No. 16-1450

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Cross-Petitioner,

v.

SUPREME COURT OF NEW MEXICO, THE DISCIPLINARY BOARD OF NEW MEXICO, AND OFFICE OF THE DISCIPLINARY COUNSEL OF NEW MEXICO,
Cross-Respondents.

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

RESPONSE TO CONDITIONAL CROSS-PETITION

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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 by the conditional cross-petition is whether Rule 16-308(E) is preempted with respect to federal prosecutors in the context of trial proceedings.

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The Supreme Court of New Mexico, the Disciplinary Board of New Mexico, and the Office of the Disciplinary Counsel of New Mexico respectfully submit that if their petition for a writ of certiorari in No. 16-1323 is granted, the conditional cross-petition of the United States should also be granted.

STATEMENT

The relevant facts and procedural history are largely set forth in the petition for a writ of certiorari in No. 16-1323 (at 6-17), which presents the question whether New Mexico Rule of Professional Conduct 16-

308(E) is preempted in the context of grand jury proceedings. The following discussion focuses on the issue presented by DOJ's cross-petition: Whether Rule 16-308(E) is preempted in the context of *trial* proceedings.

1. In 1993, DOJ sued the Colorado Supreme Court and its associated disciplinary bodies, seeking a judgment that Colorado Rule of Professional Conduct 3.8(f)—which is identical to the New Mexico rule at issue here, Pet. App. 9a-10a—could not be enforced against federal prosecutors in trial or grand jury proceedings.[1]

The district court held that the Colorado rule could lawfully be applied to trial subpoenas, but not grand jury subpoenas. *United States* v. *Colorado Sup. Ct.*, 988 F. Supp. 1368, 1370-1371 (D. Colo. 1998). The Tenth Circuit unanimously affirmed the judgment that the Colorado rule could lawfully be applied in trial proceedings. *United States* v. *Colorado Sup. Ct.*, 189 F.3d 1281 (10th Cir. 1999). The Colorado Supreme Court did not appeal the district court's decision as to the grand jury context, and the Tenth Circuit accordingly did not address it. *Id.* at 1284.

The Tenth Circuit's analysis focused almost entirely on whether the Colorado rule fell within the ambit of the McDade Amendment, 28 U.S.C. § 530B(a), which states in relevant part 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." Given that statute, the

[1] Pet. App. citations in this document refer to the Petition Appendix in No. 16-1323.

court explained, "the question whether Rule 3.8 violates the Supremacy Clause … turns on whether the rule is a rule of professional ethics clearly covered by the [statute], or a substantive or procedural rule that is inconsistent with federal law." 189 F.3d at 1284.

The court "easily conclude[d]" that the Colorado rule was "an ethical one." 189 F.3d at 1288. It explained that "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"—damage that "raises manifest *ethical* concerns." *Id.* (quotation marks omitted). The court further relied on the fact that the rule was "in commandment form," and that it was "clearly directed at the prosecutor, not at the cause of action … , with the consequences of personal sanction." *Id.*

In one concluding paragraph, the court further held that the Colorado rule did "not conflict with" Federal Rule of Criminal Procedure 17, "which details only the procedures for issuing a proper subpoena." 189 F.3d at 1288-1289. "Rule 17," the court explained, "does not abrogate the power of courts to hold an attorney to the broad normative principles of attorney self-conduct." *Id.* at 1289.

DOJ petitioned for rehearing en banc. C.A. App. 651-689.[2] No member of the Tenth Circuit requested a vote on rehearing, and the petition was denied. C.A. App. 705.

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[2] In an April 28, 2014 Order, the Tenth Circuit granted cross-respondents' motion to supplement the record in this case with designated portions of the record in *Colorado Supreme Court*, and those documents were filed in a separate volume of the Appendix.

