State of West Virginia
Office of the Attorney General
John B. McCuskey
Attorney General

April 6, 2026

The Honorable Todd Blanche
Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington DC 20530

Submitted Electronically via Regulations.gov

Re: Comments on Proposed Rulemaking Titled "Review of State Bar Complaints and Allegations Against Department of Justice Attorneys," by the Attorneys General of the States of West Virginia, Alabama, Florida, Indiana, Iowa, Kentucky, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, and Texas (Docket No. [OAG199, AG Order No. 6653– 2026–A])

Dear Acting Attorney General Blanche:

We appreciate the opportunity to comment on the Department of Justice's proposal to establish a process for reviewing bar complaints and allegations filed against Department of Justice attorneys. *See Review of State Bar Complaints and Allegations Against Department of Justice Attorneys*, 91 Fed. Reg. 10780 (Mar. 5, 2026). We strongly support the Proposed Rule. Though important when properly executed, bar complaints and ethics investigations have been increasingly deployed as all too convenient lawfare weapons against attorneys performing important public functions. The rule is a welcome step toward reversing that trend.

We're deeply concerned about how politically motivated people or groups might try to influence the DOJ's advocacy by threatening bar complaints. Although DOJ attorneys have never been immune from this brand of lawfare, they have recently been targeted more often. Yet DOJ attorneys must be able to continue to enforce our Nation's laws without fear of ideologically driven bar complaints or ethics investigations. And DOJ attorneys are already subject to aggressive oversight and control, given that they "are subject to a bewildering array of ethical regulations ranging from state ethical codes to local rules adopted by federal courts to the internal policies of the Department of Justice." Bradley T. Tennis, *Uniform Ethical Regulation of Federal Prosecutors*, 120 YALE L.J. 144, 147 (2010).

As self-governing bodies, state bar associations can sometimes be susceptible to the political whims of their members and leadership. We cannot ignore that "precedents for professional discipline of lawyers acting in political settings show both the propriety of some disciplines and the danger of being caught up in popular passions." William J. Wernz, *What Would A Discipline Office Do? Examining the High-Profile Complaints Against Election Attorneys from A Lawyer Regulatory Perspective*, BENCH & B. MINN (Mar. 2021, at 26, 28). The risk of leaving the disciplinary process entirely to state bar associations—without any threshold federal review—is too great.

The rule offers a more uniform approach to attorney ethics that also balances the States' interests in maintaining regulatory authority over attorneys practicing in our courts. Adopting it is one step toward ensuring that the disciplinary process for government lawyers remains politically neutral, whichever way the political tides may turn. We support it.

BACKGROUND

I. Politically motivated actors have used bar complaints and ethics investigations to advance their ideological aims.

Malicious actors have sought to weaponize attorney disciplinary proceedings. And at times, bar associations have responded by using their licensing authority and disciplinary oversight to chill dissenting speech. During the 1950s and 1960s, for instance, attorneys who represented civil rights workers faced disbarment, unsupported complaints for professional misconduct, and ethics investigations predicated on "baseless" claims. James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725, 741-43 (2005). Legal Aid attorneys offering pro-bono services to indigent clients were also targeted. *Id*. at 745; *see also In re Primus*, 436 U.S. 412, 439 (1978) (holding state bar's reprimand of an ACLU-affiliated attorney unconstitutional on First and Fourteenth Amendment grounds).

In recent years, the use of bar complaints as a method of lawfare has surged. Self-professed watchdog groups have filed hundreds of complaints against attorneys representing ideological opponents or disfavored interests. And these groups are now taking aim at career DOJ attorneys—simply for doing their jobs.

