado Supreme Court II* was the second time we had addressed the United States's Supremacy Clause challenge to this Colorado rule. We previously reversed and remanded the district court's dismissal for lack of standing when we first considered that case. *See United States v. Colo. Supreme Court (Colorado Supreme Court I)*, 87 F.3d 1161, 1166-67 (10th Cir. 1996). When we addressed the rule in *Colorado Supreme Court I*, it contained a requirement precluding the issuance of a third-party subpoena unless the attorney "obtain[ed] prior judicial approval after the opportunity for an adversarial proceeding." *Id.* at 1163. By the time of *Colorado Supreme Court II*, that requirement had been removed, leaving us with a rule governing third-party subpoenas indistinguishable from New Mexico's. *See Colo. Supreme Court II*, 189 F.3d at 1284.

unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice"). In short, the question was whether Colorado's rule was "one of those normative legal standards that guides the conduct of an attorney." *Id.*

To answer that question, we outlined a three-prong test.[5] "First," an ethical rule bars "conduct recognized by consensus within the profession as inappropriate." *Id.* at 1287. "Second," such rules are like "commandment[s] dealing with morals and principles" and in "directing sweeping commandments of conduct" can be "quite vague" in nature, in contrast to procedural or substantive law, "the purposes of which are to direct a cause of action through the courts." *Id.* "Finally," such rules are "directed at the attorney herself." *Id.* "Applying [those] factors" to Colorado's rule, we "easily conclud[ed] the rule [was] an ethical one." *Id.* at 1288.

But the majority relies on a brief aside at the end of the opinion, made after we applied our test and concluded the rule was an ethics rule, that Colorado's rule also "does not conflict with" a particular federal rule of criminal procedure and, "[a]ccordingly, … is not inconsistent with federal law." *Id* at 1288-89. That statement, however, is merely an affirmation of the truism that it is not inconsistent with federal law to apply state ethics rules as federal law instructs.

A natural reading of the opinion and a reasonable understanding of the word "ethical" supports that posi-

[5] Notably, this means a rule is not applicable to federal prosecutors just because a state enacts rules of professional responsibility; the state rule must still pass our three-prong test. In other words, the McDade Amendment does not give states carte blanche to regulate federal prosecutors under the guise of ethical regulation.

tion. We plainly thought what mattered was the meaning of the word ethical, and every factor we announced goes to the essence of that word. The Amendment speaks of "Ethical standards," § 530B, and we generally interpret words in a statute "as taking their ordinary, contemporary, common meaning." *Bilski v. Kappos*, 561 U.S. 593, 603 (2010). And a rule governing ethics, by our own definition, is neither a substantive nor procedural rule. Thus, the McDade Amendment suffices to ensure that rules of truly ethical concern fit unobtrusively into the federal scheme, because it explicitly deems such rules applicable to federal prosecutors.

And I cannot see how New Mexico's rule is any less a "normative legal standard[]" guiding "the conduct of an attorney," *Colo. Supreme Court II*, 189 F.3d at 1285, than the identical rule we considered in *Colorado Supreme Court II* because it might affect federal prosecutors in grand-jury practice. It, no less, "bar[s] conduct recognized by consensus within the profession as inappropriate." *Id.* at 1287. It deals with the same "morals and principles" as that rule, and, like that rule, it is "directed at the attorney herself." *Id.* Because we are bound by *Colorado Supreme Court II*, there is no Supremacy Clause violation here.[6]

The foregoing analysis of the McDade Amendment's plain language and our decision in *Colorado Su-*

[6] The United States also challenges the application of New Mexico's rule outside the grand jury context. But as the majority explains, this challenge "is primarily form, not substance." Majority Op. [14a]. I agree with the majority that our review is confined by our prior conclusions in *Colorado Supreme Court II*, Majority Op. [61a], absent direction from the Supreme Court or the en banc panel. I also note the Supreme Court has not had the opportunity to construe whether our delineation between rules that are ethical and those that are substantive or procedural is a correct one.

preme Court II demonstrates the infirmity of the Supremacy Clause argument. But understanding the problem Congress wished to fix by passing the McDade Amendment operates to underscore the inapplicability of an additional independent preemption analysis.

In 1989, the Department of Justice issued the "Thornburgh Memorandum," which concluded that "although the states have the authority to regulate the ethical conduct of attorneys admitted to practice" in their courts, federal prosecutors may only be regulated in that manner "if the regulation does not conflict with the federal law or with the attorneys' federal responsibilities." Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 Geo. Wash. L. Rev. 460, 471 (1996) (quoting Memorandum from Dick Thornburgh, Attorney General, U.S. Department of Justice, to All Justice Department Litigators (June 8, 1989)). The DOJ intended to insulate federal prosecutors in at least some circumstances from compliance with state ethics rules modeled upon ABA Model Rule 4.2, which prohibited ex-parte attorney contacts with a represented party. *N.Y. State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110, 132 (D.D.C. 2003).

The memorandum received substantial criticism. *See id.*; *In re Doe*, 801 F. Supp. 478, 487 (D.N.M. 1992); *see also United States v. Tapp*, No. CR107-108, 2008 WL 2371422, at *6 (S.D. Ga. June 4, 2008) (noting criticism from "the ABA, the state bar associations, the Judicial Conference of the United States, the Conference of State Chief Justices, [and] the Federal Bar Association"). Nevertheless, in 1994, the DOJ promulgated a regulation dubbed the Reno Regulation, which essentially codified the Thornburgh Memorandum. *See N.Y. State Bar Ass'n*, 276 F. Supp. 2d at 132; *see also* John

H. Lim, *The Side Effects of a Legal Ethics Panacea: Revealing a United States's Standing Committee's Proposal to "Standardize" Ethics Rules in the Federal Courts as an Attempt to Undermine the No-Contact Rule*, 13 Geo. J. Legal Ethics 547, 568 (2000) ("[T]he Reno [Regulation was] a virtual reprise of the Thornburgh Memo.").

The Eighth Circuit invalidated portions of the Reno Regulation as beyond the DOJ's statutory authority, *see United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998), and criticism of the DOJ's attempt to insulate itself from state rules of professional responsibility persisted. Litigation continued on the subject. *See, e.g.*, *Colo. Supreme Court I*, 87 F.3d at 1163 (noting challenge by the United States in 1996 to application of certain Colorado ethics rules to federal prosecutors); *Stern v. U.S. Dist. Court for Dist. of Mass.*, 214 F.3d 4, 9 (1st Cir. 2000) (noting same type of challenge to application of Massachusetts ethics rules to federal prosecutors).