2. In this case, DOJ challenged whether New Mexico Rule 16-308(E) could lawfully be applied to either trial or grand jury subpoenas. Both the district court and the Tenth Circuit regarded the trial context as controlled by the Tenth Circuit's decision in *Colorado Supreme Court*, and accordingly held that the New Mexico rule may lawfully be applied with respect to trial subpoenas. Pet. App. 102a-106a (district court); Pet. App. 59a-62a (Tenth Circuit majority); *see also* Pet. App. 83a n.6 (Tenth Circuit partial dissent).

DOJ filed a petition for rehearing en banc, asking the Tenth Circuit "to reconsider *Colorado Supreme Court*." U.S. Reh'g Pet. 3. No member of the Tenth Circuit called for a vote on DOJ's request, and the petition was denied on October 13, 2016.

ARGUMENT

I. DOJ'S CROSS-PETITION MAKES THE PETITION EVEN MORE WORTHY OF REVIEW

The cross-respondents agree that, if this Court decides to consider the question presented by the petition—whether New Mexico's Rule of Professional Conduct 16-308(E) is preempted in the context of grand jury subpoenas—it should also consider whether that rule is preempted in the context of trial subpoenas.

The conditional cross-petition makes this case an ideal vehicle to resolve the profoundly important questions presented by the petition and cross-petition. Had DOJ not filed a cross-petition, the Court might have wished to wait for a case in which it could decide the enforceability of attorney-subpoena rules in both grand jury and trial proceedings. This case now affords the Court that opportunity.

DOJ's cross-petition also highlights its recognition that the questions presented by the petition and cross-petition are important. This is a case in which DOJ has seen fit to sue the supreme court of a sovereign State, to seek rehearing en banc—for a second time on the same issue—in the court of appeals, and now to seek review (albeit conditionally) from this Court. DOJ invokes each of those prerogatives rarely, and only after consideration by senior officials.[3]

II. THE TENTH CIRCUIT'S HOLDING AS TO TRIAL SUBPOENAS WAS CORRECT

Although DOJ is correct that the question presented by this conditional cross-petition warrants review, it is incorrect to suggest that the question was wrongly decided below.

Rule 16-308(E) is not preempted in the context of trial proceedings largely for the same reasons it is not preempted in the context of grand jury proceedings—reasons discussed more fully in the petition for a writ of certiorari in No. 16-1323 (at 17-23) and the petitioners' reply brief (at 2-8). In particular, because Rule 16-308(E) "govern[s] attorneys" and thus falls within the scope of the McDade Amendment, 28 U.S.C. § 530B(a), it is authorized by federal law. As Chief Judge Tymkovich wrote, "[t]hat should end the matter," with no need to consider whether Rule 16-308(E) would other-

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[3] *See U.S. Attorney's Manual* § 4-6.240 (suits against "a state government, agency, or entity" must be authorized by the Assistant Attorney General for the Civil Division, with notice to the Deputy Attorney General, and after notice to the State's Governor and Attorney General); *id.* §§ 2-2.121, .122 (appeals, petitions for rehearing en banc, or petitions for certiorari on behalf of the United States must be authorized by the Solicitor General).

wise conflict with federal law. Pet. App. 78a. DOJ's argument (at 7) that the New Mexico rule conflicts with Federal Rule of Criminal Procedure 17 is therefore irrelevant.

Even if the New Mexico rule were not authorized by the McDade Amendment, it still would not be preempted. DOJ invokes (at 7) the doctrine that States may not "forbid, or … impair significantly, the exercise of a power … explicitly granted" by federal law, *Barnett Bank of Marion Cty., N.A.* v. *Nelson*, 517 U.S. 25, 33 (1996). Rule 16-308(E) runs afoul of that rule, DOJ claims, because it "effectively overrides" Rule 17's "substantive standard for the enforcement of a subpoena" in the federal courts. Relatedly, DOJ argues (at 7) that Rule 16-308(E) impermissibly imposes "new and more restrictive conditions" on federal prosecutors. But those arguments mischaracterize both rules, which work in fundamentally different spheres.