Take the Legal Accountability Center and the 65 Project, two affiliated advocacy groups. These groups have filed "more than [90] bar complaints." *What We Do*, LEGAL ACCOUNTABILITY CTR., https://perma.cc/XKV7-PVR3, (last accessed Mar. 20, 2026). They aim to create "a deterrent for lawyers who disregard their oaths." *Id*. Many of these complaints have been filed against DOJ attorneys, including against career attorneys. Ben Miller, *Bar Complaints Offer 'Imperfect Tool' to Challenge Trump's DOJ*, BLOOMBERG L. (Sept. 18, 2025, 12:09 PM), https://bit.ly/3PwZdJi.

These two groups are not alone. Another frequent complainant, the Campaign for Accountability, also routinely files bar complaints against DOJ attorneys. *See, e.g.*, Press Release, Campaign for Accountability, Watchdog Renews Lindsey Halligan Bar Complaint Following Court Rulings (Feb. 2, 2026), https://perma.cc/NB27-MH7S; Press Release, Campaign for Accountability,

Watchdog Files John Sarcone Bar Complaint Over Apparently Illegal Actions (Aug. 6, 2025), https://perma.cc/B786-47JW; Press Release, Campaign for Accountability, Watchdog Responds to Judges' Alina Habba Ruling, Encourages NJ Bar to Act (July 22, 2025), https://perma.cc/F4V7-M5PD; Press Release, Campaign for Accountability, CfA Statement on NY Bar's Punt on Emil Bove Complaint (May 28, 2025), https://perma.cc/MD52-8CZM.

Some of these claims involve little more than political theatre. Nevada bar counsel confirmed a Project 65 bar complaint was quickly dismissed because it involved purely "subjective claims of frivolity and dishonesty" and was "divided along political lines." Arthur Kane, *Nonprofit files complaints against Trump attorneys but almost no public discipline*, CTR. SQUARE (Aug. 25, 2025), https://perma.cc/CS5G-2K4H.

The problem also isn't a partisan one—public officials of all political stripes have faced complaints. Last year, a democratic Attorney General candidate in Maine faced a bar complaint about outreach to victim advocates she made as District Attorney. Jackie Mundry, *Maine DA's attorney says complaint filed against her hurt AG chances*, WMTW8 (Apr. 30, 2025, 8:14 PM), https://perma.cc/CFJ6-97N6. Two bloggers filed a bar complaint against then-Attorney General Eric Holder in 2012. Laura Prabucki, *Complaint seeks to have Holder disbarred after contempt vote*, FOX NEWS (July 12, 2012, 11:49 AM), https://perma.cc/27JD-J4MW. Former Attorney General Bill Barr likewise received bar complaints against him. *See* John Kruzel, *More than two dozen DC Bar members urge disciplinary probe of AG Barr*, THE HILL (July 22, 2020, 11:06 AM), https://bit.ly/4sT7cyM. Jack Smith, a special counsel appointed by President Biden, is facing renewed bar complaints. Ben Whedon, *Watchdog to file supplemental bar complaint against Jack Smith*, MSN (Mar. 13, 2026), https://perma.cc/26N4-M5JA. Even Supreme Court justices aren't immune: following his confirmation hearing, Justice Brett Kavanaugh had 83 ethics complaints filed against him. Debra Cassens Weiss, *Appeals challenge dismissal of ethics complaints against Kavanaugh*, ABA J. (Feb. 1, 2019, 12:00 PM), https://perma.cc/TMX5-YX8A. And state Attorneys General have seen politics-driven complaints, too. *See generally, e.g.*, *In re Knudsen*, 582 P.3d 87 (Mont. 2025); *Webster v. Comm'n for Law. Discipline*, 704 S.W.3d 478 (Tex. 2024).

Though public officials sometimes act unethically, we can't ignore how many of these complaints have a clear ideological slant. And we cannot discount how many of these complaints were filed by politically motivated persons or entities.

II. Although Section 530B prescribes ethical rules for DOJ attorneys, it does not prescribe how those rules should be enforced.

The Proposed Rule implicates 28 U.S.C. § 530B—commonly referred to as the McDade Amendment. *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2080 (2000).

