Case Nos. 14-2037, 14-2049

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/
Cross-Appellant,

v.

SUPREME COURT OF NEW MEXICO, THE DISCIPLINARY BOARD OF NEW MEXICO, AND THE OFFICE OF THE DISCIPLINARY COUNSEL OF NEW MEXICO,

Defendants-Appellants/
Cross-Appellees.

On Appeal from the United States District Court
for the District of New Mexico, D.C. Case No. 13-cv-0407
The Honorable William Johnson, United States District Judge

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS/APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

Of Counsel
MICHAEL S. GRECO
JOHN LONGSTRETH
MOLLY SUDA

LINDA A. KLEIN
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5000
Counsel for American Bar Association

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CORPORATE DISCLOSURE STATEMENT

Amicus the American Bar Association ("ABA") hereby states pursuant to Fed. R. App. P. 26.1 that it is an Illinois not-for-profit corporation. It has no corporate parents, subsidiaries or affiliates, and no publicly held corporation owns 10% or more of its stock.

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I. INTEREST OF *AMICUS*[1]

The American Bar Association (ABA) respectfully submits this *amicus* brief in support of the petition filed by the Supreme Court of New Mexico and its aligned parties for rehearing of the panel decision reported at 824 F.3d 1263 (10th Cir. 2016).

The ABA respectfully submits that Judge Tymkovich's dissenting opinion correctly concluded that 28 U.SC. § 530B ("Section 530B"), which provides that federal government attorneys practicing in a state "shall be subject to State laws and rules, and local Federal court rules . . . to the same extent and in the same manner as other attorneys in that State," applies in the grand jury context, and by its express terms resolves the pre-emption claims of the United States. The panel majority's conclusion that federal law pre-empts the full application of New Mexico Rule of Professional Conduct 16-308(E) to federal prosecutors, even though a federal statute, Section 530B, expressly requires just that, is unsupported. The decision

[1] All parties have consented to the submission of this brief. No party's counsel has authored this brief in whole or in part, and no party, party's counsel, or any person other than the *amicus*, its members, or its counsel has contributed money intended to fund preparing or submitting this brief.

thus wrongly invalidates the New Mexico rule in this context, and if followed threatens virtually identical rules in a majority of the other states.

The ABA believes it is uniquely positioned to address the issue before the Court. The ABA, the leading organization of legal professionals in the United States,[2] has worked throughout its history to promote the ethical conduct of all lawyers, adopting CANONS OF PROFESSIONAL ETHICS in 1908 and then continuously reviewing and updating them. Now known as the ABA MODEL RULES OF PROFESSIONAL CONDUCT,[3] these serve as models for ethical codes adopted by every state except California. ABA Model Rule 3.8(e), originally designated Model Rule 3.8(f), is identical to New Mexico's Rule 16-308(E).

The ABA House of Delegates in 1986 adopted the policy on which Model Rule 3.8(e) is based after receiving a report on the increasing use by federal prosecutors of grand jury subpoenas issued to attorneys that

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief; nor was it circulated to any member of the Judicial Division Council before filing.

[3] A Model Rule becomes ABA policy only after it is presented as a recommendation and adopted by vote of the ABA's 560-member House of Delegates.

intruded on the attorney-client relationship. The report was presented to the House of Delegates by undersigned co-counsel Michael S. Greco, who later served as ABA president, and who successfully defended Massachusetts' similar rule in *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987)(en banc). Recognizing that our adversarial system of justice requires protection of the centuries-old attorney-client relationship, and concerned that giving a prosecutor unbridled discretion to subpoena an opposing attorney inhibits its proper functioning, the ABA adopted a policy setting out standards for grand jury subpoenas. *See* Attachment A. This policy as amended became ABA Model Rule 3.8(e).

For the same reasons, the ABA supported the legislation that became Section 530B, opposed the Justice Department's efforts to kill or weaken it, and now submits this *amicus* brief to support the protections of the attorney-client relationship embodied in New Mexico's Rule 16-308(E) and its counterpart, ABA Model Rule 3.8(e). Far from being *pre-empted* by federal law, state authority to regulate the ethical conduct of federal prosecutors practicing in New Mexico, including the ethical considerations in issuing grand jury subpoenas to attorneys, is *expressly authorized* by federal law.

II. ARGUMENT

A. In Enacting 28 U.S.C. § 530B, Congress Expressly Rejected In All Contexts The Justice Department's Well-Publicized Position That State Ethical Rules Should Not Apply To Federal Prosecutors.

The panel majority's decision invalidating Rule 16-308(E) in grand jury practice ignores Congress' clear rejection of this position in enacting Section 530B. The history of the enactment demonstrates that Congress intended state ethical rules to apply fully to federal prosecutors, and the continuing need for Rule 16-308(E).

