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The Honorable Tod Blanche
Acting Attorney General United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Re: Department of Justice – Office of the Attorney General
Docket No. OAG199
Comment to: Proposed Rulemaking
Review of State Bar Complaints and Allegations Against Department of Justice Attorneys

Dear Acting Attorney General Blanche:

We write as members of Lawyers for the Rule of Law (“LFRL”) to offer comment on the proposed rulemaking for the Review of State Bar Complaints and Allegations Against Department of Justice (“DOJ”) Attorneys (“Proposed Rule”).¹

A. Introduction

LFRL is a not-for-profit comprised of over 300 volunteer lawyers whose mission is to support United State institutions according to the Constitution, and democratic and ethical principles; to protect the civil and Constitutional rights of individuals in the United States: and to offer public education and guidance that helps individuals understand and exercise those rights.

In pursuit of this mission, LFRL has filed complaints with state disciplinary authorities alleging that DOJ attorneys, including, but not limited to, the former Attorney General, Pamela Bondi have violated the Rules of Professional Conduct.² In the Proposed Rule, the DOJ characterizes persons who file state bar complaints against senior DOJ officials as “political activists” who seek to “weaponize” the State disciplinary process.³ While we dispute that characterization, LFRL appears to be one of the “activists” whom the DOJ seeks to “disarm” through the Proposed Rule.⁴

¹ See 91 FR 10780 (Mar. 5, 2026)

² See Letter to the Florida Bar, re. Ethics Complaint against Pamela Jo Bondi (June 5, 2025)(hereinafter “Florida Ethics Complaint”), set forth in, https://140252c9-fa75-46bc-bdc4-c610f4e785cb.filesusr.com/ugd/4c8d66_30609e0f5e4649cda6f33cc9c073e28e.pdf ., Letter to Hon. Paula Xinis , re. Ethics Complaint against Pamela Jo. Bondi (hereinafter “ MDDC Ethics Complaint”), set forth in, https://140252c9-fa75-46bc-bdc4-c610f4e785cb.filesusr.com/ugd/4c8d66_5d054600ea124571aac5fa1cb491a7ae.pdf . See generally, Ellen Yaroshefsky and Abbe Smith, “The Legal Profession’s Duty to Hold Attorney General Bondi Accountable,” ABA Criminal Justice, at 33 (Winter 2026)(analyzes complaints).

³ 91 FR 10782.

⁴ Compare 91 F.R. 10782 (activists) with Ethics Complaints, n. 2, supra.

In addition to our lawful, responsible, and justifiable use of the disciplinary process, LFRL has sought to advance its mission by participating in litigation to compel this Administration to lawfully appoint a United States Attorney.⁵ We have also made a referral to the former Attorney General to review the conduct of a Senior DOJ official pursuant to the President’s “frivolous litigation” memo.⁶ There was never any response. LFRL members have also filed successful habeas petitions on behalf of noncitizens who were unlawfully detained by the Department of Homeland Security (“DHS”) and successfully defended persons accused of criminal obstruction of DHS immigration enforcement operations.

On behalf of the LFRL, member Daniel Arshack,⁷ Esq, Martin Cronin, Esq.⁸ and Jon May, Esq.⁹ submit this comment. We do so in our capacities as members of the bar and the LFRL, rather than on behalf of our prior public sector employers.

B. Summary of Comment.

Our objections to the Proposed Rule are straightforward. First, the former Attorney General and the DOJ lack authority to promulgate this proposed rule. Second, if promulgated, its enforcement would violate an act of Congress, namely the McDade Amendment,¹⁰ and principles of federalism as reflected in the Tenth Amendment.¹¹ Third, by seeking to insulate all DOJ attorneys from external accountability for their conduct, the Proposed Rule would accelerate the ongoing erosion of public confidence in both the DOJ and in the criminal justice system itself.

Over the last four decades, both Congress and the Courts have consistently rejected similar DOJ efforts to intrude upon regulation of the legal profession, a power reserved to the States under the

⁵ See *United States v. Giraud*, 795 F.Supp. 3d. 560 (D.N.J), aff’d, 160 F.4th 390 (3d Cir. 2025).

⁶ See LFRL letter to Hon. Pamela Bondi (July 8, 2025)(hereinafter “LFRL referral”) set forth in, https://140252c9-fa75-46bc-bdc4-c610f4e785cb.filesusr.com/ugd/4c8d66_cb90c6e951f0453fb75d57eb24cd4ce5.pdf .

⁷ Mr. Arshack is licensed to practice law in the State of New York. He is a founding member and current President of LFRL He practices law throughout the United States in both federal and state courts. As an LFRL member, Mr. Arshack signed the Florida and MDDC Ethics Complaints, the LFRL referral letter, and a brief filed in the *Giraud* appointment litigation.

⁸ Mr. Cronin is licensed to practice law in the State of New Jersey. He is a retired New Jersey Superior Court Judge who had the privilege of serving as an Assistant United States Attorney in the District of New Jersey from 1989 to 1999. He was hired by then United States Attorney Hon. Samuel A. Alito Jr. and served under both Republican and Democratic administrations. Mr. Cronin held the supervisory positions of Deputy Chief of the Criminal Division, Organized Crime Drug Enforcement Task Force (“OCDETF”) Coordinator, Violent Crime Coordinator, and Operation Triggerlock Coordinator. He successfully prosecuted the retaliatory murderer of a federal informant and first federal carjacking case in New Jersey. As an LFRL member, Mr. Cronin signed the LFRL referral letter and briefs filed in the *Giraud* litigation.

⁹ Mr. May is licensed to practice law in the State of Florida. He had the privilege of serving as an Assistant United States Attorney in the Southern District of Florida, criminal division, from 1981 to 1986. After returning to private practice, he represented the accused in several notable cases, including General Manuel Antonio Noriega as co-counsel at trial and lead counsel on appeal and at resentencing. Mr. May is currently the Chair of the Amicus Committee for the LFRL and a signatory on the Florida Ethics Complaint.

¹⁰ Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Public Law 105-277, 112 Stat. 2681, Division A, section 801(commonly known as “McDade Amendment), codified at, 28 U.S.C. 530B (effective April 19, 1999).

¹¹ U.S. Constit. Amend. X. Since this rule’s invalidity is established through statutory interpretation, it is not necessary for either the DOJ or any reviewing court to rule upon the Constitutional Issue. based See [cite](constitutional avoidance doctrine).

Tenth Amendment. If promulgated, this Proposed Rule would facilitate an even greater intrusion into this reserved power. Moreover, it suffers from the same legal infirmities as those prior failed efforts. The DOJ's proffered reasons for reinitiating their effort consist of rehashed arguments that both Congress and the Court determined to be without merit long ago.¹²

Rather than ensuring that their attorneys adhere to the highest ethical standards, this Proposed Rule reflects the DOJ's desire to avoid the pain emanating from its self-inflicted wound.¹³ That wound arises from enforcement of the former Attorney General's "zealous advocacy" memorandum.¹⁴ By requiring DOJ attorneys to adhere to that memorandum's command to advance the President's interpretation of the law even when it conflicts with a DOJ attorney's independent assessment of what that law permits, the "zealous advocacy" memorandum places DOJ attorneys in an irreconcilable "Catch-22" situation.¹⁵ These DOJ attorneys can either follow their ethical duty to exercise their independent assessment of what good faith arguments the law permits or face possible suspension or termination of their DOJ employment.

Rather than eliminating this conflict by rescinding the "zealous advocacy" memorandum, the now DOJ seeks, through this Proposed Rule, to compound its damage by effectively eliminate all State enforcement of the ethical constraints upon DOJ attorney conduct.

Responding to a similar effort by the DOJ to exempt its litigators from complying with State ethics rules, Congress "urged" the DOJ to withdraw its 1989 Thornburgh memorandum.¹⁶ Initially, the DOJ resisted this Congressional request. However, after a series of judicial decisions finding that its purported exemption was unlawful, the DOJ eventually withdrew the Thornburgh memorandum and published regulations that it now seeks to amend. This Proposed Rule faces the same legal defects as the 1989 Thornburgh memorandum. Accordingly, similar to Congress in 1990, the LFRL now respectfully urges the DOJ to withdraw this Proposed Rule.