The McDade Amendment came on the heels of "a national debate over the authority of the Department of Justice to exempt itself from state and federal district court ethics rules." Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 209 (2000). Both the Bush and Clinton administrations promulgated policies that exempted federal

government attorneys from state ethics rules. *Id*. at 212-13. Attorney General Janet Reno even issued formal regulations making it the Department's official policy that DOJ attorneys were exempt from state ethics rules (although compliance was generally encouraged). *Id*. at 213. Lawsuits and media attention followed, as state bar associations and other stakeholders pushed back on the Department's policies. *Id*. at 213-14.

Congress pushed back after DOJ sought to prosecute one of its own. Congressman Joseph McDade was investigated by the Department of Justice and indicted on bribery charges around the time this debate began percolating. Zacharias & Green, *supra*, at 211. Congressman McDade repeatedly expressed his displeasure—both in court filings and in the media—over how the Department of Justice handled his investigation and prosecution. *Id*. at 212. And ultimately, Congressman McDade was acquitted. Shortly after, Congressman McDade introduced (and Congress ultimately adopted) legislation subjecting DOJ attorneys to state ethics rules. *Id*. at 214-15. The final push came when lawmakers decided independent counsel Kenneth Starr had overreached in the Whitewater investigation—and needed to be punished accordingly. *In re Clark*, 678 F. Supp. 3d 112, 128 (D.D.C. 2023).

In the resultant legislation, Section 530B, Congress expressly subjected DOJ attorneys to the state ethics rules of any state they practice in—irrespective of what state granted them a license to practice law. *State ex rel. York v. W. Va. Off. of Disciplinary Couns.*, 744 S.E.2d 293, 304 (W. Va. 2013). Section 530B mandated that DOJ attorneys are "'subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.'" *United States v. Talao*, 222 F.3d 1133, 1140 n.27 (9th Cir. 2000) (quoting 28 U.S.C. § 530B(a)). Since its passage, the law has been "a thorn in the side of the Department of Justice." *United States v. Tapp*, No. CR107-108, 2008 WL 2371422, at *8 (S.D. Ga. June 4, 2008).

Yet Congress did not decide how this regulatory mandate should be enforced. Section 530B(b) instructs that the Attorney General is vested with rulemaking authority. It states that "[t]he Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section." 28 U.S.C. § 530B(b). But Congress was otherwise silent on enforcement.

To be sure, DOJ already polices its attorneys' ethics in a slew of ways, often alongside States. Most state bar associations already work hand-in-hand with the Department to ensure ethical compliance by its attorneys. *Review of State Bar Complaints and Allegations Against Department of Justice Attorneys*, 91 Fed. Reg. 10780, (Mar. 5, 2026). Within the DOJ, three internal offices are charged with handling attorney discipline: "the Office of Professional Responsibility …, the Professional Misconduct Review Unit …, and the Office of the Inspector General." *Id*. at 10781. OPR engages "in liaison with the bar disciplinary authorities of the states, territories, and the District of Columbia with respect to professional misconduct matters." 28 C.F.R. § 0.39a(a)(6).

But the McDade Amendment left open whether DOJ or States are to be the exclusive enforcers of ethical obligations. The Proposed Rule helps answer that question.

DISCUSSION

We recognize that most state bar processes operate with integrity and serve a vital public function. Our concern is not with the system as a whole, but with whether that system is well-suited to evaluate the unique demands of federal practice—and whether its openness to outside complainants creates risks that a more structured federal process would reduce.

The Proposed Rule would help stop those instances of lawfare that threatens to stifle the federal government's ability to zealously advocate for itself. We welcome it.

I. Additional safeguards are needed.

We see two distinct reasons for implementing reforms. For one, as the above discussion suggests, state ethics investigations and proceedings have sometimes become inappropriately politicized. For another, state ethics investigations could threaten to impose inconsistent and unclear obligations on Department attorneys.

