No. 11-934

In the Supreme Court of the United States

MICHAEL S. CARONA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the crime of "corruptly persuad[ing] another person * * * with intent to * * * cause or induce any person to withhold testimony * * * from an official proceeding," 18 U.S.C. 1512(b)(2)(A), includes corruptly persuading someone not to provide certain information when testifying at an official proceeding.

2. Whether federal prosecutors violated California Rule of Professional Conduct 2-100, which prohibits ex parte contact with represented parties, by using a cooperating witness, before indictment, to obtain incriminating statements from petitioner, in part through the use of false subpoena attachments.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-25) is reported at 660 F.3d 360. The opinion of the district court denying petitioner's motion to suppress (Pet. App. 55-72) is not reported, but is available at 2008 WL 1970218. The opinions of the district court denying petitioner's request for a jury instruction (Pet. App. 78-83) and petitioner's motion to arrest judgment (Pet. App. 114-129) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2011. A petition for rehearing was denied, and an amended opinion was filed, on October 25, 2011 (Pet. App. 1-4). The petition for a writ of certiorari was

filed on January 23, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of corruptly persuading a witness to withhold testimony, in violation of 18 U.S.C. 1512(b)(2)(A). Pet. App. 26. He was sentenced to 66 months of imprisonment, to be followed by two years of supervised release. *Id.* at 27-28. The court of appeals affirmed. *Id.* at 1-25.

1. From 1999 through 2008, petitioner served as the elected sheriff of Orange County, California. Pet. App. 6. A campaign supporter, Donald Haidl, testified at trial that he regularly bribed petitioner throughout that period, including by giving petitioner a speedboat in 2001 and by paying petitioner $1000 a month not to take bribes from anybody else. *Id.* at 7. Haidl further testified that petitioner "offered [Haidl] the complete power of the sheriff's department in return for raising money and supporting him." *Id.* at 6.

In 2004, acting on information from a recently fired assistant sheriff, the federal government began investigating petitioner's and Haidl's activities. Pet. App. 7; Gov't C.A. Br. 7. In March 2007, Haidl pleaded guilty, under seal, to one count of filing a false tax return and signed a cooperation plea agreement with the government. Pet. App. 7; Gov't C.A. Br. 7-8. Pursuant to that cooperation agreement, federal prosecutors directed Haidl to meet with petitioner and secretly record their conversations. Pet. App. 7. The government was aware that petitioner was represented by an attorney. *Ibid.*

The first two arranged meetings between petitioner and Haidl produced only limited evidence. Pet. App. 7. For the third meeting, to take place on August 13, 2007, the government provided Haidl with two fake "Subpoena Attachments" purporting to identify records relating to bribes from Haidl to petitioner. *Ibid.* During the August 13 meeting, petitioner made statements suggesting both that he had received payments and gifts from Haidl and that he wanted Haidl not to tell the grand jury about the transactions. *Id.* at 7-8. In particular, petitioner encouraged Haidl to "say this to you, you know . . . you never gave me cash"; told Haidl that "the answer is flat-ass didn't [expletive deleted] happen"; and stated that "unless there was a pinhole in your ceiling that evening, it never [expletive deleted] happened." *Id.* at 17-18 (alterations in original). Petitioner and Haidl also "strategized about who would be 'first on the stand' and how to 'get [their] stories straight.'" *Id.* at 18 (brackets in original).

2. On September 10, 2008, a federal grand jury in the Central District of California returned a fourth superseding indictment charging petitioner with one count of conspiring to commit mail fraud, in violation of 18 U.S.C. 371; three counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346; one count of corruptly persuading a witness to testify untruthfully, in violation of 18 U.S.C. 1512(b)(1); and one count of corrupting persuading a witness to withhold testimony, in violation of 18 U.S.C. 1512(b)(2)(A). Pet. App. 84-107. The final count was based on the August 13, 2007, meeting between Haidl and petitioner. *Id.* at 106-107.

a. Before trial, petitioner moved to suppress the statements he made during the August 13 meeting, arguing that they were obtained in violation of California

Rule of Professional Conduct 2-100. Pet. App. 55-72. Rule 2-100 generally prohibits an attorney from "communicat[ing] directly or indirectly * * * with a party [the attorney] knows to be represented by another lawyer" without the lawyer's consent, but contains an exception for "[c]ommunications otherwise authorized by law." Cal. R. Prof'l Conduct 2-100(A) and (C)(3). The comments to Rule 2-100 explain that "[o]ther applicable law * * * includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law." The state-law rule applies to federal prosecutors through the McDade Amendment, 28 U.S.C. 530B(a), which 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."