C. The Proposed Rule.

This regulation provides the DOJ with a "right of first review" over any state bar complaint filed against one of its attorneys for allegedly unethical conduct arising out of the performance of their official duties. During this review period, the Proposed Rule requires state authorities to suspend their investigation until the DOJ completes its internal review.

¹² See Section G(a), *infra*.

¹³ See Section G(b-c)--, *infra*

¹⁴ Memorandum from former Attorney General Pamela Bondi to All Justice Department employees, "General Policy Regarding Zealous Advocacy on Behalf of the United States." (February 5, 2025) see also EO 14215 (Feb. 18, 2025) (providing that a DOJ attorney cannot "advance an interpretation of the law as the position of the United States this contravenes the President or Attorney General opinion as a matter of law...").

¹⁵ See Kaliana Pierga, "Do or Be Dismissed: Zealous Advocacy Enforcement in Pam Bondi's DOJ," *Georgetown Journal of Legal Ethics* (Jan. 23, 2026) <https://www.law.georgetown.edu/legal-ethics-journal/blog/do-or-be-dismissed-zealous-advocacy-enforcement-in-pam-bondis-doj/>. Such independent evaluation is required by RPC 2.1. Accord Yaroshefsky and Smith, n. 2 *supra.*, at 33. (the zealous advocacy memo sets the tone for today's DOJ; "a culture of zeal with no guardrails, pursuing the President's interests, heedless of professional ethics, is the job.")

¹⁶ See Subcommittee on Government Information, Justice, and Agriculture, Committee on Government Operations, *Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required*, H.R. Rep. No. 986, 101st Cong., 2d Sess. at 32 (1990).

a. The Language of Comity is Undermined by the Unilateral Assertion of Exclusive Federal Authority.

Section 77.5(a) of this rule is phrased in the language of comity. It provides that the Attorney General may “request” that state bar authorities suspend their proceedings while the DOJ conducts its review.¹⁷ However, the following section 77.5(b) is an unambiguous assertion of exclusive federal authority over these State disciplinary proceedings. If a State refuses to grant the Attorney General’s “request,” then section 77.5(b) empowers 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.”¹⁸

While “appropriate action” is not otherwise defined in this rule, it is defined in a Presidential memorandum cited within this rule.¹⁹ These actions “include[e] reassessment of security clearances held by the attorney, termination of any contact for which the relevant attorney or law firm has been hired to perform services, or any other appropriate action.”²⁰ Thus, “appropriate action” may include the suspension or termination of employment of any DOJ attorney who cooperates with any State ethics investigation that the Attorney General “requested” the State to suspend.²¹ That “cooperation” extends to providing State investigators with any “nonpublic information” during the review period.²² The mere possibility of these sanctions imposes a chilling effect upon DOJ witness cooperation in State disciplinary proceedings. The unavailability of these essential witnesses adversely affects the State’s ability to effectively investigate allegations against DOJ attorneys, thereby undermining the DOJ’s suggestion of comity.

In addition to this textual analysis, the preamble to the Proposed Rule further gives the lie to any DOJ interest in comity. More specifically, “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.”²³ Thus, the Proposed Rule purports to empower the Attorney General with authority to preempt, in the exercise of her unbridled discretion, any State disciplinary proceeding that she chooses.

b. The Effect of an Attorney General Request: Indefinite Suspension of State Disciplinary Proceedings.

Once the Attorney General elects to review a state disciplinary complaint, the Proposed Rule requires the State to suspend its investigation.²⁴ The rule does not require the Attorney General to

¹⁷ 91 FR 10744 (summary), 91 FR 10787 (proposed 77.5(a)).

¹⁸ *Id.* (emphasis added).

¹⁹ 91 F.R. 10782, *citing*, Memorandum on Preventing Abuses of the Legal System and the Federal Court, 2025 Daily Comp. Press. Doc. 2 (March 21, 2025) (hereinafter “Frivolous Litigation Memo”).

²⁰ *Id.* at 2.

²¹ *Id.* See generally Editorial, “Federal Preemption of Legal Ethics is a Dangerous Encroachment on New Jersey’s Constitutional Authority,” New Jersey Law Journal (March 8, 2026)(hereinafter “NJLJ Editorial”).

²² 91 F.R 10784

²³ 91 F.R. 10784.

²⁴ Proposed 77.5(a). The Attorney General’s “request” is effectively a command. See Section C(a), *supra*.

conduct her review within any specified time period. Hence, it empowers her to suspend the state disciplinary procedure indefinitely.²⁵

If the Attorney General completes a review, then the rule requires her to advise the State authorities of that fact.²⁶ However, the rule does not require her to advise them of the results of her review.²⁷ Moreover, after their review is completed, the rule does not require the DOJ to share the content of any investigatory files with State authorities.²⁸

D. State Authority to Regulate the Legal Profession.

Through this proposed rule, the DOJ seeks to effectively replace the States as regulators of the ethical conduct of DOJ attorneys. The premise of their proposal -that the DOJ has authority to regulate the conduct of its own attorneys that is superior to that of the States - is contrary to the Tenth Amendment as interpreted by our Supreme Court. Our Constitution provides that “[t]he 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”²⁹ In *Leis v. Flynt*, our Supreme Court said:

Since the founding of the Republic, the licensing and regulation of lawyers has been left *exclusively* to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.³⁰

By referencing “the founding,” the Court provided an originalist repudiation of the DOJ’s revisionist premise. By expressly ruling that the States’ exclusive authority extends to “the discipline of attorneys,” the Court refutes the DOJ’s present effort to distinguish the State’s primacy regarding the substance of ethics rules from their primacy in enforcement of those rules.³¹ The States have exclusive authority over both the substance and enforcement of the rules of ethics in our federalist system of government.³²

Historically, the States’ interest in regulating attorney conduct is heightened because attorneys are “officers of the court.”³³ In criminal cases, our Supreme Court further emphasized that” [t]he

²⁵ See Editorial, *supra* n. 22.

²⁶ Proposed 77.5(a).

²⁷ *Id.* The rule confers the Attorney General with discretion, requiring disclosure “as appropriate.” *Id.*

²⁸ *Id.*

²⁹ U.S. Const. Amend. X.

³⁰ 439 U.S. 438, 442 (1979) (emphasis added).

³¹ See 91 F.R. 10783.

³² See *Leis v. Flynt*, 439 U.S. at 442. Accord *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423,433 (1982)(recognizes that State Constitution vests in the New Jersey Supreme Court “the authority to fix standards, regulate admission to the bar, and enforce professional discipline among members of the bar) (emphasis added), citing, [N. J. Const., Art. 6, § 2, para. 3.](#) .

³³ In *Goldfarb v. Va. State Bar*, the Court acknowledged that “[t]he 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.”” 421 U.S. 773, 792 (1975).

State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance.”³⁴

Among those attorneys practicing within the criminal justice system, the State has the *greatest* interest in regulating the conduct of *federal* prosecutors. This heightened interest arises from the “vast power” that they possess,³⁵ their unique duty to ensure that “justice is done,” and the broad discretion³⁶ accorded to them in discharging that duty.

Courts have traditionally accorded “the presumption of regularity” to their federal “prosecutorial decisions.”³⁷ In *Berger v. United States*, Justice Southerland explained that the duty of a federal prosecutor is “not that it shall win a case, but that justice be done.”³⁸ While these DOJ attorneys may “strike hard blows, [they] are not at liberty to strike foul ones,”³⁹

At times, a federal prosecutor’s path between fair and foul blows may not be clear. That is when the exercise of prosecutorial discretion becomes critically important. The exercise of that discretion is influenced by guardrails.⁴⁰ For DOJ attorneys, those guardrails include Executive Orders,⁴¹ Attorney General Directives,⁴² and State professional ethics rules.⁴³ Through this proposed rule, the DOJ seeks to effectively remove an essential external guardrail - State enforcement of their ethics rules - which encourages fair blows.⁴⁴

E. Prior Unsuccessful DOJ Efforts to Intrude Upon State Regulation of the Legal Profession.

Prior DOJ efforts to exempt its attorneys from State enforcement of the rules of professional responsibility centered on the rules which prohibit certain contact with represented persons.⁴⁵

³⁴ *Middlesex County*, 457 U.S. at 435.

