April 6, 2026

Hon. Todd Blanche
Acting Attorney General and
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington DC 20530
Attn: Docket No. OAG199

RE: *Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780 (Mar. 5, 2026).*

Democracy Defenders Fund, Lawyers Defending American Democracy, and the 129 undersigned former federal and state judges respectfully submit this comment on the Department of Justice's (DOJ) proposed rule, *Review of State Bar Complaints and Allegations Against Department of Justice Attorneys,* 91 Fed. Reg. 10780 (Mar. 5, 2026) (Proposed Rule). As described further in this comment, the Proposed Rule violates the plain text of 28 U.S.C. § 530B, strays far beyond DOJ's statutory and constitutional authority, infringes upon important federalism concerns related to an area traditionally regulated by state authorities, and was not promulgated consistent with the Administrative Procedure Act. The Proposed Rule has the obvious purpose, and if adopted in its current form will have the practical effect, of improperly insulating DOJ attorneys, including prosecutors, from regulation by the state ethics bodies who issued their respective licenses to practice and who regulate all other lawyers licensed in the state. It will also impede DOJ attorneys' ability to respond to lawful requests from state disciplinary bodies, in violation of their ethical obligations to do so.

That result is untenable. The American public is entitled to know that all DOJ attorneys – regardless of rank or role – are bound by the same ethical rules that apply across the profession and that if they fail to do so they will be held accountable to the same extent and in the same manner as all other attorneys. As Justice Gorsuch recently emphasized in *Niz-Chavez v. Garland*: "If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."[1] The Proposed Rule would shake, not strengthen, public confidence. As a result, we request that DOJ formally withdraw the Proposed Rule in its entirety.

Background

Section 801 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, codified at 28 U.S.C. § 530B and commonly referred to as the McDade Amendment, provides, in part:

> (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

[1] 593 U.S. 155, 172 (2021).

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.

Prior to the passage of the McDade Amendment, and since at least 1980, the Department of Justice had attempted to insulate government attorneys from certain state ethics rules, particularly those that preclude communications with represented parties ("no contact rule"). In 1980, the Department of Justice's Office of Legal Counsel opined that professional rules of professional conduct did not always apply to criminal investigations when they would burden federal activities.[2] The Second Circuit rejected that position in 1988.[3]

In response to that ruling, in 1989, Attorney General Richard Thornburgh issued a memorandum to DOJ litigators explaining that they were not bound by the no contact rules of the various state bars.[4] The memo based this assertion on DOJ's "position that the Supremacy Clause of the Constitution does not permit local and state rules to frustrate the lawful operation of the federal government" and that such rules would not, therefore, apply if they conflicted with "federal law or with the attorney's federal responsibilities."[5] The American Bar Association immediately rejected that approach as "a unilateral assumption of authority to render self-interested interpretations of ethical standards, but also an unwarranted and unfounded use of executive power to create unequal classes of both litigants and lawyers."[6]

Courts considering the Thornburgh Memo rejected it as being "misguided and not premised on sound legal authority."[7] The United States District Court for the Northern District of California, for example, explained that "[t]here are profound flaws in the Attorney General's policy and they are demonstrated within the four corners of the Thornburgh Memorandum."[8] Similarly, the District Court for the District of Columbia in *U.S. v. Ferrara* determined that the Thornburgh Memo was not "'federal law,' for purposes of preempting state regulation of attorney ethics."[9] Although the court ultimately concluded that it did not have personal jurisdiction, and therefore could not rule on the merits of the dispute, the court expressed its view

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[2] *See, e.g., Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations,* 4B Op. O.L.C. 576, 601-602 (1980).
[3] *United States v. Hammad*, 858 F.2d 834, 837 (2d Cir. 1988).
[4] Memorandum from Attorney General Thornburgh, *Re: Communication with Persons Represented by Counsel* (June 8, 1989), *set forth in Matter of Doe*, 801 F. Supp. 478, 490 (D.N.M. 1992) (Thornburgh Memo).
[5] *Id.*
[6] *Matter of Doe*, 801 F. Supp. 478, 487 (D.N.M. 1992) (reprinting portions of the statement of the American Bar Association Report to the House of Delegates (Feb. 12, 1990)).
[7] *United States v. Lopez*, 765 F. Supp. 1433, 1450 (N.D. Cal. 1991), *vacated on other grounds*, 989 F.2d 1032 (9th Cir. 1993), *opinion amended and superseded*, 4 F.3d 1455 (9th Cir. 1993), *and vacated*, 4 F.3d 1455 (9th Cir. 1993).
[8] *Id.* at 1446.
[9] *United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993), *aff'd*, 54 F.3d 825 (D.C. Cir. 1995), *amended* (Jul. 28, 1995).

that disciplinary actions against DOJ attorneys did not violate the Supremacy Clause irrespective of the Thornburgh Memo.[10]

In 1994, Attorney General Janet Reno went further and promulgated regulations that codified the Thornburgh Memo.[11] As DOJ explained in the preamble to the 1994 rulemaking, the regulations were "intended fully to preempt and supersede" state bar rules related to the no contact rule.[12] Those regulations met with similar disfavor, and the Eighth Circuit set them aside in 1998.[13] In particular, the court found that the Department had no legal authority, including under the federal "Housekeeping Statute,"[14] to exempt DOJ attorneys from the local rules that apply to all other attorneys:[15] "An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set these regulations aside."[16] In other words, "invalid promulgations of the Attorney General can neither preempt nor supersede the local federal rules."[17]

Congress was also focused on these issues at the same time. In 1990, after holding hearings,[18] a subcommittee of the House Committee on Oversight (then the Committee on Government Operations) issued a report concerning federal prosecutorial authority.[19] Among other things, the subcommittee expressed serious reservations with DOJ's view that it had the authority to exempt government attorneys from state ethics laws. The subcommittee also conveyed deep skepticism about DOJ's assertions that it could or would hold its own staff to account. As the report explained, there are "problems inherent in any system of self-policing and regulation," and quoted one witness who pointed out that turning oversight over to DOJ was "like the fox guarding the chicken coop."[20]

Congress eventually returned to the issue six years later, when Representative McDade introduced the "Ethical Standards for Federal Prosecutors Act of 1996."[21] Section 2 of the bill contained essentially the same language as the McDade Amendment that Congress passed three years later, now codified at 28 U.S.C. § 530B. The bill was not passed immediately, although the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary held