The district court denied the motion, concluding that the prosecutors had violated the rule, but that suppression was not an appropriate remedy. Pet. App. 55-72. In finding a violation, the court recognized that pre-indictment, non-custodial communications with a represented party by a cooperating witness generally fall within the rule's "authorized by law" exception. *Id.* at 58-59. But it held that the particular meeting between Haidl and petitioner in this case did not fall within the exception. *Id.* at 59-66. Although it believed that the prosecutors here "likely tried their best," *id.* at 65, to follow the rule, the court focused in particular on the fake subpoena attachments to conclude that "Haidl improperly became the 'alter ego' of the prosecutors," *id.* at 66.

In denying suppression, however, the court reasoned that "the harm caused by suppression is too high a price to pay" for a violation of Rule 2-100. Pet. App. 72. It found no precedent for that remedy in this context, noted that Rule 2-100 has proved difficult for attorneys to apply in practice, and concluded that state disciplinary procedures might provide a more appropriate remedy. *Id.* at 71-72. For similar reasons, the court also denied petitioner's later request for an instruction permitting the jury to consider the prosecutors' violation of the rule in determining the weight to be given to petitioner's recorded statements. *Id.* at 78-83.

b. The jury convicted petitioner of corruptly persuading someone to withhold testimony, in violation of 18 U.S.C. 1512(b)(2)(A), and acquitted him on the other counts. Pet. App. 9, 26. After the verdict, petitioner moved for an arrest of judgment and judgment of acquittal, raising an argument that he had previously mentioned only in a reply brief at the pre-trial stage (see *id.* at 45), namely, that the conduct alleged in the indictment did not qualify as "corruptly persuad[ing] another person * * * with intent to * * * cause or induce any person to withhold testimony, or withhold a record, document, or other object, from an official proceeding," within the meaning of Section 1512(b)(2)(A). *Id.* at 126-129. In his view, that language does not proscribe persuading someone to omit testimony on a particular topic, but instead only proscribes persuading someone to "refrain from testifying" altogether. *Id.* at 127-128.

The district court denied the motion, concluding that petitioner's argument "fails for numerous reasons." Pet. App. 128-129. First, the district court observed that "the jury instructions accepted by [petitioner] fatally undercut [petitioner's] position and may indicate that his

present interpretation of the statutory language varies from the interpretation most obvious even to [him]." *Id.* at 128. Those instructions defined "'[t]o act with intent to cause another to intentionally conceal or withhold material facts' as 'to act for the purpose of getting a person to withhold truthful information, or to omit information from statements thereby causing a portion of such statements to be misleading.'" *Ibid.* (brackets in original; emphasis and some internal quotation marks omitted). Second, the district court reasoned that petitioner's proposal "that a witness who 'withholds' testimony must by definition not testify at all * * * parses the definition of 'withhold' too finely." *Ibid.* The district court agreed with the government that persuading a witness to, for example, "make false denials," is "attempting to persuade the witness to withhold testimony within the meaning of section 1512(b)." *Id.* at 129. Finally, the district court reasoned that dismissal of the indictment was unwarranted in light of the subsequent trial and the jury's guilty verdict, which was based on "abundant facts." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-25. It held that the federal prosecutors had not violated Rule 2-100 at all (and thus the district court had not erred in declining to remedy such a violation) and that petitioner's conduct fell within the scope of Section 1512(b)(2)(A).

a. On the Rule 2-100 issue, the court of appeals observed that a previous circuit decision, *United States* v. *Talao*, 222 F.3d 1133 (9th Cir. 2000), had "adopted a 'case-by-case adjudication' approach rather than a bright line rule" for determining whether "'pre-indictment, non-custodial communications by federal prosecutors and investigators with represented parties'" violate

the rule. Pet. App. 11 (quoting 222 F.3d at 1138-1139). The court further observed that in two previous cases—*United States* v. *Powe*, 9 F.3d 68, 69 (9th Cir. 1993) (per curiam), and *United States* v. *Kenny*, 645 F.2d 1323 (9th Cir.), cert. denied, 452 U.S. 920 (1981)—it had found no violation when a cooperating co-defendant secretly recorded a conversation with a represented defendant. Pet. App. 11.

