No. 16-1450

In the Supreme Court of the United States

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

SUPREME COURT OF NEW MEXICO, ET AL.

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

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

Whether the court of appeals erred in holding that Rule 16-308(E) may be applied to federal prosecutors serving subpoenas outside the grand jury context.

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The Acting Solicitor General, on behalf of the United States, respectfully files this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. Although we respectfully suggest that this Court should deny the petition in *Supreme Court of New Mexico* v. *United States*, No. 16-1323, if the Court grants that petition, it should also grant this cross-petition. If the Court denies that petition, it should also deny this cross-petition.

OPINIONS BELOW

The opinion and order of the court of appeals (Pet. App. 1a-93a) is reported at 839 F.3d 888. The opinion and order of the district court (Pet. App. 95a-119a) is

not published in the Federal Supplement but is available at 2014 WL 12487697.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2016. A petition for rehearing was denied on December 2, 2016 (Pet. App. 121a-122a). On February 13, 2017, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including April 3, 2017. On March 17, 2017, Justice Sotomayor further extended the time to May 1, 2017. The petition in No. 16-1323 was filed on May 1, 2017, and placed on this Court's docket on May 4, 2017. This conditional cross-petition is being filed pursuant to Rule 12.5 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The legal background, facts, and proceedings in this case are fully set forth in the government's brief in opposition in No. 16-1323 (at 2-8). Briefly, this case presents the question whether a State may, through its rules of professional conduct, prohibit federal prosecutors practicing in federal courts from serving subpoenas that are authorized by and enforceable under federal law. The petition in No. 16-1323 presents that question in the context of grand jury subpoenas. This conditional cross-petition presents the same question for subpoenas outside the grand jury context, which the parties and the decisions below have called "trial subpoenas."

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[1] References to "Pet.," "Pet. App.," and "Br. in Opp." refer to the petition for a writ of certiorari, appendix, and brief in opposition in No. 16-1323.

1. This case arises from New Mexico Rule of Professional Conduct 16-308(E), which 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.

In 2013, the United States filed this suit against cross-respondents, the New Mexico entities responsible for adopting and enforcing Rule 16-308(E). The government claimed that Rule 16-308(E) conflicts with federal law and is therefore preempted to the extent it applies to federal prosecutors. Pet. App. 10a.

2. The district court agreed with the United States that Rule 16-308(E) is preempted as applied to federal prosecutors serving grand jury subpoenas, but held that the rule may be enforced against federal prosecutors serving trial subpoenas. Pet. App. 95a-119a. With respect to trial subpoenas, the court concluded that it was bound by *United States* v. *Colorado Supreme Court*, 189 F.3d 1281 (10th Cir. 1999). Pet. App. 100a-106a. In that case, the Tenth Circuit held that a materially identical rule was enforceable against federal prosecutors outside the grand jury context, pursuant to the McDade Act, 28 U.S.C. 530B. See 189 F.3d at 1288-1289.

The McDade Act provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. 530B(a). In *Colorado Supreme Court*, the Tenth Circuit held that a Colorado rule analogous to Rule 16-308(E) was enforceable against federal prosecutors outside the grand jury context because the rule was a "rule of professional ethics" covered by the McDade Act and because the rule's application to trial subpoenas was not otherwise "inconsistent with federal law." 189 F.3d at 1284.

The district court reached a different conclusion with respect to grand jury subpoenas, which were not at issue in *Colorado Supreme Court*. The court held that Rule 16-308(E) is preempted as applied to federal grand jury subpoenas because it "conflicts with [federal] grand jury procedure" by limiting the evidence available to grand juries and by intruding on the secrecy of grand jury proceedings. Pet. App. 117a-118a.

3. A partially divided panel of the court of appeals affirmed. Pet. App. 3a-93a. Like the district court, the panel concluded that *Colorado Supreme Court* required it to hold that Rule 16-308(E) is enforceable against federal prosecutors outside the grand jury context. *Id.* at 62a. The panel majority also agreed with the district court that Rule 16-308(E) is preempted in the grand jury context because it conflicts with federal law. *Id.* at 63a-73a. Chief Judge Tymkovich dissented in part, explaining that he would have held that Rule 16-308(E) may be applied to federal prosecutors in the grand jury context as well. *Id.* at 77a-93a.

