No. 10-326

In the Supreme Court of the United States

FRANKLIN C. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals misinterpreted Pennsylvania Rule of Professional Conduct 4.2 by holding that petitioner's statements to a confidential informant were not obtained in violation of that Rule and did not warrant suppression under the McDade Amendment, 28 U.S.C. 530B(a), which provides that government attorneys are subject to state attorney ethics rules.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rules:

Statutes and rules—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A58) is reported at 595 F.3d 498. The memorandum opinion of the district court (Pet. App. B1-B31) is reported at 239 F. Supp. 2d 535.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2010. A petition for rehearing was denied on May 6, 2010 (Pet. App. C1-C2). On July 27, 2010, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including September 3, 2010, and the petition was filed on that date. 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 Middle District of Pennsylvania, petitioner was convicted of one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371; four counts of filing false statements with the Securities and Exchange Commission, in violation of 18 U.S.C. 1001(a)(1); one count of conspiring to obstruct justice, in violation of 18 U.S.C. 371; one count of obstructing grand jury proceedings, in violation of 18 U.S.C. 1503; one count of obstructing government agency proceedings, in violation of 18 U.S.C. 1505; and one count of intimidating a witness, in violation of 18 U.S.C. 1512(b). The court of appeals affirmed petitioner's convictions but vacated petitioner's sentence and remanded for resentencing in light of *United States* v. *Booker*, 543 U.S. 220 (2005). Pet. App. A1-A58. On remand, the district court sentenced petitioner to 90 months of imprisonment, to be followed by two years of supervised release.

1. Petitioner worked for the Rite Aid Corporation, the operator of a chain of retail drug stores, for more than 30 years. He eventually became one of its top executives and served until 2000, when he resigned. Pet. App. A3.

From 1995 until 1999, while petitioner was serving first as Rite Aid's Chief Legal Counsel and then as a Vice Chairman of Rite Aid's Board of Directors, Martin Grass was Rite Aid's Chief Executive Officer. During this period, Rite Aid undertook an aggressive expansion. Rite Aid's profits and its stock price both increased significantly. Pet. App. A3.

Beginning in March 1999, however, Rite Aid suffered financial reversals. That month, Rite Aid stock lost more than half its value in a single day when the com-

pany announced significantly lower-than-expected earnings and higher-than-expected expenses. The stock price continued to fall over the next several months, and on October 18, 1999, Rite Aid's Board of Directors announced that Grass was resigning as CEO and that the company intended to restate its income negatively for fiscal years 1997-1999. Rite Aid's new leadership then launched an internal investigation. In July 2000, that investigation resulted in a restatement of income of more than $1 billion—at the time, the largest corporate restatement in United States history—for fiscal years 1998 and 1999 and the first quarter of fiscal year 2000. Pet. App. A3-A4.

The Securities and Exchange Commission (SEC) commenced a civil investigation into Rite Aid's accounting practices, and the Federal Bureau of Investigation (FBI) launched a criminal investigation in conjunction with the United States Attorney's Office for the Middle District of Pennsylvania. FBI agent George Delaney and Assistant United States Attorney (AUSA) Kim Douglas Daniel led the criminal investigation. Petitioner retained counsel and informed the government that he had done so. Pet. App. A4.

On February 12, 2001, AUSA Daniel contacted petitioner's counsel and arranged a meeting between government representatives and petitioner for April 4, 2001. On March 28, 2001, AUSA Daniel faxed petitioner's counsel a letter setting out the topics to be discussed at the April 4 meeting. Petitioner subsequently changed his mind and decided not to meet with the government. Pet. App. A4.

The government was also communicating with Timothy Noonan, who had been Rite Aid's President and Chief Operating Officer during Grass's tenure as CEO.

Noonan informed the government that, at petitioner's request, he had agreed to meet petitioner on March 13, 2001. Noonan agreed to act as a confidential informant for the government and to secretly record his conversation with petitioner. Agent Delaney instructed Noonan to steer the conversation toward the topics listed in the agenda letter that AUSA Daniel had sent to petitioner's counsel. Noonan attached a hidden microphone to his body and recorded his conversation with petitioner. Pet. App. A4-A5.

On March 30, 2001, petitioner and Noonan met again at Noonan's request, and Noonan again recorded their conversation. In order to focus the conversation on topics related to the government's investigation, Noonan brought to the March 30 meeting a letter from AUSA Daniel to Noonan's counsel. The letter purported to set forth a discussion agenda for an upcoming meeting between Noonan and the government, but the government had actually created the letter for purposes of Noonan's meeting with petitioner. Pet. App. A5.

Noonan also recorded conversations with petitioner on April 1, 2001; April 27, 2001; and May 21, 2001, as well as a conversation with Grass and petitioner on May 2, 2001. In addition, the FBI videotaped each of Noonan's conversations with petitioner during this period, except for the April 27 meeting. Pet. App. A5.

2. On June 21, 2002, a grand jury in the Middle District of Pennsylvania returned a multi-count indictment against petitioner, Grass, and two other Rite Aid executives. The indictment charged petitioner with multiple counts of securities, mail, and wire fraud, false statements, obstruction of justice, witness tampering, and conspiracy. Pet. App. A5-A6; Gov't C.A. Br. 6. Peti-

tioner's three co-defendants all pleaded guilty to various counts before trial. Pet. App. A6 n.2; Gov't C.A. Br. 7-8.

3. Before trial, petitioner moved to suppress the conversations secretly recorded by Noonan. Petitioner argued that the recordings had been obtained in violation of the McDade Amendment, 28 U.S.C. 530B(a), and Pennsylvania Rule of Professional Conduct 4.2.