The court recognized that in this case, unlike in those cases, the prosecutors gave the informant fake subpoena attachments to use in getting petitioner to incriminate himself. Pet. App. 12. The court further recognized that the Second Circuit, in addressing a similar state ethical rule, had "held that issuing a false subpoena to an informant to 'create a pretense that might help the informant elicit admissions. . . . contributed to the informant's becoming that alter ego of the prosecutor.'" *Id.* at 12 (quoting *United States* v. *Hammad*, 858 F.2d 834, 840 (1988), cert. denied, 498 U.S. 871 (1990)) (alteration in original). It concluded, however, that "[u]nder the facts presented here," no violation of Rule 2-100 occurred. *Id.* at 13; see *id.* at 15 ("On the facts presented in this case, we conclude that there was no violation of Rule 2-100.").

The court reasoned that the use of false subpoena attachments did not cause Haidl "to be any more an alter ego of the prosecutor than he already was by agreeing to work with the prosecutor." Pet. App. 13. Rather, the false documents were "props used by the government to bolster the ability of the cooperating witness to elicit incriminating statements from a suspect," and "it has long been established that the government may use deception in its investigations in order to induce suspects into making incriminating statements." *Id.* at 13-14. "If government officials may pose as non-existent

sheiks in an elaborately concocted scheme, supply a necessary ingredient for a drug operation, and utilize landing strips, docking facilities, and other accoutrements of an organized smuggling operation, all in order to catch criminals," the court reasoned, "then their use of a subpoena in the name of an undercover agent to enable him to retain his credibility with suspected criminals seems innocuous by comparison." *Id.* at 14 (quoting *United States* v. *Martino*, 825 F.2d 754, 760 (3d Cir. 1987)). The court of appeals added that "[i]t would be antithetical to the administration of justice to allow a wrongdoer to immunize himself against such undercover operations simply by letting it be known that he has retained counsel." *Id.* at 15.

b. On the Section 1512(b)(2)(A) issue, the court of appeals "agree[d] with the district court's conclusion that [petitioner] violated § 1512(b)(2)(A) by attempting to persuade Haidl to withhold testimony about particular topics in the course of giving false testimony." Pet. App. 18; see *id.* at 15-24. The court first observed that the *Black's Law Dictionary* definition "of 'withhold' includes 'to omit to disclose upon request, as, to withhold information.'" *Id.* at 17 (quoting *Black's Law Dictionary* 1437 (5th ed. 1979)); see *ibid.* (noting that statute was enacted in 1982). The court also noted that petitioner identified no court of appeals that had expressly adopted his proposed narrowing construction and that several of the cases he cited appeared to undercut that construction. *Id.* at 18-20. And the court rejected petitioner's argument that his construction was compelled by the rule of lenity, observing that "the phrase 'withhold testimony' in § 1512(b)(2)(A) does not contain a 'grievous ambiguity or uncertainty'" that might trigger the rule's application. *Id.* at 23 (citation omitted).

The court of appeals additionally rejected petitioner's argument that his construction was necessary in order to avoid rendering a neighboring subsection, 18 U.S.C. 1512(b)(1), superfluous. Pet. App. 20-23. Section 1512(b)(1) prohibits "corruptly persuad[ing] another person * * * with intent to * * * influence, delay, or prevent the testimony of any person in an official proceeding." The court of appeals acknowledged some overlap between the two sections, but reasoned that because they "do not completely overlap, * * * neither one is superfluous, even if both might apply to [petitioner's] conduct." *Id.* at 21-22. The court observed that "a defendant who intends for a person with no relevant information to provide a grand jury with a fabricated alibi supporting the defendant would transgress § 1512(b)(1) by corruptly influencing that person's testimony, but would not appear to violate § 1512(b)(2)(A) because the defendant did not intend for that witness to 'withhold testimony.'" *Id.* at 22. "Conversely," the court continued, "a defendant who persuades someone else to conceal and fail to produce a document that had been subpoenaed would appear to violate § 1512(b)(2)(A), which explicitly covers withholding a document, but not § 1512(b)(1), which appears to cover only prevention of the testimony of a person." *Ibid.*