A. State complaints have sometimes become political weapons.

Attorneys "often threaten one another with professional discipline" to "gain an advantage in the matter at hand." Douglas R. Richmond, *Saber-Rattling and the Sound of Professional Responsibility*, 34 AM. J. TRIAL ADVOC. 27, 28 (2010); *see also* Andrew F. Halaby, *The (Mis)use of Lawyer Discipline in Civil Litigation*, ARIZ. ATT'Y, Nov. 2014, at 48, 49 (same). This same tactic has bled over into ideologically motivated lawfare—albeit in a much more organized way. Little wonder why: the threat of bar complaints offers a low consequence means of dissuading attorneys from zealously advocating for disfavored positions.

Bar complaints are an all too convenient method of lawfare. Lawsuits require standing. Bar complaints, however, require neither injury nor even personal knowledge. A bar association in any of fifty states (or territories)—with no knowledge of the underlying case, no access to privileged materials, and no familiarity with the norms of federal practice—can open an investigation triggered by a complaint filed by a political activist with no firsthand knowledge of any misconduct. And indeed, numerous complaints have been filed without even the most miminal personal knowledge of any of the alleged misconduct. *See, e.g.*, Press Release, Campaign for Accountability, Maryland Bar Cites Technicality in Declining to Investigate FCC Chair Brendan Carr: Watchdog Responds (Jan. 9, 2026), https://perma.cc/WK84-DU7J. In one instance, the Campaign for Accountability complained about the complaint being dismissed—yet by its own admission, the complaint arose solely from Carr's public statements during a podcast interview and his public posts on X. *Id.*

Coordinated bar complaint campaigns give advocacy groups the ability to publicly shame, cause reputational harm to, and impact the livelihoods of attorneys representing disfavored interests. These aims are not concealed. One advisor to the 65 Project explained that it files complaints "not only [to] bring the grievances" but to "shame [attorneys] and make them toxic in their communities and in their firms." Lachlan Markay & Jonathan Swan, *Scoop: High-powered group targets Trump*

lawyers' livelihoods, AXIOS (Mar. 7, 2022), https://bit.ly/4sWFVLR. One group has even overtly threatened attorneys who might take on disfavored causes: in 2024, the 65 Project placed print ads in state bar journals cautioning lawyers not to "lose your law license for Donald Trump." *The 65 Project Warns Aspirant Big Lie Lawyers: Don't Lose Your Law License for Trump*, THE 65 PROJECT, (Sept. 23, 2024), https://perma.cc/F9BW-KV7L.

The deterrent effect of these efforts is apparent. Even when a complaint is unfounded, "the mere existence of the charge, not to mention its investigation, inevitably will impose a personal toll on the respondent: stress, at a minimum, as well as costs—opportunity and perhaps out-of-pocket—associated with responding to the charge." Halaby, *supra*, at 49.

Even career attorneys have been caught in the crosshairs. An activist explained that "littler fish" are considered "more vulnerable" because bar complaints "threaten[] their livelihood" and "reputations in their local communities." Markay, *supra*. By targeting career attorneys, complainants may be seeking to deter DOJ attorneys from zealously advocating for positions they oppose on ideological grounds. Fear of public shaming is a powerful deterrent, after all. When groups "accus[e] lawyers of misconduct in a very public way" they are able to "misconstrue what they're doing and embarrass them." Tierney Sneed, *Inside the Effort to Disbar Attorneys Who Backed Bogus Election Lawsuits*, CNN (Mar. 10, 2022, 5:08 AM), https://bit.ly/4mgDQbA.

This sudden proliferation of ideologically driven complaints could also deter legal talent from remaining at, or joining, the Department of Justice. And indeed, a source involved with Project 65 remarked that its efforts targeting Trump affiliated attorneys were "mostly important for the deterrent effect that it can bring so that you can kill the pool of available legal talent going forward." Markay, *supra*.