Thus, in 1998, it was unclear whether or to what extent the DOJ could exempt its attorneys from complying with a given state's rules. Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 Harv. L. Rev. 2080, 2088 (2000) ("By 1998, the war over ethics regulations had reached a stalemate."). Congress clarified that uncertainty with the McDade Amendment. *See N.Y. State Bar Ass'n*, 276 F. Supp. 2d at 133 ("[I]n the face of the Justice Department's repeated attempts to exclude its attorneys from compliance with state bar rules, Congress adopted the [McDade Amendment] …. "). The method Congress chose lacked any of the exemption-granting language present in the controversial Thornburgh Memorandum and Reno Regulation. And we should not take

Congress's failure to include those exemptions as reason to read those exemptions into the plain meaning of a word—ethical—that does not naturally encompass them. The simpler reading is that Congress was aware of the debate and came down on the side of a blanket authorization of any rule deemed to govern attorney ethics.[7] *See Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, *supra*, at 2088 ("[U]nlike prior DOJ guidelines, [the McDade Amendment] affords no exceptions for federal prosecutors when state ethics rules impinge on federal law enforcement interests."). That is the reading we adopted *in Colorado Supreme Court II*.[8]

---

[7] It is unsurprising that Congress chose such a broadly sweeping method in light of the long tradition of states "exercis[ing] extensive control over the professional conduct of attorneys." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (noting "special importance" of the "State's interest in the professional conduct of attorneys involved in the administration of criminal justice"); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (noting "the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States").

[8] *See Colo. Supreme Court II*, 189 F.3d at 1284 (outlining the operative question as "whether Rule 3.8 violates the Supremacy Clause now *turns on* whether the rule is a rule of professional ethics clearly covered by the McDade Act, *or a substantive or procedural rule* that is *inconsistent with federal law*" (emphasis added)). Other commentators agree. Sara S. Beale, et al., Grand Jury Law & Prac. § 6:24 (2d ed.) ("[T]he question whether Rule 3.8(e) may be applied to federal prosecutors *may turn on* whether it is treated as a procedural rule or an ethical rule.… The Tenth Circuit held that the modified version of Rule 3.8(e) adopted in Colorado is an ethical rule rather than a procedural rule and therefore was applicable to federal prosecutors under the McDade Act." (emphasis added) (footnotes omitted)); 2 Charles Alan Wright, et al., Fed. Prac. & Proc. Crim. § 276 (4th ed.) (citing *Colorado Supreme Court II*, 189 F.3d at 1288 and stating "*if* such local rule is

Of course, Congress did not intend to allow states to regulate government attorneys in a manner inconsistent with federal law. But after the McDade Amendment, regulation of federal prosecutors via rules that are truly ethical in nature is expressly authorized by, and therefore consistent with, the dictates of federal law. It would be perverse to say states act in a manner inconsistent with federal law when they act as federal law instructs. Whether the Amendment's authorization of such regulation in these circumstances is a wise policy choice is not a question this court can or should answer.

B. Grand-Jury Practice and Procedure as Preemptive

In proceeding with its preemption analysis, the majority rests its preemption finding on the role grand-jury practice and procedure plays in the federal legal system—particularly, that New Mexico's rule imposes more onerous conditions on federal prosecutors issuing subpoenas to third-party lawyers in a grand jury context than required by the Supreme Court in *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991). Majority Op. [63a-73a]. So to adhere to the Supremacy Clause's dictate that only three named sources of federal law enjoy supremacy ("This Constitution," "the Laws of the United States," and "all Treaties," Const. art. VI, cl. 2) the majority reasons the grand-jury subpoena standard must be traced to the constitutional

---

characterized as an ethics provision rather than a substantive or procedural rule, it may by imposed upon federal prosecutors *consistent with the Supremacy Clause*." (emphasis added)).

significance of grand juries as recognized in the Fifth Amendment's Grand Jury Clause.[9]

As an initial matter, I note the peculiar circumstances that this case presents. Our conflict preemption analysis requires us to compare a state statute to its federal counterpart and evaluate whether (1) "compliance with both federal and state regulations is a physical impossibility," or (2) "*the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress*." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (emphasis added) (citations and internal quotation marks omitted). But as the majority presents it here, we are deciding whether New Mexico's rule—which, as a rule of ethics, Congress has authorized its application by enacting the McDade Amendment—stands as an obstacle to the accomplishment and execution of the federal grand-jury subpoena standard as announced by judicial decision. Majority Op. [68a-69a] (discussing grand-jury subpoena standard announced in *R. Enterprises*). Thus, the federal interest here is one of judicial making, and Congress has seen fit to expressly authorize the conflict.

The majority relies heavily on the Grand Jury Clause to ground its preemption analysis in some constitutional text. Although there was no mention of

---

[9] The majority also concludes New Mexico's rule stands as an obstacle to the important investigative function of grand juries. But New Mexico's rule (as a rule of ethics) is not directed at the grand jury as an institution. It is directed only at prosecutors. Simply because the prevailing practice is for prosecutors to issue subpoenas on behalf of grand juries, Sara S. Beale, et al., Grand Jury Law & Prac. § 6:2 (2d ed.), is insufficient to conclude the rule violates the Supremacy Clause as being inconsistent with the protections of the Grand Jury Clause.

grand juries in the original Constitution, the Fifth Amendment reads, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." This guarantee "confer[s] a right not to be tried (in the pertinent sense) when there is no grand jury indictment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989); *see also Ex parte Wilson*, 114 U.S. 417, 426 (1885) ("The purpose of the [Grand Jury Clause] was to limit the powers of the legislature, as well as of the prosecuting officers, of the United States.... [T]he constitution protect[s] every one from being prosecuted, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment."). The Supreme Court, however, has limited the Grand Jury Clause's reach by, for one, not compelling its application to the states through the Due Process Clause. *See generally Hurtado v. California*, 110 U.S. 516 (1884); *see also* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 St. Louis U. L.J. 303, 385 (2001) ("Of the specific guarantees aimed at the criminal justice process, only the Fifth Amendment requirement of prosecution by indictment or presentment quite clearly will not be incorporated [into the Fourteenth Amendment's due process guarantees].").