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[10] 847 F. Supp. at 968.
[11] 28 C.F.R. § 77 (1994).
[12] 59 Fed. Reg. 39910, 39912 (Aug. 4, 1994).
[13] *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1256-1257 (8th Cir. 1998).
[14] 5 U.S.C. § 301. That statute provides in relevant part that "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." *Id.*
[15] *McDonnell Douglas Corp*., 132 F.3d at 1256-1257.
[16] *Id.*
[17] *Id.*
[18] *See, e.g.* Hearing on the Exercise of Federal Prosecutorial Authority, Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, U.S. House of Representatives (May 10, 1990).
[19] Committee on Government Operations, Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required, H. Rept. 101-986 (1990).
[20] *Id.*
[21] H.R. 3386, 104th Cong., § 2 (1996). The bill was also reintroduced as H.R. 232 in 1997. *See* H.R. 232, 105th Cong. (1997).

hearings on the bill the same year McDade first introduced the language.[22] In 1998, Representative McDade returned to the issue through the "Citizens Protection Act of 1998."[23] Section 101 of that bill again contained identical language to the McDade Amendment that was eventually adopted in the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999. Months after the McDade Amendment was enacted, Senator Orrin Hatch introduced a bill that would have amended the law to require federal prosecutors to follow state ethics laws *except* when they were "inconsistent with Federal law or interfere[d] with the effectuation of Federal law or policy, including the investigation of violations of Federal law."[24] That bill never made it out of committee.

Following passage of the McDade Amendment, DOJ promulgated an interim final rule pursuant to 28 U.S.C. § 530B(b) to "assure compliance" with the legislation.[25] In doing so, DOJ explained that the rules "recognize that attorneys are principally subject to discipline by their state of licensure and the courts before which they practice."[26] As a result, "although Department attorneys are also subject to discipline by the Office of Professional Responsibility, the regulations generally direct DOJ attorneys to look, according to the circumstances, to the rules of the court before which they are appearing and the rules of their licensing jurisdiction."[27]

The current regulations implementing the McDade Amendment are found at 28 C.F.R. part 77. The operative portion is § 77.3:

> In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local 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, as these terms are defined in §77.2 of this part.

The regulations also provide guidance on what to do if two applicable rules of ethical conduct conflict; delineate special responsibilities of supervisory attorneys and those overseeing investigative agents; and establish limits on private remedies.[28]

The Proposed Rule

The Proposed Rule would revise 28 C.F.R. Part 77 in several material ways.[29] The most important change is contained in a new 28 C.F.R. § 77.5:

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[22] Ethical Standards for Federal Prosecutors Act of 1996: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong., 2d Sess. (1996).
[23] H.R. 3396, § 101(a), 105th Cong. (1998).
[24] Federal Prosecutor Ethics Act, S. 250, 106th Cong. § 2 (1999).
[25] *Ethical Standards for Attorneys of the Government,* 64 Fed. Reg. 19273 (Apr. 20, 1999) (codified at 28 C.F.R. pt. 77).
[26] 64 Fed. Reg. 19274.
[27] *Id.*
[28] 77 C.F.R. §§ 77.4-77.5.
[29] The Proposed Rule would also amend 28 C.F.R. § 77.1, *Purpose and Authority*, to, e.g., reflect the substantive changes by providing that "The regulations set forth in this part establish a process for the Attorney General or her

> Before the bar disciplinary authorities of the States, the Territories, or the District of Columbia undertake any investigative steps that seek information or otherwise require participation from an attorney for the government in response to allegations that a current or former attorney for the government violated a rule of ethical conduct while engaging in that attorney's duties for the Department, the Attorney General shall have the right to review the allegations in the first instance.

The purported basis for the Proposed Rule is the "weaponization" of the state disciplinary process.[30] The preamble to the Proposed Rule suggests that state bar disciplinary proceedings "would interfere with the broad statutory authority of the Attorney General to manage and supervise Department attorneys."[31] These points echo statements recently made by DOJ in an amicus brief filed in the D.C. Court of Appeals disciplinary action against former Assistant Attorney General Jeffrey Clark,[32] which involved serious allegations of misconduct under the District of Columbia's legal ethics rules.[33]

In implementing the regulatory "right of first review" the Proposed Rule would give the Attorney General the authority to "request that the bar disciplinary authorities suspend any parallel investigations or disciplinary proceedings until the completion of [her] review."[34] The preamble explains that the "Attorney General or her designee" would review bar complaints, with DOJ's Office of Professional Responsibility (OPR) serving as her "designee for reviewing bar complaints and allegations against Department attorneys."[35] Although the Proposed Rule frames the "right of first review" as a "request," the preamble actually goes further by providing that OPR would "direct Department personnel not to provide any non-public information to any parallel investigations or disciplinary proceedings until the completion of OPR's review."[36] This includes "all or nearly all" interviews with state disciplinary bodies.[37] The Proposed Rule also provides that "[s]hould the relevant bar disciplinary authorities refuse the Attorney General's request, the Department shall take appropriate action to enforce this regulation or to prevent the bar disciplinary authorities from interfering with the Attorney General's review of the allegations."[38] The clear implication is that a state disciplinary authorities' decision to not abide by the Attorney General's "request" would trigger action directed at the disciplinary body.

Moreover, the preamble makes clear that DOJ views its authority to displace state disciplinary bodies expansively, claiming that "the Attorney General retains the discretion to displace state bar enforcement and to create an entirely Federal enforcement mechanism, or to

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designee to review bar complaints and allegations against Department attorneys." 91 Fed. Reg. 10780, 101786-10787 (Mar. 5, 2026) (proposed amendments to 28 C.F.R. § 77.1).
[30] *Id.* at 10782.
[31] *Id.*
[32] Amicus Brief of the Department of Justice, *In re Jeffrey B. Clark*, No. 22-BG-0731 (Oct. 6, 2025).
[33] Report and Recommendation of the Board of Professional Responsibility, *In re Jeffrey B. Clark*, No. 22-BD-039 (Jul. 31, 2025).
[34] 91 Fed. Reg. 10787 (proposed amendments to 28 C.F.R. § 77.5).
[35] *Id.* at 10784.
[36] *Id.*
[37] *Id.* n.4.
[38] *Id.* at 10787.

displace state bar enforcement in part when it is inconsistent with the Federal Government's determinations regarding the regulation of Federal attorneys."[39]