In the mid-1980's, criminal defense attorneys received alarming and increasing numbers of subpoenas from federal prosecutors seeking information contrary to the interests of clients. This practice threatened the critical trust between attorney and client.[4] In 1986, the Massachusetts Supreme Judicial Court, at the urging of the Massachusetts Bar Association, responded by adopting an ethical rule titled Prosecutorial Function 15 ("PF 15") that stated: "It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial

[4] The Committee on Criminal Advocacy of the Bar Association of the City of New York concluded in 1985, for example, that the practice "threatens both the integrity of the criminal justice system and the ability of large classes of defendants to obtain representation." See Attachment B, at 5-6.

approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness." *Klubock* 824 F.2d at 668 n.1. After the United States District Court for the District of Massachusetts amended its local rules to include PF 15, an equally divided *en banc* First Circuit affirmed the rule in *Klubock.* The Justice Department sought no further review.

In 1986, the ABA adopted policy that a "prosecuting attorney shall not subpoena nor cause a subpoena to be issued to an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness," with approval requiring a finding that the subpoena is "relevant to an investigation within the jurisdiction of the grand jury" and is not issued to harass, and that there "is no other feasible alternative to obtain the information sought." *See* Attachment A, at 1, 4, 7. The ABA revisited the matter two years later, noting that the 1986 Policy had failed to stem the "tide" of prosecutorial subpoenas, which continued at the rate of almost 40 per month. *See* Attachment B. The ABA adopted a new policy to strengthen

the existing one, but by 1990 the issuance of prosecutorial subpoenas was continuing unabated. The ABA thus concluded that a Model Rule was required to protect the attorney-client relationship and the functioning of a fair adversary system. The ABA accordingly adopted Model Rule 3.8(e),[5] which embodied the principles of the 1988 policy. *See* Attachment C.

In 1995, following litigation as to the prior form of the Rule, *Baylson v. Disciplinary Bd.*, 975 F.2d 102 (3d Cir. 1992), the ABA amended Model Rule 3.8(e) to remove the "judicial pre-approval" requirement. *See* http://www.americanbar.org/content/dam/aba/directories/policy/1995_am_101.authcheckdam.pdf. *See also Whitehouse v. United States Dist. Court for the Dist. of R. I.*, 53 F.3d 1349, 1355 & n.8, 1357 (1st Cir. 1995) (upholding Rhode Island's version of Rule 3.8(e) and noting that the rule is "aimed at, and principally affecting, *prosecutors*, not the grand jury," that the "attorney-to-attorney ethical concerns that the Rule was designed to mitigate are not implicated when the grand jury, acting independently, seeks to subpoena counsel," and that grand jury subpoenas had been widely viewed, including by other courts, "as a tool of prosecutorial abuse and as an

[5] Adopted as Rule 3.8(f), it was redesignated as Rule 3.8(e) in 2002.

unethical tactical device") (emphasis in original). Amended Model Rule 3.8(e) has been adopted by 31 states, including New Mexico.[6]

The applicability of state ethical rules to federal prosecutors became widely publicized in another context in 1989 when the United States Attorney General issued an internal memorandum purporting to define circumstances in which federal prosecutors were free to ignore any state ethical rule modeled upon ABA Model Rule 4.2 (the "no contact" rule). This attempt to exempt federal prosecutors from state ethical rules was protested by the ABA, state bar associations, the Judicial Conference of the United States, the Conference of Chief Justices, and the Federal Bar Association, among many others. *See United States v. Tapp*, No. CR 107-108, 2008 WL 2371422, at *6-7 (S.D. Ga. Jun. 4, 2008) (describing widespread opposition to DOJ policy).

Thus, by the late 1990s, state ethical regulation of federal prosecutors when issuing grand jury subpoenas, and when contacting represented parties, had raised substantial concern and awareness in the legal

[6] Adoption of the rule state-by-state is shown at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_e.authcheckdam.pdf. Massachusetts and Rhode Island retained the preapproval requirement.

community. At this point Congress decisively came down in favor of state ethical regulation of federal prosecutors. Over the Justice Department's opposition, Congress enacted Section 530B to provide, *without any exception in the grand jury context*, that a state's ethical rules apply *fully* to federal prosecutors practicing in that state. If the panel's decision stands, the Justice Department will have obtained reversal in this Court of Congress' decisive and explicit repudiation of the Department's position.

B. The Panel Majority Has Invented A New And Unsupported Principle of Statutory Construction In Refusing To Apply Section 530B According To Its Plain Terms.