The majority's conclusion that the standard adopted in *R. Enterprises* is mandated by the Grand Jury Clause (thus, taking on constitutional supremacy) reads too much into the Supreme Court's decision. The Court clearly defined its task: "[T]he focus of our inquiry is the limit imposed on a grand jury by Federal Rule of Criminal Procedure 17(c)." *R. Enters.*, 498 U.S. at 299 ("'[Rule 17(c)] provides that the court on motion made

promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.'"). Because "reasonable[ness] depends on the context," *id.*, "[t]o the extent that Rule 17(c) imposes some reasonableness limitation on grand jury subpoenas … [the Court's] task is to define it." *Id.* at 300. The Court then rejected the *Nixon* standard, applying to trial subpoenas, and adopted the following standard: "[W]here … a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *Id.* at 301. That this standard is of constitutional significance—as opposed to federal grand juries generally—goes too far.[10]

Having concluded the invocation of the Grand Jury Clause is illusory, I return to the majority's preemption finding. Although the Supreme Court has approved of the doctrine of obstacle preemption (or frustration-of-

---

[10] And it is generally understood that Congress controls the Supreme Court's rulemaking authority to promulgate rules of federal criminal procedure. *See* 28 U.S.C. § 2072(a). Indeed, Congress has regulated grand-jury practice and procedure through amendments to the federal rules. From 2001 to 2004, Congress expanded the disclosure provisions in Rule 6(e) three times. *See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 279-80 (2001); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2256-57 (2002); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3760 (2004). Of course, this discussion only has significance if New Mexico's rule is deemed to be "procedural" in form—that is, it is a rule of procedure infringing upon the federal rules. But, as the majority concedes, that is not the case here. Following *Colorado Supreme Court II*'s framework, New Mexico's rule is clearly one governing ethics.

purpose preemption), *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000), the doctrine has been heavily criticized, *see generally* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225 (2000), and the Court has been sensitive to its over application. The Court has directed that in obstacle preemption cases, "There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).[11]

Notwithstanding the Court's sensitivity and criticism to the doctrine, *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 123 (2002), the Court has continued to apply it to invalidate state laws that stand as obstacles to the purpose of a particular federal statutory scheme, *see* Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 648 (6th ed. 2009) (citing Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Sup. Ct. Rev. 343 (2002)). Thus, in such cases, the Court generally departs from traditional canons of statutory interpretation by looking past the plain language of the statute

---

[11] Justice Thomas, in no less than four recent opinions, has questioned the constitutional lineage of the doctrine. *See Wyeth v. Levine*, 555 U.S. 555, 604 (2009) (Thomas, J., concurring in judgment); *Arizona*, 132 S. Ct. at 2524 (Thomas, J., concurring in part and dissenting in part); *Williamson v. Mazda Motor of Am.*, 562 U.S. 323, 340 (2011) (Thomas, J., concurring in judgment); *Haywood v. Drown*, 556 U.S. 729 767 (2009) (Thomas, J., dissenting). In Justice Thomas's words, obstacle preemption "is inconsistent with the Constitution because it invites courts to engage in free-wheeling speculation about congressional purpose that roams well beyond statutory text.... Under the Supremacy Clause, pre-emptive effect is to be given to congressionally enacted laws, not to judicially divined legislative purposes." *Arizona*, 132 S. Ct. at 2524 (citation omitted).

and focusing on legislative intent to divine the full purpose and objectives of Congress. *See Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A.*, 519 U.S. 316, 335-36 (1997) (Scalia, J., concurring); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868, 870 (2000) (quoting *United States v. Locke*, 529 U.S. 89, 106 (2000)). But still, the purposes and objectives are those of Congress, not the courts. *Cf. Atherton v. FDIC*, 519 U.S. 213, 218 (1997) ("'Whether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts." (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

With that, I fully recognize the grand jury's special position. *See, e.g.*, *R. Enters.*, 498 U.S. at 297 (noting grand jury's "unique role in our criminal justice system"). But the grand jury's unique role does not mean federal grand juries are immune from congressional regulation absent some constitutional directive stating otherwise. Majority Op. [70a-71a] (citing *In re Grand Jury*, 111 F.3d 1066, 1073 (3d Cir. 1997) ("Just as grand juries must operate within the confines of the Constitution, so too must they comply with the limitations imposed on them by Congress (as long as those limitations are not unconstitutional)."). Regulation of grand juries via a federal statute, of course, is precisely that. The majority does not hold that Congress lacks the power to say federal prosecutors in the grand jury context are bound by standards mirroring New Mexico's. That it did so more indirectly—but still expressly, by a general reference to ethics rules—makes no difference. In short, the question of whether the McDade Amendment authorizes a rule's application as ethical in no way depends on whether that rule's application to federal prosecutors may have the effect of changing their conduct. To the contrary, *Colorado Supreme Court II* and

the statute's plain meaning make clear that any obstacle created by state law here exists pursuant to Congress's express intent.[12]

II. Conclusion

In sum, without some indication that Rule 16-308(E) stands as an obstacle to the accomplishment and execution of *Congress's* purposes and objectives, I respectfully dissent from the majority's determination that the rule conflicts with federal interests and is thus preempted.

---

[12] I note that one judge has concluded in a separate opinion that an Illinois rule identical to the one here would apply to federal prosecutors by virtue of the McDade Amendment, citing *Colorado Supreme Court II* for support. *See United States v. Williams*, 698 F.3d 374, 391-92 (7th Cir. 2012) (Hamilton, J., concurring in part and dissenting in part). *See also United States ex rel. U.S. Attorneys for the E. & W. Dists. of Ky. v. Ky. Bar Ass'n*, 439 S.W.3d 136, 146 (Ky. 2014) ("In our view, E-435 survives scrutiny under [the McDade Amendment] and the Supremacy Clause because it is simply an ethical rule and does not affect federal substantive, procedural, or evidentiary law." (footnote omitted)).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 13cv0407-WJ/LFG

UNITED STATES OF AMERICA,
Plaintiff,

v.

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

Filed: February 3, 2014

MEMORANDUM OPINION AND ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR AND PARTIAL SUMMARY JUDGMENT IN DEFENDANTS' FAVOR

THIS MATTER comes before the Court upon Plaintiff's Motion for Summary Judgment, filed June 28, 2013 **(Doc. No. 13)** and Defendants' Rule 56(D) Motion to Extend Time to Respond to Plaintiff's Motion for Summary Judgment, or, in the Alternative, to Grant Summary Judgment in Defendants' Favor Based on the Existing Record, filed November 20, 2013 **(Doc. No. 34)**[1]. Having considered the parties' briefs, the argu-

[1] The Court previously denied Defendants' request for an extension of time to respond to Plaintiff's Motion for Summary

ments presented at the hearing conducted on January 9, 2014, and the applicable law, the Court finds that Plaintiff's motion is partially well-taken and, therefore, is GRANTED in part and DENIED in part. Further the Court finds that Defendants' Motion is partially well-taken and therefore, is GRANTED in part and DENIED in part.

Background

The United States instituted this action facially challenging the New Mexico Rule of Professional Conduct 16-308(E) ("Rule 16-308(E)") as it applies to federal prosecutors. [2] Plaintiff argues that Rule 16-308(E) is preempted by federal law under the doctrines of both conflict and field preemption. Defendants contend that Rule 16-308(E) is an ethical rule that is not subject to preemption.

Undisputed Material Facts

The undisputed material facts of this matter are quite simple. Defendants are the parties responsible for enacting and enforcing Rule 16-308(E) and it applies to federal prosecutors practicing in New Mexico. Plaintiff attempted to add additional "facts" by presenting specific instances where federal prosecutors declined to subpoena attorneys because of a fear of running afoul of Rule 16-308(E). Although couched as facts, many of these statements were simply legal arguments claiming

---

Judgment. *See* **(Doc. No. 37)**. Accordingly, the Court's opinion addresses the only remaining issue in Defendants' Motion, the merits of Defendants' Motion for Summary judgment.