³⁵ *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (federal prosecutors are conferred with “vast power” and “immense discretion”).

³⁶ See *United States v. Lopez*, 765 F. Supp. 1443, 1450(N, D. Cal 11991) (the character, quality, and efficiency of the whole [criminal justice] system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretion”), quoting, H.R. Rep No. 986 at 3 (1990).

³⁷ *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

³⁸ 295 U.S. 78, 88(1935).

³⁹ *Id.*

⁴⁰ See Yaroshefsky and Smith, *supra* n. 2, at 33(today’s DOJ has “a culture of zeal with no guardrails”), Accord Cass R. Sunstein, *Ethics of Nudging*, 32 *Yale Journal of Regulation* 41, 442-44 (2015) (loss aversion intrudes upon decisionmaker autonomy),

⁴¹ See, e. g., EO 14215 (2025).

⁴² See, e.g., n. 17, *supra*, (zealous advocacy memo).

⁴³ See,e.g., Rule DR 7-104(A)(1)

⁴⁴ For example, the Thornburgh memo provided guidance to DOJ attorneys which “spawned” their misconduct. *Lopez*, 765 F. Supp. at 1460. As such, that official policy guidance “represent [ed] [a serious threat to the integrity of criminal justice proceedings ...” *Id.* Similarly, enforcement to the proposed rule would eliminate these guardrails for DOJ attorneys for federal prosecutors, the attorneys for whom the State has the *greatest* interest in regulating.

⁴⁵ See, e.g., Rule DR 7-104(A)(1) of the American Bar Association’s Model Code of Professional Responsibility provides that:

“A. During the course of his representation of a client a lawyer shall not:

a. The 1980 DOJ OLC memo.

In this memo, the DOJ Office of Legal Counsel (“OLC”) opined that that the Supremacy Clause⁴⁶ preempts application of State “no contact” rules to DOJ attorneys during the preindictment stage of a criminal investigation.⁴⁷ The DOJ OLC’s preemption claim was rejected in *United States v. Hammad*.⁴⁸ The district court determined that its supervisory authority over the administration of criminal justice conferred it with discretion⁴⁹ to suppress a recorded statement obtained in violation of DR 7-104(A)(1).

b. The 1989 Thornburgh Memo.

Partially in response to the *Hammad* decision, then Attorney General Richard Thornburgh issued a memorandum declaring that federal prosecutors were not bound by State ethics rules prohibiting contact with represented persons.⁵⁰ The Attorney General opined that DR 7-104(a)(1) has been “broadly” interpreted⁵¹ to prohibit communications by law enforcement personnel with the target of a criminal investigation during the preindictment stage.

While acknowledging the significant State interest in regulating the legal profession, the DOJ maintained that (1) the Supremacy Cause does not permit State ethics rules to frustrate the lawful operation of the federal government and (2) that States may regulate the ethical conduct of DOJ attorneys “only if the regulation does not conflict with the federal law or with the attorney’s federal responsibilities.”⁵²

Contending that application of State ethics rules may interfere with federal undercover operations before a Sixth Amendment right to counsel attaches, the Thornburgh memo announced that “it is

1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.”

⁴⁶ “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. Art. VI, cl.2

⁴⁷ “Ethical Restraints of the ABA Code of Prof’l Responsibility on Fed. Crim. Investigations, 4B Op. OLC 576 (1908)

⁴⁸ 858 F.2d 834, 836-38 (2d Cir. 1988), cert. denied, 498 U.S. 871– (1990).

⁴⁹ *Id.* at 841. While upholding the district court’s assertion of its supervisory authority, the Second Circuit remanded on remedy. Due to the previously unsettled status of the law on the suppression issue and the absence of an adequate record that it considered lesser sanctions, the Second Circuit court held that the District Court abused its discretion in suppressing the evidence in the Hammad prosecution. 858 F.2d at 848. That ruling did not preclude suppression as a matter of law, but rather a remedy that was not adequately supported in the appellate record.

⁵⁰ See Memorandum from Attorney General Richard Thrrnburgh, *Re Communications with Persons Represented by Counsel* (June 8, 1989) ,hereinafter “Thornburgh Memo”) , as s set forth in, *In re Doe*, 801 F. Supp. 478 (D.N.M.1992)(Ex. E).

⁵¹ The memo noted that this has occurred two contexts - motions to suppress and State disciplinary charges filed against DOJ attorneys. *Id.*

⁵² *Id.* at 2, 5-6

the [DOJ's] position that contact with a represented individual in the course of an authorized law enforcement activity does not violate DR 7-104."⁵³

A few months after the Thornburgh memo was issued, a Congressional subcommittee unambiguously expressed its “disagree[ment] with the Attorney General’s attempts to exempt departmental attorneys from compliance with the ethical requirements to which they belong and in the rules of the federal courts where they appear.”⁵⁴ The depth of their disagreement was so fundamental, that this subcommittee “urged” the DOJ to withdraw the Thornburgh memo.⁵⁵ For more than 4 years, the Executive Branch declined to act upon this Legislative Branch request, requiring the Judicial Branch to repeatedly determine the memo’s invalidity.

Citing the Thornburgh memo, the DOJ in *In re Doe*⁵⁶ and in *United States v. Ferrara*⁵⁷ sought to preempt New Mexico disciplinary board proceedings pending against an AUSA who allegedly communicated with a represented person in violation of DR 7-104. Both the *Doe* and *Ferrara* courts rejected the DOJ’s reliance upon the Thornburgh memo.

Representing the AUSA in *Doe*, the DOJ argued: (1) that the Supremacy Clause preempts the enforcement of State ethics rules which conflict with the performance of an AUSA’s duties, and; (2) that it is vested with exclusive authority to determine “when and how” that conflict arises.⁵⁸ Supremacy clause jurisprudence, the *Doe* court observed, required the DOJ to establish “a conflict between a federal prosecutor’s duties under federal law and his duties under state law.”⁵⁹ To satisfy this standard, the DOJ had to overcome the “presumption against preemption.” This presumption applies whenever federal authorities seek to regulate subjects traditionally within the realm of the States. Since regulation of the legal profession is one of those subjects, the *Doe* court required the DOJ to demonstrate Congress’ “clear and manifest purpose to preempt state law” through enactment of the McDade Amendment.⁶⁰

Concluding that the requisite conflict was not established, the *Doe* court identified a “false assumption” within the DOJ’s argument – that a federal “prosecutor is under no duty to investigate criminal activity in an ethical manner.”⁶¹ Apart from its false assumption, the *Doe* court concluded

⁵³ Id. at 6-7. Significantly, the Thornburgh memo sought to exempt DOJ attorney from compliance with the substantive requirements of only one State ethics rule, DR 7-104. It did not seek to alter a DOJ attorney’s duty to comply with the substance of any other State ethics rule.. Moreover, by its terms, it did not seek to insert the DOJ into any State disciplinary enforcement procedure. Accordingly, it was a far more limited intrusion into State regulation of the legal profession than the DOJ now seeks to accomplish through the Proposed Rule. See --, supra (summarizes proposed rule).

⁵⁴ See H.R. Rep No 986, n. 19, supra.

⁵⁵ Id.

⁵⁶ 801 F. Supp. 478 (D.N.M.1992). In *Doe*, it sought to remove the New Mexico disciplinary proceeding to federal court.

