No. 16-1323

IN THE
Supreme Court of the United States

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

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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For years, DOJ claimed the right to exempt federal prosecutors from state ethics rules, on the ground that the rules were preempted by federal law. Congress responded by enacting the McDade Amendment, which rejected DOJ's position and declared that federal prosecutors are subject to state (and federal-court) ethics rules. Congress specifically intended that federal prosecutors would be subject to rules governing attorney subpoenas, like the New Mexico rule at issue here. The brief in opposition relitigates the battle DOJ lost before Congress.

DOJ's refusal to accept that congressional mandate, calling into question 31 States' ethical rules, presents a question of national importance. DOJ's decisions to sue a state supreme court, to seek rehearing en banc, and now to file a conditional cross-petition for certiorari belie its current claim that this case is unimportant.

I. THE TENTH CIRCUIT'S DECISION IS INCORRECT

A. Rule 16-308(E) Is Authorized By The McDade Amendment

DOJ makes a threshold argument (at 17-19) that Rule 16-308(E) "is not properly classified as a rule of ethics under the McDade Act." That is incorrect.

First, Rule 16-308(E) is "ethical" in nature. "Legal ethics" are "[t]he standards of professional conduct applicable to members of the legal profession." *Black's Law Dictionary* (10th ed. 2014). Rule 16-308(E) meets that definition. It is codified among New Mexico's Rules of Professional Conduct, which "provide the framework for the ethical practice of law." *Garcia* v. *Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 750 P.2d 118, 124 (N.M. 1988). It applies only to lawyers, not to others who may participate in a proceeding. And it is enforceable through professional discipline. *Id.*

DOJ argues (at 18 n.8) that "[t]he rule is highly specific, lacks a consensus in ethical rules, and aims only at prosecutors." Whether a rule is "specific," however, does not indicate whether it is ethical in nature; other rules indisputably recognized as ethical are equally specific. *See, e.g.*, N.M. R. Prof'l Conduct 16-105 (Fees), 16-106 (Confidentiality of Information), 16-108 (Conflict of Interest). And Rule 16-308(E) reflects wide professional consensus—it derives from one of the ABA's Model Rules of Professional Conduct, and 31 States

have identical or similar rules, Pet. 11-12 & n.6. Rule 16-308(E) is also consistent with the well accepted principle that lawyers generally should refrain from calling opposing counsel to disclose information about their representations. *See, e.g.*, *Shelton* v. *American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986).

Rule 16-308(E) is no less "ethical" merely because it is directed at prosecutors. Prosecutors' conduct naturally requires special ethics rules given the awesome power they wield. *See* Model R. Prof'l Conduct 3.8. As multiple courts have recognized, prosecutors' service of subpoenas on defense counsel raises distinct ethical concerns. *See United States* v. *Colorado Sup. Ct.*, 189 F.3d 1281, 1288 (10th Cir. 1999); *Whitehouse* v. *U.S. Dist. Ct. for Dist. of R.I.*, 53 F.3d 1349, 1358 (1st Cir. 1995).

Moreover, even putting aside the "ethical" label (which appears only in the heading of 28 U.S.C. § 530B), the McDade Amendment's *text* makes clear that it authorizes Rule 16-308(E). The Amendment subjects federal prosecutors to "rules … governing attorneys," and there is no question that Rule 16-308(E) "govern[s] attorneys."

Second, DOJ invokes its own regulation providing that the McDade Amendment "should not be construed to encompass 'rules of procedure, evidence, or substantive law,' even if those rules are 'included in a code of professional responsibility for attorneys.'" Opp. 18 (quoting 28 C.F.R. § 77.2(h)(1)). That distinction is nowhere to be found in the statute, however. And since the Amendment's purpose was to reject an earlier version of the DOJ regulation, which purported to preempt state ethical rules, DOJ's self-serving attempt to limit the statute's reach warrants skepticism. Congress di-

rected DOJ to "make and amend rules … to *assure compliance* with" the McDade Amendment, not to confine it. 28 U.S.C. § 530B(b) (emphasis added).