[2] Plaintiff's Complaint refers both to federal prosecutors and federal attorneys. The Court assumes that Plaintiff only intended to bring this suit on behalf of federal prosecutors, because by it terms, Rule 16-308(E) only applies to prosecuting attorneys.

that Rule 16-308(E) presents a different standard than the one federal prosecutors usually abide by. While these allegations are not undisputed, they go to the merits of Plaintiff's conflict preemption argument and will be considered in that regard.

> Rule 16-308(E) provides 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:
>
> (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[3].

Rule 16-308(E), unlike many of the rules discussed below, does not contain a judicial pre-approval requirement. In fact, the only pre-issuance action that would potentially take place involving Rule 16-308(E) would be a prosecutor choosing not to issue a subpoena because of an uncertainty about whether or not the subpoena would meet the standards set forth in Rule 16-308(E). The rule, rather than being proactive, is reactive. If a subpoena is issued, the witness attorney would not be able to quash the subpoena on the grounds that the subpoena did not comport with Rule 16-308(E); the witness-attorney would have to comply

---

[3] Plaintiff is not challenging the first requirement that the subpoenaed material not be subject to privilege, just the second and third requirements.

with the subpoena subject to applicable privilege. *See In re Grand Jury Proceedings*, 616 F.3d 1172, 1186 (10th Cir. 2010) (rejecting the argument that Rule 16-308(E) provided a basis for a motion to quash a subpoena in federal court); *see also* New Mexico Rules of Professional Conduct, Scope ("The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule."). Independent of the grand jury investigation or criminal proceeding, a complaint would have to be filed with the State Disciplinary Board alleging that the prosecutor issuing the subpoena violated Rule 16-308(E). Under this scenario, the prosecutor would have to demonstrate that the subpoena complied with Rule 16-308(E). If the prosecutor was found to have violated Rule 16-308(E), the only remedy would be discipline by the State Bar. *See* New Mexico Rules of Professional Conduct, Scope ("violation of a rule does not necessarily warrant any other non-disciplinary remedy.") A violation of Rule 16-308(E) does not give rise to an independent cause of action. *See Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 1988-NMSC-014, 106 N.M. 757, 762, 750 P.2d 118, 123 (holding that a violation of the New Mexico Rules of Professional Conduct cannot provide the basis for a private cause of action); *see also* New Mexico Rules of Professional Conduct, Scope ("Violation of a rule should not itself give rise to a cause of action against a lawyer… The[] [rules of professional conduct] are not designed to be a basis for civil liability.").

Discussion

I. Legal Standards

Summary Judgment Standard

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c); *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. Once that burden is met, the nonmoving party must put forth specific facts showing that there is a genuine issue of material fact for trial; he may not rest on mere allegations or denials in his own pleadings. *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-57 (1986). In order to avoid summary judgment, the nonmoving party must put forth enough evidence that a reasonable jury could return a verdict in the nonmovant's favor. *Id.* at 249. A mere scintilla of evidence in the nonmovant's favor is not sufficient. *Id.* at 252.

Law Regarding Preemption

The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land; … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Pursuant to this provision, Congress has the power to enact statutes that preempt state law. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989). Thus, preemption is ultimately a question of congressional intent. *See Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008). There are three

types of preemption: (i) "express preemption, which occurs when the language of the federal statute reveals an express congressional intent to preempt state law;" (ii) "field preemption, which occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a State to supplement it;" and (iii) "conflict preemption, which occurs either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010) (citation omitted).

II. The Court will not Revisit its Decision Regarding Subject Matter Jurisdiction

In their Motion for Summary Judgment, Defendants attempt to revive arguments already made and rejected in regards to their Motion to Dismiss **(Doc. No. 15)**. The Court has already determined that Plaintiff has sufficiently demonstrated that this Court has subject matter jurisdiction. *See* **(Doc. No. 29)**. If the Court is wrong on the subject matter jurisdiction issue, the Tenth Circuit will not hesitate to reverse. Accordingly, Defendants' Motion for Summary Judgment based upon a lack of subject matter jurisdiction is denied.

II. The Court is Bound by the Tenth Circuit's Opinion in *United States v. Colorado Supreme Court* 189 F.3d 1281 (10th Cir. 1999) in Regards to Rule 16-308(E)'s Application to General Criminal Proceedings but not in Regards to Grand Jury Proceedings

The Tenth Circuit held that a similar rule enacted by the Colorado Supreme Court did not violate the Supremacy Clause in *United States v. Colorado Supreme Court*, 189 F.3d 1281 (10th Cir. 1999). The rule at issue

in *Colorado Supreme Court* (Rule 3.8(f)) provided that a prosecutor shall:

> not subpoena a lawyer in a [] criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:
>
> (i) the information sought is not protected from disclosure by any applicable privilege;
>
> (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
>
> (iii) There is no other feasible alternative to obtain the information[.]

Id., 189 F.3d at 1284, n. 2[4].

Parties devoted a large amount of briefing arguing why *Colorado Supreme Court* should or should not compel the same result in this case. Setting aside the issue of whether Rule 16-308(E) is applicable to grand juries, Colorado Rule 3.8(f) is identical to Rule 16-308(E). The Court is therefore bound by the Tenth Circuit's holding in *Colorado Supreme Court* regarding Rule 16-308(E)'s application to criminal proceedings outside the grand jury context. Although Plaintiff attempted to cajole the Court into essentially ignoring

---

[4] The Colorado Rule originally required that a prosecutor obtain judicial approval prior to serving a subpoena on a lawyer. During the course of litigation, however, the rule was modified to eliminate that requirement. Additionally, the original rule also applied to grand jury proceedings, but the district court held that the grand jury restriction violated the Supremacy Clause and Defendants did not appeal that part of the ruling. Accordingly, the Tenth Circuit did not address these two provisions on appeal.

what Plaintiff claims is an erroneous decision by the Tenth Circuit, the Court simply cannot distinguish the Tenth Circuit's opinion in *Colorado Supreme Court*.[5]

The applicability of Rule 16-308(E) to federal grand juries, however, is a different matter. The Tenth Circuit specifically stated it was not expressing an opinion whether or not a restriction on grand proceedings violates the Supremacy Clause. *See Colorado Supreme Court*, 189 F.3d at 1284. Because it is clear that the Tenth Circuit was not offering an opinion on the Colorado rule's applicability to grand juries and because the Tenth Circuit actually stated that case law governing criminal proceedings generally is not exactly on point for rules governing grand jury practice, the Court finds that *Colorado Supreme Court* is not binding in regards to the applicability of Rule 16-308(E) to federal grand juries.