The Proposed Rule also leaves many important questions unresolved. It says that, "as appropriate," DOJ would advise the relevant state of the results of its review[40] – suggesting that DOJ could simply sit on an investigation, or the results of that investigation, blocking or impeding the state from acting. The preamble never addresses the question of what, in DOJ's view, a state may or may not do if DOJ concludes that a DOJ lawyer did not violate an ethics rule. While the Proposed Rule suggests that states need not defer to DOJ's conclusion that a lawyer violated an ethics rule,[41] it does not explicitly address whether states would be expected to defer to DOJ's conclusion that a lawyer did not.[42]

Discussion

The McDade Amendment mandates that DOJ attorneys "shall be subject" to state ethics laws to the "same extent" and in the "same manner" as all other attorneys.[43] To ensure that DOJ adheres to Congress's expressed will, the law also requires DOJ to promulgate regulations that would implement a prophylactic system to "assure compliance" with that requirement.[44]

Through the Proposed Rule, DOJ now seeks to reinterpret its statutory mandate to "assure compliance" with the McDade Amendment as an authorization to *violate* the Amendment by subjecting DOJ attorneys to an ethics process that fundamentally differs from the one that applies to all other attorneys. The McDade Amendment not only did not give the Attorney General this exceptional authority—it expressly held that government attorneys are to be subject to "[s]tate laws and rules to the *same extent* and in the *same manner* as other attorneys in [the] State."[45] And even if the statute did not expressly preclude DOJ's reinterpretation, the Attorney General would lack the requisite authority to upend the longstanding balance between federal and state authorities. If Congress had intended to make the Attorney General the general superintendent – a sort of roving commissar – of all bar complaints across 50 state bars related to past and present DOJ attorneys, it would not hide such an enormous elephant in the mousehole that is the McDade Amendment's ministerial direction to DOJ to "assure compliance" with the statute. For these reasons and additional ones discussed below, the Proposed Rule cannot stand.

1. *The Proposed Rule Violates the Plain Text of the McDade Amendment and Exceeds DOJ's Statutory Authority*

a. DOJ Has No Authority to Displace or Delay State Bar Investigations

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[39] *Id.* at 10784.
[40] *Id.* at 10787 (proposed § 77.5(a)).
[41] *Id.* at 10784.
[42] The preamble asserts that "[t]he State bar disciplinary authorities will still have the power and the opportunity to review complaints against current or former Department attorneys, to conduct disciplinary proceedings, and to impose appropriate sanctions." *Id.* at 10785. It is difficult to take comfort in this statement in light of the Proposed Rule's aggressive legal interpretations and the many issues it leaves unaddressed.
[43] 28 U.S.C. § 530B(a).
[44] *Id.* § 530B(b).
[45] *Id.* § 530B(a)(emphasis added).

DOJ alleges that its authority to provide for a "right of first review" is embedded in the statutory responsibilities of the Attorney General to promulgate regulations to "assure compliance" with the McDade Amendment.[46] DOJ is wrong for two reasons. First, the McDade Amendment is explicit that DOJ attorneys are not only "subject to State laws and rules . . . to the same extent . . . as other attorneys in that State" but also that they are subject to those laws "in the same manner" as other members of the bar. Second, DOJ's regulation-writing authority provides no power to superintend or supersede state bar proceedings concerning current and former DOJ attorneys.

To the first point, the McDade Amendment clarifies that each government attorney is subject to "State laws and rules" to both the "same extent" and "in the *same manner*" "as other attorneys in that State." These two terms, "extent" and "manner" refer, respectively, to the substantive and procedural aspects of the state ethics laws. The term "extent" means "the range ... over which something extends: scope" and "the point or degree to which something extends."[47] In the context of the McDade Amendment, the term refers most logically to the *substance and content* of state ethics laws. The term "manner," on the other hand, refers to "the means or procedure for doing something."[48] That most logically refers to the way in which the states apply their ethics laws and rules.

In the face of the plain text, however, DOJ states that it "does not interpret section 530B to require that Department attorneys must be subject to the same procedures for enforcing substantive State ethics rules."[49] Yet, state bar enforcement proceedings constitute part of the "manner" by which "other attorneys in the state" are subject to state laws and rules. For DOJ attorneys to be "subject to State laws and rules . . . to the same extent and in the same manner as other attorneys in that State," they must be subject to the same processes. Those processes include initial licensure; continuing requirements such as paying dues and maintaining good character; and cooperating with state ethics investigations. Every state bar has a way of enforcing its code of professional responsibility – the manner by which attorneys are subject to the code. It is for this reason that DOJ acknowledged in 1999 that "[t]he regulations . . . recognize that attorneys are principally subject to discipline by their state of licensure and the courts before which they practice."[50]

The legislative history of the McDade Amendment supports this reading. As Representative McDade stated when he introduced the version of the law that was included in the Citizens Protection Act of 1998:

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[46] 91 Fed. Reg. 10783.
[47] *Extent*, Webster's Third New International Dictionary of the English Language (1971). *See also Extent*, The Random House Dictionary of the English Language (1966) ("[T]he space or degree to which a thing extends; length, area, volume, or scope."); *Extent*, The American College Dictionary (1970) ("[T]he space or degree to which a thing extends; length, area, or volume ... scope.").
[48] "Manner" *Merriam-Webster.com Thesaurus*, Merriam-Webster, https://www.merriam-webster.com/thesaurus/manner (last visited Mar. 24, 2026); *see also* Webster's Third New International Dictionary (1993) ("a way of acting or performing").
[49] 91 Fed. Reg. 10785.
[50] Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19274.

> [T]he bill insures that the Department of Justice, through attempts at self-regulation, cannot exempt its lawyers from the same rules of ethics that govern the professional conduct of all other attorneys. *These rules are currently in force, and must continue to be enforced, by the state supreme court*.[51]

If the Attorney General were authorized to interdict ethics complaints made to state bars, however, it would have the practical effect of preventing state licensing bodies, including the state supreme courts, from controlling the "manner" in which state legal ethics laws apply to government attorneys. That result is incompatible with the plain text of the McDade Amendment.

Second, DOJ argues that the Attorney General has broad authority to interject herself in state bar proceedings because she is required to "make and amend rules of the Department of Justice to assure compliance with" the McDade Amendment.[52] To that end, the Proposed Rule's preamble claims that "the Attorney General retains the discretion to displace State bar enforcement and to create an entirely Federal enforcement mechanism, or to displace State bar enforcement in part when it is inconsistent with the Federal Government's determinations regarding the regulation of Federal attorneys."[53] But this view is inconsistent with the statutory language itself.