1. Section 530B by its plain terms subjects federal prosecutors to state ethical rules in the grand jury context.

Section 530B (a) provides that "[a]n attorney for the Government *shall* be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, *to the same extent and in the same manner as other attorneys in that State*." (emphasis added). The statute expressly applies to all federal attorneys and does not suggest any exception for grand jury practice.

"[T]he starting point in any case involving the meaning of a statute [ ] is the language of the statute itself." *Group Life & Health Ins. Co. v. Royal*

Drug Co., 440 U.S. 205, 210 (1979). In the absence of a statutory definition, courts should "construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). Abundant case law confirms that "the ordinary meaning of 'shall' is 'must,'" and that a court or an agency has no discretion to take contrary action. *Cook v. FDA*, 733 F.3d 1, 7 (D.C. Cir. 2013). Section 530B does not provide for exceptions, either in the grand jury context or otherwise, to its command that federal prosecutors and other federal government attorneys are subject to state laws and rules governing attorney conduct. Nor does it establish a balancing test under which federal prosecutors can excuse themselves from compliance with a state ethical rule based on alleged interference with a federal interest.

Under these traditional rules of statutory construction Rule 16-308 (E) applies in full to federal prosecutors, including in the grand jury context. Rather than apply these principles, however, the panel majority discussed the general history and importance of the grand jury (which as *Whitehouse* noted is distinct from the prosecutor), acknowledged that Rule 16-308(E) does not come close to the "danger zone "or "nullifying effect" of congressional enactments that might conceivably interfere with the grand

jury in a constitutional sense, and surprisingly concluded that Congress was required to "speak more clearly than it has in the McDade Act" to apply Section 530B in grand jury proceedings. 824 F.3d at 1300. The panel majority cited no authority for the proposition that legislation of broad applicability does not apply to a specific case unless Congress expressly names that case.

The Justice Department correctly argued to the panel, citing *Hancock v. Train*, 426 U.S. 167 (1976), that Congress must clearly state its intent that state regulations apply to federal officials; however, courts may not ignore principles of statutory construction in determining whether Congress has done so. *Hancock* itself held that following enactment of a statute requiring federal entities to comply with state air pollution requirements "to the same extent that any person is subject to such requirements," language similar to that in Section 530B, "there is no longer any question whether federal installations must comply with established air pollution control and abatement measures." *Id*. at 172. Similarly, after enactment of Section 530B

there is no question of Congress' intent that federal prosecutors must fully comply with state ethical rules.[7]

2. The legislative history of Section 530B confirms its broad applicability.

In addition to the historical setting within which Congress enacted Section 530B, the statute's legislative history confirms that Congress intended precisely what the statute says—federal prosecutors are fully subject to the ethical rules of the state in which they practice. As summarized by one court, Section 530B "was enacted in direct response to the DOJ's attempt to exempt its lawyers from state ethical rules, . . . reflects the respect Congress has for the right of the states to regulate the ethical conduct of lawyers who practice law in their jurisdictions," and represents "a rebuff by both the legislative and judicial branches of attempts by the executive branch to regulate in an area that has been left exclusively in the hands of the states." *New York State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110,

[7] *Hancock* noted that it was a separate question "how their compliance is to be enforced," *id.*, just as Section 530B makes ethical rules applicable to federal attorneys but does not, for example, mandate exclusion of evidence obtained in violation of an ethical rule. *See, e.g., Tapp* at *18 (holding Section 530B applicable to grand juries, but noting that exclusion of evidence is a separate issue, citing *United States v. Lowery*, 166 F.3d 1119 (11th Cir.1999)).

133 (D.D.C. 2003), *aff'd sub nom. American Bar Ass'n v FTC*, 430 F.3d 457 (D.C. Cir. 2005).

The legislative history also confirms that Section 530B was intended to have a broad scope that includes grand jury proceedings. Its sponsor noted widespread "[c]oncerns about the DOJ's attempts at self-regulation" and pointed specifically to grand jury matters, including "[u]sing *grand jury subpoenas* directed against the attorney of the target of the investigation to disrupt [the] attorney-client relationship and otherwise harass the attorney and his client." 144 Cong. Rec. E301-02 (daily ed. March 5, 1998). (emphasis added). The Chairman of the Senate Judiciary Committee voiced concern that passage of Section 530B would make "the conduct of *matters before a grand jury* . . . subject to state bar review," *id*. at S12799 (daily ed. Oct. 21, 1998) (statement of Sen. Hatch)(emphasis added), and another Senator noted that "rules requiring prior judicial approval of subpoenas of attorneys . . . will indeed govern federal prosecutors' conduct" once 530B took effect. *Id*. at S12996 (daily ed. Nov. 12, 1998) (statement of Sen. Abraham). These Senators correctly read Section 530B to cover grand jury matters, exactly as it is written. The panel majority did not address this or any other legislative history.