IV. Based on *Colorado Supreme Court*, Rule 16-308(E) is an Ethical Rule and its Applicability to Criminal Proceedings Outside the Grand Jury Context Does Not Violate the Supremacy Clause

Field Preemption

During the pendency of the appeal in *Colorado Supreme Court*, Congress enacted the McDade Act which provides in pertinent part:

---

[5] The Court was impressed by Plaintiff's arguments regarding the validity of the *Colorado Supreme Court* opinion and sympathizes with Plaintiff's position. However, this Court does not have the authority to overrule the Tenth Circuit. The Court encourages Plaintiff to seek an *en banc* review of the Tenth Circuit's opinion, because absent a controlling decision by the U.S. Supreme Court, an *en banc* panel of the Tenth Circuit is the only body that has the authority to overrule *Colorado Supreme Court*.

> (a) An 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.
>
> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section

28 U.S.C. § 530B.

Thus, as the Tenth Circuit noted after enactment of the McDade Act, "…the question whether Rule 3.8(f)[6] violates the Supremacy Clause now turns on whether the rule is a rule of professional ethics clearly covered by the McDade Act, or a substantive or procedural rule that is inconsistent with federal law." *Colorado Supreme Court*, 189 F.3d at 1284. The Tenth Circuit considered three factors to help determine whether a rule really is one of professional conduct or whether it is actually a substantive rule disguised as an ethical rule. "First, a rule of professional conduct would bar conduct recognized by consensus within the profession as inappropriate." *Id.* at 1287. "Second, a rule of professional conduct is like a commandment dealing with morals and principles." *Id.* Commandment form is the "thou shalt not" structure. *Id.* (citation omitted). "This commandment format allows a rule of ethics to be quite vague, a luxury not afforded to rules of procedural or substantive law." *Id.* "Finally, a rule of ethics is directed at the attorney herself." *Id.* "Accordingly, when a rule of

---

[6] As noted above, Rule 3.8(f) identical to Rule 16-308(E) in matters outside the grand jury context. Thus, the Tenth Circuit's references to Rule 3.8(f) apply equally to Rule 16-308(E).

professional conduct is violated, members of the profession would agree that the violating attorney ought to be held personally accountable; whereas when a procedural or substantive rule is violated, any negative effect would be directed primarily at the progress of the claim itself." *Id.*, at 189 F.3d. at 1288. Applying these three factors to the Colorado Rule, the Tenth Circuit concluded that Rule 3.8(f) "…is an ethical one.

First, Rule 3.8(f) involves ethical concerns. Most significantly, the attorney-client relationship is by general consensus of our profession worthy of protection, and the service of 'an attorney-subpoena may cause irreparable damage to the attorney-client relationship.'" *Id.* 189 F.3d 1288 (*citing Whitehouse*, 53 F.3d at 1358). Once a subpoena is served, the client is forced into a waiting game, uncertain of whether or not his attorney will testify. *See id.* ("[f]rom the moment that the subpoena is served on counsel until the issue of its validity is resolved, the client resides in a state of suspended animation, not knowing whether his attorney will testify against and perhaps be required to withdraw his representation."). "That uncertainty inevitably undermines the trust and openness so important to the attorney-client relationship." *Id.* Additionally, counsel is distracted from the primary goal of preparing his or her client for the grand jury because counsel must focus on defending against or responding to the subpoena. *See id.* ("Second, the 'service of a subpoena opens a second front which counsel must defend with her time and resources, thus diverting both from the client.'") (citation omitted). The Tenth Circuit noted that these concerns are clearly ethical concerns. *See id.* Under the second factor, Rule 3.8(f) is written in commandment form. "The prosecutor in a criminal case shall … not subpoena a lawyer in a grand jury or other criminal proceeding to

present evidence about a past or present client unless…" *See Colorado Supreme Court*, 189 F.3d at 1288, n. 1.. Rule 3.8(f) "has the vague sweeping character of moral edict." *Seeid.*, 189 F.3d at 1288. "Embodying the well-honored principle of professional conduct that thou shalt not interfere with the attorney-client relationship without a showing of cause, the text does not concern itself with the actual procedural steps to satisfy the rule." *Id.* Therefore, the Tenth Circuit found that the second factor likewise was in favor of finding that Rule 3.8(f) is an ethical rule.

The third and final factor also points to the conclusion that Rule 3.8(f) is an ethical rule rather than a procedural one.[7] The rule is directed specifically at prosecutors. The consequence of violating the rule is a personal sanction. *See* Comment 1 to NMRA Rule 16-804 ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct."). Rule 3.8(f) does not provide any sanction that would have an impact on the case itself. In fact, the scope of the New Mexico Rules of Professional Conduct specifically disavows an interpretation that would allow a violation of the rules to provide a litigant in a collateral proceeding with an enforceable right. *See* New Mexico Rules of Professional Conduct, Scope ("[The rules] do [] not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule.").

---

[7] For its analysis of the third factor, the Court will consider the New Mexico laws surrounding the enforcement of Rule 16-308(E) rather than simply quoting *Colorado Supreme Court* because the Tenth Circuit looked to Colorado law in its consideration of the final factor.

Applying the above-discussed factors to the text of Rule 16-308(E), which is identical in all relevant aspects to Colorado Rule 3.8(f), this Court concludes that Rule 16-308(E) is an ethical rule as opposed to a procedural or substantive rule. Therefore, there can be no field preemption because Section 530(B) of the McDade Act explicitly authorizes states to enact ethical rules and allows for those rules to be applied to federal prosecutors.

Conflict Preemption

The Court is also bound by the Tenth Circuit's holding that the Colorado Rule did not conflict with Fed. R. Crim. P. 17. The Tenth Circuit stated:

> Furthermore, we hold that Rule 3.8, in its mandate that a federal prosecutor ought not to disturb an attorney-client relationship without a showing of cause, does not conflict with Fed. R. CIM. P. 17, which details only the procedures for issuing a proper subpoena. Rule 17 does not abrogate the power of courts to hold an attorney to the broad normative principles of attorney self-conduct.

Colorado Supreme Court, 189 F.3d at 1288-89.