As noted above, Congress *has* addressed who is to enforce state ethics laws: the plain text of 28 U.S.C. § 530B(a) makes each government attorney subject to state ethics laws in the "same manner" as every other attorney. DOJ clearly understood this direction in 1999, when it explained in the preamble to the implementing regulations that "Section 530B does not change the enforcement authority of the Office of Professional Responsibility, state authorities, or the federal courts."[54]

To avoid the obvious implications of the McDade Amendment, DOJ now claims that its prior statement was "fundamentally ambiguous as it does not explain the nature of these entities' respective authorities."[55] Indeed, DOJ claims that this "ambiguity" gives it authority to put the Attorney General herself in charge of disciplining DOJ lawyers (necessarily including herself). But DOJ's 1999 statement is not ambiguous. Rather, DOJ's statement recognized that Congress intended for states to continue to have responsibility for overseeing lawyers admitted to their bars and for state bar proceedings to continue to apply, alongside the other processes.

Moreover, DOJ's novel assertion that the Attorney General has the extraordinary power to displace state disciplinary authorities raises fundamental questions. DOJ appears to suggest that this exceptional power has been hidden in plain sight for nearly 30 years. But Congress does not "hide elephants in mouseholes."[56] And Congress certainly "does not alter the fundamental

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[51] 144 Cong. Rec. E301 (Mar. 5, 1998) (extended remarks of Representative McDade) (emphasis added).
[52] 28 U.S.C. § 530B(b).
[53] 91 Fed. Reg. 10784.
[54] *Ethical Standards for Attorneys for the Government,* 64 Fed. Reg. 19273, 19274 (Apr. 20, 1999).
[55] 91 Fed. Reg. 10783.
[56] *Whitman v. Am. Trucking Ass'ns, Inc*., 531 U.S. 457, 468 (2001).

details of a regulatory scheme in vague terms or ancillary provisions or invisible clauses."[57] Nothing in Section 530B(b) purports to affirmatively displace state authority to discipline attorneys who violate their professional responsibilities. Quite the opposite. As the District Court for the District of Columbia said less than three years ago: "Congress has committed the regulation of federal government attorneys to the states and courts where they practice."[58]

The text of Section 530B(b) is clear, as is its import: it is garden-variety regulation-writing authority that Congress often provides to agencies when it enacts statutes. Directing the Attorney General to "make and amend rules of the Department of Justice to assure compliance with this section" is not some *sub rosa* grant of *carte blanche* authority to avoid the statute's mandate entirely. Rather the section merely exhorts the Attorney General to amend the rules DOJ has on its books (including the 1994 regulations promulgated by Attorney General Reno) to ensure that they comport with the language and intent of the McDade Amendment. Certainly, the requirement to ensure that the rules will "assure compliance with" the McDade Amendment cannot reasonably be read as conveying the power to displace the authority of states to discipline attorneys who violate their state bar rules. That would assure *noncompliance* with the law.

Indeed, the text, context, and history of the McDade Amendment confirm that Congress did not intend to authorize the Attorney General to have a "right of first review" of any allegation of unethical misconduct under *state* ethics laws. The fact that DOJ has found such exceptional statutory authority hidden in a ministerial regulation-writing responsibility—right at the time when it was politically expedient to do so—is powerful evidence that the Proposed Rule is an exercise in motivated reasoning.[59]

b. DOJ Does Not Have the Authority to Prevent Current and Former Attorneys' Lawful Cooperation with State Bar Investigations

The preamble to the Proposed Rule explains that part of DOJ's method of enforcing the Attorney General's "right of first review" will be preventing current and former attorneys' lawful cooperation with investigations by state disciplinary bodies. The McDade Amendment, however, does not provide the Attorney General with the authority to ban current or former attorneys from cooperating with state disciplinary actions. In fact, the opposite is true.

Rule 8.1 of most state bar rules provides that a lawyer "in connection with a disciplinary matter, shall not . . . knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority."[60] The obligation to respond to lawful demands from a disciplinary authority is a substantive rule of ethics that is, like other professional responsibility standards, aimed at "conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration

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[57] *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.,* 794 F. Supp. 3d 610, 631 (D.N.D. 2025) (citing *Whitman v. AM. Trucking Ass'ns, Inc*. 531 U.S. 457, 468 (2001) (cleaned up).

[58] *In re Clark,* 678 F. Supp. 3d 112, 132 (D.D.C. 2023), *aff'd*, No. 23-7073, 2024 WL 3385251 (D.C. Cir. Jul. 12, 2024).

[59] Former Supreme Court Justice Antonin Scalia and legal scholar Bryan Garner referred to the act of "reading into a text one's own desired meaning" as *eisegesis*. ANTONIN SCALIA & BRYAN GARNER, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS 10, 428 (2012).

[60] American Bar Association, Model Rule of Professional Responsibility Rule 8.1(b).

of justice."[61] It is therefore the exact type of rule that DOJ attorneys are "subject to . . . to the same extent and in the same manner as other attorneys in that State" pursuant to the McDade Amendment.[62] DOJ's attempt to exempt current and former DOJ attorneys from Rule 8.1 is in direct contravention of both the plain text of 28 U.S.C. § 530B(a) and of Congress' clear direction that DOJ "assure compliance" with state ethics rules under 28 U.S.C. § 530B(b).

DOJ also lacks authority independent of the McDade Amendment to prevent cooperation by current and former attorneys with state disciplinary bodies. Even before passage of the McDade Amendment, the Eighth Circuit had concluded that DOJ's housekeeping authority under 5 U.S.C. § 301, including any regulations concerning the production of documents or testimony by current and former attorneys, did not permit it to "exempt the DOJ from the requirements of state and local federal ethical rules which bind all other litigants."[63]

Finally, if the Proposed Rule were to become effective, it would place current and former federal attorneys who are subject to investigation by a state disciplinary authority in an insurmountable Catch-22. By complying with the Proposed Rule, they would be violating their responsibilities under Rule 8.1. By complying with Rule 8.1, they would be violating their responsibilities under the Proposed Rule. The McDade Amendment was enacted to *resolve*, not create, these types of ethical dilemmas.