⁵⁷ 847 F. Supp. 964 (D.D.C. 1993), aff’d, 54 F.3d 825 (D.C. Cir. 1995). After its removal motion failed in *Doe*, the DOJ sought to enjoin a New Mexico disciplinary board official from “inquiring” into that AUSA’s ethical conduct in *Ferrara*. The DOJ essentially sought to suspend that State’s ethics disciplinary procedure. in *Ferrara*. Cf. Section C, supra (summarizes Proposed Rule).

⁵⁸ 801 F. Supp. at 848-49.

⁵⁹ Id. at 849, citing, *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

⁶⁰ Id. , citing, *Hillsborough*, 471 U.S. at 715.

⁶¹ Id.

that the DOJ failed to provide “the Court with any federal law directly contradicting or demonstrating a clear and manifest purpose to preempt the application of state ethical codes to an AUSA.”⁶²

Undeterred by the *Doe* ruling, the DOJ then sought to enjoin a New Mexico disciplinary board official from “inquiring” into the same allegedly unethical AUSA conduct in *Ferrera*. While the *Doe* court concluded that no “conflict” was established, the *Ferrera* court found that the Thornburgh memo did not constitute a “federal law” required for Constitutional conflict analysis.⁶³ Expounding upon the latter point, the *Ferrera* court viewed that memo as “no more than a unilateral statement of Justice Department policy by the Attorney General. The Court cannot accept this as “federal law” sufficient to supplant state regulation under the [Supremacy Clause](#).”⁶⁴ Applying the presumption against preemption, the *Ferrera* court concluded that the DOJ failed to demonstrate the required “clear and manifest purpose of Congress” to preempt State regulation of the legal profession.⁶⁵

Another repudiation of the Thornburgh memorandum occurred in *United States v. Lopez*, where a defendant moved to dismiss the indictment as a remedy for an AUSA’s negotiation of a plea agreement directly with him in violation of the no contact rule.⁶⁶ Citing the Thornburgh memorandum, the DOJ contended that AUSA’s contact qualified under the “authorized by law” exception to DR 7-104(A)(1) and that the general vesting and delegation statutes⁶⁷ conferred Mr. Thornburgh with statutory authority to issue that memorandum.⁶⁸ Finding both of those contentions unpersuasive, the *Lopez* court emphasized that “these are nothing more than general authorizing statutes; none expressly or impliedly authorize government attorneys either to disregard court adopted rules or to violate ethical rules regarding contact with represented individuals.”⁶⁹

The DOJ also raised a separation of powers challenge to the District Court’s authority to enforce its local rules when they conflict with DOJ policy as reflected in the Thornburgh memo. *Id.* Forcefully rejecting that challenge, the *Lopez* court observed that “*inherent in the court’s power to make rules is the ability to enforce them.*”⁷⁰ A contrary ruling, the court reasoned, would nullify

⁶² *Id.* at 849, [citing](#), 28 C.F.R. 45.735-1(a). Accord *United States v. Lopez*, 765 F. Supp 1433, 1454 (N.D. Cal. 1991)(finds no conflict between compliance with State ethics rules and performance of AUSA duties), vacated on other grounds, 989 F.2d. 1032 (9th Cir)(dismissal not appropriate remedy), *amended*, 4 F. 3d 1455 (9th Cir 1993) (same)

⁶³ 847 F. Supp. at 969-.

⁶⁴ *Id.* at 969, [citing](#), *Wabash Valley Power v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) (“We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication.”)

⁶⁵ *Id.*, [citing](#), *Hillsborough*, 471 U.S. at 715. Accordingly, the *Ferrera* court granted the defendant’s motion for summary judgment, dismissing the DOJ’s complaint seeking to enjoin the New Mexico disciplinary proceedings pending against the AUSA.

⁶⁶ 765 F. Supp. at 1455-50.

⁶⁷ See 28 U.S.C. 509, 515(a), 516, 533, and 547.

⁶⁸ 765 F. Supp. at 1447.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1454 (emphasis added).

its rulemaking power⁷¹. On appeal,⁷² DOJ “prudently” abandoned its reliance on the Thornburgh memo, the general vesting and delegation statutes, and any preemption claim.

c. The 1994 Reno Regulation

Even though the *Doe* and *Ferrera* courts rejected its preemption arguments, the DOJ recirculated them as support for their 1994 Reno regulations which also sought to exempt federal prosecutors from State ethics rules prohibiting contact with represented people.⁷³ Unlike the 1980 DOJ OLC memo and the 1989 Thornburgh memo, the Reno Regulation went further – it contained an express preemption provision:⁷⁴ A civil litigant in *United States ex.re. O’Keefe v. McDonnell Douglas Corp.* challenged the Attorney General’s authority to promulgate that regulation.⁷⁵ In support of its authority, the DOJ cited the general vesting and supervision statutes.⁷⁶ “[A]bsent more explicit guidance from Congress” the *O’Keefe* court “decline[d] to read the general statutes cited by the DOJ as authority for displacing state ethical rules.”⁷⁷

F. The McDade Amendment.

In response to these repeated DOJ claims that their attorneys were not bound by state ethics rules regarding contact with represented persons,⁷⁸ Congress enacted the McDade Amendment⁷⁹ which provides that:

⁷¹ Id. Similarly, by divesting State disciplinary authorities of their ability to enforce their ethics rules, the Proposed Rule would nullify States of their regulatory authority. See Section C(b), *supra* (effect of Proposed Rule).

⁷² 989 F.2d. 1032 (9th Cir. 1993). While affirming the District Court’s finding of an ethics violation, the Ninth Circuit held that the District Court abused discretion to impose “extreme remedy” of dismissal. *Id.*, *amended* 4 F. 3d 1455 (9th Cir 1993) (same). The appellate court expressly noted that the trial court had authority to impose lesser sanctions, including a referral of AUSA to the state bar for disciplinary proceedings. *Id.*

⁷³ 28 C.F.R. sec. 77 (1994), 59 FR 39,910 (Supremacy Clause reliance) (1994). See Neals-Erik William Delker, Comment, *Ethics and the Federal Prosecutor: The Continuing Conflict Over Application of Model Rule 4.2 to Federal Attorneys*, 44 Am. U.L. Rev. 855, 862-74 (1995)

⁷⁴ 28 C.F.R. sec 77—provides that “this part is intended to preempt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorneys for the government, and those acting at their direction or under their supervision, with represented parties or persons in criminal or civil law enforcement investigations or proceedings; it is designed to preempt the entire field of rules concerning such contacts.” The DOJ explained that this regulation was “intended to fully preempt and suspend” State bar rules prohibiting contact with represented persons. 59 F.R. 39910, 12.

⁷⁵ 961 F. Supp. 1288, 1293-94 (E.D. Mo. 1997), *aff’d*, 132 F. 2d 1252 (8th Cir. 1998)

⁷⁶ Id. at 1293, citing 5 U.S.C. § 301, and 28 U.S.C. §§ 509, 510, 515(a), 516, 519, 533, and 547. In *Lopez*, the DOJ relied upon these statutes to support an interpretation of a state ethics rule. More specifically, the “authorized by law” exception to the DR 7-104(A)(1). In *O’Keefe*, the DOJ relied upon those statutes to support their authority to promulgate a federal regulation expressly preempting the same State ethics rule.

⁷⁷ Id. at 1294.

⁷⁸ See *New York State Bar Ass’n v. F.T.C.*, 276 F.Supp. 2d 110, 133 (D.D.C. 2003)(noting that statute was “enacted in direct response to the DOJ’s attempt to exempt its lawyers from state ethics rules’). Representative McDade explained that “[t]he bill insures that the [DOJ], through attempts at self-regulation, cannot exempt its lawyers from the same rules of ethics that govern the professional conduct of all other attorneys. These rules are currently in force, and must continue to be enforced, by the state supreme court.” 144 Cong. Rec. E301 (Mar. 5, 1998)(emphasis added). See also Levin, Leslie C. The Use of State Discipline to Sanction Attorneys General and other High-Ranking Legal Officers (Nov. 21, 2024), available at SSRN:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5753303

⁷⁹ 28 U.S.C. 530B (effective date April 19, 1999) (emphasis added).