In any event, Rule 16-308(E) is *not* a rule of procedure or evidence. The government claims (at 18) that it "functions" as such, "notwithstanding its label," because "[i]ts purpose and effect is to alter the evidence that a prosecutor presents." But by that rationale, many ethics rules would fall outside the McDade Amendment. Such rules commonly guide how attorneys conduct themselves in court—what arguments they make, what evidence they present, and so on. For example, the rule that generally prohibits lawyers from "communicat[ing] about the subject of [a] representation with a person the lawyer knows to be represented," Model R. Prof'l Conduct 4.2, may "alter the evidence" that a prosecutor obtains or presents. Yet it is hard to imagine a more quintessential rule of "ethics." *See also, e.g.*, Model R. Prof'l Conduct 3.1, 3.3, 3.4, 3.5.

DOJ argues (at 12) that if the McDade Amendment applies to all state ethics rules—as Congress provided—then States could "use ethics rules to effectively nullify wide swaths of federal substantive, procedural, and evidentiary law." This is not a genuine problem. State rules of professional conduct have long governed lawyers' conduct in federal courts, yet there is no history of state efforts to impose requirements that conflict with "wide swaths" of applicable federal substantive, procedural, or evidentiary law. Lawyers generally have no difficulty adhering simultaneously to both federal law and state ethics rules, and DOJ does not argue otherwise. Indeed, many *federal* jurisdictions have adopted the same or substantially similar rules of professional conduct as the States, *see* Pet. 12 & n.7, under their authority to adopt local rules that are "consistent

with Acts of Congress and" the Federal Rules of Civil Procedure, 28 U.S.C. § 2071(a), which in turn may "not abridge, enlarge or modify any substantive right," *id.* § 2072(b).

That state standards may affect how lawyers conduct themselves in both state and federal courts—which is, after all, their legitimate purpose, *see Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975)—hardly means they "nullify" intersecting federal laws. Moreover, the McDade Amendment protects federal prosecutors from being singled out by States by providing that they are subject to state rules of professional conduct only to the same extent as state prosecutors. There is no basis to believe States will exploit the Amendment to override federal substantive, procedural, or evidentiary law.

B. The McDade Amendment Subjects Federal Prosecutors To Rules That Would Otherwise Be Preempted

The government further argues (at 12-15) that the McDade Amendment does not subject federal prosecutors to state ethics rules that would otherwise be preempted. But the Amendment's entire point was to override DOJ's efforts to exempt its attorneys, on preemption grounds, from state-law rules governing other attorneys. *See* Pet. 6-9. The Amendment is an anti-preemption clause: If a given rule "govern[s] attorneys," the Amendment provides that it is authorized and thus *not* preempted by any other federal law. 28 U.S.C. § 530B(a). DOJ's circular argument—that the Amendment cannot authorize the application of an otherwise-preempted state rule to federal prosecutors if the rule is otherwise preempted—would nullify the statute.

DOJ argues (at 12-13) that the Amendment requires federal prosecutors to follow state rules of professional conduct only "to the same extent and in the same manner as other attorneys," 28 U.S.C. § 530B(a), and that "*no* attorney can be required to comply with a state rule that conflicts with—and is thus preempted by—federal law." That argument reflects an erroneous reading of the statute. State prosecutors *are* subject to Rule 16-308(E) (before New Mexico grand juries), and thus the Amendment subjects federal prosecutors to the rule (before federal grand juries).

DOJ next invokes (at 13) the "background rule" that Congress must speak clearly to authorize "state regulation of federal officials." But as the petition explains (at 18-23), the McDade Amendment *does* clearly subject federal prosecutors to rules like the one here. The whole point of the Amendment was to reach federal government attorneys; Congress could hardly have been clearer in its intent. The Amendment also closely resembles the statute at issue in *Goodyear Atomic Corp.* v. *Miller*, which this Court regarded as clear enough to subject federal premises to a particular type of state worker's compensation law, notwithstanding the federal contractor's argument that the statute applied only to certain types of worker's compensation regimes. *See* 486 U.S. 174, 182-185 (1988).