2. *The Proposed Rule Violates Basic Tenets of Federalism*

The licensure of attorneys is a matter principally of state law. Each of the fifty states has rules of professional conduct for the practice of law. Generally, state supreme courts "are responsible for promulgating their jurisdictions' codes of professional responsibility . . . [and] oversee[ing] the disciplinary process by serving as courts of last resort after findings of discipline are made."[64] Fifty years ago, the Supreme Court, in *Leis v. Flynt,* recognized this fundamental feature of the U.S. legal system:

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They are also responsible for the discipline of lawyers.[65]

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[61] *United States v. Colorado Supreme Ct.*, 189 F.3d 1281, 1285 (10th Cir. 1999) (quoting *In re Snyder,* 472 U.S. 634, 645 (1985)).

[62] Courts that have considered whether a state law is an "ethics" rule covered by the McDade Amendment generally look to three factors: (1) whether the rule bars conduct that the profession recognizes as inappropriate; (2) whether the rule is in a "commandment" (i.e. shall / shall not) form; and (3) whether the rule is focused on the conduct of the attorney themselves, warranting personal accountability. *United States v. Colorado Supreme Ct*., 189 F.3d 1281, 1287 (10th Cir. 1999); *United States v. Supreme Ct. of New Mexico*, 839 F.3d 888, 921 (10th Cir. 2016); *U.S., ex rel. U.S. Att'ys ex rel. E., W. Districts of Kentucky v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 145 (Ky. 2014).

[63] *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.,* 132 F.3d 1252, 1255 (8th Cir. 1998).

[64] Fred Zacharias, *The Myth of Self-Regulation*, 93 Minn. L. Rev. 1147, 1174 (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1(b) (2000) ("Today, as for the last quarter-century, professional discipline of a lawyer in the United States is conducted pursuant to regulations contained in regulatory codes that have been approved in most states by the highest court in the jurisdiction in which the lawyer has been admitted").

[65] *Leis v. Flynt,* 439 U.S. 438, 442 (1979).

States have an immense interest in being able to oversee the responsibility of attorneys they license. As the Supreme Court recognized decades ago, each state has an "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses."[66] That interest is in no small part because "lawyers are essential to the primary governmental function of administering justice."[67] "The ultimate objective of such control is the protection of the public, the purification of the bar and the prevention of a re-occurrence" of unethical behavior by an attorney.[68] The McDade Amendment was "enacted in direct response to the DOJ's attempt to exempt its lawyers from state ethical rules" and "reflects the respect Congress has for the right of the states to regulate the ethical conduct of lawyers who practice law in their jurisdictions."[69]

The Proposed Rule would turn the purposes of the McDade Amendment on its head and provide the Attorney General with the power to effectively invade state law proceedings through a "right of first review" backed by the threat of enforcement action. But "[a]s every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[70] As the Supreme Court has noted, "[j]ust as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the states and the Federal Government will reduce the risk of tyranny and abuse from either front."[71] When a power is reserved to the states, such as discipline of attorneys licensed to practice in their jurisdiction, DOJ cannot simply promulgate a regulation purporting to interject itself in the disciplinary process and to force the states to stay their hands.

Congress could have excluded DOJ attorneys from the application of certain ethics laws in 1998. With passage of the McDade Amendment, however, the opposite occurred. Certainly one would "expect more than simple statutory silence if, and when, Congress were to intend a major departure" from the well-settled understanding that it is *states* who enforce *state law*.[72] "Put somewhat more directly, we would expect to see some affirmative indication of intent if Congress actually meant to" have the Attorney General decide that she or another DOJ attorney violated state ethics rules.[73]

The effect of the Proposed Rule on state disciplinary efforts is not an abstract matter. If the Attorney General takes action against a state to prevent its investigation until she is done with her review, or seeks to proceed but is denied evidence a DOJ attorney is ethically required to provide, the state might be forced to delay or abandon investigating allegations of wrongdoing. On one hand, that means that attorneys who have engaged in misconduct are shielded from

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[66] *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982); *see also Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 460 (1978) ("[T]he State bears a special responsibility for maintaining standards among members of the licensed professions").
[67] *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).
[68] *Middlesex Cnty. Ethics Comm.,* 457 U.S. at 434 (citing *In re Baron*, 25 N.J. 445, 449 (N.J. 1958)).
[69] *New York State Bar Ass'n v. F.T.C.,* 276 F. Supp. 2d 110, 133 (D.D.C. 2003).
[70] *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991).
[71] *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991)).
[72] *Czyzewski v. Jevic Holding Corp.,* 580 U.S. 451, 465 (2017).
[73] *Id.*

liability at least for a time, while the state is effectively locked into placing its imprimatur of approval on an attorney who might otherwise be censured, suspended, or removed from practice. The public, including non-federal clients, would suffer from the inability of the state to remove such bad actors from the rolls. On the other hand, an attorney who has done nothing wrong cannot benefit from the speedy review of allegations against them. Either result is anathematic to the state disciplinary process.[74] In light of the foregoing, it is preposterous for the Proposed Rule to conclude in its "Federalism" analysis that: "This proposed rule will not have substantial direct effects on the States . . . or on the distribution of power and responsibilities among the various levels of government."[75]

3. *The Supremacy Clause Does Not Support the Proposed Rule*

The Proposed Rule never mentions the Supremacy Clause of the U.S. Constitution.[76] That is likely because the plain text of the McDade Amendment makes clear that DOJ attorneys are subject to state ethics laws, foreclosing any preemption argument rooted in the statute. At the same time, the preamble echoes preemption arguments DOJ has made over the years regarding state ethics laws interference with the work of DOJ.[77] Because these arguments form the background of the Proposed Rule, it is important to highlight that they are wrong.

First, the McDade Amendment was enacted to put to rest the question of whether DOJ's *general* statutory law enforcement responsibilities displaced state ethics laws and disciplinary authority. The statute, which is itself the "supreme Law of the Land," makes clear that they do not. DOJ is therefore wrong that the McDade Amendment merely "provides limited authority for State bars to regulate Department lawyers by requiring those attorneys to conform to the same substantive standards of conduct as non-Federal attorneys in the States in which they are practicing, where compliance with the State rules does not *interfere* . . . with Federal law."[78] Had Congress sought to displace state ethics laws whenever there was a conflict with DOJ practices or procedures, it could easily have done so. Congress could have passed a bill like Senator Hatch's that would have provided an exemption from state ethics laws where they were "inconsistent with Federal law or interfere[d] with the effectuation of Federal law or policy, including the investigation of violations of Federal law."[79] But Congress never acted on that bill. Instead, Congress has maintained the text of the McDade Amendment, making clear that local ethics rules apply to federal prosecutors and other DOJ attorneys. Ironically, the very cases the Proposed Rule cites stand for the proposition that preemption has no application where Congress

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[74] The Proposed Rule also purports to provide the same "right of first review" for complaints filed with the disciplinary bodies of the District of Columbia and U.S. Territories. Congress, however, has plenary authority over both D.C. and U.S. Territories pursuant to the Enclave Clause and the Territory Clause of the U.S. Constitution, respectively. U.S. Const. Art. § I, 8, cl. 17 (providing Congress with plenary authority over the District of Columbia); Art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). As a result, in addition to raising important federalism concerns, the proposed rule also poses serious separation-of-powers issues.