(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.

(b). The Attorney General shall make and amend rules of the Department of Justice to ensure compliance with this section.

(c). As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

To discern the meaning of "extent" and "manner" within this statute, courts "take account of the specific content in which the language is used, and the broader context of the statute as a whole."⁸⁰ That context is provided by the Congressional purpose to enact it – to respond to repeated DOJ attempts to exempt its attorneys from State ethics rules.⁸¹ Since the DOJ previously sought to exempt its attorneys from State ethical rules prohibiting contact with represented persons, the phrase "to the same extent" prohibits the DOJ from deciding which State ethics rules apply to their attorneys.⁸² Since the DOJ previously sought to enjoin State disciplinary enforcement proceedings, the phrase "in the same manner" prohibits the DOJ from deciding how those State rules should be enforced.⁸³ Since the DOJ previously sought to enjoin State disciplinary enforcement proceedings, the phrase "in the same manner" prohibits the DOJ from deciding how those State rules should be enforced.⁸⁴ Accordingly, the McDade Amendment preserves State authority to adjudicate whether ethical rule is violated and, if so, the appropriate sanction. This textual interpretation is reinforced by legislative history. The Committee Report accompanying the enacted bill clarified that it "addresses concerns ...about the [DOJ's] issuance of a regulation that exempts its attorneys from the same State laws and rules of ethics which all attorneys must follow."⁸⁵ In contrast to that enacted bill, Congress also considered a bill introduced by Senator Hatch which would have required federal prosecutors to follow State ethics rules *except* when they were "inconsistent with federal law or interfered[d] with the effectuation of Federal law or policy, including the investigation of violations of Federal law."⁸⁶ However, that bill was not enacted, a Congressional decision that "strongly militates against a judgment that Congress intended a result that it expressly declined to enact."⁸⁷ That result – application of only those State ethics rules

⁸⁰ *United States v. Giraud*, 795 F.Supp. 3d at 577, citing, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.").

⁸¹ See n. 81, *supra*.

⁸² See Section E, *supra*.

⁸³ See Section E, *supra*. The DOJ's contrary interpretation would render the phrase "in the same manner" meaningless. It conflates it with their interpretation of "to the same extent," namely the substance of State ethical requirements. See 91 F.R. 10783. Their interpretation violates the well-established canon of statutory construction "to give effect, if possible, to every clause and word of a statute." *Giraud*, 795 F.Supp. 3d at 577, citing, *Williams v. Taylor*, 529 U.S. 342, 404 (2000).

⁸⁴ See Section E, *supra*.

⁸⁵ See H.R. Rep. No. 105-636 at 154 (1998), quoted in, *In re Clark*, 678 F. Supp. 3d 112, 118 (D.D.C.), *aff'd*, No. 23-7073, 2024 WL 3385251 (D.C. Cir. Jul. 12, 2024).

⁸⁶ See Federal Prosecutor Ethics Act, S 250, 106th Cong, sec 2 (1999) (commonly referred to as the "Hatch Amendment").

⁸⁷ *Giraud*, 795 F.Supp. 3d at 583.

which the DOJ determines not to be inconsistent with federal policy – is exactly what Congress rejected and what the DOJ now seeks through the Proposed Rule.⁸⁸

G. The Attorney General lacks authority to promulgate the proposed rule.

While Subsection (b) of the McDade Amendment directs the Attorney General to promulgate rules “to assure compliance with” subsection a, it does not confer her with any authority to promulgate any rule that would undermine that compliance or otherwise frustrate the Congressional purpose reflected in that statute. *See United States ex.re. O’Keefe v. McDonnell Douglas Corp.*,⁸⁹ While subsection a seeks to preserve State authority to enforce their ethics rules, the DOJ’s Proposed Rule seeks to effectively eliminate that State authority.⁹⁰ The DOJ proposal ignores the purpose of that statute and the principles of federalism that Congress, through enactment of subsection a, sought to preserve. Accordingly, the Attorney General lacks authority to promulgate this rule.

a. Language and purpose of the McDade Amendment.

When viewed in conjunction with the abuses it sought to remedy, the “to the same extent and in the same manner” language within subsection (a) expresses the Congressional intent to end the DOJ’s repeated efforts to exempt its attorneys (1) from the substance of State rules of professional conduct and (2) from the procedures which the States have developed to determine whether these rules have been violated and, if so, the appropriate sanction.⁹¹

b. Intrusion into State Reserved Power to Regulate the Legal Profession.

The DOJ’s present proposal seeks to intrude *further* into reserved State power to regulate the legal profession than any of its prior unsuccessful attempts. This primarily occurs in two ways. Firstly, those prior efforts focused upon a single State rule precluding certain contact with represented persons.⁹² Its present proposal empowers the Attorney General to suspend *any* State disciplinary proceeding, regardless of which rule is allegedly violated.⁹³ The Proposed Rule does not impose any limitation upon which State disciplinary proceeding the Attorney General may exercise her discretion to suspend. Secondly, the DOJ’s prior efforts did not *expressly* extend to either the State’s *enforcement* procedures or the sanctions that the State may impose on an ethical violation.⁹⁴ Their intrusion into those areas was exposed during litigation.⁹⁵ Their proposal now expressly empowers the Attorney General to suspend, in her unbridled discretion, anyone (or all) of those State enforcement proceedings involving a DOJ attorney.⁹⁶

⁸⁸ See 91 F.R. 10784, discussed in Section C, *supra*.

⁸⁹ 961 F. Supp. 1288, 1293-94 (E.D. Mo. 1997), *aff’d*, 132 F. 2d 1252 (8th Cir. 1998).

⁹⁰ See Section F, *supra*.

⁹¹ See Section G, *supra*.

⁹² See Section F, *supra*.

⁹³ See Section D, *supra*.

⁹⁴ See Section F, *supra*.

⁹⁵ *Id.*

⁹⁶ See Section D, *supra*.

Commenting on this proposal, the Conference of Chief Justices reaffirmed that each State, through its highest court, has “the responsibility and authority to regulate the professional conduct of attorneys” and “to enforce the ethical standards and enforcement mechanisms governing the legal profession...”⁹⁷ The Conference concluded that the proposed rule “may interfere with the ability of jurisdictions’ highest Courts to exercise their long-established authority to regulate the professional conduct of attorneys authorized to practice in their jurisdiction, which authority is essential to the public trust and confidence in the legal profession and, by extension, in the Rule of Law itself...”⁹⁸

Since the purpose of the McDade Amendment was to end these intrusions into State authority to regulate the legal profession, that statute does *not* confer to the DOJ *any* authority to promulgate their proposed regulation.

c. Rules of Statutory Construction and Constitutionally Grounded Presumptions.

As previously noted, textual analysis of the statutory language deprives the Attorney General of authority to promulgate the Proposed Rule.⁹⁹ Even though the touchstone of statutory construction¹⁰⁰ supports that conclusion, the DOJ seeks to avoid it by either misapplying or ignoring other well- established rules of statutory construction.

Whether Congress has authority to enact the McDade amendment is beyond cavil. Nevertheless, the DOJ seeks to rely upon language within *McColloch v. Maryland* wherein the Court explained how the necessary and proper clause conferred to Congress the authority to enact a statute and insulate it from State interference.¹⁰¹ Here, Congress enacted the McDade Amendment for the opposite purpose -to insulate the States from federal Executive branch interference with the exercise of State powers reserved to them in our federalist system of government.¹⁰²

In view of that interference, the DOJ bears the burden of rebutting certain presumptions in order to establish that the Attorney General has authority to promulgate the proposed regulation. One of these presumptions applies whenever a federal agency promulgates a regulation which encroaches upon powers reserved to the States. Thus, whenever the federal government seeks to regulate the legal profession,¹⁰³ a presumption against preemption applies.¹⁰⁴ To rebut this presumption, the DOJ bears the burden of demonstrating that when Congress enacted the McDade Amendment it was their “clear and manifest purpose” to preempt State application and enforcement of their ethical codes against AUSAs.¹⁰⁵ Since Congress had the *opposite* purpose¹⁰⁶

⁹⁷ Conference of Chief Justices, Resolution 1-2026 (March 24, 2026).