The Amendment's legislative history confirms that Congress understood federal prosecutors would be subject to state rules governing prosecutors' issuance of grand-jury subpoenas to lawyers. DOJ's increasing use of attorney subpoenas was an impetus for congressional action. *See* Pet. 8-10. In opposing the 1996 bill that became the McDade Amendment, DOJ stated that a "major effect" of the bill would be "to leave federal prosecutors vulnerable to hostile state ethics rules," includ-

ing rules "requiring prior judicial approval for subpoenas against attorneys" (such as the initial ABA model rule, Pet. 10 n.4). *Ethical Standards for Federal Prosecutors Act of 1996: Hearing Before the Subcomm. on Courts & Intellectual Property of the H. Comm. on the Judiciary* ("1996 Hearing"), 104th Cong. 12, 47-48 (1996). And both Representative McDade and Senator Hatch confirmed the Amendment would cover prosecutorial conduct before grand juries.[1]

Finally, it blinks reality for DOJ to argue (at 13) that "Congress gave no indication that it 'meant to empower states … to regulate government attorneys in a manner inconsistent with federal law.'" The purpose of the McDade Amendment was to prevent DOJ from asserting that state ethics rules were "inconsistent with federal law." DOJ recognized that at the time; for example, it told Congress that the language eventually included in the Amendment would "implicitly cut[] back

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[1] DOJ notes (at 14-15) that Representative McDade referred to numerous examples of misconduct in introducing his bill, and claims (at 15) that he "did not suggest that his proposed legislation would address all of the examples." But it would have been odd for Representative McDade to identify a type of misconduct as problematic if he did *not* intend to address it. And DOJ's argument (at 15 n.7) that he was referring to the examples only in connection with a never-enacted part of his bill—a set of federal ethics standards—is incorrect. Those standards would not have covered the issuance of grand jury subpoenas to attorneys; only the surviving part of the bill, subjecting federal lawyers to state rules, did so. *See* H.R. 3396, 105th Cong. § 201 (1998) (proposed standards). DOJ also errs in arguing (at 15) that Senator Hatch's comment should not be considered because he opposed the bill. The fear that opponents of a bill may "'overstate its reach,'" *Bryan* v. *United States*, 524 U.S. 184, 196 (1998), does not apply where, as here, the bill's proponent and opponent *agreed* about its scope.

on the Attorney General's … power to preempt [state ethics] rules when they conflict with federal law." 1996 Hearing 47. Yet DOJ now argues as if Congress intended to accomplish nothing by enacting the Amendment.

C. Rule 16-308(E) Does Not Conflict With Federal Law

Even if DOJ were correct that the McDade Amendment does not authorize Rule 16-308(E), the rule would still not be preempted because it does not, contrary to DOJ's assertion (at 9-12), "interfere[] with the grand jury's 'constitutionally sanctioned investigative role'" or conflict with Federal Rule of Criminal Procedure 6(e).

1. DOJ largely recapitulates (at 9-11, 15-17) the Tenth Circuit majority's reasoning that Rule 16-308(E) limits the broad scope of the grand jury's investigative powers. But as the petition explains (at 23-25), that argument ignores the distinction between prosecutors and grand juries. Rule 16-308(E) regulates prosecutors' conduct before the grand jury; it does not regulate grand juries. As the First Circuit has recognized, that distinction is "critical." *Whitehouse*, 53 F.3d 1357.[2]

DOJ's notion (at 16) of the supine grand jury, dependent on prosecutors, clashes with its own emphasis

[2] DOJ notes (at 16) that a later First Circuit panel purported to "eschew this component of [*Whitehouse*'s] reasoning," *Stern* v. *U.S. Dist. Ct. for Dist. of Mass.*, 214 F.3d 4, 16 n.4 (1st Cir. 2000). Whatever it means for one panel to "eschew" circuit precedent—while remaining "bound by [its] holding," *id.*—*Whitehouse* remains persuasive.

on the grand jury's constitutional independence. At the Founding, "the grand jury had sweeping proactive and inquisitorial powers." Amar, *The Bill of Rights* 85 (1998). Its "role … went far beyond oversight of a prosecutor's proposed indictments." *Id.* And this Court has confirmed in more modern times that "the whole theory of [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." *United States* v. *Williams*, 504 U.S. 36, 47 (1992). Indeed, the Fifth Amendment's "constitutional guarantee presupposes an investigative body acting independently of either prosecuting attorney or judge." *Id.* at 49 (emphases and quotation marks omitted).

Nor is the grand jury's independent power merely a historical relic. Even today, a grand jury may "subpoena new witnesses and documents" by request to the court as well as the prosecutor, and may exercise this power "even over the active opposition of the government's attorneys." Beale et al., *Grand Jury Law & Practice* § 4:5 (2d ed. 2016); *see also id.* (grand jury can subpoena "any other witnesses that [it] may request"); Goldstein & Witzel, *Grand Jury Practice* § 3.04[1] (2017) ("[A]lthough law enforcement agencies and prosecutors now do the majority of the investigatory work prior to indictment, the grand jury retains powers commensurate with its historically broad based role.").