[75] 91 Fed. Reg. 10786.

[76] U.S. Const. Art. VI, cl. 2.

[77] *See, e.g.,* 91 Fed. Reg. 10783 (citing to the Thornburgh Memo).

[78] 91 Fed. Reg. 10783 (emphasis added).

[79] Federal Prosecutor Ethics Act, S. 250, 106th Cong., § 2 (1999).

has provided states with "clear and unambiguous authorization" to regulate an activity.[80] That is precisely what Congress has done in the McDade Amendment.

Second, "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it."[81] The Supreme Court has "identified three different types of preemption—conflict, express, and field."[82] Before the McDade Amendment, courts rejected the argument that Assistant U.S. Attorneys could not be subject to state ethical oversight on the basis of preemption.[83] The McDade Amendment confirms that there is neither express or field preemption of state ethics laws. Therefore, the Supremacy Clause would only come into play when a state law "actually conflict[ed] with federal law."[84] But under established conflict-preemption principles, there is plainly no conflict. So long as a specific state ethics rule "is not inconsistent with federal law [it] can be adopted and enforced by the state [disciplinary bodies] against federal prosecutors."[85] Nowhere does the Proposed Rule suggest that there are specific state ethics rules that are inconsistent with specific constitutional or statutory provisions.[86] Absent that showing, DOJ's arguments are simply an attempt to resurrect the now invalidated Thornburgh Memo.[87]

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[80] *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180-183 (1988) (no party disputed that statute authorizing states to impose workers compensation laws on government-owned installations "in the same way and to the same extent as" they would apply to state-owned facilities "provides the requisite clear congressional authorization for the application of the provision to workers at the Portsmouth facility"); *United States v. Washington*, 596 U.S. 832, 835 (2022) (characterizing the issue as one of "intergovernmental immunity," but applying the same test). *See also Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 607 (2011) ("Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'").

[81] *United States v. Supreme Ct. of New Mexico*, 839 F.3d 888, 918 (10th Cir. 2016) (citing *P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988)).

[82] *Murphy v. Nat'l Collegiate Athletic Ass'n,* 584 U.S. 453, 477 (2018) (cleaned up).

[83] *See United States v. Ferrara, supra*, 847 F. Supp. at 968-969 (treating issue as "intergovernmental immunity" and holding that "state law is nullified under this doctrine only when 'there is a conflict between state law and conduct that is necessary and proper to the performance of a federal duty.' . . . The Court simply cannot find AUSA Doe's violation of state ethical requirements 'necessary and proper' to the performance of his duties as a federal prosecutor."); *Matter of Howes*, 940 P.2d 159, 169 (N.M. 1997) ("Respondent has not cited and cannot point to any federal law which requires him to carry out his duties as an AUSA in an unethical manner or to any intent of Congress that he even be permitted to do so. To the contrary, the intent of Congress still appears to be that respondent and others in his position should adhere to the ethical standards prescribed by their licensing courts").

[84] *English v. Gen. Elec. Co.,* 496 U.S. 72, 79 (1990).

[85] *United States v. Colorado Supreme Ct.*, 189 F.3d 1281, 1289 (10th Cir. 1999) (finding that Colorado Rules of Professional Responsibility Rule 3.8 was not inconsistent with rules and practices of DOJ in serving grand jury subpoenas pursuant to the Federal Rules of Criminal Procedure).

[86] Post-McDade, several courts have considered claims that application of a specific state ethics rule to a federal prosecutor was preempted. While those courts have reached different results, where they found a conflict, they did so on the basis of a specific constitutional or statutory provision, *see, e.g., Colorado Supreme Court, supra; see also United States v. Supreme Ct. of New Mexico*, 839 F.3d 888, 928 (10th Cir. 2016) (finding that New Mexico Rule of Professional Conduct 16-308(E) was inconsistent with the grand jury clause of the Sixth Amendment, but upholding the rule in the non-grand-jury (i.e., trial) context), or on the basis that the state law imposed procedural, not ethical, obligations, *see, e.g., Stern v. U.S. Dist. Ct. for Dist. of Mass*., 214 F.3d 4, 20 (1st Cir. 2000) (local rule 3.8(f) was "more than an ethical standard"; instead, "[i]t add[ed] a novel procedural step ... and ... ordain[ed] that the hearing be conducted with new substantive standards in mind").

[87] Courts have handily disposed of general claims of interference with DOJ practice. *See In re Clark*, 311 A.3d 882, 887-889 (D.C. 2024) (citing the McDade Amendment and rejecting claim that the D.C. Bar did not have jurisdiction to sanction Department lawyer admitted there); *In re Kline*, 113 A.3d 202, 206 (D.C. 2015) ("The discipline of attorneys, including determination of appropriate sanctions, is the responsibility of this court."); *U.S. Att'ys ex rel.*

In this light, and DOJ's policy arguments notwithstanding, the McDade Amendment is Congress's final word on whether the government attorneys are subject to state disciplinary measures. The answer is yes, and the Attorney General has no authority to unilaterally change that balance.

4. *The Proposed Rule Was Not Promulgated Consistent with the Administrative Procedure Act*

Section III.A of the Proposed Rule states that the regulation is exempt from the Administrative Procedure Act's procedural requirements in 5 U.S.C. § 553 because it is a rule of "agency organization, procedure, or practice." DOJ is incorrect. As the D.C. Circuit stated in *American Hosp. Ass'n v. Bowen,* "[t]he distinctive purpose of [the exception] is to ensure that agencies retain latitude in organizing their *internal* operations."[88] A rule that "encodes substantive value judgments" or "substantially alters the rights or interest of regulated" entities is not exempted pursuant to Section 553(b)(A).[89]

The Proposed Rule does not simply organize how DOJ will conduct its own affairs; rather it purports to give the Attorney General a "right of first review" over state disciplinary matters and to direct that DOJ employees refuse to cooperate with those entities in violation of their ethical duties. That "right of first review," which the Proposed Rule explains will be backed by DOJ's taking of "appropriate action to enforce th[e] regulation or to prevent the bar disciplinary authorities from interfering with the Attorney General's review of the allegations," and DOJ's attempt to restrict employee cooperation with state bar investigations will have a substantive impact on "the bar disciplinary authorities of the States, the Territories, [and] the District of Columbia."[90] Those non-federal entities would be required to delay, defer, or abandon investigations at the request of the Attorney General or run the risk of retaliatory action. That has a substantial impact on those outside parties, going far beyond the "internal operations" of the agency.