Despite the personal and professional harm for attorneys targeted by meritless bar complaints, there is little recourse against ill-intentioned complainants. "Most jurisdictions throughout the United States recognize an absolute immunity for Bar complainants." *Tobkin v. Jarboe*, 710 So. 2d 975, 977 (Fla. 1998). Because complainants have immunity, attorneys who pursue legal action against the filer of a frivolous bar complaint may themselves face discipline for filing a frivolous lawsuit. *See, e.g.*, *In re Spikes*, 881 A.2d 1118, 1123 (D.C. 2005) (affirming DC Bar's discipline of attorney for filing frivolous defamation claim against bar complainant, who had absolute immunity). So civil lawsuits are seldom an option for attorneys to seek relief from these claims. This asymmetry problem creates tangible, perverse incentives: stakes couldn't be lower for individuals or groups that choose to weaponize bar complaints to target Department of Justice attorneys advocating for disfavored positions.

These risks are too great to be ignored. This type of lawfare has gone unchecked, even as proponents have openly announced their goal of exerting influence over how attorneys advocate for disfavored clients. We urge you to adopt the Proposed Rule to safeguard federal government attorneys—especially career attorneys—from this type of lawfare.

B. Federal practice presents unique concerns.

The present regulatory system leaves the licenses of DOJ attorneys exclusively vested "in the hands of state bar authorities operating under rules [that are at times] contrary to federal law." Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 779 (1996). The Proposed Rule should help alleviate the uncertainty and inconsistency that results from this Balkanized enforcement scheme while safeguarding DOJ attorneys from any biased or inconsistent or ideologically slanted investigations.

First, the Proposed Rule should help address any "inconsistency between state and federal ethical rules." *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2096 (2000). DOJ attorneys "have national jurisdiction and, as a consequence, their cases often stretch across state lines." Zacharias & Green, *supra*, at 242-43. So attorneys may well be subjected to varied state ethical rules. Yet state bar enforcement treats DOJ attorneys the same way as other attorneys, without bearing "practical and ethical distinctions between federal prosecutors and other lawyers." Tennis, *supra*, at 147. Large-scale investigations particularly implicate inconsistent ethical regulation. Multi-state efforts make it "possible for two lawyers working on the same matter to be subject to different rules." *Id*. at 159. What's more, multi-state efforts like these often "require the use of investigative or surveillance techniques rarely required for the typical state prosecution." *Id*. at 163. It makes little sense then for state bar associations to enforce their ethics rules against DOJ attorneys and other attorneys in the same way.

The Proposed Rule appropriately elevates OPR. OPR is well positioned to ensure a balance is met and to measure the impact of applicable ethics rules. It "is intimately familiar with all State rules of professional conduct and how they apply to the work of Department attorneys." *Review of State Bar Complaints and Allegations Against Department of Justice Attorneys*, 91 Fed. Reg. 10780, *supra*. So of the available regulators, "the OPR is likely to be the most sensitive to needs and constraints unique to federal prosecutors" and "has considerable flexibility in crafting disciplinary sanctions appropriate to the severity of the misconduct." Tennis, *supra*, at 180. What's more, "[a] disciplinary proceeding conducted before the OPR will have superior access to the facts necessary to obtain a complete understanding of the circumstances surrounding the case." *Id*.

Because OPR's investigation still includes state bar associations, concerns that the Department won't be an objective investigator should be alleviated. *See* Tennis, *supra*, at 180 (positing that "reliance on self-regulation would stoke the perception of the 'fox guarding the henhouse'"). And really, OPR is not the fox. Rather, it is a professionally staffed, institutionally independent office with a decades-long track record of investigating and sanctioning DOJ attorneys, including senior officials. A system in which an impartial federal body conducts initial review, subject to state oversight, is far preferable to one in which ideologically motivated outside groups can trigger costly investigations with no threshold showing of merit. Contrast that with the current system that's driven by outside complaints. An activist group filing ninety complaints is not a neutral gatekeeper; it's a fox of a different fur.