2. DOJ is also incorrect in arguing (at 11-12) that Rule 16-308(E) conflicts with the grand-jury-secrecy provisions of Federal Rule of Criminal Procedure 6(e).

DOJ wrongly assumes (at 12) that, to respond to ethics complaints, "federal prosecutors would have to establish to the satisfaction of state disciplinary author-

ities that 'the evidence sought [wa]s essential to the successful completion of an ongoing investigation' and that 'there [wa]s no other feasible alternative to obtain the information.'" In fact, the rule requires only a "reasonable belief" that those standards were met.

Moreover, the only issue here is whether the standard of conduct set forth in Rule 16-308(E) is preempted by federal law. No disclosure of grand jury material is necessary for prosecutors to comply with that standard. There is no occasion to decide here whether Rule 16-308(E)'s enforcement in a disciplinary proceeding would require such disclosure—or, if so, whether that disclosure would fall within one of the many exceptions to the rule of grand-jury secrecy.[3] Any tension between Rule 16-308(E) and Rule 6(e) may be addressed, if necessary, on an as-applied basis.

II. THIS CASE WARRANTS REVIEW

DOJ's attempts (at 19-23) to minimize the importance of this case are unpersuasive.

First, DOJ observes (at 20-21) that although 31 States have adopted rules like New Mexico's, there is no known "instance in which a State has sought to en-

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[3] Piercing the veil of grand jury secrecy may be warranted by a "particularized need for disclosure." *Douglas Oil Co. of Cal.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). Rule 6(e)(3) itself contains various exceptions, and "courts and legislatures have fashioned a complex set of rules" governing disclosure of grand jury materials, Beale et al., *Grand Jury Law & Practice* § 5:1; *see id.* §§ 5.3-5.11. Courts can consider exceptions to the secrecy rule in the context of disciplinary proceedings. *See, e.g.*, *Matter of Federal Grand Jury Proceedings*, 760 F.2d 436, 438-440 (2d Cir. 1985); *In re Barker*, 741 F.2d 250, 255 (9th Cir. 1984).

force a rule like Rule 16-308(E) against a federal prosecutor." But when petitioners made a similar point below, in arguing that DOJ lacked standing (Pet. C.A. Br. 27-29), DOJ responded by arguing that the threat of enforcement was serious enough that prosecutors had altered their practices to conform to the rule. U.S. C.A. Br. 25-26; *see* C.A. App. 84-88 (DOJ declaration). Having argued below that the mere existence of the rule is enough of a threat for federal prosecutors to modify their conduct, DOJ can hardly now argue the opposite.

Second, DOJ argues (at 21) that "it is unclear whether and to what extent other States would purport to apply their rules of professional conduct to federal prosecutors practicing before grand juries," on the theory that most States have a rule specifying that conduct before a tribunal is governed by "'the rules of the jurisdiction in which the tribunal sits, *unless the rules of the tribunal provide otherwise*.'" But it is not obvious that that rule would govern grand-jury proceedings—and even if it does, DOJ's argument would make sense only if federal courts in the relevant States had adopted rules providing that state ethics rules do *not* apply. As the petition shows (at 12 & n.7), the opposite is true: Many federal courts in the relevant States explicitly require attorneys to comply with state rules of professional conduct.

Third, DOJ argues (at 20) that the validity of attorney-subpoena rules has "given rise to … little litigation," and (at 23) that the question presented would be worthy of review only "[i]f other States or district courts assert the authority to enforce rules like Rule 16-308(E) against federal prosecutors serving grand jury subpoenas." But DOJ alone decides when the existence of an attorney-subpoena rule warrants suing the court that promulgated the rule. The reason the

rules have not been litigated more often is that DOJ has seen fit to challenge them only rarely.

DOJ's apparent preference for suing state and federal courts in piecemeal fashion—bringing clarity only to one court at a time—is baffling. If the validity of New Mexico's Rule 16-308(E) was important enough for DOJ to sue the state supreme court, it is important enough to warrant a nationwide resolution that would forestall the need for other state and federal courts that adopted a similar rule to defend themselves in court. This case presents "an important question of federal law that has not been, but should be, settled by this Court," S. Ct. R. 10(c), and DOJ has identified no impediment to its resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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