⁹⁸ Id.

⁹⁹ See Section F, and G(a), *supra*.

¹⁰⁰ See *Giraud*, 795 F.Supp. 3d at 577.

¹⁰¹ 91 F.R. 10783, citing, *McColloch v. Maryland*, 17 U.S. 316 (1819). Significantly, States do not rely upon any powers conferred by Congress, but rather upon their powers reserved under the Tenth Amendment to regulate the ethical conduct of DOJ attorneys. See Section E, *supra*.

¹⁰² See Section G, *supra*.

¹⁰³ See Section E, *supra*.

¹⁰⁴ See Section E, *supra*, discussing application of the presumption against preemption in *Doe*, *Ferrara*, *Lopez*, and *O’Keefe*.

¹⁰⁵ Id., discussing *Doe*, 801 F. Supp. at 849.

¹⁰⁶ See Section G, *supra*.

– to prevent DOJ interference with those State disciplinary proceedings- the DOJ is incapable of rebutting this presumption against preemption.

Additionally, application of the major questions doctrine imposes another insurmountable obstacle to the Attorney General’s authority. This doctrine requires clear congressional authorization for agency action of vast economic and political significance. Our Supreme Court “has long expressed “reluctan[ce] to read into ambiguous statutory text” extraordinary delegations of Congress’s powers.”¹⁰⁷ In “major question” cases, the Court has reasoned that “both separation of powers principles and a practical understanding of legislative intent” suggest Congress would not have delegated “highly consequential power” through ambiguous language.¹⁰⁸

Promoting the ethical conduct of attorneys, particularly federal prosecutors, is a matter of vast political significance in maintaining the integrity of our criminal justice system.¹⁰⁹ Alternatively stated, “[s]tripping fifty state supreme courts of their primary disciplinary authority over federal actors is, by definition, a “major question.””¹¹⁰ Seeking to regulate in this area, the DOJ argues the McDade Amendments are “ambiguous” due to their “silence” on enforcement mechanisms.¹¹¹ Since an ambiguity claim is legally insufficient under major questions analysis, this argument is without merit.¹¹² Moreover, the meaning of the statutory language, when viewed together with its purpose, undermines any suggestion that it confers the Attorney General with any authority to promulgate this Proposed Rule.¹¹³

d. In sufficiency of General Vesting and Supervision Statutes.

Seeking to support their reformulated¹¹⁴ preemption claim, the DOJ maintains that the general vesting and supervision confer to the Attorney General authority to promulgate this regulation.¹¹⁵ This claim was expressly rejected by the courts in *Ferrara Lopez* and *O’Keefe*.¹¹⁶ The *O’Keefe* court held “that the general statutes cited by the DOJ do not authorize it to issue regulations which exempt its attorneys from the requirements of state ethical rules.”¹¹⁷

¹⁰⁷ *West Virginia v. EPA*, 597 U. S. 697, 723, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022), quoting, *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014).

¹⁰⁸ See *West Virginia v. EPA*, 597 U.S. at 723-724.

¹⁰⁹ See Section D, supra. Accord. *New York State Bar Ass’n v. F.T.C.*, 276 F. Supp. 2d 110, 124-25 (D.D.C 2003)(regulation of legal profession is a “significant matter” in an area already subject to State oversight; clear statement of Congressional purpose required).

¹¹⁰ See NJLJ editorial, supra n. 21. See also Section D, supra. .

¹¹¹ See 91 FR 10783. To bolster their ambiguity claim, the DOJ cites to their own prior interpretation of the statute. *Id.* citing 64 FR 19274 (Reno rule). That citation is self-defeating and of little significance. It is self-defeating because the quoted language acknowledges that the DOJ did not interpret the McDade Amendment to “change the enforcement authority of the ... state authorities...” *Id.* It has little significance in light the substantial reduction in deference now accorded to administrative agency legal interpretations after *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)

¹¹² See *West Virginia v. EPA*, 597 U.S. at 723-724.

¹¹³ See Sections F and G(a), supra.

¹¹⁴ The DOJ now claims, “unlawful interference,” rather than preemption. 91 FR 10782.

¹¹⁵ 91 F.R. 10482, citing, 28 U.S.C. 503, 509, 515(a), 516, 517, 519, and 510.

¹¹⁶ See section E, supra.

¹¹⁷ 961 F. Supp. at 1293-94., citing, *Ferrara*, 847 F. Supp. at 969

Recently, the DOJ’s broad interpretation of the general vesting and delegation statutes has been rejected in another context¹¹⁸ where that interpretation would undermine more specific statutory limitations upon the exercise of the Attorney General’s management and supervisory authority. Here, that more specific statute is the McDade Amendment. Its passage reinforces the judicial rulings decided before the McDade Amendment was enacted. Hence, the general vesting and delegation do not confer the Attorney General with any authority to promulgate the Proposed Rule.

H. Proffered Explanations for initiating Rulemaking Further Demonstrate why this Proposal should be Withdrawn.

a. Failure to Recognize State Primacy in Regulating the Legal Profession, including DOJ Attorneys.

In its explanation for revisiting this issue, the DOJ reveals its refusal to accept the primacy of State bar oversight.¹¹⁹ Although regulation of the legal profession is a power reserved to the States, the DOJ “determined that the proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.”¹²⁰ That determination is truly remarkable, since all of its prior efforts to interfere with the enforcement of State bar disciplinary rules have been defeated on federalism grounds.¹²¹ Indeed, the DOJ does not even refer to, let alone attempt to distinguish, any of the judicial decisions invalidating their prior regulatory incursions.¹²²

The DOJ not only attempts to diminish State authority in bar disciplinary proceedings, it also disparages State exercise of that authority. More specifically, the DOJ suggests that State bar authorities are somehow complicit with “political activists” who are allegedly “weaponizing” the disciplinary process.¹²³ The DOJ finds “troubling” that any State bar disciplinary authority would “give credence” to disciplinary complaints.

Since the DOJ did not identify *any* disciplinary complaints that were improperly accorded such credence, the basis for its conclusion that they are without merit is even more “troubling.” It suggests that the DOJ has already decided that those complaints are not worthy of credence before any State disciplinary authority completes their investigation. Such premature determinations, in turn, suggest that the DOJ is incapable or unwilling to fairly evaluate the merits of these complaints in the future.¹²⁴

¹¹⁸ See e.g., *Giraud*, 795 F.Supp. 3d. at 603-04 (rejects DOJ interpretation; applies Federal Vacancy Reform Act exclusivity provision; concludes that Attorney General did not validly appoint an individual to the office of U.S. Attorney); *United States v. Garcia*, 2025 U.S. Lexis 194389 at * 34 (D. Nev. 2025)(same).

United States v. Ramirez, 807 F.Supp. 3d 1083, 1103-04 (C.D. Cal. 2025)(same).

¹¹⁹ See 91 Fr 10783.

¹²⁰ 91 F.R. 10786. These statements are required whenever a regulation has a “substantial direct effect” on “[t]he relationship between the national government and the states.” EO 13132 (1999), cited in, FR 10786. This relationship is affected by any regulation “that expressly or impliedly preempts state law.” Id.

¹²¹ See section F, *supra*.

¹²² Compare 91 Fr 10780-10787 (notice of rulemaking) with Section F, *supra* (summarizes cited judicial decisions)

¹²³ 91 F.R. 10782.

¹²⁴ See also Section I, *infra*.

b. Failure to Consider whether its Rule Proposal Responds to a Self-Inflicted Wound arising from Application of the Zealous Advocacy Memo.