Second, because bar associations are "dominated by the private bar," ideological interests could be hard to disentangle from their governance. *See* Zacharias & Green, *supra*, at 220 (explaining how state bar associations might "lobby state courts and legislatures to adopt provisions constraining prosecutors"). Some state bar assessments "of moral character have proven … subjective and inconsistent in the context of nonprofessional discipline." Deborah L. Rhode, *Moral Character As A Professional Credential*, 94 YALE L.J. 491, 551 (1985). Disparate outcomes tend to suggest subjective enforcement. Zack Smith & Cully Stimson, *State Bar Associations Let Rogue Leftist Prosecutors Skate While Throwing the Book at GOP Lawyers*, THE FEDERALIST (Feb. 12, 2024), https://perma.cc/665C-YBCR. Yet neither attorneys nor the public have much recourse against disciplinary proceedings infected with ideological bias. Largely, that's because state bar investigations are shrouded in secrecy. That "[s]ecrecy makes it impossible to determine whether the system is fair, and there is evidence that even lawyers—the primary beneficiaries of confidentiality—believe it is not." Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 50 (2007).

What scant research exists indicates inconsistencies in state bar disciplinary proceedings. One study determined that New York's attorney disciplinary system, for example, was both "deficient in design and operation." Stephen Gillers, *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 485, 490 (2014). Disciplinary sanctions across New York "lack[ed] even an approximation of consistency." *Id*. at 503. Biases, personal relationships, and ideological tilt can factor into these inconsistencies. *See* Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 31 (1998) (noting inconsistencies in bar investigations and "possible biases of the decision-makers" when imposing sanctions); *see also* Smith & Stimson, *supra* (observing disparate outcomes in bar ethics investigations may be tied to attorney's political affiliation).

And really, these problems have been recognized for a long time. When Congressman McDade first introduced legislation to bind DOJ attorneys to state ethics rules, Clinton Administration officials voiced similar concerns. Seth Waxman, Associate Deputy Attorney General, explained to Congress that the amendment might "leave Federal law enforcement vulnerable to hostile State ethics rulings or decisions that interfere with the enforcement of Federal law." *Ethical Standards for Federal Prosecutors Act of 1996: Hearing on H.R. 3386 Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 104th Cong. 12 (1996). These fears were not unfounded: Waxman testified that such "misuse of the ethics rules, while very uncommon, is not unprecedented." *Id*. at 13. So "long as a reasonable possibility of such misuse exists," Waxman cautioned that it was "imperative that the Attorney General retain the power to issue regulations that permit Federal prosecutors to do their jobs as prosecutors." *Id.*

Certainly, "[r]egulation of the legal profession admittedly implicates significant state interests, but the federal interest in protecting federal officials in the performance of their federal duties is paramount." *Kolibash v. Comm. on Legal Ethics of W. Va. Bar*, 872 F.2d 571, 575 (4th Cir. 1989). For too long though, DOJ attorneys have been "subject to potentially abusive state process[es]" and ideologically slanted ethics investigations. *Id*. We believe the Proposed Rule strikes a needed balance between state interests on the one hand and regulatory clarity and consistency on the other.

Lastly, some will read the Proposed Rule's authorization to "take appropriate action" against ongoing state proceedings as an invitation to stonewalling. On our read, it is not. The provision's enforcement authority is tethered to a defined and temporary purpose: protecting OPR's right of first review while that review is ongoing. Once OPR completes or abandons its review, state bars resume their proceedings with full authority intact. Far from displacing state bar oversight, the Proposed Rule merely ensures that oversight is sequenced in a manner consistent with the Attorney General's independent statutory obligation to supervise Department attorneys. That is a modest and legally well-grounded proposition.