The Justice Department and Congressional opponents of Section 530B offered amendments to limit the provision, including a rejected proposal that would have pre-empted any state ethical rule that was "inconsistent" or "interferes" with federal law or policy. *See* S. 250, 106th Cong. 1st. Sess., 145 Cong. Rec. S704 (daily ed. Jan. 19, 1999) (statement of Sen. Hatch). Having failed to either defeat or amend Section 530B, the Justice Department must comply with its terms, including in the grand jury context. *See United States v. Colorado Supreme Court* 189 F.3d 1281, 1284 (10th Cir. 1999) (Section 530B "conclusively establish[es] that a state rule governing attorney conduct is applicable to federal attorneys practicing in the state."); *United States v. Williams*, 698 F.3d 374, 392 (7th Cir. 2012) (Hamilton, J., concurring in part and dissenting in part) (Ill. S. Ct. R. 3.8(e) applied to federal prosecutors in Illinois by virtue of 28 U.S.C. § 530B and "embodies a very old norm against non-essential testimony from the opposing party's lawyer. *See, e.g., Berd v. Lovelace*, 21 Eng. Rep. 33 (1577) (excusing solicitor from testifying about his client)."); *Stern v. United States Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 22 (1st Cir. 2000)(Torruella, Stahl, and Lipez, Js., dissenting)("A prosecutor is not immunized from ethical considerations because his or her conduct takes place in connection

with grand jury proceedings."). *See also United States v. Koerber*, 966 F. Supp. 2d 1207, 1242 (D. Utah 2013)(under Section 530B "a prosecutor's failure to comply with the applicable no-contact rule is now also a violation of a federal statute."); *Tapp, supra,* (federal prosecutor violated state ethical rules in calling a witness to the grand jury without notifying his counsel); Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2088 (2000) ("the law subjects federal prosecutors to all state ethics rules [and] affords no exceptions for federal prosecutors when state ethics rules impinge on federal law enforcement interests").

In sum, the assertion that federal prosecutors should be exempt from New Mexico Rule 16-308(E) when issuing grand jury subpoenas is unsupported. Even if the Justice Department were to establish on a properly contested record that federal prosecutors are "chilled" by the rule, Congress nevertheless has expressly directed in Section 530B that prosecutors "shall be subject" to a state's laws and rules governing attorneys within the state in which they practice. While the ABA agrees that efforts of federal prosecutors are important, the need to prevent prosecutorial ethical misconduct in the grand jury context remains as

critical today as when Congress, in enacting Section 530B, expressly required that prosecutors comply, including at grand jury, with the ethical rules of the state where they practice. The real issue before this Court is not the Justice Department's alleged, but unproven, claim that Section 530B materially interferes with grand jury procedures, but the clear intent of Congress in Section 530B to prevent prosecutorial misconduct and protect the sanctity of the centuries old attorney-client relationship, a foundation of our system of justice and democracy.

III. CONCLUSION

Amicus curiae American Bar Association respectfully suggests that rehearing and/or rehearing en banc be granted.

Respectfully submitted,

/s/ John Longstreth

MICHAEL S. GRECO
JOHN LONGSTRETH
MOLLY SUDA
1601 K Street NW
Washington DC 20006
(202)-778-9000
john.longstreth@klgates.com

LINDA A. KLEIN
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5000
abapresident@americanbar.org

August 29, 2016

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing brief:

(1) all required privacy redactions have been made;

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_____/s/_____
John Longstreth

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 2,998 words, which is within the limit provided in 10th Cir. R. 29.1, excluding the items excludable under those rules, as counted by the Microsoft Word program with footnotes included.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/
John Longstreth

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016 I served a copy of the foregoing Amicus Brief of the American Bar Association in support of Appellants by CM/ECF to the Court and to:

Douglas N. Letter
U.S. Department of Justice
950 Pennsylvania Ave NW, Rm. 7519
Washington, DC 20530
(202) 514-3602
Douglas.Letter@usdoj.gov

Jaynie R. Lilley
U.S. Department of Justice
950 Pennsylvania Ave. NW, Rm. 7321
Washington, DC 20530
(202) 514-3542
Jaynie.Lilley2@usdoj.gov

James R. W. Braun
Office of the U.S. Attorney
P.O. Box 607
Albuquerque, NM 87103
(505) 346-7274

Paul J. Kennedy
Arne R. Leonard
Paul Kennedy & Associates, P.C.
201 12th Street N.W.
Albuquerque, NM 87102
(505) 842-8662
pkennedy@paulkennedylaw.com
aleonard@paulkennedylaw.com

/s/
John Longstreth