The DOJ acknowledges that there has been an increase in the number of ethics complaints filed against DOJ attorneys, including senior officials. They attribute this increase solely to the alleged “weaponization” of the complaint process by “political activists.”¹²⁵ As a disciplinary complainant,¹²⁶ LFRL vehemently disputes that characterization. More significantly, we offer a more plausible alternative explanation- recent Executive Branch directives encourage DOJ attorneys to disregard their “independent assessment” of the legality and ethical propriety of Administration policies and to implement them anyway.

i. The Attorney General’s “Zealous Advocacy” Memo.

This memo advises all DOJ attorneys that their job is to “zealously defend the interests of the United States” which “are set by the Nation’s Chief Executive.”¹²⁷ This job extends to “vigorously defending presidential policies....” It warns that “[t]he discretion afforded [DOJ] attorneys entrusted with these responsibilities does not include latitude to substitute personal political views or judgments for those that prevailed in the election.” Imposing an obligation to advance the President’s views, the memo declares that when DOJ attorneys refuse to advance good-faith arguments in support of the President’s policies, it “deprives the President of the benefit of *his* lawyers.”¹²⁸ That declaration attempts to convert DOJ attorneys into the President’s personal lawyers, rather than their statutorily defined function as defenders and promoters of the Constitution on behalf of the people of the United States.¹²⁹

Ominously, the memo continues “[i]t is therefore the policy of the [DOJ] that any attorney who because of their personal political views or judgments [...] 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.”¹³⁰

Through reference is made to “good-faith” arguments, this memo could be interpreted to preclude discipline whenever there is a “good-faith” dispute between an AUSA and DOJ supervision as to what constitutes a “good-faith” argument. However, about 2 weeks later, in E.O. 14215, the

¹²⁵ 91 FR 10782.

¹²⁶ See Florida Complaint, set forth in, https://140252c9-fa75-46bc-bdc4-c610f4e785cb.filesusr.com/ugd/4c8d66_30609e0f5e4649cda6f33cc9c073e28e.pdf.

¹²⁷ See Zealous Advocacy memo, supra n 17. See also EO 14215 (providing that a DOJ attorney cannot “advance an interpretation of the law as the position of the United States this contravenes the President or Attorney General opinion as a matter of law....”)

¹²⁸ Zealous Advocacy memo, supra n. 17 (emphasis added). Neither the Attorney General, nor any DOJ attorney, is the President’s personal lawyer. They took the following oath “I, [insert name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”5 U.S.C. 3331.

¹²⁹ See Jacqueline Thomsen, *Bondi’s Attorney Advocacy Memo Raises Independence Concerns*, Bloomberg Law (Feb. 7, 2025) <https://news.bloomberglaw.com/us-law-week/bondi-raises-independence-concerns-with-attorney-advocacy-memo>. (“We’re seeing Donald Trump treat the Justice Department as his own personal law firm, to do his own personal bidding even when it is in violation of the laws and interests of the United States”).

¹³⁰ See n. 17, supra.

President precluded that interpretation by declaring that a DOJ attorney cannot “advance an interpretation of the law as the position of the United States that contravenes the President or Attorney General opinion as a matter of law....”¹³¹ Reading the Attorney General’s zealous advocacy memo together with the President’s E.O. 14215, the message became clear. DOJ attorneys must follow the President’s interpretation of the law or face potential employment termination.¹³² Subsequent mass terminations or forced resignations of DOJ attorneys who disagreed with the President’s legal interpretations or otherwise impeded his “mission” confirmed that the Zealous Advocacy Memo did not convey an idle threat.¹³³

ii. The “Catch 22” Situation.

The rules of professional conduct require all attorneys to be candid with the court¹³⁴ and to exercise their independent professional judgement.¹³⁵ Similar to the *Lopez* court’s analysis of the Thornburgh memo,¹³⁶ several commentators identified the “zealous advocacy” memo¹³⁷ as potentially promoting unethical behavior by DOJ attorneys.¹³⁸ This may occur through a “Catch 22” situation arising when compliance with the “zealous advocacy” memo “may conflict with DOJ attorneys’ independent evaluations of the legality of the President’s or the Attorney General’s positions.”¹³⁹ Alternatively stated, this Catch 22 situation is presented to a DOJ attorney when the President’s interpretation of the law is not supported by either existing law or a good faith interpretation of it. These attorneys can either (1) violate their ethical obligations or (2) get fired.¹⁴⁰

Maintaining their employment provides a powerful incentive for DOJ attorneys to exercise their vast discretion to “push the envelope” concerning what constitutes a good faith interpretation of the law or a sufficiently candid communication to the court. There is growing evidence that this incentive is influencing DOJ attorney conduct, potentially encouraging ethical lapses and thereby inflicting the self-imposed wound which is reflected in the increased volume of disciplinary complaints.¹⁴¹ It is submitted that this wound is most clearly revealed in the complaints detailing

¹³¹ EO 14215(Feb. 18, 2025)

¹³² See Pierga, *supra* n. -- 15, Yaroshefsky and Smith, n. 2, *supra* (the zealous advocacy memo sets the tone for today’s DOJ; “a culture of zeal with no guardrails, pursuing the President’s interests, headless of professional ethics, is the job.”)

¹³³ See Florida Ethics Complaint and DC Ethics Complaint, n. 2, *supra* (discussing termination of Erez Reuveni, forced resignations of Denise Cheung, and Danielle Sasson), Yaroshefsky and Smith, *supra* n. 2 (same), Pierga, *supra* n 15 (discussing termination of DOJ attorneys Erez Reuveni, Maurene Comey, and Liz Oyer)

¹³⁴ RPC 3.3

¹³⁵ RPC 2.1

¹³⁶ *Lopez*, 795 F.Supp. at 1460.

¹³⁷ See n. 17 --, *supra*. See also EO 14215 (2025).

¹³⁸ See, e.g., Pierga, *supra* n. 15, Sulaiman Abdur-Rahman, *Bondis’ Firing of DOJ Lawyer for Lack of ‘Zealous Advocacy’ in Deportation Case Raises Concerns*, Constitutional Accountability Center: News (May 1, 2025) <https://www.theusconstitution.org/news/bondis-firing-of-doj-lawyer-for-lack-of-zealous-advocacy-in-deportation-case-raise>

¹³⁹ Pierga, *supra* n. 15

¹⁴⁰ See Yaroshefsky and Smith, *supra* n. 2 (the zealous advocacy memo sets the tone for today’s DOJ; “a culture of zeal with no guardrails, pursuing the President’s interests, headless of professional ethics, is the job.”)

¹⁴¹ See Section H(b)(ii), *infra*.

forced resignations of DOJ attorneys who refused to implement Administration policy which, in their independent judgement, was not supported by a good faith interpretation of the law.¹⁴²

iii. The Result: Loss of Public Confidence.

The devastating adverse effects of this incentive have been recognized by Courts¹⁴³ and court observers.¹⁴⁴ It is most evident in the charging decision where the scope of prosecutorial discretion is the broadest and its exercise is the least transparent.¹⁴⁵ The decrease in the public's confidence is reflected in the reduced willingness of grand juries to return federal indictments.¹⁴⁶ By dismissing criminal complaints that they previously authorized, DOJ prosecutors have implicitly acknowledged the distorting effect of the zealous advocacy memorandum upon the exercise discretion in their initial charging decision¹⁴⁷

Judicial skepticism concerning the candor of DOJ attorneys has become so pronounced and widespread that some judges and scholars question whether the presumption regularity, traditionally accorded to DOJ attorneys, will continue.^{148, 149} Since it is the public's trust in the DOJ that empowers it to act,¹⁵⁰ erosion of that trust diminishes the its authority and ability to its attorneys to fulfill their sworn duty to protect the public.¹⁵¹ That inflicts damage upon our criminal justice system "beyond calculation."¹⁵²

¹⁴² See RPC 2.1.