Therefore, relying on controlling Tenth Circuit precedent as set forth in *Colorado Supreme Court*, the Court finds that Rule 16-308(E) is an ethical rule and its application to federal prosecutors outside the grand jury context does not violate the Supremacy Clause.[8]

---

[8] The Court recognizes that the Tenth Circuit did not explicitly address the argument raised by Plaintiff in the instant case that Rule 16-308(E) conflicts with the Federal Rules of Evidence (402 and 501) by keeping otherwise admissible relevant evidence away from the jury and creating new privileges for evidence. However, the Tenth Circuit's opinion implicitly disavows that argument with

IV. Rule 16-308(E) Conflicts with Fed. R. Crim. P. 6(e) and Federal Grand Jury Practice

Plaintiff also alleges that Rule 16-308(E) conflicts with Fed. R. Crim. 6(e), providing secrecy requirements for grand jury proceedings, as well as federal grand jury practice generally, because a prosecutor would be forced to reveal certain details about grand jury practice in order to make a showing that a subpoena meets the requirements of Rule 16-308(e). Defendants argue that there are many exceptions to the general rule that grand jury proceedings are kept secret, and that there are ways for Rule 16-308(E) to be enforced without offending the general principles governing federal grand jury practice. Before determining if there is a conflict between Rule 16-308(E) and Fed. R. Crim. P. 6(e) or grand jury practice more generally, the Court will first reference relevant case law regarding grand juries.

"The grand jury occupies a unique role in our criminal justice system." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297(1991). "The function of the grand jury 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. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush." *Id.* "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Branzburg v. Hayes*, 408 U.S. 665,

---

its finding that the Colorado rule was an ethical rule rather than one that imposed new substantive standards. Accordingly, the Court is bound by the Tenth Circuit's ruling in regards to Plaintiff's arguments regarding the Federal Rules of Evidence.

701 (1972) (citation omitted). The United States Supreme Court "has emphasized on numerous occasions that many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings." *R. Enterprises, Inc.*, 498 U.S. at 298 (collecting cases). "This is especially true of evidentiary restrictions." *See id.* ("The same rules that, in an adversary hearing on the merits, may increase the likelihood of accurate determinations of guilt or innocence do not necessarily advance the mission of a grand jury, whose task is to conduct an *ex parte* investigation to determine whether or not there is probable cause to prosecute a particular defendant."). "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." *Id.* Nevertheless, the investigation powers of a grand jury are not unlimited; there are some boundaries on a grand jury's power to gather evidence. *See id.*, at 299 ("… grand juries are not without their restrictions.[] Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass."). However, "a new requirement to be complied with by the government before it may enforce a grand jury subpoena served upon an attorney can be justified only if the information sought is protected by a constitutional, common law, or statutory privilege." *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 249 (2nd Cir. 1986) (citing *Branzburg*, 408 U.S. at 688).

The United States Supreme Court has resisted efforts to force prosecutors to reveal information regarding a grand jury investigation in order to satisfy other rules of procedure. For example, the United States

Supreme Court rejected a rule that would require the government to make an affirmative showing that a grand jury subpoena was reasonable in *R. Enterprises, Inc.* The Court stated that "[r]equiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise 'the indispensable secrecy of grand jury proceedings.'" *R. Enterprises, Inc.*, 498 U.S. at 299 (citation omitted). "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Id.* (citing *United States v. Dionisio*, 410 U.S. 1, 17 (1973)). The Supreme Court noted that rules regarding grand jury subpoenas must "fashion an appropriate standard of reasonableness, one that gives due weight to the difficult position of subpoena recipients but does not impair the strong governmental interests in affording grand juries wide latitude, avoiding minitrials on peripheral matters, and preserving a necessary level of secrecy." *R. Enterprises, Inc.*, 498 U.S. at 300.

Field Preemption

Even though the Tenth Circuit did not rule on the Colorado rule's application to grand jury proceedings in Colorado Supreme Court, the Tenth Circuit's consideration of the text of the rule is still relevant to this Court's analysis. Given that Rule 16-308(E)'s treatment of grand jury proceedings is identical to the provisions in the Colorado rule, the Court finds that the analysis of the factors determining whether Rule 16-308(E) as applied to grand juries is an ethical rule is the same as the reasoning set forth in Colorado Supreme Court. Accordingly, Rule 16-308(E) as applied to grand juries is an ethical rule, and there is no field preemption

because through Section 530(B) of the McDade Act, Congress specifically allowed for the states to enact ethical rules that apply to federal attorneys practicing in that state. However, the Court's inquiry cannot stop there. The Court will conduct a separate analysis of whether Rule 16-308(E) as applied to grand juries actually conflicts with federal law. This is the same approach taken by the Tenth Circuit in Colorado Supreme Court. *See Colorado Supreme Court*, 189 F.3d at 1288-89 (holding that the Colorado rule was an ethical rule and then undertaking a separate conflict preemption analysis).

Conflict Preemption

As noted above, the Tenth Circuit in *Colorado Supreme Court* did not consider the issue of whether Colorado Rule 3.8(f), in the context of grand jury proceedings, conflicted with federal law in violation of the Supremacy Clause. The Tenth Circuit offered no opinion on the matter, but did note that the circuits are split on this issue. *See Colorado Supreme Court*, 189 F.3d at 1284, n. 3. ("Although circuits are split as to Rule 3.8 with respect to its applicability to grand jury proceedings, that disagreement is inapposite with respect to the revised Rule 3.8 before us.") (citing *Whitehouse v. United States Dist. Court*, 53 F.3d 1349 (1st Cir. 1995) and *Baylson v. Disciplinary Bd.*, 975 F.2d 102 (3rd Cir. 1992)). The Tenth Circuit did however give a hint as to its opinion of the application of state ethical rules to federal grand jury proceedings in a separate case. *See In re Grand Jury Proceedings*, 616 F.3d 1172, 1186 (10th Cir. 2010) (noting that the Tenth Circuit had "considerable doubt" about the proposition that "the [state] Rules of Professional Conduct [] apply to federal prosecutors' practice before a federal grand jury"). The Tenth Circuit has likewise rejected heightened stand-

ards for attorney subpoenas in grand jury proceedings. *See In re Grand Jury Subpoenas*, 906 F.2d 1485, 1496 (10th Cir. 1990) (holding "that the government is not required to make any further showing of need or lack of another source for the subpoenaed information. This holding puts us into agreement with every other circuit that has addressed this issue. No circuit court has found a right to force the government to show a need or lack of another source for the information."). Since the Tenth Circuit has not definitively ruled on the applicability of state ethical rules to federal prosecutors' practice before a federal grand jury, the Court will look to the other circuits' treatment of state bar ethical rules which apply to grand jury proceedings. As a preliminary matter, however, the Court notes that the other authority is not binding nor is any of it directly on point, because as the parties have pointed out, there are differences between rules previously addressed by other circuits and Rule 16-308(E). Interestingly, the First Circuit considered this issue on two separate occasions, and based upon nuances in the ethical rules at issue came to two different conclusions. The Court will discuss the case upholding the ethical rule first.