II. More federal oversight over disciplinary proceedings is the best answer.

Federal regulation of disciplinary proceedings against DOJ attorneys will ensure the practical realities of their jobs are accounted for. It will safeguard officials, career attorneys, and the public from unfair or ideologically driven investigations. Of course, we're not blind to the tension inherent in any system of self-regulation. But the premise that DOJ cannot be trusted to review its own attorneys' conduct proves too much. Every major institution of government engages in some form of self-regulation; the judiciary disciplines its own judges, Congress polices its own members, and state bar associations govern their own. The question is never whether self-regulation exists, but whether sufficient structural constraints exist to make it trustworthy.

Here, they do. OPR operates under established procedures, reports its findings to state bars, and those bars retain authority to impose sanctions that DOJ cannot. The Department cannot bury a finding; it must disclose its conclusions. That system is not designed to protect bad actors. It is a system designed to ensure that the people best positioned to evaluate the conduct of federal attorneys in the performance of federal duties are the ones who evaluate it first.

And the law leaves room to implement these reforms. Pre-McDade Amendment, many Courts agreed that "the interpretation of state disciplinary rules as they apply to federal criminal law practice 'should be and is a matter of federal law.'" *United States v. Plumley*, 207 F.3d 1086, 1095 (8th Cir. 2000) (cleaned up) (collecting cases). We believe it still is.

Federal government attorneys are bound by State ethics rules "to the same extent and in the same manner as other attorneys" in States they "engage[] in [their] duties." 28 U.S.C. § 530B(a). But this commandment extends only to "ethics rules"—defined as "normative legal standard[s] that guide the conduct of an attorney." *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 920-21 (10th Cir. 2016) (cleaned up). These rules are neither substantive nor procedural. Ethical rules direct "sweeping commandments of conduct" and are commonly "quite vague." *United States v. Colo. Sup. Ct.*, 189 F.3d 1281, 1287 (10th Cir. 1999). Substantive and procedural laws, "by contrast … cannot afford such vagueness." *Id*.

Both substantive and procedural laws and rules fall outside the scope of the McDade Amendment, as "[S]ection 530B applies only to ethical standards." *Stern v. U.S. Dist. Ct. for Dist. of Mass.*, 214 F.3d 4, 20 (1st Cir. 2000). And even ethics rules that fall under McDade's umbrella cannot supersede conflicting federal rules. "[C]ourts have specifically concluded that a Supremacy Clause analysis may still be appropriate and necessary in instances where Congress has granted

states regulatory authority through language similar to that employed by the McDade Act (e.g., 'to the same extent ... as')." *Sup. Ct. of N.M.*, 839 F.3d at 921.

Yet Congress was silent about the procedural or enforcement authority Section 530B accords the States. That silence should speak for itself. "Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States," state regulation over the federal government is authorized "only when and to the extent there is a clear congressional mandate." *Hancock v. Train*, 426 U.S. 167, 179 (1976) (cleaned up). Such a mandate requires "specific congressional action that makes … authorization of state regulation clear and unambiguous." *Id*. (cleaned up). Section 530B offers nothing that approaches the "clear congressional mandate" required. *Cf. United States v. Lowery*, 166 F.3d 1119, 1125 (11th Cir. 1999) ("If Congress wants to give state courts and legislatures veto power over the admission of evidence in federal court, it will have to tell us that in plain language using clear terms.").

Put another way: States get to set ethical standards for federal government attorneys practicing within their borders. But Section 530B didn't grant States exclusive enforcement authority to regulate those ethical rules. Take *Hancock*. There, Kentucky argued the Clean Air Act implicitly subjected federal installations to its permit requirements by requiring federal agencies to comply with state pollution requirements "to the same extent as" others. *Hancock*, 426 U.S. at 182-83. The Court rejected this argument. It concluded that "Congress has fashioned a compromise which … require[ed] federal installations to abate their pollution to the same extent as any other air contaminant source and under standards which the States have prescribed." *Id*. at 198-99. But that compromise "stopped short of subjecting federal installations to state control." *Id*.