¹⁴³ See Goodman et al. "The Presumption of Regularity" in Trump Administration Litigation," Just Security (Nov. 2025), <https://www.justsecurity.org/120547/presumption-regularity-trump-administration-litigation/>

¹⁴⁴ Christine Burger, The Department of Justice's Broken Accountability System, Brennan Center for Justice (October 2025) <https://www.brennancenter.org/our-work/research-reports/departments-justices-broken-accountability-system>

¹⁴⁵ "Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion" alone. *United States v. Batchelder*, 442 U.S. 114, 124 (1979). Indeed, "grand jury proceedings are secret, Ex parte [,] and largely under the control of the federal prosecutor." *United States v. Serubo*, 604 F.2d 807, 816-18 (3d Cir. 1979). In that setting, "the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny." *Id.* at 817.

¹⁴⁶ See "Prosecutors fail to obtain indictment against man who threw a sandwich at a federal agent" New York Times (Aug. 27, 2025), <https://www.nytimes.com/2025/08/27/us/politics/trump-sandwich-assault-indictment-justice-department.html>. Federal grand juries have been particularly inclined to "no bill" assault charges arising from the Administration's recent immigration enforcement activities. *Id.*

¹⁴⁷ Examples of these dismissals include the trespassing charge against Newark Mayor Ras Baraka and the obstruction charges against LFR clients who were arrested for distributing informational materials to noncitizens awaiting deportation proceedings. See Florida Ethics Complaint, supra n.2 (Baraka dismissal), section A supra (obstruction dismissals). Addressing the AUSA seeking dismissal of the charges against mayor Baraka, United States Magistrate Judge Hon. Andre M. Espinosa observed the application "suggested a failure to . . . thoughtfully consider the implications of your actions before wielding your immense power." Stephanie Nieto-Munoz, "Judge admonishes prosecutors over handling of Newark mayor's arrest, New Jersey Monitor (May, 21, 2025) <https://newjerseymonitor.com/2025/05/21/judge-admonishes-prosecutors-over-handling-of-newark-mayors-arrest/>

¹⁴⁸. See, e.g., *Hueso v. Soto*, No. 26-1455, 2026 WL 539271 at 83 (D.N.J. Feb. 26, 2026)(notes erosion of the presumption of regularity), *Kumar v. Soto*, No. 26-777 (D.N.J. Feb. 13, 2026)(DOJ concedes violating 72 orders in habeas proceedings).

¹⁴⁹ See e.g., Goodman, supra n. 144.

¹⁵⁰ See *Doe*, 801 F. Supp. at 479

¹⁵¹ See 5 U.S.C. 3331 (DOJ oath).

¹⁵² See *Doe*, 801 F. Supp. at 479.

I. Failure to Demonstrate how the Proposed rule will promote the highest standard of ethics among DOJ attorneys.

The Proposed Rule purportedly seeks to uphold the highest standard of ethics among DOJ attorneys.¹⁵³ Other than reiterating that lofty goal, there is nothing in the proposal which demonstrates that existing DOJ leadership has, can or will provide either a timely or objective assessment of alleged unethical conduct by their own attorneys.

To the contrary, the DOJ has indicated, ipse dixit, that it has already determined that every one of the existing complaints against senior DOJ officials are without merit.¹⁵⁴ Given this unlikely mathematical possibility, it is axiomatic that, under the Proposed Rule, potential conflicts of interest abound. Indeed, there is a real possibility that the former Attorney General could decide, in her sole and unfettered judgment, to resolve the complaint that the LFRL filed against her.¹⁵⁵

The Proposed Rule contemplates utilizing its existing internal process for investigating misconduct allegations against career DOJ attorneys.¹⁵⁶ That process requires initial review by their Office of Professional Responsibility (OPR), a unit that has been historically described as “a veritable graveyard where allegations of prosecutorial misconduct go to die.”¹⁵⁷ That description remains accurate, as internal DOJ sources allege that the OPR is currently ignoring at least twenty misconduct allegations involving current DOJ employees.¹⁵⁸

There is little reason to expect that it will change in the near future. The OPR’s budget for FY 2026 was cut by 26%.¹⁵⁹ In mid-2025, the head of OPR was fired and has not been replaced.¹⁶⁰ At that time, the Attorney General also fired the head of DOJ’s Department of Ethics.¹⁶¹ Relatedly, pursuant to the President’s “frivolous litigation” memo, the LFRL made a referral to the Attorney General in July, 2025.¹⁶² To date, the DOJ has not advised LFRL what, if anything, they did in response to that referral. After that referral, the subject continued to receive the Administration’s support to be appointed as a United States Attorney and continues to serve as a senior DOJ

¹⁵³ 91 F.R. 10781.

¹⁵⁴ See Section H (a) , supra, discussing 91 FR 10782.

¹⁵⁵ See Florida Ethics Complaint and DC Ethjics Complaint, supra n. 2.

¹⁵⁶ 91 F.R. 10781.

¹⁵⁷ Mike Fox, *How the DOJ Helps Federal Prosecutors Escape Accountability & Evade Public Scrutiny*, CATO INST. (Jan. 29, 2025), <https://www.cato.org/blog/how-doj-helps-federal-prosecutors-escape-accountability-evade-public-scrutiny>. See also Brooke Williams, Samata Joshi & Shawn Musgrave, *The Secretive “Discipline” Process for Federal Prosecutors Buries Misconduct Cases*, INTERCEPT (Oct. 10, 2019), <https://theintercept.com/2019/10/10/justice-department-federal-prosecutors-accountability/> (referring to OPR’s nickname, the “roach motel” where complaints go in but nothing comes out).

¹⁵⁸ See “Justice Dept. Watchdog Has Gone Silent, Lawyers for WhistleBlower Say,” New York Times (March 30, 2026) <https://www.nytimes.com/2026/03/30/us/politics/trump-administration-doj-watchdog-reuveni.html?smid=nytcore-ios-share>

¹⁵⁹ U.S. DEP’T OF JUST., FISCAL YEAR 2026 BUDGET AND PERFORMANCE SUMMARY 49 (June 13, 2025), <https://www.justice.gov/media/1403736/dl/>.

¹⁶⁰ Rebecca Beitsch, *Schiff, Democrats Demand Rationale on Bondi Firing of Ethics Attorney*, THE HILL (July 16, 2025), <https://thehill.com/homenews/administration/5404767-justice-department-fires-career-ethics-official/>

¹⁶¹ Id.

¹⁶² See LFRL Referral Letter , n. 6, supra.

official.¹⁶³ Hence, it does not appear that the DOJ is positioned to investigate any additional disciplinary complaints in a timely manner.

Most fundamentally, the DOJ fails to explain how stripping States of their existing authority to regulate the legal profession would promote the highest standard of ethics among DOJ attorneys. To the contrary, by eliminating any realistic exposure to discipline for violating their ethical obligation, the Proposed Rule would further insulate DOJ attorneys from accountability, thereby acerbating the wound already inflicted by application of the zealous advocacy memo.¹⁶⁴

J. Recommendation

Since the Proposed Rule impermissibly intrudes upon State authority to regulate the legal profession, the Attorney General lacks any legal authority to promulgate it. Hence it is respectfully submitted that the Office of Attorney General should exercise its discretion to immediately withdraw it.

Immediate withdrawal would not only avoid an inevitable and probably successful legal challenge, but it would also communicate a reaffirmation of the DOJ's historical adherence to the rule of law and commitment to the public whom it serves and from whom it derives its authority. In view of the public's eroding confidence in the DOJ, now is a particularly opportune time for that reaffirmation.

Rather than enhancing that public confidence, promulgation of the Proposed Rule promises to further diminish it. Present Executive branch directives may encourage DOJ attorneys to disregard their independent assessment of what the law permits and justice demands, thereby promoting their unethical conduct. The Proposed Rule would effectively shield DOJ attorneys from external State bar oversight. The result – a system which simultaneously encourages ethical lapses and discourages accountability for them – would benefit neither the DOJ nor the public whom it serves.

Respectfully submitted.

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¹⁶³ See *Giraud*, 795 F.Supp. 3d. at 603-04.

¹⁶⁴ See Section H(b), *supra* .