ARGUMENT

Petitioner renews (Pet. 17-39) his arguments that 18 U.S.C. 1512(b)(2)(A) does not cover his conduct and that he was entitled to suppression or some alternative remedy based on an asserted violation of a state ethics rule. The court of appeals' decision is correct and no further review is warranted.

1. a. The court of appeals correctly concluded that petitioner "corruptly persuad[ed] another person * * * with intent to * * * cause or induce any person to withhold testimony * * * from an official proceeding," 18 U.S.C. 1512(b)(2)(A), when he tried to convince Haidl not to tell the grand jury about a longstanding bribery scheme. As petitioner himself acknowledges, the term "withhold" means "[t]o omit to disclose upon request; as to withhold information." Pet. 20 (quoting *Black's Law Dictionary* 1437 (5th ed. 1979)). Had petitioner gotten what he wanted, Haidl would have "omit[ted]" to provide testimony, in response to questions posed to him during a grand-jury appearance, about a particular topic (bribery of petitioner). The plain language of Section 1512(b)(2)(A) squarely prohibited petitioner's effort to secure that result.

As this Court recognized in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005), a person can "withhold testimony" by withholding some, but not all, testimony. The Court in that case offered examples of conduct that would constitute "'persuading' a person 'with intent to . . . cause' that person to 'withhold' testimony or documents." *Id.* at 703 (brackets omitted). The Court's examples—"a mother who suggests to her son that he invoke his right against compelled self-incrimination" and "a wife who persuades her husband not to disclose marital confidences," *id.* at 704—are both scenarios in which the prospective witness could provide testimony on some topics (*i.e.*, topics that do not require self-incrimination or disclosure of marital confidences) but not others.

A person who appears before the grand jury and then omits to provide relevant information in response to questions is naturally understood to be "withholding

testimony." That is so even though he may additionally be giving false testimony (*e.g.*, by falsely denying knowledge of relevant events). Whether the witness refuses to answer questions or offers a lie in place of the testimony he is declining to provide, he is "withholding testimony" all the same. In both cases, he has "omit[ted] to disclose" testimony, *Black's Law Dictonary* 1437 (5th ed. 1979)—namely, the truthful testimony that the question sought to elicit.

Petitioner contends (Pet. 22-24) that this interpretation of the phrase "withhold testimony" would "render superfluous" Section 1512(b)(1)'s prohibition on corrupt persuasion with an intent to "influence" testimony. But as the court of appeals recognized (Pet. App. 20-23), no superfluity exists, because each subsection covers at least some conduct that the other does not. See *Russello* v. *United States*, 464 U.S. 16, 24 & n.2 (1983) (recognizing that sections may overlap without being superfluous). First, persuading someone to fabricate additional testimony would be an example of seeking to "influence" testimony (and thus within the scope Section 1512(b)(1)) but not to "withhold" testimony (and thus outside the scope of Section 1512(b)(2)(A)). Petitioner suggests (Pet. 24) that even this would be "withholding" testimony, but inventing testimony on a topic that would not otherwise come up (*e.g.*, an alibi defense) does not involve "withhold[ing]" testimony. Pet. App. 22. Second, persuading someone to invoke the privilege against self-incrimination unjustifiably (thereby causing no testimony at all to be given on a particular topic) would be an example of seeking to "withhold" testimony but not to "influence" it.