We read Section 530B the same way. The mandate that federal government attorneys must comply with state ethical rules "to the same extent and manner" as other attorneys practicing in that state "stopped short" of vesting States with exclusive enforcement authority. *Hancock*, 426 U.S. at 198-99; *see also* 28 U.S.C. §§ 2674, 2679(d) (subjecting the United States to state tort claims "in the same manner and to the same extent as a private individual," but not empowering state courts to decide those claims). Any enforcement authority that States have over ethical oversight of federal employees who are acting in the scope of their federal duties must be derived from the Federal Government. *Cf. Sperry v. State of Fla. ex rel. Fla. Bar*, 373 U.S. 379, 402 (1963) (explaining that "since patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives"). Here, accomplishing federal objectives requires a balance between the state's interest in regulating licensure and the federal government's interest in ensuring that regulatory compliance is fair and consistent. DOJ can appropriately use rules like this one to strike that balance.

What's more, the Amendment expressly grants rulemaking authority to the Attorney General. Section 530B(b) provides that "[t]he Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section." That language answers the question about how Section 530B(a)'s mandate shall be enforced. Recall that nothing in the plain text addresses the inconsistencies between state and federal ethics rules—although "[t]he potential for conflict between state and federal law … should have been obvious." *Stern*, 214 F.3d at 20. It is

accordingly fair to assume that when Congress included Section 530B(b), it "directed the Attorney General to fill out the details of enforcement by regulation." *Id*. Indeed, Congress might not have even needed to speak, as some conclude that "the Department's preemptive authority does not derive directly from Congress, but rather reflects a separate executive preemptive power." Zacharias & Green, *supra*, at 253.

The Proposed Rule merely fills the gaps in the statutory language while providing a clear path for regulatory enforcement of the varied ethical rules governing DOJ attorneys.

CONCLUSION

DOJ attorneys are not above accountability, and not every bar complaint filed against a federal attorney is meritless. Some complaints are legitimate, and the disciplinary system serves a vital public function when it operates as intended. Likewise, in many instances state bars themselves have appropriately dismissed meritless complaints. So we understand that many state ethics processes do not indulge abusive tactics. In the end, we do not wish to strip them of all discretion.

But the question is who is best positioned to make the relevant determinations fairly and consistently as to federal attorneys. OPR is not a shield against accountability; it is a more reliable mechanism for it. Giving OPR the initial authority to review and investigate bar complaints filed against DOJ attorneys lessens the risk that attorneys will continue to be targeted and promises more consistency in how state ethics rules are applied.

We strongly support the Proposed Rule and urge its prompt adoption.

Sincerely,

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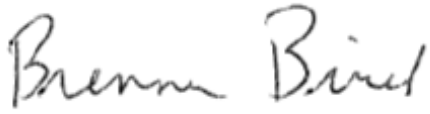

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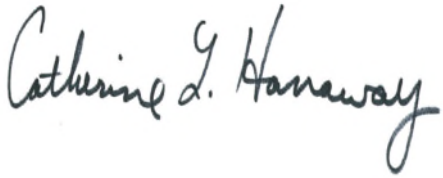

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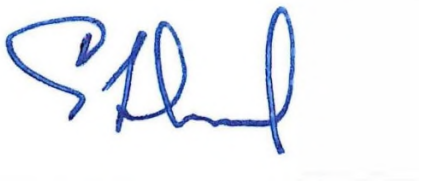
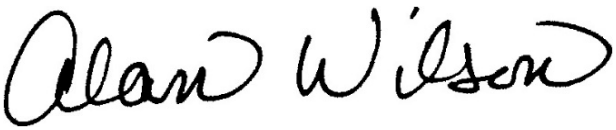


Gentner Drummond
Oklahoma Attorney General



Alan Wilson
South Carolina Attorney General

Ken Paxton
Texas Attorney General