The Proposed Rule would also cover former DOJ attorneys—not just current ones. In cases involving former DOJ attorneys, the rule would permit DOJ to control state and local disciplinary actions related to private persons. In those circumstances, it is impossible to understand the Proposed Rule as one of "agency organization, procedure, or practice." Finalizing the rule without a full notice-and-comment period and mandated delay in effective date would therefore violate § 553.

E., W. Districts of Kentucky v. Kentucky Bar Ass'n, 439 S.W.3d 136, 149 (Ky. 2014) ("The United States' Supremacy Clause argument likewise fails because there is no 'Law of the United States' mandating the terms a prosecutor must offer in a plea bargain"); *In re Nowacki*, D.C. Bar Docket No. 2008-0339 (July 23, 2009), https://www.dcbar.org/ServeFile/GetDisciplinaryActionFile?fileName=20090723Nowacki.pdf (Bar Counsel issued "informal admonition" to Department lawyer for drafting a proposed response to media inquiry which he knew to be inaccurate, as well as for failing to disclose that Department staff used political affiliation in accessing candidates).

[88] *American Hosp. Ass'n v. Bowen,* 834 F.2d 1037, 1047 (D.C.Cir. 1987) (emphasis added) (cleaned up); *see also United States Dep't of Labor v. Kast Metals Corp*., 744 F.2d 1145, 1153 (5th Cir. 1984) (clarifying that the exemption does not apply to a rulemaking that "affects the rights of outside parties").

[89] *American Hosp. Ass'n v. Bowen,* 834 F.2d at 1047, 1041.

[90] 91 Fed. Reg. 10780, 10787 (Mar. 5, 2026) (proposed amendments to 28 C.F.R. pt. 77).

5. *The Proposed Rule Would Remove Deterrents to Unethical Behavior*

DOJ attorneys occupy a unique position in the legal landscape. The Supreme Court has consistently held that DOJ attorneys must hold themselves to the highest standards of ethical conduct. As the Court said in 1935:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[91]

The American Bar Association has also recognized the special role of prosecutors. Pursuant to Model Rule 3.8, prosecutors are beholden to a higher set of responsibilities than other litigants. Most states have either adopted the Model Rule, in part or in whole, or have established similar rules for prosecutors.[92]

State and local bar rules both help guide future conduct and serve as important deterrents to illegal and unethical attorney behavior. On one hand, federal prosecutors should be zealous advocates for the United States.[93] On the other hand, they are officers of the court and servants of justice. While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones."[94]

This careful balance protects the judicial system and those who are subject to legal process. The fear of sanction, whether it be reprimand, suspension, or disbarment, reinforces the importance of ethical conduct by attorneys. The state has an interest in preventing unethical conduct and therefore the greatest interest in policing the legal profession.

DOJ also argues that this change will have no impact on addressing misconduct. Instead, DOJ states that "[t]he proposed rule will benefit Department attorneys by ensuring the consistent application of the State ethics rules" as a result of "OPR ha[ving] 50 years of experience in evaluating allegations of professional misconduct against Department attorneys." [95] The Attorney General removed the nonpartisan head of the Office of Professional Responsibility – the very person who would be responsible for impartially carrying out DOJ's oversight of the ethical conduct of DOJ officials.[96] Despite the suggestion that an independent and impartial OPR will principally control the process, in practice it appears that it will be the Attorney General and her appointees.

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[91] *Berger v. United States,* 295 U.S. 78, 88 (1935).
[92] American Bar Association, CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct, Rule 3.8: Special Responsibilities of a Prosecutor (Nov. 8, 2024), *available at* mrpc-3-8.pdf.
[93] *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 248 (1980).
[94] *Berger v. United States*, 295 U.S. 78, 88 (1935).
[95] 91 Fed. Reg. 10780, 10785.
[96] Perry Stein, et al., *Several top career officials ousted at Justice Department,* WASH. POST (Mar. 7, 2025), https://www.washingtonpost.com/national-security/2025/03/07/justice-department-trump-firings/.

Instead of increasing accountability, DOJ's Proposed Rule would destroy the careful balance that allows for zealous, yet ethical, advocacy and would create the exact type of "fox guarding the henhouse" concerns that Members of Congress raised concerns about after issuance of the Thornburgh Memo and that eventually drove passage of the McDade Amendment.[97]

6. *The Proposed Rule Indicates that it is Necessary Because of "Weaponization" but Fails to Support that Claim*

DOJ argues that the Proposed Rule is necessary because "political activists have weaponized the bar complaint and investigation process" and that, "[e]ven more troubling than the recent spate of State bar complaints is the willingness of some State bar disciplinary authorities to give credence to such complaints."[98] As a result, DOJ takes the position that it is time to unilaterally "restructure the enforcement of ethical rules by OPR and the bar disciplinary authorities."[99]

The Proposed Rule is a solution in search of a problem and would be arbitrary and capricious if finalized. DOJ provides no empirical support for its statements. DOJ fails to identify which bar complaints were meritless, why they were meritless, the number of meritless complaints, and why state disciplinary authorities are unable to weed out meritless complaints on their own. DOJ also fails to provide any evidence that state disciplinary authorities have conducted their investigations in a way that is prejudicial to the Attorney General or DOJ staff. Nor have they explained why a DOJ attorney's ability to appeal an adverse disciplinary decision, like any other attorney within the state of jurisdiction—as intended by the McDade Amendment—is insufficient.

The Proposed Rule's deficient reasoning is especially notable because it reflects a major "changed position" on these issues.[100] Since 1999, shortly after the McDade Amendment's enactment, DOJ by regulation has faithfully implemented the statute's text and manifest purpose. These "longstanding policies" have "engendered serious reliance interests that must be taken into account," including, as discussed above, the immense interests of states in regulating lawyers that practice in their jurisdictions.[101] Yet the Proposed Rule does not so much as mention these interests.

Nor does DOJ acknowledge any evidence on the other side of the balance. Several serious and meritorious claims have been filed alleging that DOJ officials have violated their ethical obligations, including charges brought against Ed Martin, former interim U.S. Attorney for the District of Columbia, by the D.C. Bar, the day after the Proposed Rule was published in the *Federal Register*.[102] Instead of taking steps to assure the public that DOJ attorneys are acting

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[97] Committee on Government Operations, Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required, H. Rept. 101-986, at 35 (1990).
[98] 91 Fed. Reg. 10780, 10782.
[99] *Id.*
[100] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).
[101] *Id.* at 222; *see also, e.g., Dep't of Homeland Sec. v. Regents of the Univ. of Californi*a, 591 U.S. 1, 30 (2020) ("It would be arbitrary and capricious to ignore such matters.").
[102] Specification of Charges, *In re: Edward R. Martin Jr.*, Disciplinary Docket No.: 2025-D047 (D.C. Cir., Mar. 6, 2026) *available at* ed-martin-disciplinary-complaint.pdf.

with the highest level of ethical responsibility, the Proposed Rule seeks to interdict ethics complaints filed with state and local disciplinary authorities and displace those authorities for however long DOJ wishes.

Conclusion

The Proposed Rule would give the Attorney General an authority that Congress has expressly withheld from her. The McDade Amendment plainly states that government attorneys shall be covered by the state ethics laws "to the same extent" and in the "same manner" as all other attorneys. DOJ has no statutory or constitutional basis for the Proposed Rule. Nor can DOJ prevent current and former government attorneys from cooperating with lawful requests from state disciplinary bodies. The Attorney General's exercise of a "right of first review" would also invade areas traditionally left to state governments in derogation of core tenets of federalism. Finally, while DOJ professes it would end weaponization of the state disciplinary process, its failure to provide any credible evidence for its claims suggests the rule itself is the exact type of federal overreach and weaponization that DOJ says it aims to prevent with the Proposed Rule.

Any one of these reasons would be a basis for withdrawing the Proposed Rule. Taken together, it is obvious that the rule is fundamentally flawed. As a result, we respectfully request that DOJ formally withdraw the Proposed Rule in its entirety.

Respectfully submitted,

Norman Eisen, Executive Chair
Democracy Defenders Fund

Scott Harshbarger, Chairman
Lawyers Defending American Democracy

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King County Superior Court, Washington (Ret.)

Judge Nan R. Shuker,
Superior Court of the District of Columbia (Ret.)

Associate Justice Sheila Sonenshine,
California Court of Appeal (Ret.)

Judge Michael Spearman,
Washington Court of Appeals (Ret.)

Judge Diana I. Stuart,
Oregon Circuit Court (Ret.)

Judge Jeffrey Swartz,
Miami-Dade County Court, Florida (Ret.)

Chief Justice Marsha Ternus,
Iowa Supreme Court (Ret.)

Judge Michael J. Trickey,
Washington Court of Appeals (Ret.)

Judge John P. Wesley,
Windham County Superior Court, Vermont (Ret.)

Judge Ken Williams,
Clallam County Superior Court, Washington (Ret.)

Judge Larry Weeks,
Juneau Superior Court, Alaska (Ret.)

Judge Art Wang,
Washington Court of Appeals (Ret.)

Chief Justice Daniel E. Wathen,
Maine Supreme Judicial Court (Ret.)

Judge Merri Souther Wyatt,
Oregon Circuit Court, Multnomah County (Ret.)

Former International Judges

International Judge Patricia Whalen,
War Crimes Chamber, Court of Bosnia and Herzegovina (Ret.)

Democracy Defenders Fund

Virginia Canter
Ethics and Anticorruption Chief Counsel and Director,
Democracy Defenders Fund

Diamond Brown
Senior Policy Counsel
Democracy Defenders Fund

David W. Ogden
Senior Counsel, Democracy Defenders Fund

Christopher Swartz
Senior Ethics Counsel
Democracy Defenders Fund

Lawyers Defending American Democracy

Martha W. Barnett
Former President, American Bar Association
Board Member, Lawyers Defending American Democracy

James W. Conrad
Principal, Conrad Law & Policy Counsel**
Volunteer, Lawyers Defending American Democracy

Evan Falchuk
Board Member, Lawyers Defending American Democracy

Nicholas Fels
Retired Partner, Covington & Burling LLP
Board Member, Lawyers Defending American Democracy

John Koski
Former Partner and Global Chief Legal Officer, Dentons
Board Member, Lawyers Defending American Democracy

Stephen Marcus,
Volunteer, Lawyers Defending American Democracy
Adjunct Professor, Georgetown University Law Center**

Thomas Mela
Retired Managing Attorney of the Massachusetts Advocates for Children
Board Member, Lawyers Defending American Democracy

John T. Montgomery
Board Member, Lawyers Defending American Democracy

Peggy A. Quince
Retired Chief Justice of the Florida Supreme Court
Board Member, Lawyers Defending American Democracy

Raymond L. Ocampo Jr.
Board Member, Lawyers Defending American Democracy

Gershon M. (Gary) Ratner
Co-Founder and Board Member, Lawyers Defending American Democracy
Former Associate General Counsel for Litigation, U.S. Department of Housing & Urban Development

Mitt Regan
McDevitt Professor of Jurisprudence**
Director, Center on National Security and Law Coordinator, Program on Law, Ethics, and International Security
Georgetown University Law Center
Board Member, Lawyers Defending American Democracy

Lauren Stiller Rikleen
Executive Director and Board Member, Lawyers Defending American Democracy
Past Chair Civil Rights & Social Justice Section of the American Bar Association
Former President, Boston Bar Association

Estelle H. Rogers
Former Member, ABA House of Delegates
Board Member, Lawyers Defending American Democracy

R. Kelly Sheridan
Board Member, Lawyers Defending American Democracy

Gary Simson
Macon Chair in Law and Former Dean, Mercer Law School**
Professor Emeritus, Cornell Law School
Board Member, Lawyers Defending American Democracy

Walter H. White Jr.
Former Wisconsin Securities Commissioner
Past Chair Civil Rights & Social Justice Section of the American Bar Association
Board Member, Lawyers Defending American Democracy

*** These signatories have signed solely in their individual capacities and.do not do so on behalf of the named organization or other affiliation.*