Petitioner's reliance (Pet. 24-26, 31-32) on legislative history and the rule of lenity is likewise unavailing. As

a threshold matter, the plain language of the statute obviates the need to resort to either. "[R]eference to legislative history is inappropriate when the text is unambiguous," *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 132 (2002), and the rule of lenity is inapplicable absent "a grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks omitted). In any event, petitioner identifies nothing in the legislative history to demonstrate that Congress necessarily viewed the phrase "withhold testimony" as restricted solely to occasions when a witness is entirely absent from the proceedings. Although at least some Members of Congress appear to have contemplated that corrupt persuasion to give false testimony could be prosecuted under Section 1512(b)(1), that does not imply that such conduct is immune to prosecution under Section 1512(b)(2)(A) when it involves "withhold[ing] testimony." For reasons already explained, the subsections need not be read as mutually exclusive. See *Russello*, 464 U.S. at 24 & n.2.

b. Petitioner fails to identify any decision of any other court of appeals that explicitly adopts his proposed construction of the statute. He suggests (Pet. 27-31) that prosecutions concerning false testimony are typically brought under Section 1512(b)(1), rather than Section 1512(b)(2)(A). But even if that were so, that prosecutorial practice would not indicate that Congress's use of the term "withhold" should receive petitioner's unnaturally cramped interpretation. And in any event, the court of appeals correctly highlighted (Pet. App. 19-20) several Section 1512(b)(2)(A) cases that, like this one, involved the withholding of testimony on certain subjects. See *United States* v. *Vampire Nation*, 451 F.3d

189, 194 (3d Cir.) (defendant encouraged witness not to give information about a particular transaction), cert. denied, 549 U.S. 970 (2006); *United States* v. *Freeman*, 208 F.3d 332, 335 (1st Cir. 2000) (defendant encouraged witnesses to "not to say anything" about a nightclub where there was illegal activity); *United States* v. *Johnson*, 968 F.2d 208, 210 (2d Cir.) (defendant encouraged witness to "change his story and tell them that he didn't know what he was talking about") (alterations omitted), cert. denied, 506 U.S. 964 (1992).

Petitioner errs in suggesting (Pet. 19) that the decision below is "in striking tension" with this Court's decision in *Arthur Andersen*. In that case, the Court considered jury instructions in a Section 1512(b)(2)(A) prosecution for corrupt persuasion to destroy documents. 544 U.S. at 698, 702. The Court concluded that the instructions were erroneous because they "failed to convey the requisite consciousness of wrongdoing" and "led the jury to believe that it did not have to find *any* nexus between the 'persuasion' to destroy documents and any particular proceeding." *Id.* at 706-707. That conclusion has no direct bearing on the question presented here, which concerns neither Section 1512(b)(2)(A)'s mens rea requirement nor its requirement of a nexus with a particular proceeding, but instead concerns the meaning of the phrase "withhold testimony." As explained above (see p. 10, *supra*), to the extent that *Arthur Andersen* discussed that issue (which was not directly presented in that case), its discussion supports the decision below. No further review of the application of Section 1512(b)(2)(A) in this case is warranted.

2. Nor is further review warranted of petitioner's contention (Pet. 32-29) that prosecutors violated California Rule of Professional Conduct 2-100. The contention

is incorrect, and the issue, in any event, ultimately turns on an interpretation of state ethics law.

As previously noted (p. 4, *supra*), Rule 2-100 (which applies to federal prosecutors under the McDade Amendment, 28 U.S.C. 530B(a)) generally bars direct or indirect communication with a represented party, but contains an exception for "the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law." Courts of appeals addressing Rule 2-100 and similar state-law rules have uniformly concluded that such rules do not categorically bar pre-indictment, non-custodial contact with a represented party for purposes of criminal investigation. See Pet. App. 10-15; *United States* v. *Brown*, 595 F.3d 498, 514-516 (3d Cir. 2010), cert. denied, 131 S. Ct. 903 (2011); *United States* v. *Balter*, 91 F.3d 427, 435-436 (3d Cir.), cert. denied, 519 U.S. 1011 (1996); *United States* v. *Heinz*, 983 F.2d 609, 613 (5th Cir. 1993) (per curiam); *United States* v. *Ryans*, 903 F.2d 731, 739 (10th Cir.), cert. denied, 498 U.S. 855 (1990); *United States* v. *Hammad*, 858 F.2d 834, 839 (2d Cir. 1988); *United States* v. *Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States* v. *Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983); see also *United States* v. *Ford*, 176 F.3d 376, 382 (6th Cir. 1999). The court of appeals' decision in this case (Pet. App. 10-15) is consistent with that uniform authority.