In *Whitehouse v. U.S. Dist. Court*, 53 F.3d 1349(1st Cir. 1995), the First Circuit considered a Rhode Island ethical rule that prevented prosecutors from issuing subpoenas to attorneys in grand jury proceedings unless they obtained prior judicial approval. The First Circuit held that the Rhode Island rule did not affect grand juries' ability to investigate because the rule only governed subpoenas issued by prosecutors and did limit subpoenas issued by the grand jury itself. *Id.*, 53 F.3d at 1357. The First Circuit also pointed out that the rule did not work a change in substantive law, because it only excluded privileged evidence, evidence that would

not have reached the grand jury anyway. *See id.*, 53 F.3d at 1358 ("the Rule makes no change in substantive law. It merely authorizes district courts to reject a prosecutor's attorney-subpoena application for the traditional reasons justifying the quashing of a subpoena[]. Local Rule 3.8(f) does not keep any evidence from reaching the grand jury which would not potentially have been kept from it anyway."). The First Circuit characterized the judicial pre-approval requirement as merely shifting the time of the determination of whether the subpoenaed material was subject to privilege. *See id.* ("In effect, Local Rule 3.8(f) merely changes the timing with respect to motions to quash in recognition of the fact that service itself of an attorney-subpoena seeking to compel evidence concerning a client may cause irreparable damage to the attorney-client relationship."). Further, the First Circuit brushed aside secrecy concerns by noting attorney subpoena applications could be filed under seal or viewed *in camera*. *See id.* ("Nothing in the text of the Rule prohibits the filing of attorney-subpoena applications to the court under seal or *in camera*. [] District courts routinely use *in camera* procedures to maintain grand jury secrecy in the context of post-service motions to quash.") The Court also held that the judicial predetermination did not involve a greater breach of secrecy of grand jury proceedings than a traditional motion to quash. *See id.* ("Moreover, because the grounds upon which a district court may reject an attorney-subpoena application mirror those for quashing a subpoena, the prosecutor will be required to divulge no more information with respect to the grand jury's investigation than it would in responding to a motion to quash."). Finally, the First Circuit found that the delay in grand jury proceedings was no greater than the delay caused by traditional mo-

tions to quash and any additional delay was outweighed by the benefits of the rule in protecting the attorney client relationship. *See id.*, at 1359 ("Furthermore, any procedural delay or detour which does result would be minimal—presumably no greater than that caused by a traditional motion to quash a subpoena issued at the grand jury stage. [W]e think any minimal delay is outweighed by the benefits of the Rule.").

The First Circuit faced a similar rule, this time a Massachusetts ethical rule in *Stern v. U.S. Dist. Court for Dist. of Mass.*, 214 F.3d 4 (1st Cir. 2000).[9] In *Stern*, the First Circuit held that the state ethical rule *did* violate the Supremacy Clause. The First Circuit distinguished its holding in *Whitehouse*, noting that the *Whitehouse* court's opinion rested largely on the premise that the judicial preapproval would be guided by traditional motion to quash standards, rather than the considerations outlined in the comments to the Rhode Island rule. *See Stern*, 214 F. 3d at 16 (noting the

---

[9] The Massachusetts rule read the prosecutor in a criminal case shall

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; [and]

(iii) there is no other feasible alternative to obtain the information; and

(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

Stern, 214 F.3d at 8 (1st Cir. 2000).

Whitehouse "holding 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" and commenting "[i]n so holding, the *Whitehouse* court brushed aside the seemingly more rigorous criteria delineated in the comment to the rule, on the ground that the comment was merely advisory."). In regards to the Massachusetts rule, the First Circuit found that the rule actually required that judicial pre-approval be based upon a finding that the three substantive requirements set forth in the rule were met; thus, under the Massachusetts rule, judicial pre-approval was based upon factors other than traditional motions to quash considerations. *See id.* ("The Rhode Island rule's saving grace is absent here. [The Massachusetts rule] differs significantly in that it imposes new substantive requirements for judicial preapproval of grand jury subpoenas."). After distinguishing *Whitehouse*, the First Circuit held that the Massachusetts rule's requirement that in grand jury proceedings, a prosecutor must show that the subpoenaed evidence is essential and not otherwise feasibly obtainable would have "the []two impermissible effects" of adversely "impact[ing] grand jury secrecy [and] [becoming] an incubator for delay." *Id.* The First Circuit noted the considerable Supreme Court case law emphasizing the importance of secrecy in grand jury proceedings. *See id.* (gathering cases). The First Circuit concluded by stating that "we hold that [the Massachusetts rule] as it pertains to grand jury subpoenas, encroaches unduly upon grand jury prerogatives and, therefore, is *ultra vires*." *Id.*, at 17. In response to an argument that the Massachusetts rule was an ethical rule rather, than a substantive one and was thus ex-

pressly allowed by Section 530B of the McDade, the First Circuit responded, "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." *Id.*, at 20.

There have been several other cases where courts have likewise rejected state bar ethical rules that imposed additional requirements for attorney subpoenas. *See Baylson v. Disciplinary Bd. of Supreme Court of Pennsylvania*, 975 F.2d 102 (3rd Cir. 1992) (holding that a rule which "requires a federal prosecutor to obtain prior judicial approval before serving a grand jury subpoena on an attorney where the attorney would be asked to testify about past or present clients" violated the Supreme Clause and fell outside the rule-making authority of federal district courts.); *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 248 (2nd Cir. 1986) ("To impose additional requirements that the government show its need for the information sought and that the attorney is the only source for that information would hamper severely the investigative function of the grand jury, if not stop the grand jury "'dead in its tracks.'").

The Court is persuaded by the line of cases invalidating state ethical restrictions on attorney grand jury subpoenas. Rule 16-308(E) interferes with the three strong governmental interests in grand jury proceedings of "[(1)] affording grand juries wide latitude, [(2)] avoiding minitrials on peripheral matters, and [(3)] preserving a necessary level of secrecy." *See R. Enterprises, Inc.*, 498 U.S. at 300. First, Rule 16-308(E) jeopardizes the autonomy of grand juries and impairs their ability to "paint with a broad brush" during their investigations. *R. Enterprise* 498 U.S. at 297. The

United States Supreme Court and the Tenth Circuit have repeatedly recognized the special importance of the grand jury and why it should be treated differently than other types of adversarial proceedings. The Supreme Court has rejected attempts to add additional requirements for issuing grand jury subpoenas. *See R. Enterprise supra*. The Tenth Circuit has likewise rejected similar attempts as well as expressed doubt as to whether state ethical rules should apply to federal grand jury proceedings. *See In re Grand Jury Subpoenas*, 906 F.2d at 1496 (rejecting requirement that prosecutors show no other feasible means before issuing grand jury subpoenas to attorneys); *In re Grand Jury Proceedings*, 616 F.3d at 1186 (noting that the Tenth Circuit had "considerable doubt" about the proposition that "the [state] Rules of Professional Conduct [] apply to federal prosecutors' practice before a federal grand jury").