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

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The petition for a writ of certiorari in No. 16-1323 seeks review of the court of appeals' holding that Rule 16-308(E) may not be applied to discipline a federal prosecutor practicing before a federal grand jury for serving a subpoena that is authorized by federal law. As the brief in opposition in No. 16-1323 demonstrates, that conclusion was correct and does not warrant this Court's review. Among other things, no court of appeals has held that the McDade Act empowers state disciplinary authorities to apply a rule like Rule 16-308(E) to a federal prosecutor practicing before a federal grand jury, and only a handful of circuit court decisions have addressed the McDade Act at all. The petition in No. 16-1323 should therefore be denied. But if the Court grants that petition, it should also grant this conditional cross-petition for two reasons.

First, some of the arguments that the United States would present to defend the court of appeals' holding that Rule 16-308(E) may not be enforced in the grand jury context would, if accepted, also mean that the rule may not be enforced in the trial subpoena context. For example, the United States has argued that, notwithstanding its label, Rule 16-308(E) is not a rule of ethics within the meaning of the McDade Act because its purpose and effect is to restrict attorney subpoenas

and limit the evidence that a prosecutor may present. Br. in Opp. 17-18. Because the logic of that argument would suggest a modification of the portion of the judgment holding that the McDade Act authorizes the enforcement of Rule 16-308(E) against federal prosecutors outside the grand jury context, the United States is filing a conditional cross-petition to ensure that this Court could consider all of the arguments that bear on the question presented in No. 16-1323 if it grants that petition.[2]

Second, if this Court grants the petition in No. 16-1323 to determine whether Rule 16-308(E) may be applied to federal prosecutors in connection with grand jury subpoenas, its review should also encompass the question whether the rule may be applied to federal prosecutors outside the grand jury context. The two questions are related and raise overlapping issues. Both involve the same threshold dispute about whether Rule 16-308(E) is a rule of ethics under the McDade Act. See Br. in Opp. 17-19. Both also turn in part on the issue that divided the court of appeals: whether the McDade Act subjects federal prosecutors to state ethics rules only insofar as those rules are consistent with federal law, Pet. App. 57a-58a & n.20, or whether it also requires them to comply with state ethics rules that conflict with federal law, *id.* at 77a-80a (Tymkovich, C.J., dissenting). See Br. in Opp. 12-14.

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[2] See Stephen M. Shapiro et al., *Supreme Court Practice* § 6.35, at 493 (10th ed. 2013) (citing cases in which this Court has required a cross-petition because a respondent sought to present "an argument that would have supported the judgment in [its] favor," but the argument's "logic would have led to the entry of a judgment that went further in [the respondent's] direction"); see also, *e.g.*, *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1529 (2013).

Finally, although the relevant federal laws differ somewhat, Rule 16-308(E) conflicts with federal law outside the grand jury context for reasons similar to the reasons why it conflicts with federal law governing grand jury subpoenas. The Tenth Circuit's contrary conclusion rested on the court's assumption that a rule like Rule 16-308(E) "does not conflict" with Federal Rule of Criminal Procedure 17 because Rule 17 "details only the procedures for issuing a proper subpoena." *United States* v. *Colorado Supreme Court*, 189 F.3d 1281, 1288-1289 (1999). That assumption is incorrect.

As this Court has explained, Rule 17 also establishes a substantive standard for the enforcement of a subpoena, specifying that "[a] subpoena for documents may be quashed if their production would be 'unreasonable or oppressive,' *but not otherwise*." *United States* v. *Nixon*, 418 U.S. 683, 698 (1974) (emphasis added) (quoting Fed. R. Crim. P. 17(c)).[3] The application of Rule 16-308(E) to federal prosecutors effectively overrides that standard by establishing new and more restrictive conditions for a prosecutor to issue a trial subpoena—and by imposing disciplinary sanctions on a federal prosecutor for issuing a subpoena that is authorized by federal law. A state law with that effect conflicts with federal law and is preempted. See *Barnett Bank of Marion Cnty., N. A.* v. *Nelson*, 517 U.S. 25, 33 (1996) ("Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted.").

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

CONCLUSION

If this Court grants the petition for a writ of certiorari in No. 16-1323, it should also grant this cross-petition. If the Court denies the petition in No. 16-1323, it should deny this cross-petition.

Respectfully submitted.

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