The court of appeals cited its decision in *United States* v. *Talao*, 222 F.3d 1133 (9th Cir. 2000), for the proposition that it has "adopted a 'case-by-case adjudication' approach rather than a bright line rule" for determining whether particular "'pre-indictment, non-custodial communications by federal prosecutors and investigators with represented parties'" violates the rule. Pet.

App. 11 (quoting 222 F.3d at 1138-1139). Petitioner's suggestion (Pet. 35-38) that this case conflicts with *Talao*—a case involving different facts and in which the court of appeals in fact *rejected* a Rule 2-100 claim, 222 F.3d at 1135-1136, 1140—is accordingly misplaced. In any event, even if a intra-circuit conflict existed, it would not warrant certiorari. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Petitioner additionally errs in asserting (Pet. 38-39) a conflict between the court of appeals' decision here and *United States* v. *Hammad*, *supra*. The Second Circuit held in *Hammad* that a federal prosecutor had violated Rule DR-7-104(A)(1) of the American Bar Association's Model Code of Professional Responsibility (an analogue of California's Rule 2-100) when the prosecutor "issued a subpoena for the informant, not to secure his attendance before the grand jury, but to create a pretense that might help the informant elicit admissions from a represented suspect." 858 F.2d at 840. The Second Circuit emphasized, however, that "the use of informants to gather evidence against a suspect will frequently" be consistent with the bar association rule; that "case-by-case adjudication" is the proper course for determining violations; and that it had simply concluded that the prosecutor's actions had violated the rule "under the circumstances of this case." *Id.* at 839-840.

This case differs from *Hammad* in two material ways. First, the prosecutors here did not use their authority actually to "issue[] a subpoena," but instead merely created documents that appeared to be subpoena attachments. Pet. App. 7. *Hammad*'s case-specific holding would not necessarily extend to these particular

circumstances. See *United States* v. *Schwimmer*, 882 F.2d 22, 29 (2d Cir. 1989) (stating that *Hammad*'s holding is "limited * * * to the circumstances of that case."), cert. denied, 493 U.S. 1071 (1990).

Second, and more fundamentally, the decision in this case did not interpret the same rule at issue in *Hammad*, but instead interpreted a different rule—a California ethics rule. The interpretation of that rule is a question of California law, on which a decision of the Second Circuit has no direct bearing. Rather than supplying a uniform federal standard, the McDade Amendment instead makes federal attorneys subject to state and local ethics rules. A consequence of Congress's choice is that the ethical rules governing federal attorneys can potentially vary by jurisdiction.

There is no reason for this Court to address the interpretation of California's particular no-contact ethics rule. The final word on the application of California's ethics rules would not lie in any federal court, but instead with the California courts. See, *e.g.*, *Balter*, 91 F.3d at 435 (acknowledging that state decisions would be controlling on interpretation of New Jersey's no-contact ethics rule). This Court typically defers to regional circuits' interpretation of state law, see, *e.g.*, *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998), and deciding a question that could be superseded by a state decision is not a useful investment of this Court's limited resources, see, *e.g.*, *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 235 & n.3 (1991).

Further review here would be inappropriate for the additional reason that, even if the Court were to find an ethical violation, petitioner has no reasonable prospect of altering the outcome of his criminal case. The district court concluded that neither suppression nor any other

remedy suggested by petitioner was warranted under the circumstances. See Pet. App. 71-72, 78-83. Petitioner identifies no authority for the proposition that the district court was compelled to provide such a remedy based on a violation of the rule, and the government is aware of none. See *Hammad*, 858 F.2d at 842 (concluding that the district court abused its discretion in suppressing evidence for violation of no-contact rule); *United States* v. *Lowery*, 166 F.3d 1119, 1125 (11th Cir.) (under Fed. R. Evid. 402, neither state ethical rules nor district courts' local rules can be a basis for suppressing otherwise admissible evidence), cert. denied, 528 U.S. 889 (1999); *Heinz*, 983 F.2d at 613 ("[O]ur research shows that no court has ever suppressed evidence in a criminal case because a prosecutor on the prosecutorial team—much less an investigator or an informant—violated [the bar association no-contact rule] in the course of an investigation and before the grand jury indicted the defendant.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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