With the guidance of the above cited precedent, the Court finds that Rule 16-308(E), as applied to grand jury proceedings, violates the Supremacy Clause because it "threaten[s] to compromise the indispensable secrecy of grand jury proceedings." *R. Enterprises, Inc.*, 498 U.S. at 299. If a complaint for a violation of Rule 16-308(E) is initiated, the prosecutor will have to disclose information regarding the grand jury's process and investigation surrounding the issuance of the attorney subpoena in order to show that the subpoena complied with Rule 16-308(E). Finally, challenges to attorney subpoenas will delay grand jury proceedings by shifting the focus from moving the investigation forward to the peripheral matter of whether a proposed attorney subpoena follows Rule 16-308(E). In other words, Rule 16-308(E) imposes a higher burden on federal prosecutors that is simply not warranted at the grand jury stage.

As a practical matter, if Rule 16-308(E) is applied to grand jury proceedings, prosecutors will spend additional time and resources determining whether information sought from an attorney subpoenaed to appear before a grand jury is essential and available from another source. Therefore, the fact that the challenge under Rule 16-308(E) will happen after the subpoena is issued does not render Rule 16-308(E) harmless in this regard, because it will still change prosecutor's behavior and become "an incubator for delay" in grand jury proceedings. *Stern*, 214 F.3d at 16.

The Court finds the holding in *Whitehouse* distinguishable for the same reason that the First Circuit distinguished it in *Stern*. The lynchpin of the *Whitehouse* holding was that the Rhode Island rule essentially reinforced traditional motion to quash standards and was therefore commensurate with grand jury procedures already in place in terms of invasion of secrecy and delay in proceedings. Here, Rule 16-308(E) is more like the rule addressed in *Stern* in that prosecutors are bound by the two new standards of essentiality and lack of a feasible alternative source instead of simply being prohibited from seeking privileged material. Accordingly, the burdens imposed by Rule 16-308(E) are greater than those imposed by motions to quash. Prosecutors would not be just limited from obtaining evidence that should not be presented to the grand jury anyway, because they would also be prohibited from introducing unprivileged attorney testimony that was not essential or could be feasibly obtained from another source. Moreover, because of the additional requirements set forth by Rule 16-308(E), a prosecutor is likely to be required to reveal more information about the grand jury than he or she would in responding to a traditional motion to quash. Further, the Court finds the

Whitehouse Court's argument that *in camera* proceedings would cure any violation of the grand jury's secrecy unpersuasive. Here, a showing regarding compliance with Rule 16-308(E) would not be made to a judge in an *in camera* hearing, but rather to the completely separate entity of the state disciplinary board; an entity which would normally have no business piercing the secrecy in which grand jury proceedings are generally cloaked. Forcing a prosecutor to reveal details about grand jury practice to an outside agency is arguably a more severe violation of grand jury secrecy than making a preliminary showing to a judge. Additionally, the Court is not convinced by the *Whitehouse* court's reasoning that Rule 16-308(E) will not impede the issuance of grand jury proceedings because the rule does not apply to subpoenas issued by the grand jury itself. This reasoning is not persuasive given the fact that, as a practical matter, the majority of subpoenas for grand jury investigations come from the prosecutor, not the grand jury. *See Stern*, 214 F.3d at 16, n.4 ("As a practical matter, grand jury subpoenas are almost universally issued by and through federal prosecutors.").

The Court finds that Rule 16-308(E) conflicts with grand jury procedure and therefore its application to federal grand jury proceedings violates the Supremacy Clause.[10] Plaintiff requests injunctive relief in its Mo-

[10] Defendants place a lot of emphasis on Section 530(B)'s grant of authority to the states to promulgate ethical rules that also apply to federal attorneys. Section 530(B) cannot save an ethical rule that actually conflicts with federal law. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) ("If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law."); *United States v. Lowery*, 166 F.3d 1119, 1125 (11th Cir. 1999) (noting that although the state clearly had the authority to enact ethical rules, "[s]tate rules of professional conduct, or

tion for Summary Judgment and so the Court grants Plaintiff's request with respect to the application of Rule 16-308(E) to grand jury proceedings.

THEREFORE, IT IS ORDERED, that Plaintiff's Motion for Summary Judgment **(Doc. No. 13)** is hereby **GRANTED** in part and **DENIED** in part and Defendants' Motion for Summary Judgment **(Doc. No. 34)** is hereby **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED, that New Mexico Rule of Professional Conduct 16-308(E) is valid and enforceable, except as it pertains to federal prosecutors practicing before the grand jury. The Court will enter a separate judgment consistent with this Opinion.

FINALLY, IT IS ORDERED, that Defendants, and their successors, agents, and employees are permanently enjoined from instituting, prosecuting, or continuing any disciplinary proceeding or action against federal attorneys for otherwise lawful actions taken in the course of a grand jury investigation or proceeding on the ground that such attorneys violated Rule 16-308(E) of the New Mexico Rules of Professional Conduct.

/s/ William P. Johnson
UNITED STATES DISTRICT JUDGE

---

state rules on any subject, cannot trump the Federal Rules of Evidence."); *Stern v. U.S. Dist. Court for Dist. of Mass.*, 214 F.3d 4, 19 (1st Cir. 2000) (if an ethical rule "impermissibly interferes with federal grand jury practice,[] section 530B cannot salvage it.); *Id.*, at 20. ("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.")

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 14-2037 & 14-2049
(D.C. No. 1:13-CV-00407-WJ-SMV)
(D. N.M.)

UNITED STATES OF AMERICA,
Plaintiff—Appellee/Cross-Appellant,

v.

SUPREME COURT OF NEW MEXICO; THE DISCIPLINARY BOARD OF NEW MEXICO; OFFICE OF THE DISCIPLINARY COUNSEL OF NEW MEXICO,
Defendants—Appellants/Cross-Appellees.

THE AMERICAN BAR ASSOCIATION,
Amicus Curiae.

Filed: December 2, 2016

ORDER

Before **TYMKOVICH**, Chief Judge, **KELLY**, **BRISCOE**, **LUCERO**, **HARTZ**, **GORSUCH**, **HOLMES**, **BACHARACH**, **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.*

* The Honorable Scott Matheson is recused in this matter and did not participate in the consideration of en banc rehearing.

On October 13, 2016, an order issued in these matters granting limited panel rehearing. The appeals are now before the court on the petition for en banc rehearing of the New Mexico Supreme Court, the Disciplinary Board of New Mexico, and its Office of Disciplinary Counsel. We also have a response to the petition, and have considered the amicus curiae brief filed on behalf of the American Bar Association. *See* 10th Cir. R. 29.1. All of the pleadings were circulated to the active judges of the court who are not recused.

Upon consideration, a poll was called, and a majority of the available active judges voted to deny the request. *See* Fed. R. App. P. 35(a). Chief Judge Tymkovich, as well as Judges Kelly, Lucero, Hartz, and Gorsuch voted to grant en banc rehearing.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk