April 6, 2026

submitted electronically via regulations.gov

Todd Blanche, Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW
Washington, DC 20530

Re: U.S. Department of Justice, *Review of State Bar Complaints and Allegations Against Department of Justice Attorneys*, 28 CFR Part 77, 91 Fed. Reg. 10780 (Mar. 5, 2026); **Docket No. OAG199**, AG Order No. 6653–2026–A, RIN 1105–AB82 (proposed rule)

Dear Acting Attorney General Blanche:

Protect Democracy opposes the proposed Department of Justice ("DOJ") regulation referenced above. Protect Democracy is a nonpartisan, nonprofit organization dedicated to preventing American democracy from declining into a more authoritarian form of government. Our work is focused on addressing multiple goals, including preventing the unchecked consolidation of federal power and defending the rule of law. We are deeply alarmed by the DOJ's attempt to subvert the independence of state bar disciplinary authorities and create a separate and preferential system of discipline for DOJ attorneys. If finalized, the proposed rule would erode the independence and integrity of the bar, decrease public trust in the justice system, and undermine the rule of law.

Under the proposed rule, the Attorney General would have a "right of first review" over alleged violations of the rules of professional responsibility by DOJ attorneys.[1] Whenever a complaint is filed by a third party or bar disciplinary authorities open an investigation into a current or former DOJ attorney for violating an ethics rule, the Attorney General would have the right to (1) request that state bar disciplinary authorities indefinitely suspend any investigation or proceeding and (2) direct DOJ personnel to not cooperate with any investigation or disciplinary proceeding until the DOJ completes its own review of the allegations. If state bar disciplinary authorities refuse the Attorney General's request to suspend their investigation, the rule would permit the DOJ to "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."

[1] Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10787 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77), https://tinyurl.com/2smc5drp.

The proposed regulation is a brazen effort by former Attorney General Bondi to shield government lawyers from accountability when faced with allegations of ethical misconduct. The proposed regulation sets no time limit on the Department's delay of states' accountability proceedings. While the proposed regulatory text speaks of delay, the rulemaking notice hints at blocking disciplinary action entirely — declaring that a state may resume its work only *if* officials at the Justice Department first conclude that a DOJ lawyer has violated the state's ethics code.[2] It says nothing about what will happen if the DOJ does not acknowledge that a violation has occurred.[3] By keeping its review open indefinitely, the Justice Department could hold captive all allegations against its employees. Backed by the threat to take "appropriate action" against state authorities to enforce the regulations, complaints could disappear within the Justice Department headquarters.

Former Attorney General Bondi's strained justification for the proposed rule relies on a misreading of the McDade Amendment — an uncontroversial provision Congress adopted in the 1990s to avoid precisely this sort of abuse. That law expressly recognized state power over attorney discipline, affirming that government attorneys shall be subject to the "State laws and rules, and local Federal court rules, governing attorneys" to "the same extent and in the same manner as other attorneys."[4] The notice of proposed rulemaking contends that the McDade Amendment merely subjected DOJ attorneys to the same substantive ethics rules as other attorneys, and permits the Attorney General to enforce "State ethics rules directly." But as explained in this comment, Congress did not grant the Attorney General that authority. At most, it required the Justice Department to issue guidance for its employees, conduct training, and take personnel actions to "assure" compliance with state ethics rules — as the Department has done for almost three decades.[5]

The Department's attempt to shield DOJ lawyers from accountability is especially concerning given the tremendous power that government lawyers wield over the lives of people across this country, and the threat to liberty posed by abuses of that power.[6]

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[2] 91 Fed. Reg. at 10782 ("*If the [Professional Misconduct Review Unit ("PMRU")] concludes a bar rule is implicated*, it authorizes [the Office of Professional Responsibility] to notify the appropriate bar disciplinary authorities of the Department's findings" (emphasis added)); *id.* at 10784 ("*If the PMRU finds that the Department attorney violated an ethics rule* while engaging in that attorney's duties, the State bar disciplinary authorities will then have the option of beginning or resuming their investigations or disciplinary proceedings." (emphasis added)); *id.* at 10785 ("The proposed rule therefore does not prohibit the State bar disciplinary authorities from imposing additional sanctions *if the Department determines that an attorney violated an ethics rule*." (emphasis added)).

[3] The proposed regulation says only that states will be notified *if* the Attorney General completes her review or *if* she decides not to complete it. 91 Fed. Reg. at 10787. The Department is not proposing to create a mechanism to force the Attorney General to comply with the notification requirement. *See id*. Neither the regulatory text nor the rulemaking notice expressly indicates that states may conduct investigations in all instances.

[4] 28 U.S.C. § 530B.

[5] Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19273, 19275 (Apr. 20, 1999) (to be codified at 28 C.F.R. pt. 77).

[6] *Hodge v. Hurley*, 426 F.3d 368, 376 (6th Cir. 2005) ("[T]he tremendous power a prosecutor may wield is accompanied by a special responsibility to exercise that power fairly").

Shortly before he became a Supreme Court justice, then-Attorney General Robert Jackson observed of Justice Department lawyers:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.[7]

The Department has advanced this proposal amid growing concerns that its lawyers are engaging in an unprecedented pattern of ethically questionable behavior.[8] Federal judges have increasingly questioned the candor of DOJ lawyers,[9] second-guessed the presumption of regularity previously granted to the executive branch,[10] and reprimanded DOJ lawyers for violating court orders.[11] In one of her first acts leading the Department, former Attorney General Bondi issued a memorandum (the "February 2025 Memorandum") demanding that DOJ lawyers subordinate their personal judgment to the administration's interests first and foremost.[12] She warned Department lawyers that exercising personal judgment — something every state's ethics code demands — would get them fired should that judgment run contrary to the whims of the president. Worse, it demanded personal loyalty to him, referring to government lawyers as "his lawyers." Nothing in the February 2025 Memorandum revealed a trace of concern for the impartial administration of justice or service to the American people, their Constitution and their laws. Independent enforcement of professional ethics is crucial in light of this concerning trend.

The DOJ's current effort recalls prior failed attempts to insulate Department attorneys from accountability. A court rejecting one such earlier effort echoed Chief Justice Warren Burger's prescient warning that "when lawyers subordinate themselves to the Government and conform their conduct to governmental policy, they are no longer

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[7] Robert H. Jackson, Att'y Gen., Address at Second Annual Conference of U.S. Attorneys: The Federal Prosecutor (Apr. 1, 1940).

[8] Alan Feuer, *Judges Openly Doubt Government as Justice Dept. Misleads and Dodges*, N.Y. TIMES (Aug. 4, 2025), https://tinyurl.com/3ku79skd.

[9] *See Nat'l Treas. Emps. Union v. Vought*, 774 F. Supp. 3d 1, 56–57 (D.D.C. 2025), *vacated and remanded*, 149 F.4th 762 (D.C. Cir. 2025), *reh'g en banc granted, opinion vacated*, No. 25-5091, 2025 WL 3659406 (D.C. Cir. Dec. 17, 2025).

[10] Ryan Goodman, Siven Watt, Audrey Balliette, Margaret Lin, Michael Pusic & Jeremy Venook, *The "Presumption of Regularity" in Trump Administration Litigation*, JUST SECURITY (4th ed. Nov. 20, 2025), https://tinyurl.com/5dfa4ehw.

[11] Josh Gerstein, *Judges question Pam Bondi's social media posts on Minnesota arrests*, POLITICO (Feb. 27, 2026), https://tinyurl.com/5n8e9z39; Jacob Rosen & Joe Walsh, *Minnesota judge holds lawyer for DOJ in contempt as tensions flare over immigration cases*, CBS NEWS (Feb. 20, 2026), https://tinyurl.com/47k8ehk5.

[12] Memorandum from Pam Bondi, Att'y Gen., to all Dep't Emps., General Policy Regarding Zealous Advocacy on Behalf of the United States (Feb. 5, 2025).

free, but are reduced to vassals as in a totalitarian state."[13] By interposing federal review ahead of state proceedings without temporal limits, the proposal would undermine accountability for attorney misconduct, encroach upon longstanding state authority over legal ethics and licensure, and erode public confidence in the integrity of the justice system. For these reasons, and as detailed in the sections that follow, Protect Democracy urges the Department to withdraw the proposed regulation.

This comment addresses three principal issues with the proposed rule: the Attorney General lacks any authority to promulgate the proposed rule; the proposed rule is contrary to law; and the rationale for the proposed rule is flawed. First, the Department lacks statutory authority to promulgate a rule that would displace or delay state bar disciplinary proceedings against Department attorneys. Rather, the proposal is irreconcilable with the McDade Amendment, which subjects federal government attorneys to state ethical rules "to the same extent and in the same manner" as other attorneys. Second, the proposal violates constitutional and statutory constraints. By purporting to interpose federal control over core state police powers to regulate the practice of law and licensees, the law violates the Tenth Amendment. The notice threatens consequences for states that decline to halt their proceedings, underscoring the rule's coercive effect on state disciplinary authorities. Third, the rule is arbitrary and capricious because the record fails to establish a factual or rational basis for federal displacement of state enforcement mechanisms, and the notice's stated justifications do not align with the rule's operative effects.

I. THE ATTORNEY GENERAL LACKS AUTHORITY TO PROMULGATE THIS REGULATION

The notice of proposed rulemaking cites 28 U.S.C. § 530B, the "McDade Amendment," as the sole authority for this rulemaking.[14] The notice offers only threadbare justification for why Section 530B empowers the Attorney General to shield her employees from the states' enforcement of their ethics codes. It never names the legal theory on which it relies. Under any theory, however, the DOJ lacks authority for this rulemaking.

Congress enacted the McDade Amendment in 1998 as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.[15] Despite isolated

[13] *In re Doe*, 801 F. Supp. 478, 488 (D.N.M. 1992) (citing JUSTICE WARREN E. BURGER, DELIVERY OF JUSTICE 182 (1990)).

[14] Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10786 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77).

[15] Pub. L. 105-277, div. A, tit. VIII, § 801, 112 Stat. 2681, 2681–118 to 2681–119.

efforts at amendment, Congress has not revised the law in the nearly three decades since enacting it.[16] The law provides:

> (a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.
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> (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.
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> (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.

A. The proposed regulation exceeds the Attorney General's authority.

Congress did not enact the McDade Amendment to grant the Department authority it lacked to seize control of the vital state function of regulating the practice of law — quite the opposite. Enactment of the McDade Amendment was a clear congressional rejection of the Justice Department's past efforts to override state ethics code provisions. Nor can the Department find this authority hidden in the Supremacy Clause.

1. Congress enacted the McDade Amendment to uphold the states' historic exercise of police powers in regulating the practice of law.

"[T]he regulation of the activities of the bar is at the core of the State's power to protect the public."[17] The Supreme Court has been clear about the historic role of states in regulating the practice of law and disciplining those they license:

> 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

[16] *See, e.g.*, Professional Standards for Government Attorneys Act of 1999, S. 855, 106th Cong. (1999); Federal Prosecutor Ethics Act, S.250, 106th Cong. (1999).

[17] *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977).

> admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.[18]

The states' direct enforcement of their ethics codes is a crucial part of that responsibility because it protects the public against conduct that jeopardizes the integrity of the judicial system. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"[19] "Few other professions are as close to the core of the State's power to protect the public. Nor is any trade or other profession as essential to the primary governmental function of administering justice."[20] The Supreme Court has identified the purposes of this sovereign function of the states:

> [A state] has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. States traditionally have exercised extensive control over the professional conduct of attorneys. The ultimate objective of such control is the protection of the public, the purification of the bar and the prevention of a re-occurrence. The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice. The State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance.[21]

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[18] *Leis v. Flynt*, 439 U.S. 438, 442 (1979); *see also Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("When examining attorney conduct, a court must be careful not to . . . intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts."); *Notz v. Conn. Comm'n on Hum. Rts. & Opportunities*, 438 F. Supp. 3d 148, 153 (D. Conn. 2020) ("Indeed, the regulation of attorney practice is an area of traditional state concern, and it is far from surprising that the federal government would steer clear of regulating the qualifications of those who may represent a party in state administrative agency proceedings.").

[19] *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

[20] *Hoover v. Ronwin*, 466 U.S. 558, 569 n.18 (1984) (citation modified); *see also Bates*, 433 U.S. at 361.

[21] *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (citation modified). *See also Fla. Bar v. Went For It, Inc.,* 515 U.S. 618, 625 (1995) ("We have little trouble crediting the Bar's interest as substantial. On various occasions we have accepted the proposition that 'States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.'" (quoting *Goldfarb*, 421 U.S. at 792)); *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) ("We acknowledge that 'the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty. *See Nat'l League of Cities v. Usery*, 426 U.S. at 851. Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature. *See Bates*, 433 U.S. at 360 (State Supreme Court speaks as sovereign because it is the 'ultimate body wielding the State's power over the practice of law').").

State supreme courts are responsible for establishing and enforcing standards of professional conduct for attorneys.[22] They act in a rulemaking capacity when enacting state ethics codes under the authority of state constitutions or laws, and they are responsible for enforcing those codes as a function of the traditional police powers of the state.[23] State bars and attorney grievance commissions operate under the control of state supreme courts.[24]

The Justice Department has previously attempted to undermine the power of states to establish and enforce ethics standards for the attorneys they license. Those attempts were rejected by the legal community, courts, and Congress.

In the 1980s and 1990s, the Justice Department questioned whether state ethics code provisions restricting certain witness contacts applied to federal prosecutors, particularly in connection with the *sui generis* function of grand jury proceedings. A 1980 memorandum by the Department's Office of Legal Counsel opined that the American Bar Association Disciplinary Rule 7-104 would not restrict Department investigators from making witness contacts otherwise prohibited by states, partly on constitutional grounds and partly because the rule contained an exception for activities authorized by law.[25] That internal legal advice did not purport to control or supercede alternative provisions in states' ethics codes.[26]

In 1989, a unilateral policy issuance by Attorney General Dick Thornburgh declared that the DOJ would "resist" certain states' witness contacts rules on Supremacy Clause grounds.[27] The infamous "Thornburgh Memorandum" sparked foreseeable

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[22] Although not every jurisdiction's high court is named the "Supreme Court" (e.g., the Court of Appeals of the State of New York), the term is used throughout this comment as a reference to the highest court in a state, territory or the District of Columbia.

[23] *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1384 (7th Cir. 1992); *In re Wade*, 948 F.2d 1122, 1124 (9th Cir. 1991).

[24] *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) ("Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the [State Bar] acts as the agent of the court under its continuous supervision."). For example, Virginia's legislature has charged the Supreme Court of Virginia with defining the practice of law, issuing a code of ethics, and specifically "[p]rescribing procedures for disciplining, suspending, and disbarring attorneys." VA. CODE ANN.. § 54.1-3909 (1992). For purposes of "investigating and reporting" ethics violations, the Virginia State Bar is "an administrative agency of the Court." *Id*. § 54.1-3910. Maryland's Constitution establishes that the Maryland Supreme Court will adopt "rules and regulations" that will have "the force of law" as to "practice and procedure" in Maryland's courts. MD. CODE ANN., CONST., art. IV, § 18(a). Exercising this constitutional authority, the Maryland Supreme Court has established the Attorney Grievance Commission, whose members the Supreme Court appoints, to investigate alleged ethics violations. Md. Rule 19-702. Although the commission and its appointed bar counsel investigate suspected violations, it is the Supreme Court that imposes disciplinary actions on attorneys. Md. Rules 19-721, 19-740.

[25] *Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations*, 4B Op. O.L.C. 576, 577 (1980).

[26] *See United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993), *aff'd*, 54 F.3d 825 (D.C. Cir. 1995, amended July 28, 1995) ("[The memo] is no more than a unilateral statement of Justice Department policy by the Attorney General.").

[27] Memorandum from R. Thornburgh, Att'y. Gen., to All Just. Dep't Litigators, Communication with Persons Represented By Counsel (June 8, 1989) (reprinted as Ex. E to *In re Doe*, 801 F. Supp. 478, 489 (D.N.M. 1992)).

controversy.[28] In 1992, the outgoing Bush administration proposed to codify the memorandum, but opposition delayed issuance of a final rule.[29] The DOJ reissued the proposal in 1993 and again, the rule was not finalized.[30] The Department issued a new notice of proposed rulemaking in 1994,[31] incorporating "substantial changes" in response to "concerns raised by bar organizations, bar counsel, state and federal judges, and others."[32] Finally in 1994, Attorney General Reno finalized the regulation.[33] Reaching for statutory authority to assert preemption under the Supremacy Clause, Reno cited the "housekeeping" law at 5 U.S.C. § 301 and sections 509, 510, 515(a), 516, 533 and 547 of title 28.[34]

Courts emphatically rejected the Department's reliance on the Thornburgh Memorandum and later 1994 Reno regulations.[35] In 1993, for instance, the Ninth Circuit endorsed a district court's rejection of Thornburgh's policy: "The government, on appeal, has prudently dropped its dependence on the Thornburgh Memorandum in justifying AUSA Lyons' conduct, and has thereby spared us the need of reiterating the district court's trenchant analysis of the inefficacy of the Attorney General's policy statement."[36]

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[28] *See United States v. Tapp*, 2008 WL 2371422, at *6 (S.D. Ga. June 4, 2008) (No. CR107-108) ("Almost from the date of its issue, the Thornburgh Memorandum set off a firestorm of criticism from the organized defense bar. Once the memorandum became widely circulated, the protest then resonated from the ABA, the state bar associations, the Judicial Conference of the United States, the Conference of State Chief Justices, the Federal Bar Association, and others. The Thornburgh Memorandum threatened not only the inherent supervisory power of the federal judiciary over officers of the court, but also the ability of the states to oversee the ethical standing of the attorneys licensed in their respective jurisdictions."); *see also* CHARLES DOYLE, CONG. RSCH. SERV., RL30060, MCDADE-MURTHA AMENDMENT: ETHICAL STANDARDS FOR JUSTICE DEPARTMENT ATTORNEYS 14 n.41 (2001) (calling the regulations "a revised form of the Thornburgh Memorandum").

[29] Communications With Represented Persons, 57 Fed. Reg. 54737 (proposed Nov. 20, 1992) (to be codified at 28 C.F.R. pt. 77).

[30] Communications With Represented Persons, 58 Fed. Reg. 39976 (proposed July 26, 1993) (to be codified at 28 C.F.R. pt. 77).

[31] Communications With Represented Persons, 59 Fed. Reg. 10086 (proposed Mar. 3, 1994) (to be codified at 28 C.F.R. pt. 77).

[32] Communications With Represented Persons, 59 Fed. Reg. 39910 (Aug. 4, 1994) (to be codified at 28 C.F.R. pt. 77) (discussing the proposed rule).

[33] *Id.*

[34] 59 Fed. Reg. at 39915.

[35] *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 961 F. Supp. 1288, 1294 (E.D. Mo. 1997), *aff'd*, 132 F.3d 1252 (8th Cir. 1998); *In re Clark*, 678 F. Supp. 3d 112, 117 (D.D.C. 2023), *aff'd*, 2024 WL 3385251 (D.C. Cir. July 12, 2024) (No. 23-7073) (remanding disciplinary proceedings against former Assistant Attorney General to the District of Columbia's judicial system); *United States v. Lopez*, 765 F. Supp. 1433, 1446–48 (N.D. Cal. 1991), *vac'd on other grounds and remanded*, 4 F.3d 1455 (9th Cir. 1993); *United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993) (dismissing for lack of personal jurisdiction, but noting that the Thornburgh memorandum "is no more than a unilateral statement of Justice Department policy by the Attorney General," which "[t]he Court cannot accept . . . as 'federal law' sufficient to supplant state regulation under the Supremacy Clause."), *aff'd*, 54 F.3d 825 (D.C. Cir. 1995, amended July 28, 1995); *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992); *In re Howes*, 940 P.2d 159 (1997); *Massameno v. Statewide Grievance Comm.*, 663 A.2d 317, 336 (1995).

[36] *United States v. Lopez*, 4 F.3d 1455, 1458 (9th Cir. 1993). The Ninth Circuit found that the Assistant U.S. Attorney (AUSA) had violated a state ethics code restriction on communications with represented persons, *id*. at 1463, but it reversed the district court's dismissal of the indictment as an abuse of discretion to fashion an appropriate remedy, *id*. at 1464. The court indicated that "referral [of the AUSA'] to the state bar for disciplinary proceedings" would be an adequate remedy. *Id*. at 1464.

Then, in 1998, the Eighth Circuit held in *United States ex rel. O'Keefe v. McDonnell Douglas Corp.* that the DOJ had issued its 1994 regulations in excess of its statutory authority, holding that they were invalid.[37] That decision rejected the DOJ's reliance on 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, 515(a), 516, 519, 533 and 547.[38]

In 1998, Congress conclusively rejected the Department's efforts by enacting the "McDade Amendment," expressly subjecting the Department's lawyers to states' regulation of the practice of law.[39] This Amendment was initially introduced by Representatives McDade and Murtha as a standalone bill titled the "Citizens Protection Act of 1998" (CPA).[40] The CPA garnered over 150 co-sponsors,[41] and although the bill itself failed to pass out of subcommittee, the House later incorporated Title I of the CPA without change as title VIII, section 801, of the appropriations bill for fiscal year 1999.[42] Lawmakers adopted the House's inclusion of this provision in conference committee,[43] with no changes to its substantive provisions.[44] An amendment by Representative Asa Hutchinson seeking to remove the amendment failed overwhelmingly by a vote of 345 to 82.[45] Congress codified the McDade Amendment at 28 U.S.C. § 530B and has not amended the law in the nearly three decades since its enactment.[46] The House Committee on Appropriations explained that the McDade Amendment "addresse[d] the concerns of the Committee about the Department of Justice's issuance of a regulation that exempts its attorneys from the same State laws and rules of ethics which all other attorneys must follow."[47] This Amendment, which codifies in part the U.S. Court of Appeals for the Eighth Circuit's decision in *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*

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[37] *United States ex rel. O'Keefe v. McDonnell Douglas Corp*., 132 F.3d 1252, 1257 (8th Cir. 1998); *see also In re Clark*, 678 F. Supp. 3d at 117 (discussing history).

[38] *O'Keefe*, 132 F.3d at 1254-56.

[39] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, div. A, tit. VIII, § 801, 112 Stat. 2681, 2681–118 to 2681–119 (1998) (codified at 28 U.S.C. § 530B). Another law requires that, to be paid, Department attorneys must be licensed in at least one state, territory or the District of Columbia — thereby subjecting them to that jurisdiction's disciplinary rules and procedures. 28 U.S.C. § 530C(c)(1).

[40] Citizens Protection Act of 1998, H.R. 3396, 105th Cong. (1998).

[41] *H.R.3396 - Citizens Protection Act of 1998: Cosponsors*, CONGRESS.GOV, https://www.congress.gov/bill/105th-congress/house-bill/3396/cosponsors (last visited Mar. 31, 2026).

[42] *Compare* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999, H.R. 4276, 105th Cong., tit. VIII, § 811 (as passed by House of Reps., Aug. 8, 1998) *with* Citizens Protection Act of 1998, H.R.3396; *see also* Fern L. Kletter, J.D., Annotation, *Construction and Application of Citizens Protection Act or McDade Act, 28 U.S.C.A. § 530B, Respecting Ethical Standards for Government Attorneys*, 25 A.L.R. Fed. 3d Art. 4 (2017).

[43] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, div. A, tit. VIII, § 801.

[44] Compare *id*. with Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999, H.R. 4276, 105th Cong., tit. VIII, § 811(as passed by House of Reps., Aug. 8, 1998). The final enactment modified subsection (c) by expanding the coverage of 28 U.S.C. § 530B to include the independent counsel's office, but that language has since been removed from the U.S. Code due to the sunsetting of the independent counsel law. The only other change, also in subsection (c), was the addition of the relevant section number in a reference to title 28 of the Code of Federal Regulations.

[45] H.Amdt. 852 to H.R. 4276, 105th Congress (1998).

[46] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, div. A, tit. VIII, § 801.

[47] H.R. REP. NO. 105-636, at 154 (1998) (citing 59 Fed. Reg. 39910 (Aug. 4, 1994)); *see also* DOYLE, *supra* note 28, at 2 .

finding that Attorney General Reno had no authority to promulgate the 1994 rules,[48] has been repeatedly affirmed by the courts. As the U.S. District Court for the District of Columbia observed in 2003, "[t]his legislation, which was enacted in direct response to the DOJ's attempt to exempt its lawyers from state ethical rules, is telling because it reflects the respect Congress has for the right of the states to regulate the ethical conduct of lawyers who practice law in their jurisdictions."[49] Twenty years later, the same district court observed that "Section 530B crystalizes . . . [that] Congress has committed the regulation of federal government attorneys to the states and courts where they practice."[50] The McDade Amendment and its implementing regulations "were enacted to curb overzealous and unethical behavior on the part of government prosecutors."[51]

2. The McDade Amendment does not delegate the Attorney General authority over the states' regulation of the practice of law.

Former Attorney General Bondi's interpretation of the McDade Amendment stands in conflict with the statutory text. Congress did not enact the McDade Amendment to delegate to the Attorney General authority over the states' regulation of the practice of law; it enacted that law to block the DOJ's efforts to free its lawyers from certain ethical obligations under state ethics codes. In relying on the McDade Amendment for this rulemaking, the DOJ is attempting to use a law that *expressly subjects its lawyers to regulation by the states* as authority to free them from regulation by the states.[52]

The DOJ declares, without explanation, 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" as other attorneys.[53] This declaration represents a complete reversal for the DOJ. Attorney General Janet Reno — who issued the 1994 regulations and subsequently the 1999 regulations implementing the McDade Amendment — told the Senate Judiciary Committee that the DOJ could not shield its attorneys from state disciplinary procedures: "[T]he guidance that the Department provides is in a sense of less value to its attorneys than the guidance it can provide in other areas. In attempting to interpret § 530B, we can advise Department attorneys as to our best reading of the statute, but cannot protect them from the personal consequences if a court or disciplinary committee takes a different view."[54]

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[48] 132 F.3d 1252 (8th Cir. 1998); *see, e.g.*, Barbara Bergman & Theresa Duncan, *Prosecutors required to abide by state rules of professional conduct*, in Everytrial Criminal Defense Resource Book § 71:2 (Feb. 2025).

[49] *N.Y. State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110, 133 (D.D.C. 2003).

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

[51] Kletter, *supra* note 42.

[52] *See In re Clark*, 678 F. Supp. 3d at 133 ("[T]he Court struggles to see anything in a statute that explicitly subjects federal government attorneys to regulation by states that preempts their regulation by states.").

[53] Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10785 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77).

[54] *Department of Justice Oversight:, Hearing before the S. Comm. on the Judiciary*, 106th Cong. 71 (1999) (written responses of Janet Reno, Att'y Gen., to questions by Sen. Orin Hatch).

Former Attorney General Bondi strains logic and the plain text to argue that the McDade Amendment's requirement that DOJ lawyers "shall be subject to State laws and rules . . . *to the same extent and in the same manner* as other attorneys in that State"[55] does not mean what it clearly says. Subsection (a) of the McDade Amendment sets forth three requirements: DOJ lawyers (1) shall be subject to the State laws and rules, (2) to the same extent as other attorneys in the state, and (3) in the same manner as the other attorneys in the state.[56] The notice of proposed rulemaking contends that these provisions purportedly mean that DOJ attorneys are only subject to state substantive rules, but may be subject to unique procedural rules. The DOJ does this by suggesting that all three provisions simply point to the substantive requirement, but that there is no command with respect to process.

This argument is simply untenable. The text of the McDade Amendment is not limited to substantive rules only nor does it purport to exclude procedural requirements. Rather, Congress used extremely broad language ("to the same extent" and "in the same manner") to elucidate the application of the relevant "State laws and rules." No canon of statutory interpretation would justify imposing an arbitrary limitation on the meaning of otherwise purposefully capacious language.

Former Attorney General Bondi's interpretation of the McDade Amendment also runs afoul of the canon of statutory construction that disfavors reading statutory language in a way that renders it superfluous.[57] The rulemaking notice claims that "to the same extent" means only that DOJ lawyers shall be subject to "the same substantive State ethics rules as non-Department attorneys in that State — i.e., 'to the same extent.'"[58] That, however, is already covered by Section (a)'s first requirement: DOJ lawyers "shall be subject to the State laws and rules." The notice then argues that "in the same manner" means "the State ethics rules will apply to Department attorneys under the same factual circumstances as they would to non-Department attorneys under identical or similar circumstances."[59] The correct reading of the statue is that the requirement that state ethics rules shall apply to DOJ attorneys under the same factual circumstances as non-DOJ attorneys flows from the phrase "to the same extent." Former Attorney General Bondi's interpretation renders the separate provisions "to the same extent" and "in the same manner" superfluous. The better reading of "in the same manner" is that the phrase refers to the disciplinary procedures of state supreme courts.

The notice of proposed rulemaking focuses exclusively on the word "assure" in Subsection (b) of the McDade Amendment addressing compliance with the states'

[55] 28 U.S.C. § 530B(a) (emphasis added).
[56] *Id*.
[57] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).
[58] 91 Fed. Reg. at 10785.
[59] *Id*.

regulation of the practice of law: "The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section."[60] The notice finds in the word "assure" hidden authority, unchained from "any limitations," previously dormant but apparently awaiting the Attorney General's decision to "structur[e]" a new "regulatory system" that can "displace State Bar enforcement," either "entirely" or "in part."[61] The word "assure," the notice insists, is "broad, sweeping, language" that "should be given broad, sweeping application."[62] "[B]ecause the language . . . is broad," the DOJ contends, "so too is the authority of the Attorney General."[63]

The word "assure" cannot bear the weight of the DOJ's proposed interpretation. The rulemaking notice fails to cite judicial opinions defining the word "assure" as universally signifying a congressional grant of limitless power to an administrative agency. At most, the term is vague. The Supreme Court has counseled a different approach when confronting vague language: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."[64]

Subsection (b) of the McDade Amendment does not address the state's regulatory authority at all. Nothing in the text of that subsection expressly or implicitly restricts the authority of states. Subsection (b) is a personnel law directed not at the states but at the Department's management of its employees. The McDade Amendment does not (and could not) delegate to the Attorney General any authority over state licensure. Only states can revoke or suspend state law licenses, and the Attorney General's authority is limited to personnel actions against DOJ lawyers. "Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided."[65] Though former Attorney General Bondi does not claim she has the power to revoke a state law license, the proposed rule would effectively *grant continuation of state licensure*, temporarily or permanently, to DOJ lawyers who violate ethics rules, effectively making her their licensing authority. For that proposition, the DOJ cites no authority and offers no argument substantiating such an authorization. Empowering the Attorney General to override the states' exercise of a police power dating back to the republic's founding would take much more than language calling for the Attorney General to "assure" that the DOJ's attorneys comply with applicable laws.[66]

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[60] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, div. A, tit. VIII, § 801, 112 Stat. 2681, 2681–118 to 2681–119 (1998).

[61] Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10783–84 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77).

[62] *Id*. at 10783.

[63] *Id*.

[64] *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001) (citing *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) and *FDA v. Brown & Williamson Tobacco. Corp*., 529 U.S. 120, 159–60 (2000)).

[65] *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 117 (2022).

[66] The notice quotes language from the DOJ's 1999 rulemaking: "[T]he regulations that the Attorney General is authorized to promulgate include those that establish 'enforcement mechanisms.'" Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10784 (proposed Mar. 5, 2026) (to be

Rather than reading a hidden meaning into subsection (b), as the DOJ urges, a court would apply its plain language.[67] The text of the McDade Amendment addresses the DOJ's relationship with and responsibilities in regards to its employees, not with the states.[68] While the DOJ cannot command states to refrain from using their ethics code enforcement mechanisms, it can take action to "assure" that its employees comply with state ethics codes via education, cooperation with state investigations, and intra-departmental disciplinary and employment consequences. The DOJ can also "assure" compliance by incorporating subsection (a) in its regulations to advise its employees of their responsibilities under the McDade Amendment. Which is precisely what the DOJ has done since 1999.[69] In fact, the DOJ's existing regulations go further to "assure" compliance by purporting to clarify choice of law questions under the McDade Amendment.[70] On the date that the McDade Amendment became effective, the DOJ also established its Professional Responsibility Advisory Office to counsel its employees as to their ethical responsibilities under various state ethics codes.[71]

Beyond the statutory text, the history of the McDade Amendment belies any claim that Congress enacted it to *expand* the DOJ's authority. As explained earlier, the McDade Amendment was a rejection of the DOJ's prior efforts to exempt its prosecutors from a narrow category of state ethics regulations. In his extended remarks introducing the Citizens Protection Act, which included the language that became the McDade

codified at 28 C.F.R. pt. 77) (quoting Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19273, 19274 (Apr. 20, 1999)). The quotation is irrelevant and misleading. The courts will not defer to the DOJ's interpretation of its own authority under the McDade Amendment. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 401 (2024) ("The very point of the traditional tools of statutory construction — the tools courts use every day — is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power — perhaps the occasion on which abdication in favor of the agency is *least* appropriate." (emphasis in original)). In any event, the rulemaking notice distorts the meaning of the earlier issuance's reference to "enforcement mechanisms." In 1999, the DOJ made the point that the Congress did not alter existing enforcement mechanisms, including those of the states, when it enacted the McDade Amendment: "Section 530B directs Department attorneys to comply with rules of ethical conduct, but is silent on enforcement mechanisms. For this reason, section 530B *does not change the enforcement authority of . . . state authorities* . . . ." 64 Fed. Reg. at 19274 (emphasis added).

[67] *Cf. Wyeth v. Levine*, 555 U.S. 555, 600–01 (2009) (Thomas, J., concurring) ("[N]o agency or individual Member of Congress can pre-empt a State's judgment by merely musing about goals or intentions not found within or authorized by the statutory text.").

[68] 28 U.S.C. § 530B(b).

[69] 64 Fed. Reg. 19273.

[70] 28 C.F.R. § 77.4(b) & (c).

[71] The McDade Amendment became effective on April 19, 1999. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, div. A, tit. VIII, § 801(c), 112 Stat. 2681, 2681–119 (1998). "The mission of the Professional Responsibility Advisory Office (PRAO) is to ensure prompt, consistent advice to Department attorneys and Assistant United States Attorneys with respect to professional responsibility and choice-of-law issues." *Mission*, DEP'T OF JUSTICE: PROF. RESP. ADV'Y OFF. (last visited Apr. 1, 2026), https://www.justice.gov/prao. The DOJ established the PRAO on April 19, 1999. *Professional Responsibility Advisory Office*, DEP'T OF JUSTICE: ORG., MISSION & FUNCTION MANUAL (last visited Apr. 1, 2026), https://www.justice.gov/doj/organization-mission-and-functions-manual-professional-responsibility-advisory-office ("After passage of 28 U.S.C. 530B (the McDade Amendment), which applied the state, District of Columbia, and territorial rules of professional conduct to federal attorneys, the Department established the Professional Responsibility Advisory Office (PRAO) on April 19, 1999.").

Amendment, Representative McDade declared the specific aim of preventing the DOJ from policing itself: "The rights and freedoms of our citizens will come under increasing danger if we continue to allow the Justice Department to police itself in secret and exempt itself from regular rules of attorney conduct. We must strengthen oversight of the Department and shine a bright light on prosecutorial misconduct."[72] Representative McDade also spoke to the question of who should enforce states' ethics codes when DOJ lawyers commit violations: "These rules are currently enforced, *and must continue to be enforced*, by the state supreme courts."[73]

B. The Attorney General cannot preempt the states' regulation of the practice of law under the Supremacy Clause.

The brief legal analysis in the proposed rule does not expressly invoke the Supremacy Clause or preemption doctrine. However, the notice of proposed rulemaking assumes that the DOJ's regulatory procedures may preempt disciplinary enforcement by state authorities. Because the proposed regulation would substantially alter and, in effect, entirely displace state regulation in this area, preemption analysis is necessary to determine whether such federal interference is permitted under the Supremacy Clause. Any reliance upon the Supremacy Clause would indeed be mistaken, as it is inapplicable here, where the federal agency lacks statutory authority to promulgate the proposed rule.[74] Because the DOJ lacks authority to promulgate new regulations suspending the states' ethics code enforcement mechanisms, there is no legitimate source of federal law to preempt the applicable state processes.[75]

Each type of preemption authority is lacking here. There are "three different types of preemption — 'conflict,' 'express,' and 'field' . . . — but all of them work in the same

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[72] 144 Cong. Rec. E301-01 (daily ed. Mar. 5, 1998) (statement of Rep. Joseph McDade).

[73] *Id*. (emphasis added).

[74] *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982).

[75] The rulemaking notice prudently avoids any express claim that existing regulation preempts state disciplinary proceedings. *See* Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10784 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77) ("To date, the Attorney General has relied upon the State bar licensing authorities to enforce these substantive ethics standards."). Notwithstanding the language in 28 C.F.R. § 77.1(b) arguing that the McDade Amendment "should not" be interpreted to "alter federal substantive, procedural, or evidentiary law," the DOJ could not claim that the existing regulation alters the states' authority over their enforcement mechanisms. The cases discussing the regulation after enactment of the McDade Amendment focused on substantive ethics rules that directly imposed requirements for the government's investigative or trial techniques or on the *sui generis* conduct of grand jury proceedings. *See, e.g., United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 893 (10th Cir. 2016) ("The district court concluded . . . that Rule 16–308(E) is preempted with respect to federal prosecutors practicing before grand juries, but is not preempted outside of the grand-jury context. We agree."); *Cf. Stern v. U.S. Dist. Ct.*, 214 F.3d 4, 20–21 (1st Cir. 2000) ("As written, Local Rule 3.8(f) is more than an ethical standard. It adds a novel procedural step — the opportunity for a pre-service adversarial hearing — and to compound the matter, ordains that the hearing be conducted with new substantive standards in mind. . . . . Because Local Rule 3.8(f) goes beyond the realm of ethics, section 530B neither rescues it nor renders the instant case moot."). The rules at issue in those cases did not address enforcement mechanisms that, unlike substantive ethics rules, have no direct application to investigations, trials or grand jury proceedings.

way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted."[76] The categories are not "rigidly distinct."[77] Under any of them, a preemption argument would fail.

1. Express preemption: Congress has not expressly preempted the states' authority or authorized the Attorney General to do so.

Express preemption occurs when Congress "define[s] explicitly the extent to which its enactments preempt state law."[78] Agency regulations can preempt state law where Congress has authorized an agency to take specific action displacing state authority.[79] But here, Congress has never defined the extent to which it sought to preempt state law nor authorized the DOJ to promulgate regulations that do so.

Any argument by the DOJ that Congress's intent to preempt state law is clear from its grant to the Attorney General of a "right to review the allegations in the first instance" fails.[80] Congress has not authorized the DOJ to conduct a review "in the first instance," to direct the states to suspend their enforcement activities, or to "establish a process wherein the Department assumes the responsibility for enforcing State ethics rules directly against Department attorneys" "to create an entirely Federal enforcement mechanism."[81] The question is not whether Congress specifically authorized the DOJ to "preempt" state law, but whether Congress authorized the DOJ to do any of the things it proposes to do. Congress has not. The DOJ's reading of the word "assure" is unpersuasive.[82] As discussed earlier, this language is, at most, too vague to constitute explicit authorization of a regulation establishing a new regulatory scheme at odds with the states' exercise of a core police power that originated with the founding of the republic.[83]

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[76] *Murphy v. NCAA*, 584 U.S. 453, 477 (2018) (citation modified).

[77] *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000)).

[78] *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990).

[79] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986).

[80] *Id*.

[81] Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10783–84, 10787 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77).

[82] *See id*. at 10787.

[83] *Leis v. Flynt*, 439 U.S. 438, 442 (1979); *see also Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 438 (1982) (Brennan, J., concurring) (emphasizing that the "traditional and primary responsibility of state courts for establishing and enforcing standards for members of their bars" is of such importance that federal courts should give it "exceptional deference").

2. Conflict preemption: there is no conflict between state and federal law.

Preemption can be found based on a conflict between state law and federal law. A conflict arises when compliance with both federal law and state law is impossible. However, a regulation cannot preempt state law unless Congress has granted the agency authority to issue the regulation.[84] In some cases a conflict can arise if state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[85] The Supreme Court has cautioned, however, that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law."[86] For these reasons, any claim of conflict preemption will fail.

First, federal regulations are valid only if they are authorized: "pre-emption takes place 'only when and if [the agency] is acting within the scope of its congressionally delegated authority, . . . for an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."[87] The analysis, therefore, requires examination of the statute on which an agency relies for its regulations. "[T]he scope of a [federal] statute's pre-emptive effect is guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case."[88] The Supreme Court has required that any congressional intention to preempt the historic police powers of the states, such as the regulation of the legal profession, must be "clear and manifest."[89]

The DOJ cannot demonstrate that the "clear and manifest purpose" of Congress in enacting the McDade Amendment was to empower the DOJ to regulate the practice of

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[84] *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("*The statutorily authorized regulations* of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." (emphasis added)); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982) ("[T]he questions upon which resolution of this case rests are whether the Board meant to pre-empt California's due-on-sale law, and, if so, *whether that action is within the scope of the Board's delegated authority*." (emphasis added)).

[85] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

[86] *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (citing *P.R. Dep't of Consumer Affs. v. ISLA Petroleum Corp*., 485 U. S. 495, 503 (1988)).

[87] *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 315 (2019) (alterations in original) (quoting *New York v. FERC*, 535 U. S. 1, 18 (2002)).

[88] *Hughes v. Talen Energy Mktg*., 578 U.S. 150, 162–63 (2016) (alteration in original) (quoting *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008).

[89] *Arizona v. United States*, 567 U.S. 387, 399–400 (2012) ("[S]tate laws are preempted when they conflict with federal law. This includes cases where compliance with both federal and state regulations is a physical impossibility, and those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . . In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." (citation modified)); *see also N. Va. Hemp & Agric., LLC v. Virginia*, 125 F.4th 472, 493 (4th Cir. 2025) ("[A] court should not find conflict preemption unless preemption was 'the clear and manifest purpose of Congress.'" (quoting *Arizona*, 567 U.S. at 400)).

law for its employees.[90] The legislative history points to the opposite intention. As discussed at length above, Congress enacted the law in response to the Thornburgh Memorandum and the Reno regulations, which purported to relieve DOJ lawyers of the obligation to comply with specific provisions of some states' rules regarding witness contacts.[91] Two Congressional committee reports in the 1990s expressed concern about the DOJ's ability to self-police.[92]

The term "assure" does not amount to a "clear and manifest" indication of congressional intent to authorize the DOJ to regulate the practice of law by its employees. This conclusion is bolstered by the long-standing tradition that the DOJ and the states operate in separate realms: the DOJ can take personnel actions against current DOJ employees, while states can suspend or revoke the licenses of their licensees.[93] Neither can do what the other can do.[94] There is no conflict between what Congress has authorized the Attorney General to do and the states' enforcement of their own ethics codes.

The proposed regulation runs into an additional problem with its coverage of former DOJ employees. The DOJ cannot take personnel actions against lawyers it no longer employs. The rulemaking notice concedes that the DOJ cannot even compel them to cooperate with DOJ investigations.[95] The states, however, have the authority to compel the cooperation of their licensees. All the DOJ can do is refer former DOJ lawyers to the states for enforcement proceedings.

Second, even if Congress had granted the DOJ authority to issue the proposed regulation, conflict preemption would still be inapplicable because there is no conflict

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[90] The DOJ implicitly concedes the lack of any clear and manifest purpose by admitting that its regulation is for the "benefit" of its lawyers, given that the states regulate the practice of law for the benefit of the public. *Compare* Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10785 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77) ("The proposed rule will benefit Department attorneys by ensuring the consistent application of the State ethics rules.") *with Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) ("[T]he regulation of the activities of the bar is at the core of the State's power to protect the public."). The DOJ's desire for uniformity is hardly a reason to throw out the regulatory regime that has been in place since the republic began. *Notz v. Conn. Comm'n on Hum. Rts. & Opportunities*, 438 F. Supp. 3d 148, 152 (D. Conn. 2020) ("[T]he Supremacy Clause is not a Uniformity Clause.").

[91] *See supra* Section I(A)(1).

[92] H.R. Rep. 105-636, at 154 (1998) (expressing concern about "the Department of Justice's issuance of a regulation that exempt[ed] its attorneys from the same State laws and rules of ethics which all other attorneys must follow") (citing 59 Fed. Reg. 39910, August 4, 1994); H.R. Rep. 101-986, at 35 (1990) (expressing concern about 'the problems inherent in any system of self-policing and regulation").

[93] 5 U.S.C. ch. 75.

[94] Even as to the least severe form of discipline, a reprimand, there is no overlap of authority here. A reprimand by the DOJ is a declaration only that *the Department* is dissatisfied with an employee, while a reprimand by a state is a declaration that the *state* is dissatisfied with its licensee; neither the DOJ nor the state can speak to whether the other is dissatisfied.

[95] 91 Fed. Reg. at 10785 ("OPR cannot compel former Department attorneys to submit to an interview or to respond in writing to requests for information, whereas the bar disciplinary authorities where an attorney is licensed have that authority.").

between the stated purpose of the proposed regulation and state law. In the rulemaking notice, DOJ intimates that the states' enforcement mechanisms obstruct the fulfillment of its responsibilities.[96] However, the DOJ does not specify any constitutional or statutory responsibility that state enforcement mechanisms prevent it from accomplishing. In the past, the DOJ challenged substantive state ethics code requirements, but this proposed regulation concerns only their enforcement mechanisms without regard to the content of state ethics code provisions. It is those mechanisms themselves that the DOJ must demonstrate pose an obstacle to federal objectives. The DOJ has failed to do so.

The DOJ does not identify any specific investigatory or prosecutorial authority that state enforcement mechanisms interfere with. There is an important difference between the DOJ's prior objections to substantive state ethics rules and its current objection to state enforcement mechanisms. Before Congress enacted the McDade Amendment, the DOJ objected to a substantive restriction on contacting represented persons without the advance consent of their counsel.[97] The OLC and Thornburgh memoranda objected to that requirement, claiming it limited methods of criminal investigation and prosecution, preventing the DOJ from accomplishing its criminal enforcement and civil litigation responsibilities.[98] The DOJ particularly had concerns regarding the special difficulty of compliance in the context of undercover operations. In contrast, the states' enforcement mechanisms do not block the DOJ's investigative techniques or litigation tactics or uniquely impact DOJ prosecutors or investigators.

The true target of former Attorney General Bondi's notice of proposed rulemaking appears to be the states' substantive ethics rules. However, the DOJ cannot have it both ways, simultaneously downplaying any impact of the proposed rule on substantive ethics rules while shielding DOJ lawyers from any enforcement of state ethics rules because they are per se disruptive of federal interests.

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[96] The rulemaking notice declares that "the recent complaints and disciplinary proceedings that target internal Department deliberations undoubtedly intrude on the Attorney General's statutory responsibility to carry out the functions of the Department of Justice through its attorneys . . . ." 91 Fed. Reg. at 10783). Notably, the DOJ does not actually identify any pending or recent "disciplinary proceedings," nor does it demonstrate that any such proceedings "target internal Department deliberations."

[97] Ethical Restraints of the ABA Code of Pro. Resp. on Fed. Crim. Investigations, 4B Op. O.L.C. 576 (1980); Memorandum from R. Thornburgh, Atty. Gen., to all Just, Dep't Litigators, Communication with Persons Represented By Counsel (June 8, 1989), reprinted as Ex. E to *In re Doe*, 801 F. Supp. 478, 489 (D.N.M. 1992); Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19273 (Apr. 20, 1999) (to be codified at 28 C.F.R. pt. 77).

[98] 4B Op. O.L.C. at 577–80 (describing investigative techniques covered by rule); *Doe*, 801 F. Supp. at 492 (Thornburg Memorandum) ("It is the clear policy of the Department that in the course of a criminal investigation, an attorney for the government is authorized to direct and supervise the use of undercover law enforcement agents, informants, and other cooperating individuals to gather evidence by communicating with any person who has not been made the subject of formal federal criminal adversarial proceedings arising from that investigation, regardless of whether the person is known to be represented by counsel. It is further the policy and the experience of the Department that what it may do in an undercover setting, it may similarly do overtly. Routine contacts with witnesses, even when not done undercover, are an integral part of federal law enforcement, even where a lawyer may represent the witness."); Communications With Represented Persons, 59 Fed. Reg. 39910, 39910 (Aug. 4, 1994) ("This final rule governs the circumstances under which attorneys employed by the Department of Justice ('Department') may communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings.").

3. Field preemption: Congress has not authorized the Attorney General to regulate the practice of law.

Field preemption occurs when Congress has legislated so comprehensively on a subject that it has left no room for the states to legislate.[99] The rulemaking notice asserts that the Attorney General has "the discretion to displace State bar enforcement and to create an entirely Federal enforcement mechanism."[100] The literal words suggest field preemption applying to all attorneys, though context would seem to indicate that the rulemaking notice is intended to more narrowly address the enforcement of such rules against only the Department's own employees.[101]

To the extent this pronouncement is an attempt to assert field preemption, any field preemption argument could be dispatched quickly. [102] For one thing, the Attorney General has no authority over attorneys who do not work for the DOJ — rendering field preemption an impossibility. Even a claim of *field preemption for some of the field* (i.e., only DOJ lawyers) — if such a novelty could exist — would fail. Courts are reluctant to find that Congress has preempted a field that is traditionally part of the historic police powers of the states, absent a "clear and manifest" purpose of Congress to do so.[103] The authority to regulate the practice of law is a traditional police power of the states for which a finding of field preemption would be disfavored.[104] The D.C. Circuit has observed that "[t]he Supreme Court has found complete preemption in only three

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[99] *R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 140 (1986).

[100] 91 Fed. Reg. at 10784; *see also id*. at 10783 ("The regulations could leave the responsibility for enforcing ethics rules up to the bar disciplinary authorities of the States, the Territories, and the District of Columbia. Alternatively, the regulations could establish a process wherein the Department assumes the responsibility for enforcing State ethics rules directly against Department attorneys.").

[101] A reference to "Federal attorneys" appears only in a separate clause of the sentence containing this pronouncement. *Id*, at 10784 ("But 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.").

[102] *Hillsborough Cnty. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 715–16 (1985) ("Of course, the same principles apply where, as here, the field is said to have been pre-empted by an agency, acting pursuant to congressional delegation. Appellee must thus present a showing of implicit pre-emption of the whole field, or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation.").

[103] *Hillsborough.*, 471 U.S. at 715-16 (collecting cases); *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

[104] *See, e.g*., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) ("[T]he regulation of the activities of the bar is at the core of the State's power to protect the public."); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."); *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 209 (4th Cir. 2019) (treating regulation of practice of law as a police power); *Off. of Disciplinary Couns. v. Marcone*, 855 A.2d 654, 664–66 (Pa. 2004) (same); *In re McAtee*, 162 B.R. 574, 577–78 (Bankr. N.D. Fla. 1993) (discussing the police power of the Florida State Bar to assess whether an attorney is fit to resume the practice of law); *Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health.").

instances, and in each case a statute clearly manifested that federal law wholly displaced state law."[105]

The burden is on the government to establish the existence of a clear and manifest congressional purpose.[106] Subsection (a) of the McDade Amendment subjects DOJ lawyers to the states' regulation of the practice of law, and subsection (b) is a personnel law providing that the Attorney General "assure" that they comply. The notice of rulemaking's reliance on the vague word "assure" would fall far short of meeting the high bar for field preemption.

C. The intergovernmental immunity doctrine does not authorize the Attorney General to promulgate this rule.

The DOJ does not articulate the legal justification that purportedly authorizes this extraordinary federal rulemaking; however, the rulemaking notice includes a short string citation of four cases in a brief explanatory paragraph.[107] These cases address the intergovernmental immunity doctrine, which prohibits states from directly regulating, or discriminating against, the federal government.[108] The doctrine has no application to state ethics code enforcement mechanisms, which neither directly regulate the federal government nor discriminate against it. This allusion to the intergovernmental immunity doctrine is the only explanation the DOJ offers in support of its regulation. But the doctrine does not support the proposed rule.

The notice of proposed rulemaking quotes *Hancock v. Train* for the proposition that "the activities of the Federal Government are free from regulation by any [S]tate."[109] Yet, the notice neglects to mention the following line from *Hancock*: "Neither the Supremacy Clause nor the Plenary Powers Clause bars all state regulation which may touch the activities of the Federal Government."[110] Giving an example of permissible state regulation, the Court noted the state's authority "simply to regulate the amount of pollutants which the federal installations may discharge" from the onsite air contaminant sources.[111] What the state lacked, however, was the authority to prohibit all "operation of

[105] *District of Columbia v. Exxon Mobil Corp*., 89 F.4th 144, 150 (D.C. Cir. 2023) (citation modified).

[106] *See, e.g.*, *United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993) ("Under the preemption doctrine, plaintiff bears a heavy burden of demonstrating that state regulation has been superseded by federal law; in the absence of a 'clear and manifest purpose of Congress,' courts should be wary of interfering with the historic police powers of the states." (quoting *Hillsborough*, 471 U.S. at 715)), *aff'd*, 54 F.3d 825 (D.C. Cir. 1995, amended July 28, 1995).

[107] Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10783 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77) (citing *Hancock v. Train*, 426 U.S. 167, 178 (1976); *United States v. Washington*, 596 U.S. 832, 835 (2022); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988); *Cunningham v. Neagle*, 135 U.S. 1 (1890)).

[108] *See*, *e.g.*, *United States v. Washington*, 596 U.S. 832, 835 (2022) ("The Constitution's Supremacy Clause generally immunizes the Federal Government from state laws that directly regulate or discriminate against it.").

[109] 91 Fed. Reg. at 10783.

[110] *Hancock*, 426 U.S. at 179.

[111] *Id*. at 180.

the federal installations" on which those sources were located.[112] Neither of these examples would have any relevance to the proposed rule because they both involved a state's regulation of the federal government. State ethics code enforcement mechanisms, on the other hand, do not regulate the federal government at all. They are personal to the individual state licensee.

The DOJ also relies on *United States v. Washington*, which addressed a state law making it easier for federal workers than for private workers at the same worksite to establish their entitlement to workers' compensation benefits.[113] Because the federal government was responsible for payments to its own employees, the law increased its costs.[114] The Supreme Court held that the state violated the Supremacy Clause by singling out the federal government for different treatment than it accorded other employers.[115] That is not the case here. State ethics code enforcement mechanisms do not regulate the federal government at all, and they do not single out the federal government's lawyers for different treatment than they accord other attorneys. Rather, they treat all licensed attorneys the same. It is the DOJ's proposed regulation, not state enforcement mechanisms, that would give federal lawyers special treatment.

The DOJ's reliance on *Washington* highlights another weakness of its position.[116] There, the Supreme Court wrote: "The Constitution's Supremacy Clause generally immunizes the Federal Government from state laws that directly regulate or discriminate against it. Congress, however, can authorize such laws by waiving this constitutional immunity."[117] Congress has done so explicitly and unmistakably by subjecting DOJ lawyers to the states' regulation of the practice of law via the McDade Amendment.[118] The Supreme Court has long recognized that the states' regulation of professions entails both continuing requirements after licensure and the imposition of sanctions for failure to comply.[119] Thus, the subjection of DOJ lawyers to state regulation alone is enough to meet any applicable standard for clarity in the waiver of constitutional immunity. Though not necessary, Congress went further by adding that such regulation of DOJ lawyers by the state shall be conducted "in the same manner" as for other attorneys.[120] For these two reasons, the congressional waiver of immunity would have met the standard of clarity even if the intergovernmental immunities doctrine applied.[121]

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[112] *Id*.

[113] *Washington*, 596 U.S at 835.

[114] *Id*.

[115] *Id*. at 839.

[116] Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10783 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77).

[117] *Washington*, 596 U.S. at 835 (citation modified).

[118] 28 U.S.C. § 530B(a).

[119] *Dent v. West Virginia*, 129 U.S. 114, 123–24 (1889) (holding states regulation of professions may impose conditions beyond testing intellectual qualifications of professionals).

[120] 28 U.S.C. § 530B(a).

[121] This comment attempts to read the rulemaking notice generously by giving the DOJ the benefit of the doubt as to its terse, vague argument. The rulemaking notice states that the general standard for a congressional waiver of the

The DOJ's reliance on the other two cases is equally unavailing. In *Goodyear Atomic Corp*., the Supreme Court extended its existing precedent on preemption to a state's regulation of a federal facility when a private federal contractor, rather than the federal government itself, operated a facility.[122] DOJ lawyers work for the federal government, not private contractors.

In *Cunningham v. Neagle*, the Supreme Court ordered a sheriff to release a deputy U.S. marshal he had arrested for murder after the agent shot a man in the line of duty.[123] DOJ's reliance on *Neagle* is misplaced, "as that 19th-century decision involved a federal officer's immunity from state criminal prosecution for acts necessary and proper in discharging federal duties."[124] State bar proceedings are not criminal prosecutions,[125] Congress has expressly subjected DOJ lawyers to state ethics codes,[126] and disregarding state ethics codes is not "necessary and proper."[127] *United States v. Ferrara* considered this last point: "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."[128]

The untenable implication of the reference to *Neagle* in the rulemaking notice seems to be that states lack authority to sanction or cease licensing attorneys due to ethical violations without the Attorney General's permission if those licensees happen to work or even once worked for the Justice Department. Stated affirmatively, the suggestion is that the Attorney General can force states to continue licensing government lawyers indefinitely. The states' licensing decisions may indirectly affect the employment of DOJ lawyers, who must hold a license from at least one state, territory or the District

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Supremacy Clause must be clear, though it never explicitly connects that standard to the intergovernmental immunities doctrine. *See* 91 Fed. Reg. at 10783 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819) (asserting that state law is presumptively preempted by conflicting federal law "absent a clear statement from Congress" to the contrary)).

[122] *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (considering "whether the federally owned Portsmouth facility is . . . shielded from direct state regulation even though the facility is operated by a private party under contract with the United States.").

[123] *Cunningham v. Neagle*, 135 U.S. 1, 5 (1890).

[124] *Martin v. United States*, 605 U.S. 395, 397 (2025).

[125] *In re Clark*, 678 F. Supp. 3d 112, 124 (D.D.C. 2023) ("[T]he Board's disciplinary proceeding serves a different primary purpose than a criminal prosecution. Whereas '[p]unitive fines and imprisonment are the common tools of the criminal law,' '[t]ools of attorney discipline, such as reprimands, are not traditional criminal punishments.'" (quoting *Wolters Kluwer Fin. Servs. v. Scivantage*, 564 F.3d 110, 117 (2d Cir. 2009)), *aff'd*, 23-7073, 2024 WL 3385251 (D.C. Cir. July 12, 2024); *see also Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) ("States traditionally have exercised extensive control over the professional conduct of attorneys. The ultimate objective of such control is the protection of the public, the purification of the bar and prevention of recurrence." (cleaned up)); *Ex parte Wall*, 107 U.S. 265, 288 (1883) ("[T]he constitutional privilege of trial by jury for crimes does not apply to prevent the courts from punishing its officers for contempt, or from removing them in proper cases.").

[126] 28 U.S.C. § 530B(a).

[127] *United States v. Ferrara*, 847 F. Supp. 964, 969 (D.D.C. 1993), *aff'd*, 54 F.3d 825 (D.C. Cir. 1995, *amended* July 28, 1995).

[128] *Id*.

of Columbia,[129] but *Neagle* does not authorize the Attorney General to commandeer the states' regulation of the practice of law by directing them to incorporate the DOJ's review and screening of ethics complaints into their enforcement mechanisms.[130] And, while a loss of licensure in one jurisdiction may influence the licensing decisions of another, it does not inevitably follow that a DOJ lawyer would be unable to hold a law license anywhere.[131] The state supreme court that licensed a future ethics code violator, who subsequently secured employment with the Justice Department, should not have to shoulder the burden of supplying the federal government in perpetuity with the unconditional licensure of its employee.

II. THE PROPOSED REGULATION IS CONTRARY TO THE CONSTITUTION AND FEDERAL LAW

A. The proposed regulation would violate the Tenth Amendment.

The proposed regulation would violate the Tenth Amendment by running afoul of the anticommandeering doctrine.[132] Congress may not "require the States to govern according to Congress' instructions" or "conscript state governments as its agents."[133] Former Attorney General Bondi's proposed regulation would purport to commandeer states' disciplinary processes by putting them on hold indefinitely while the DOJ conducted a review that it may or may not ever resolve. It would direct state officials not to carry out their investigative function. It would necessitate state supreme courts enacting rules to provide for indefinitely suspending investigations pending the DOJ's review.[134] Most alarmingly, the regulation would force states to continue licensing, under state law, attorneys whose licenses they would otherwise suspend or revoke. It does not matter whether this coerced continuation of licensure is temporary or, as the rulemaking implies, in some cases permanent. These are state functions that the Attorney General cannot commandeer.

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[129] 28 U.S.C. § 530C(c).

[130] *New York v. United States*, 505 U.S. 144, 162, 178 (1992).

[131] The D.C. Bar, for example, has adopted exceptions to its reciprocal discipline policy when another bar's rules differ from its own or the disciplining bar's action was unwarranted or would result in grave injustice under the relevant circumstances. D.C. Bar R. XI, § 11(c). A federal court is not bound by a state's disbarment of an attorney. *In re Ruffalo*, 390 U.S. 544, 547 (1968) (citing *Theard v. United States*, 354 U.S. 278, 281–82 (1957) ("Through [sic] admission to practice before a federal court is derivative from membership in a state bar, disbarment by the State does not result in automatic disbarment by the federal court. Though that state action is entitled to respect, it is not conclusively binding on the federal courts.")).

[132] U.S. CONST. AMEND. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[133] *New York*, 505 U.S. at 162, 178 (1992); *see also United States v. California*, 921 F.3d 865, 889 (9th Cir. 2019) (states may refuse "to adopt preferred federal policies").

[134] The Attorney General lacks authority to preempt state law in this way. Any argument to the contrary invoking the Supremacy Clause is refuted in the prior section. *See supra* Section I(B).

In a seminal opinion on the anticommandeering doctrine, Justice O'Connor explained that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[135] A concern "where the Federal Government compels States to regulate" is that "the accountability of both state and federal officials is diminished."[136] More recently, the Supreme Court has articulated the issue this way:

> The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.[137]

Two cases illustrate the courts' application of this doctrine. In *Murphy v. NCAA*, the Supreme Court held, in part, that Congress could not prohibit states from licensing gambling that involved competitive sports.[138] The obvious conclusion is that, just as the federal government cannot prohibit state licensure, the federal government cannot compel states to license individuals as the proposed regulation seeks to do.[139] "[I]t does not matter whether a law commands a state to take an affirmative action or prohibits a state from taking an action — either situation involves the exercise of control over the state."[140]

In *New York v. United States*, the Supreme Court struck down a federal law requiring states in certain circumstances to take title to low-level radioactive waste within their borders at the request of generators.[141] The Court found that Congress "crossed the line distinguishing encouragement from coercion."[142] The proposed rule crosses that same line by threatening consequences for agencies that refuse to surrender their sovereignty to the Attorney General.[143]

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[135] *New York*, 505 U.S. at 166.
[136] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 473–74 (2018); *New York*, 505 U.S. at 168.
[137] *Murphy*, 584 U.S. at 471.
[138] *Id.* at 481.
[139] Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10787 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. § 77.5(a)).
[140] *City of Chicago v. Barr*, 961 F.3d 882, 908–09 (7th Cir. 2020) (citing *Murphy*, 584 U.S. at 474–75).
[141] *New York v. United States*, 505 U.S. 144, 153 (1992).
[142] *Id.* at 168.
[143] 91 Fed. Reg. at 10787.

The DOJ's proposed regulation would directly regulate states, rather than individuals. The rulemaking notice acknowledges explicitly: "*The proposed rule is focused only on the relationship between the Department and the bar disciplinary authorities of the States, the Territories, and the District of Columbia.*"[144] Though the rulemaking notice focuses substantially on complaints filed by members of the public against government lawyers,[145] the regulation would not restrict the ability of the public to file such complaints.[146] Instead, the rule would restrict the states' efforts to investigate those complaints.[147] That arrangement clearly runs afoul of the anticommandeering doctrine.[148]

If the proposed regulation were finalized states would be required to adopt new disciplinary procedures to accommodate the DOJ's regulations. It does not matter that the necessity of states adopting new procedures would be an indirect consequence of the proposed rule. The Constitution does not give federal authorities the power to compel states to regulate, and "[t]hat is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own."[149] Moreover, former Attorney General Bondi's proposed regulation would violate the anticommandeering doctrine not only by requiring the states to amend their regulations but also by requiring them to cooperate with the DOJ's proposed procedure, making them co-administrators of a federal program.

The DOJ cannot hide behind the wording of its proposed regulatory text by claiming that the regulation authorizes the Attorney General only to "request" that states suspend their investigations. Subsection (a) of proposed § 77.5 explicitly purports to confer on the DOJ an affirmative "right to review the allegations in the first instance."[150] It further purports to provide that this federal review would occur "[b]efore the bar disciplinary authorities of the States, the Territories, or the District of Columbia undertake any investigative steps" seeking "information or otherwise requir[ing] participation" of a "current or former" DOJ attorney who is a licensee of the state.[151] Attempting to coerce state compliance with this unauthorized regulation, the DOJ threatens in subsection (b) that it "shall take appropriate action to enforce the regulation."[152]

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[144] *Id.* at 10785.
[145] *Id.* at 10782–83, 85.
[146] *See id.* at 10786–87.
[147] *Id.* at 10787.
[148] *Cf. Murphy*, 584 U.S. at 477 ("[I]n order for [a federal statutory] provision to preempt state law, it must satisfy two requirements. First, it must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do. Second, since the Constitution 'confers upon Congress the power to regulate individuals, not States,' *New York*, 505 U.S. at 166, the [statutory] provision at issue must be best read as one that regulates private actors.").
[149] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012).
[150] 91 Fed. Reg. at 10787.
[151] *Id.*
[152] *Id.*

The threat is heightened by language intimating that noncompliant state officials may risk prosecution under federal obstruction statutes. This intimation lies in language indicating that the DOJ "shall" also take appropriate action against disciplinary authorities who "interefer[e] with the Attorney General's review of the allegations."[153] The language is worded to suggest by context that a state merely continuing its own investigation would amount to unlawfully impeding a federal proceeding.[154] This threat is linked in subsection (b) to a state's refusal to grant the DOJ's request that it suspend its investigation.[155] Further establishing that linkage, subsection (a) provides that any exercise of the Attorney General's right of review precedes a state's investigation.[156] Hinting at prosecution of state officials poses a significant danger to federalism because it seeks to coerce state officials to act in their own personal interests (i.e., avoiding federal prosecution) instead of their states' interests.[157]

Any threats of criminal prosecution to advance political goals are repugnant to the administration of justice and may raise ethical concerns.[158] It undermines the fundamental principle of the republican form of government: "'[t]he Constitution created a government dedicated to equal justice under law,' not one in which criminal liability may depend on the defendant's alignment with the policy preferences of the incumbent administration."[159]

B. The proposed regulation violates the McDade Amendment.

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[153] *Id.*

[154] *Compare id.*, with 18 U.S.C. § 1505 ("Whoever corruptly . . . or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . Shall be fined under this title, imprisoned not more than 5 years or . . . or both."). The term "corruptly" means "acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information."); *see also* 18 U.S.C. § 1515(b).

[155] 91 Fed. Reg. at 10787 ("(b) Should 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.").

[156] *Id.*

[157] *United States v. Adams*, 777 F. Supp. 3d 185, 233 (S.D.N.Y. 2025) ("It is well established that 'the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.' Although this prohibition has typically been applied to acts of Congress, the principles that underpin it — namely, federalism and political accountability — would similarly preclude an attempt by the federal executive branch to coerce a state or local official into implementing federal policy objectives.") (citation omitted).

[158] *See* ABA, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, § 3.16(a) (4th ed. 2017) ("A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion."); MODEL RULES OF PRO. CONDUCT r. 8.4(d) & (e) (declaring it professional misconduct for an attorney to "engage in conduct that is prejudicial to the administration of justice" or "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law").

[159] *Adams*, 777 F. Supp. at 235 (S.D.N.Y. 2025) (citing *Cooper v. Aaron*, 358 U.S. 1, 19 (1958)).

The proposed regulation is contrary to law because the McDade Amendment subjects DOJ lawyers to state regulation of the practice of law "in the same manner" as other attorneys.[160] In direct violation of this statutory requirement, the proposed regulation would purport to set up an alternate system for enforcing state ethics code requirements against DOJ lawyers.

The DOJ declares in its rulemaking notice that "[t]he Department does not interpret section 530B to require that Department attorneys must be subject to the same procedures for enforcing substantive State ethics rules."[161] The rulemaking notice offers no explanation whatsoever for the claim. The closest the DOJ comes to explaining itself is a passing reference to the Thornburgh Memorandum and the Reno regulations,[162] all of which Congress rejected in enacting the McDade Amendment.[163] One day after the McDade Amendment became effective,[164] the DOJ issued its 1999 regulations to replace those earlier issuances.[165] In those 1999 regulations, and for nearly three decades since, the DOJ articulated a different interpretation of the law than it advances now: "[S]ection 530B does not change the enforcement authority of . . . state authorities[] or the federal courts."[166]

Former Attorney General Bondi's interpretation of the McDade Amendment suffers from a basic problem of logic and statutory construction by rendering the language of § 530B redundant. As discussed in Section I(A)(2) of this comment above, the Attorney General's reading of the phrase "to the same extent and in the same manner" is implausible and runs contrary to an important canon of statutory construction by rendering statutory language superfluous. Courts will not defer to an Attorney General's interpretation of § 530B; what matters is the text of that law and its correct interpretation.[167]

The meaning of "to the same extent and in the same manner" is context dependent. Congress has employed variations of this language in hundreds of statutory provisions.[168] The rulemaking notice cites nothing to indicate that courts have attributed a

[160] 28 U.S.C. § 530B(a).
[161] 91 Fed. Reg. at 10785.
[162] *Id*. at 10783 n.1.
[163] *See* 144 CONG. REC. E301 (daily ed. Mar. 5, 1998) (remarks of Rep. McDade) ("These rules are currently enforced, and must continue to be enforced, by the state supreme courts.").
[164] *Compare* Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19273 (Apr. 20, 1999) (to be codified at 28 C.F.R. pt. 77) with Pub. L. 105-277, div. A, tit. VIII, § 801(c), 112 Stat. 2681–118 to 2681–119 (1998).
[165] *See* 64 Fed. Reg. at 19273 ("This rule supersedes the Department of Justice regulations relating to Communications with Represented Persons and implements 28 U.S.C. 530B pertaining to ethical standards for attorneys for the government.").
[166] 64 Fed. Reg. at 19274.
[167] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 401 (2024).
[168] *See, e.g.*, 28 U.S.C. § 2674 (Federal Tort Claims Act).

universal meaning to the phrase in all its statutory manifestations.[169] Context is what gives the phrase meaning. The context of the phrase in the McDade Amendment, at 28 U.S.C. § 530B(a), is a congressional determination to subject DOJ lawyers to the states' regulation of the practice of law.[170]

It is only in the context of concerns about self-policing embodied by the McDade Amendment that the phrase "in the same manner" can be construed.[171] The House of Representatives' committee report explained that the legislation addressed concerns about "the Department of Justice's issuance of a regulation that exempt[ed] its attorneys from the same State laws and rules of ethics which all other attorneys must follow (59 Fed.Reg. 39910, August 4, 1994)."[172] The Congressional Research Service has highlighted the protracted congressional effort to address its concern:

> [The language of the McDade Amendment] was a remnant of the Citizens' Protection Act whose roots extend back at least to the 101st Congress when the House Government Operations Committee conducted hearings and recommended among other things a thorough examination of the ethics rules applicable to Department attorney[s] while expressing concern over "the problems inherent in any system of self-policing and regulation," H.R. Rep. 101-986, at 35 (1990).[173]

Read in that proper context, the McDade Amendment subjects DOJ lawyers to the states' ethics enforcement mechanisms and does not give the Attorney General the power to block those mechanisms either temporarily or indefinitely. Former Attorney General Bondi's contention that the McDade Amendment's directive that the Attorney General "assure" compliance with the statute authorized her to supplant state ethics code enforcement mechanisms is unmoored from the clear meaning of the statute.[174] Former Attorney General Bondi's attempt to break free of the McDade Amendment's mandate is not only contrary to law but also a dangerous precedent. Today, the DOJ seeks to compel states to continue licensing DOJ lawyers, tomorrow it could be emboldened to read the term "assure" in subsection (b) as likewise giving the Attorney General the authority to

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[169] *See* Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10783 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77).

[170] 28 U.S.C. § 530B(a).

[171] *Pulsifer v. United States*, 601 U.S. 124, 141 (2024) ("[I]n the usual language of statutory construction, the answer may lie in considering the paragraph's text in its legal context.").

[172] H.R. Rep. No. 105-636, at 154 (1998).

[173] Charles Doyle, Cong. Rsch. Serv., RL30060, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys 2 (2001).

[174] *See supra* Section I(A)(2).

dictate to federal courts whom they must allow to appear before them.[175] This concern is not far-fetched. The DOJ attempted to hijack the authority of federal courts when it issued its 1994 regulations:

> [A]n important feature of this regulation is its express intention to preempt and supersede the operation of state and local federal court rules as they relate to contacts by Department attorneys, regardless of whether such rules are inconsistent or consistent with this regulation, absent a finding of a willful violation of these rules by the Attorney General.[176]

Congress resoundingly rejected that attempt by enacting the McDade Amendment, which forced the Department to replace its regulations in 1999.[177] Former Attorney General Bondi's claim of authority over state and federal courts is not now (if it ever was) supportable.[178]

III. THE PROPOSED REGULATION IS ARBITRARY AND CAPRICIOUS

The DOJ's proposed rule represents a radical change in policy that lacks a rational connection between the facts found and the suggested scheme, is unsupported by the record, and cannot achieve its stated purposes. The rulemaking notice fails to justify this change. The true aim of this rule is clear: to insulate DOJ lawyers from accountability for any role in the Department's dangerous weaponization of governmental power. Far from promoting "the highest ethical standards," as the notice claims to do, the rule would serve as a shield against the fair and impartial enforcement of ethical standards.

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[175] *See In re Snyder*, 472 U.S. 634, 645 n.6 (1985) ("Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law.").

[176] Communications With Represented Persons, 59 Fed. Reg. 39910, 39916 (Aug. 4, 1994) (to be codified at 28 C.F.R. pt. 77).

[177] Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19273 (Apr. 20, 1999) (to be codified at 28 C.F.R. pt. 77).

[178] *See In re U.S.*, 791 F.3d 945, 957–58 (9th Cir. 2015) ("The Attorney General has clear statutory authority to choose which attorneys will represent the United States in litigation. *See* 28 U.S.C. §§ 515(a), 517; *Hall*, 145 F.2d at 783–84. That authority does not mandate that district courts automatically grant government attorneys' applications for pro hac vice admission. *See United States v. U.S. Dist. Court*, 694 F.3d 1051, 1059 (9th Cir. 2012) ('When the United States stands as a party before the court, the authority of the Attorney General is no greater than that of any other party. The Attorney General is not independent of the court's authority, including its authority over a settlement conference.').)."); *Texas v. United States*, No. CV B-14-254, 2017 WL 11698657, at *7 (S.D. Tex. Jan. 19, 2017) ("[A] Justice Department attorney can no longer argue with a straight face, as has been done before, that he or she is exempt from the state ethical requirements to which every other attorney practicing in that jurisdiction must adhere. *See In re Doe*, 801 F. Supp. 478, 485–86 (D.N.M. 1992).").

A. There is no rational connection between the facts the notice asserts and the Department's proposed solution.

The proposed regulation is arbitrary and capricious, in part, because there is no rational connection between the policy choice the DOJ has proposed and the facts it asserts in the rulemaking notice.

The DOJ's explanation of the supposed need for this regulation is contained in a short section titled "Prioritizing Attorney Discipline and Ending the Weaponization of the Bar Complaint and Investigation Process."[179] The section opens with the claim that the DOJ undertook a review of state bar disciplinary processes pursuant to Executive Order 14147, "Ending Weaponization of the Federal Government."[180] But that executive order does not address state government processes at all,[181] and the Attorney General's remit was limited to examination of federal departments and agencies.[182] The section further claims that a March 21, 2025, presidential memorandum "directed the Attorney General 'to prioritize enforcement of . . . regulations governing attorney conduct and discipline.'"[183] This language in the rulemaking notice distorts the president's memorandum by suggesting that it addressed the discipline of DOJ lawyers. To the contrary, the memorandum was a broadside against private attorneys and law firms "litigating against the Federal Government."[184] The memorandum had nothing whatsoever to do with the subject of the current proposed rulemaking. These glaring inaccuracies undermine any confidence in the DOJ's justification.

The section then focuses on attacking members of the public who have raised allegations of misconduct by DOJ lawyers with state bar authorities. Without offering evidence of inappropriate conduct, the notice accuses them of being "political activists," labeling some potential complainants "bad actors."[185] The notice also laments a perceived increase in complaint volume over the last year.[186] Even if the notice of rulemaking could demonstrate a recent increase in the volume of bar complaints against DOJ lawyers, which it does not, such an increase would be unsurprising given the unprecedented number of reports of the federal government violating court orders and government

[179] Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10782 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77).

[180] *Id*.

[181] Exec. Order No. 14147, 90 Fed. Reg. 8235, § 2 (Jan. 20, 2025) (declaring its purpose as seeking "to correct past misconduct by the Federal Government related to the weaponization of law enforcement and the weaponization of the Intelligence Community").

[182] *Id*. § 3.

[183] 91 Fed. Reg. at 10782.

[184] *Memorandum on Preventing Abuses of the Legal System and the Federal Courts*, 2025 DAILY COMP. PRES. DOC. 2 (Mar. 21, 2025) ("I hereby direct the Attorney General to seek sanctions against attorneys and law firms who engage in frivolous, unreasonable, and vexatious litigation against the United States or in matters before executive departments and agencies of the United States.").

[185] 91 Fed. Reg. at 10782, 10785.

[186] *Id*. at 10782 (emphasizing "the recent spate of State bar complaints").

attorneys engaging in other alleged misconduct.[187] In any event, the discussion of complainants has no bearing on the regulation itself, because nothing in the proposed rule would restrict the filing of complaints.[188]

Lastly, the notice expresses alarm at the "troubling" "willingness of some State bar disciplinary authorities to give credence to such complaints."[189] It does not explain how states have given "credence" to complaints, nor does it identify procedural irregularities or legal errors justifying the label "troubling."[190] The notice quibbles that the states have not consistently notified the Office of Professional Responsibility("OPR") of all allegations against DOJ lawyers; however, there is no legal requirement that they do so, and the rulemaking notice reveals that OPR does not always notify the states of allegations against their licensees.[191] The DOJ's recriminations not only lack factual support, but also stand in stark tension with the federalist principles underlying our constitutional system.[192]

In any event, the proposed regulation would not address this concern. On its face, the rule purports only to delay state disciplinary proceedings. The text of the proposed rule provides for suspension of the states' activities "until the completion of the [federal] review."[193] Because the text presupposes the "completion" of the federal review, the rule would not address the concern that state investigations or proceedings, which would ultimately occur at some point, would "chill" advocacy by DOJ lawyers.

However, the preamble seemingly contradicts the language of the proposed rule itself, suggesting that the DOJ could block state investigations entirely by keeping its own investigation open indefinitely or by concluding that no violation occurred. The preamble speaks of the state's ability to investigate allegations only in the event that the DOJ determines that a violation of a state's ethics code has occurred: "*If the*

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[187] Supplemental Order, *T.R. v. Noem*, No. 26-cv-0107-PJS-DLM (D. Minn. Feb. 26, 2026), ECF No. 12 (describing over 200 court orders ICE violated in one district court and explaining that "[t]he Court is not aware of another occasion in the history of the United States in which a federal court has had to threaten contempt — again and again and again — to force the United States government to comply with court orders"); Benjamin S. Weiss, *DOJ Admits it Violated More Than 50 Court Orders in New Jersey*, Courthouse News Service (Feb. 18, 2026), https://tinyurl.com/ycxzbds6; Jacob Knutson, *Despite Disqualifications, Trump Appointees Still Claim to Be Top Federal Prosecutors*, Democracy Docket (Dec. 3, 2025), https://tinyurl.com/44rytcdm.

[188] 91 Fed. Reg. at 10787.

[189] *Id*. at 10782.

[190] *Id*.

[191] The notice indicates that OPR is authorized to notify states *only* when the PMRU is of the opinion that allegations implicate a bar rule, 91 Fed. Reg. at 10782, and the PMRU receives allegations *only* if OPR is of the opinion that a DOJ lawyer violated "a clear and unambiguous obligation or standard imposed by law." Off. of Prof. Resp., Dep't of Justice, FY2024 Annual Report, 14 (n.d.).

[192] *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("The notion of 'comity' includes 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'") (citation omitted).

[193] 91 Fed. Reg. at 10787.

[Professional Misconduct Review Unit] finds that the Department attorney violated an ethics rule while engaging in that attorney's duties, the State bar disciplinary authorities will then have the option of beginning or resuming their investigations or disciplinary proceedings."[194]

The implication is that, unless and until the DOJ finds a violation, the state could not investigate the allegations. This disconnect between the preamble and the regulatory text further breaks the link between the factual findings and the proposed policy decision. Even if the DOJ means what it implies in the preamble and not what it says in the regulatory text, effectively blocking some state investigations will nonetheless fail to eliminate the "chilling effect" because DOJ lawyers will have no way of knowing in advance, when they're engaging in the potentially problematic conduct, whether the DOJ will subsequently choose to shield them from state disciplinary proceedings.

B. The rulemaking fails to address the reasons for recent investigations into alleged misconduct by Department attorneys.

This rulemaking is also arbitrary and capricious because it fails to address an important aspect of the issue. Describing the supposed problem of state bar investigations, the rulemaking notice asserts that an investigation by state bar authorities "risks chilling the zealous advocacy by Department attorneys."[195] But this assertion does not consider that, in some cases, the allegations under investigation could be demonstrably true and could involve serious violations of state ethics codes.[196] The regulatory text itself would indiscriminately delay or block the states' enforcement activities without regard to the legitimacy of complaints.[197]

In emphasizing its unbridled desire for zealous advocacy, the DOJ has not addressed the dual responsibility of federal prosecutors. The Supreme Court has spoken to this important aspect of the concerns implicated by the proposed rulemaking:

> 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. He may prosecute with earnestness and vigor — indeed, he

[194] *Id*. at 10784 (emphasis added).
[195] *Id*. at 10782.
[196] *See id*. at 10782–83.
[197] *Id*. at 10787.

> should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[198]

Instead, this rulemaking has been issued in the wake of former Attorney General Bondi's issuance of a strident memorandum demanding zealous advocacy by DOJ lawyers.[199] The framing of the issue in her memorandum left no room for DOJ lawyers to decline to advance an argument that they believe would violate their ethical duties. While the language focused partly on political disagreements, it also focused on "their . . . personal . . . judgments."[200] Yet, licensed attorneys must use their personal judgment to determine whether advancing their clients' preferred argument would violate their ethical obligations.[201]

As the Brennan Center highlighted last year, ABA Model Rule 3.3 provides that an attorney may not "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"; "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;" or "offer evidence that the lawyer knows to be false."[202] ABA Model Rule 3.4 prohibits the defiance of court orders.[203] ABA Model Rule 3.8 prohibits a prosecutor from "prosecuting a charge that the prosecutor knows is not supported by probable cause."[204] A DOJ attorney would have an ethical obligation not to do any of these things under state ethics codes that have adopted versions of these restrictions.

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[198] *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also United States v. Tapp,* No. CR107-108, 2008 WL 2371422, at *9 (S.D. Ga. June 4, 2008) ("[I]t is this Court's opinion that prosecutors' unique duty does not justify less-demanding ethics rules for Department of Justice lawyers.").

[199] Memorandum from Pam Bondi, Att'y Gen., to all Dep't Emps., *General Policy Regarding Zealous Advocacy on Behalf of the United States* (Feb. 5, 2025).

[200] *Id*. ("It is therefore the policy of the Department of Justice that any attorney who because of their personal political views or judgments declines to sign a brief or appear in court, refuses to advance good-faith arguments on behalf of the Administration, or otherwise delays or impedes the Department's mission will be subject to discipline and potentially termination, consistent with applicable law.").

[201] *See, e.g.*, MODEL RULES OF PRO. CONDUCT rs. 2.1, 3.1, 3.4, 3.5, 4.4, 8.4.

[202] MODEL RULES OF PRO. CONDUCT r. 3.3(a), https://tinyurl.com/556ajsun; *see also* Yasmin Abusaif, Miriam Rosenbaum, Derek Tisler & Daniel Weiner, *Legal Ethics and the Rule of Law*, BRENNAN CTR. (Sep. 3, 2025), https://tinyurl.com/3rjtnrej.

[203] MODEL RULES OF PRO. CONDUCT r. 3.4, https://tinyurl.com/eatvwhx4.

[204] MODEL RULES OF PRO. CONDUCT r. 3.8(a), https://tinyurl.com/26j8d2y8.

C. The notice of proposed rulemaking's conclusions are not supported by the record.

The rulemaking notice implies that the number of complaints against DOJ lawyers has soared and that this increase poses a problem. The notice offers only vague conclusions that a "spate" of complaints has been filed, the complaints are politically motivated and "disciplinary proceedings" that "target" internal deliberations are pending.[205] Noticeably absent from the record is any evidence showing that:

- complaint activity has risen recently, as would have to be shown by comparative data on the number of complaints filed in the current and prior years;
- the complaints are politically motivated;
- the complaints should have been rejected out of hand because, on their face, they are demonstrably inaccurate or do not identify ethics violations;
- the states investigate a substantial number of complaints;
- the states are being improperly influenced to pursue patently unwarranted investigations;
- "recent . . . disciplinary proceedings" have commenced following investigation in sufficient number to merit attention;[206]
- any such pending disciplinary proceedings "target internal Department deliberations," as claimed in the rulemaking notice;[207]
- current or former DOJ lawyers have been harmed in the proceedings specifically by their inability to disclose confidential information about "internal Department deliberations";
- information about "internal Department deliberations" are relevant to the determination of ethics violations, for which licensees cannot escape disciplinary actions by claiming they were simply following;
- disciplinary penalties have been imposed;
- any such penalties were not warranted; and
- interfering with state enforcement efforts would benefit *the public*, as opposed to the Attorney General or other DOJ lawyers.

Ultimately, the notice offers nothing but former Attorney General Bondi's apparent frustration that states have accountability mechanisms. It claims that federalizing the states' enforcement of their ethical standards would promote uniformity, but it does not address the need for uniformity in the application of an individual state's ethics code — the core congressional aim of the McDade Amendment, which subjects DOJ lawyers to the states' ethics regulation "to the same extent and in the same manner" as other attorneys.

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[205] Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10782–83 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77).

[206] *Id*. at 10783 (referencing "recent complaints and disciplinary proceedings").

[207] *Id*. at 10783.

D. The Department has not shown that the proposed regulation would achieve its stated goal.

The DOJ's stated goal for this rulemaking is "ensuring that its attorneys perform their duties in accordance with the highest ethical standards."[208] But the proposed regulation would succeed only in delaying — or blocking — accountability for ethical violations. Outside the Department, Americans are familiar with the maxim, rooted in the nation's traditional values, that delayed justice is no justice.[209]

The rulemaking notice fails to demonstrate that the hypothesized benefits would flow from the DOJ's supplanting state enforcement mechanisms. Any predetermined belief that the states' "troubling" exercise of their police powers processes will be unfair constitutes an invalid basis for this rulemaking.[210] Comity dictates a presumption of good faith on the part of the states in connection with their professional misconduct investigations and disciplinary proceedings for attorney licensees, absent compelling evidence to the contrary.[211] The D.C. District Court emphasized this point in connection with allegations against a former assistant Attorney General in the analogous context of the federal officer removal statute:

> In stark contrast to the divergent state and federal approaches to tribal land use, revenue collection, and slaveholding that motivated early attempts to craft federal officer removal policy, here, through section 530B, Congress has explicitly directed that federal officers be subject to state bar rules. With federal and state interests thus aligned, nothing in the cases cited by Mr. Clark, or in the history of the federal officer removal statute, supports resolving any remainder of ambiguity concerning the removability of a state bar disciplinary proceeding in favor of granting a federal forum. Indeed, well-established principles of comity for state proceedings counsel against it.[212]

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[208] *Id*. at 10786.

[209] *See, e.g., Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) ("We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right'; but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166).").

[210] 91 Fed. Reg. at 10782.

[211] *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.").

[212] *In re Clark*, 678 F. Supp. 3d 112, 131 (D.D.C. 2023), *aff'd*, 23-7073, 2024 WL 3385251 (D.C. Cir. July 12, 2024).

The proposed regulation does not displace the substantive ethics rules applicable to DOJ attorneys, so the record must show that any benefit flows exclusively from interfering with state enforcement efforts. Bar enforcement mechanisms unfold in their own context at the state level, according to rules that states have established, concluding with state supreme courts' penalty determinations when warranted.[213] They do not implicate, alter, or uniquely apply to the DOJ's investigative or litigation work, only the states' substantive ethics rules can do that in rare circumstances.

It is the timing, not the outcomes, of state proceedings that the DOJ expressly claims to be addressing in the proposed rule. The DOJ has not demonstrated that any benefit of delayed justice would outweigh the countervailing interest in states retaining and promptly exercising a function that the republic has entrusted to them since its founding. In fact, the DOJ has not demonstrated any purpose at all — other than to thwart accountability for ethical misconduct. To the extent that the DOJ claims that the states' enforcement proceedings have a "chilling" effect on advocacy, the DOJ has not demonstrated that postponing accountability could lift the fear of disciplinary sanctions.[214] Even if, as the DOJ hints it will do in the rulemaking notice, the DOJ blocks state enforcement entirely in some cases, the supposed chilling effect would remain unaddressed so long as DOJ lawyers cannot know in advance which investigations the DOJ will block.[215]

Even if the Department's real goal were not so obviously to thwart accountability, the rulemaking notice would suffer from a failure to make the case that OPR can conduct meaningful investigations thoroughly, objectively, and promptly. Historically, OPR's investigations could take a year or more to complete. Attorney General John Ashcroft told Congress that, during the period from October 1, 2000 to March 31, 2003, OPR's

[213] These disciplinary proceedings cannot normally be removed to federal court, except in the event of a violation of constitutional rights. *In re Clark*, 678 F. Supp. 3d 112, 122-25 (D.D.C. 2023) (discussing nature of bar disciplinary proceedings), *aff'd*, 23-7073, 2024 WL 3385251 (D.C. Cir. 2024) (remanding case to District of Columbia's city courts); *see also N.C. State Bar v. Dant*, 1:25-CV-0634, 2025 WL 2147155, at *6 (M.D.N.C. July 29, 2025) (collecting cases); *Manchanda v. Att'y Grievance Comm. for First Jud. Dep't*, 23-CV-3356, 2023 WL 3091787, at *3 (S.D.N.Y. Apr. 26, 2023) (collecting cases); *N.C. State Bar v. Crump*, 5:22-CV-371-D, 2022 WL 17176839, at *2 (E.D.N.C. Nov. 23, 2022); *Colorado v. Ziankovich*, 19-CV-03087-RM, 2019 WL 6907460, at *3 (D. Colo. Dec. 19, 2019); *but cf. Webster v. Comm'n for Law. Discipline*, 704 S.W.3d 478, 484 (Tex. 2024) (state court's holding that it lacked jurisdiction to discipline state's first assistant Attorney General based on statements in motion filed with U.S. Supreme Court, explaining that "[g]enerally, scrutiny of statements made directly to a court within litigation is by the court to whom those statements are made. Such a court has substantial authority and many tools to address alleged violations of professional disciplinary (and other) rules . . . ."). In one decision, the Fourth Circuit came to a different conclusion, but that case was issued before enactment of the McDade Amendment and relied on a now disfavored functional analysis of the removal statute. *Kolibash v. Comm. on Legal Ethics of W. Va. Bar*, 872 F.2d 571, 573–76 (4th Cir. 1989); *see Clark*, 678 F. Supp. 3d at 125–27 (rejecting relevance of *Kolibash*).

[214] *See* 91 Fed. Reg. at 10782 (discussing the supposed "chilling" effect of accountability to licensing states).

[215] *See id*. at 10784 ("*If the PMRU finds that the Department attorney violated an ethics rule* while engaging in that attorney's duties, the State bar disciplinary authorities will then have the option of beginning or resuming their investigations or disciplinary proceedings." (emphasis added)).

completed investigations took an average of 19 months from start to end.[216] This number did not include investigations that OPR had opened but not yet closed during that period or that OPR opened before that period and had never closed.[217]

OPR has not been a vigorous champion of accountability, earning criticism from across the political spectrum. The Cato Institute observed that, "[i]n the half-century since its inception, the Office of Professional Responsibility has become a veritable graveyard where allegations of prosecutorial misconduct go to die."[218] A defense attorney known for representing high-profile clients said: "OPR is such a joke that it often rejects even the rare judicial finding of prosecutorial misconduct. One study showed that during a three-year period, there were 60 cases of serious judicial criticisms or findings of misconduct and yet OPR found no wrongdoing by any of these prosecutors."[219] OPR's FY 2024 annual report explained that it has declined to investigate most complaints at all.[220] OPR began that year with 10 pending investigations and 31 pending initial inquiries.[221] During FY 2024, OPR received 1,346 complaints, opened and closed 61 initial inquiries, opened 4 other initial inquiries, opened 18 investigations, closed 13 investigations, and 7 investigations resulted in a finding of misconduct.[222] OPR ended the year with 10 investigations and 31 inquiries still pending.[223]

The situation has only grown worse in the last 14 months. The recent, substantial staff departures from the DOJ raise serious questions as to the timeliness and efficacy of any future OPR investigations. In the first year of the current presidential administration, the Department of Justice has weakened OPR's investigative capabilities. In March 2025, former Attorney General Bondi fired the head of OPR, Jeffrey Ragsdale.[224] As of April 3, 2026, more than a year later, OPR's website listed no replacement for Ragsdale,[225] suggesting that the office's mission appears not to be a priority for the former Attorney

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[216] *Reauthorization of the U.S. Department of Justice: Executive Office for U.S. Attorneys, Civil Division, Environment and Natural Resources Division, Executive Office for U.S. Trustees, and Office of the Solicitor General: Hearing Before the Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary*, 108th Cong. 77 (April 8, 2003), https://tinyurl.com/y3n5smtx. The average may actually be higher than 19 months as OPR excluded "extremely atypical" investigations from the calculation. *Id.* n.5.

[217] *Id*.

[218] Mike Fox, *How DOJ Helps Federal Prosecutors Escape Accountability & Evade Public Scrutiny*, CATO INSTITUTE: CATO AT LIBERTY (Jan. 29, 2025), https://tinyurl.com/j7vy2zdu.

[219] David Oscar Markus, Opinion, *OPR should investigate real prosecutorial misconduct, not Secretary of Labor Alex Acosta*, THE HILL (Feb. 11, 2019), https://thehill.com/opinion/criminal-justice/429347-opr-should-investigate-real-prosecutorial-misconduct-not-secretary/ (citing Jackie Lu, *How Terror Changed Justice: A Call to Reform Safeguards That Protect Against Prosecutorial Misconduct*, 14 J. L. & Pol'y (2006)).

[220] OFF. OF PROF. RESP., DEP'T OF JUSTICE, FY2024 ANNUAL REPORT, at 3 (n.d.).

[221] *Id*. at 9.

[222] *Id*. at 14.

[223] *Id*. at 9.

[224] Perry Stein, Shayna Jacobs, Carol Leonnig & Ann Marimow, *Several top career officials ousted at Justice Department*, WASH. POST (Mar. 7, 2025), https://tinyurl.com/36bztwyn.

[225] DEP'T OF JUSTICE: OFFICE OF PROFESSIONAL RESPONSIBILITY, https://www.justice.gov/opr (last visited Apr. 6, 2026).

General. The DOJ's workforce has been diminished by voluntary and involuntary separations, with the Office of Personnel Management reporting that 8,600 Department employees were separated in 2025, with an additional 2,100 separating thus far in 2026.[226] The Department has not publicly disclosed details on reductions in individual offices, but absent from its rulemaking notice is any contention that OPR has avoided the Department-wide trend of staffing losses. The Department's loss of nearly 11,000 employees since the start of this administration has presumably weakened the capacity of OPR to take on the heightened responsibilities that the DOJ now proposes to give it.

Further, OPR's investigative process is unsuitable for the proposed responsibilities. Recent practice suggests that OPR does not find misconduct except in the most egregious circumstances. Its FY 2024 report explained that it limits findings of misconduct to cases in which a lawyer intentionally or recklessly violated "a clear and unambiguous obligation or standard imposed by law."[227] This is the specific wording of one state's (Iowa) standard for finding prosecutorial misconduct that warrants post-conviction remedies for the defendant.[228] But in attorney disciplinary proceedings, Iowa and other jurisdictions focus on whether an attorney violated a provision of their ethics codes.[229] The DOJ's rulemaking notice points to no cases requiring that an ethics code provision itself, distinct from evidence demonstrating a violation of such provision, be "clear and unambiguous."[230]

To the contrary, courts have emphasized that ethics codes are *supposed to* articulate only generalized standards of conduct instead of bright-line rules.[231] By

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[226] OFF. OF PERS. MGMT., *Federal Workforce Data, Workforce Changes*, https://data.opm.gov/explore-data/analytics/workforce-changes (last visited Apr. 3, 2026).

[227] OFF. OF PROF. RESP., DEP'T OF JUSTICE, FY2024 ANNUAL REPORT, 14 (n.d.).

[228] *See, e.g.*, *State v. Stockbauer*, 924 N.W.2d 532 (Iowa Ct. App. 2018); *but see Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.").

[229] *See, e.g., Comm. on Pro. Ethics & Conduct of the Iowa State Bar Ass'n v. Gill*, 479 N.W.2d 303, 305 (Iowa 1991) ("The Committee has the burden to prove by a convincing preponderance of the evidence that the respondent has violated the Code of Professional Responsibility as charged."); *In re Holtzman*, 577 N.E.2d 30, 34 (N.Y. Ct. App. 1991) ("In order to adequately protect the public interest and maintain the integrity of the judicial system, there must be an objective standard of what a reasonable attorney would do in similar circumstances (*see*, *La. State Bar Assn. v. Karst*, 428 So.2d 406, 409 (La. 1983). It is the reasonableness of the belief, not the state of mind of the attorney, that is determinative.").

[230] Some states may require "clear" evidence to support a charge, but that standard goes to the sufficiency of the evidence and not the clarity of the legal requirement. *See, e.g.*, *State v. Turner*, 538 P.2d 966, 969 (Kan. 1975) ("Point one is essentially directed toward the sufficiency of evidence and related peripheral matters. The respondent correctly points out that Supreme Court Rule 207(l), 214 Kan. lviii, requires that charges of misconduct be established by substantial, clear, convincing and satisfactory evidence."); *Baumann v. Va. State Bar*, 845 S.E.2d 528, 532 (Va. 2020) ("[The attorney] maintains that the Board applied the wrong standard of review when it determined whether 'substantial evidence' supported the Committee's decision. . . . [W]e conclude that [the attorney's] argument conflicts with the plain language of the relevant disciplinary rules.").

[231] *See, e.g.*, *United States v. Colo. Sup. Ct.*, 189 F.3d 1281, 1287 (10th Cir. 1999) ("[A] rule of professional conduct is like a commandment dealing with morals and principles. As Judge Campbell in the First Circuit wrote in grappling with a local rule equivalent to an earlier version rule 3.8, a rule of professional conduct often comes in commandment form and becomes suspicious when it 'deviate[s] from this 'thou shalt not' structure.' *United States v.*

definition, therefore, OPR is applying a lower ethical standard than the licensing authorities apply. Incorporating this defective standard up the chain of command, the offices capable of imposing personnel actions on DOJ lawyers for ethics violations become involved only upon referral from OPR.[232] Substituting the DOJ's internal personnel processes for the licensing states' enforcement mechanisms — whether for an initial review or, as the notice hints, for the only review — cannot ensure that federal lawyers are held to the "highest ethical standards."[233]

IV. CONCLUSION

The Department of Justice is a federal agency in crisis. Its attorneys have come under increased scrutiny for their litigation conduct and the Department has been criticized for turning its vast law enforcement powers into weapons of retribution for the administration's perceived enemies.[234] Rather than ensuring that government lawyers are held accountable for abuses of raw power, the Department now seeks to shield them from accountability.[235] Though it lacks authority to suspend or revoke law licenses, the Department proposes to supplant the authority of the only sovereign entities that can do so. The Justice Department proposes that it will commandeer the states' ethics enforcement mechanisms as to the Department's lawyers, past and present. The Attorney General has no authority to execute this plan, which is both contrary to federal law and unlawfully arbitrary and capricious. The plan would upend a tradition dating back centuries to entrust regulation of the practice of law to the states. It would ignore the Supreme Court's admonition that the federal government should respect the states' strong interest in exercising their police powers to protect the public from unethical lawyers

Klubock, 832 F.2d 664, 669 (1st Cir.1987) (en banc) (Campbell, C.J., dissenting). Moreover, a rule of ethics in directing sweeping commandments of conduct can often be quite vague in its nature, while by contrast the procedural or substantive law, the purposes of which are to direct a cause of action through the courts, cannot afford such vagueness.").

[232] Off. of Prof. Resp., Dep't of Justice, FY2024 Annual Report, at 5 (n.d.).

[233] The regulatory certifications in the rulemaking notice contain two further errors. As to Exec. Orders 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993) and 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011) (Regulatory Review), the notice claims that the regulation affects only Department personnel, Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10780, 10786 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. pt. 77), ignoring the fact that, on the preceding page, the notice states plainly that "[t]he proposed rule is focused only on the relationship between the Department and the bar disciplinary authorities of the States, the Territories, and the District of Columbia," *id*. at 10785. That same statement contradicts the notice's claim, with respect to Exec. Order 13132, 64 Fed. Reg. 43255 (Aug. 4, 1999) (Federalism), that "[t]his proposed rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government," *id*. at 10786, as does the statement that the proposed rule is the product of the Attorney General's consideration of the need to "restructure the enforcement of ethical rules by OPR and the bar disciplinary authorities," *id*. at 10782.

[234] For a detailed look at the current administration's degradation of the presumption of regularity, see Ryan Goodman, Siven Watt, Audrey Balliette, Margaret Lin, Michael Pusic and Jeremy Venook, *The "Presumption of Regularity" in Trump Administration Litigation*, Just Security (Nov. 20, 2025), https://tinyurl.com/5dfa4ehw; *see also* Yasmin Abusaif, Miriam Rosenbaum, Derek Tisler and Daniel Weiner, *Legal Ethics and the Rule of Law*, Brennan Ctr. (Sep. 3, 2025), https://tinyurl.com/3rjtnrej.

[235] Ankush Khardori, *What I Learned By Watching Every Pam Bondi Speech*, Politico Magazine (Oct. 15, 2025), https://tinyurl.com/34nhepy7.

whose misconduct undermines the integrity of the judicial system itself. The proposed regulation is unlawful and, in every sense of the word, wrong. We urge the Attorney General to rescind it.

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