Rule 16-308(E) regulates only the professional conduct of lawyers; it has nothing to do with the procedures applied by any court. Unlike the ABA's initial version of the attorney-subpoena rule—which required judicial approval before the issuance of a subpoena, Pet. 10 n.4—Rule 16-308(E) provides no basis to quash a subpoena. *See In re Grand Jury Proceedings*, 616 F.3d 1172, 1186 (10th Cir. 2010).

By contrast, Rule 17(c)(2)—which articulates the "unreasonable and oppressive" standard—speaks to the power of courts to quash subpoenas, not the power of attorneys to issue them. Rule 17 is not a provision granting power to prosecutors. And certainly nothing in Rule 17 grants prosecutors dispensation from acting ethically in issuing subpoenas, even where ethics rules may limit their ability to issue a procedurally proper

subpoena. *See Colorado Sup. Ct.*, 189 F.3d at 1289 ("Rule 17 does not abrogate the power of courts to hold an attorney to the broad normative principles of attorney self-conduct."); *Whitehouse* v. *U.S. Dist. Ct. for Dist. of R.I.*, 53 F.3d 1349, 1364 (1st Cir. 1995) ("There is nothing in the text of Rule 17 to suggest it was intended to abrogate the power of a federal court to regulate the conduct of attorneys appearing before it."). Indeed, DOJ recognizes, in its brief in opposition to certiorari in No. 16-1323, that Rule 17's "unreasonable or oppressive" standard may provide grounds for quashing subpoenas directed at attorneys when they "'would likely destroy the attorney-client relationship.'" Opp. 10 (quoting *United States* v. *Bergeson*, 425 F.3d 1221, 1225 (9th Cir. 2005)).

The relationship between Rule 17's procedural standard and Rule 16-308(E)'s ethical standard is not unusual; to the contrary, ethical rules commonly proscribe conduct that does not run afoul of procedural or evidentiary rules. Federal Rule of Evidence 402, for example, states a highly permissive standard for admissibility: Evidence is admissible as long as it is "[r]elevant," unless its admission is forbidden by "the United States Constitution," "a federal statute," the Federal Rules of Evidence, or "other rules prescribed by the Supreme Court." Yet ethical rules may often prevent prosecutors, like other lawyers, from obtaining and introducing evidence that would be relevant under Rule 402. For example, a prosecutor (like any other lawyer) "shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Model R. Prof'l Conduct 4.2. Nor may a prosecutor (or any other

lawyer) "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Model R. Prof'l Conduct 8.4(c). The fact that these ethical rules may prevent a prosecutor from obtaining and introducing admissible evidence does not mean they conflict with Rule 402. The rules simply address different issues; they are complementary.

DOJ is therefore incorrect to argue (at 7) that Rule 16-308(E) "'forbid[s], or … impair[s] significantly, the exercise of a power … explicitly granted'" by Rule 17. Rule 17 does not grant prosecutors the power to issue subpoenas that would violate Rule 16-308(E).

Nor does any other recognized basis for preemption apply to Rule 16-308(E). For good reason, DOJ does not argue that Rule 16-308(E) is preempted "through express language in a statute," *Oneok, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015), or that "Congress has forbidden the State to take action in the *field*," *id.*, or that "'compliance with both state and federal law is impossible,'" *id.* At most, DOJ's argument (at 7) might be read to invoke the doctrine that state law may be preempted "where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," 135 S. Ct. at 1595 (quotation marks omitted). But DOJ has not articulated what congressional purposes and objectives are contravened by Rule 16-308(E). Purposes-and-objectives preemption requires a close analysis of "the nature of the federal interest," to determine whether that interest is actually frustrated by state law. *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1950 (2013); *see Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000). Here, DOJ appears to rely on Rule 17, but as discussed above, Rule 17 and Rule 16-308(E) do not conflict with each other, and no federal interest underlying Rule 17

would be undermined by New Mexico's concurrent enforcement of Rule 16-308(E).

CONCLUSION

If the petition for a writ of certiorari in No. 16-1323 is granted, this conditional cross-petition should also be granted.

Respectfully submitted.

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