The McDade Amendment 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." 28 U.S.C. 530B(a). At the relevant time, Pennsylvania Rule of Professional Conduct 4.2 provided:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Pa. R. Prof'l Conduct 4.2 (1988) (amended 2005).[1] A separate provision of the Pennsylvania rules provided that an attorney engages in misconduct if he violates the Rules of Professional Conduct through the acts of another. Pa. R. Prof'l Conduct 8.4 (1988) (amended 2005). Petitioner contended that AUSA Daniel had violated these Pennsylvania Rules by using Noonan to elicit information from petitioner about the subject matter of

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[1] Effective January 1, 2005, Rule 4.2 was amended to substitute "person" for "party" and "to do so by law or a court order" for "by law to do so." 42 Pa. Cons. Stat. Ann., R. Prof'l Conduct 4.2 historical notes (West 2008). See also note 5, *infra*.

the government's investigation at a time when AUSA Daniel knew that petitioner was represented by counsel with respect to that investigation. Pet. App. B8.

The district court denied the motion to suppress, concluding that AUSA Daniel did not violate the Pennsylvania Rules of Professional Conduct and that, even if he had, suppression of the evidence would not be an appropriate remedy. Pet. App. B1-B31.

The district court first concluded that AUSA Daniel was "authorized by law" (as Pennsylvania's Rule 4.2 used that term) to communicate with petitioner, because pre-indictment non-custodial interrogations by government agents are contacts authorized by law. Pet. App. B8-B23. The court noted that the Third Circuit had previously held, in interpreting an analogous New Jersey rule of professional conduct, that "pre-indictment investigation by prosecutors is precisely the type of contact exempted from [the New Jersey rule] as 'authorized by law.'" *Id.* at B12 (quoting *United States* v. *Balter*, 91 F.3d 427, 436 (3d Cir.) (Alito, J.), cert. denied, 519 U.S. 1011 (1996)).

The court then stated that, in any event, suppression would not be an appropriate remedy for a violation of Rule 4.2 on these facts. The court concluded that the primary purpose of the rule is to protect the confidential nature of the attorney-client relationship, and that suppression here would not serve that purpose. Pet. App. B23-B28. The court added that the Government had acted in good faith, so the deterrent effect of suppression would be, "at best, minimal," and suppression would be "unduly harsh." *Id.* at B30, B31. Petitioner's remedy, the court concluded, was to file a complaint with the state board that disciplines attorneys. *Id.* at B31.

4. A jury found petitioner guilty of conspiring to commit accounting fraud, filing false statements with the SEC, conspiring to obstruct justice, obstructing grand jury proceedings, obstructing government agency proceedings, and witness tampering. The jury found, inter alia, that petitioner had conspired to inflate Rite Aid's reported earnings for fiscal year 1999 and to create backdated severance letters awarding petitioner and other executives millions of dollars in compensation. Pet. App. A6.

On October 14, 2004, the district court sentenced petitioner to 120 months of imprisonment, to be followed by two years of supervised release. Pet. App. A2, A6; Gov't C.A. Br. 9-10.[2]

5. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing under this Court's intervening decision in *Booker*. Pet. App. A1-A58. As relevant here, the court affirmed the district court's denial of petitioner's motion to suppress the Noonan tapes. *Id.* at A29-A35.[3]

a. The court of appeals concluded that the "well-established investigatory technique" used in this case was "'authorized by law'" and therefore within an exception to the Pennsylvania rule against contacting a represented party. Pet. App. A34. The court drew support

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[2] The parties proceeded to litigate post-verdict motions by petitioner (not at issue here) that consumed the next several years before a final, appealable judgment was entered. See Pet. App. A15-A22.

[3] The court of appeals also rejected petitioner's claims that the district court abused its discretion in denying his Rule 33 motion based on newly discovered evidence, Pet. App. A7-A29, and abused its discretion and committed plain error by interfering in the plea negotiation process, *id.* at A35-A49. Petitioner does not renew those claims in this Court.

from its previous holding in *Balter* that pre-indictment non-custodial interrogations by government agents are contacts "authorized by law" under a New Jersey no-contact rule similar to the Pennsylvania rule at issue here. *Id.* at A31-A32 (citing *Balter*, 91 F.3d at 435-436). The court acknowledged that there was no Pennsylvania case squarely addressing this situation, *id.* at A33, but it noted the compelling reasons to conclude that the Pennsylvania rule should not be interpreted to prohibit the investigative technique used here. As the court explained, "[p]rohibiting prosecutors from investigating an unindicted suspect who has retained counsel would serve only to insulate certain classes of suspects from ordinary pre-indictment investigation" and "would significantly hamper legitimate law enforcement operations by making it very difficult to investigate certain individuals." *Id.* at A31 (quoting *Balter*, 91 F.3d at 436).

The court also noted that every federal court of appeals that has applied an analogous state professional-conduct rule to the investigative work of federal prosecutors has concluded that the state rules permit prosecutors to conduct pre-indictment investigations like the one here. Pet. App. A31-A32 (citing cases). The sole decision finding a violation, from the Second Circuit, concluded "that a federal prosecutor overstepped the boundaries of legitimate pre-indictment investigation by preparing a false grand jury subpoena." *Id.* at A32 (citing *United States* v. *Hammad*, 858 F.2d 834, 839-840 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990)). In this case, by contrast, the court of appeals concluded that the government did not overstep any such boundaries. Although the government did create a fictitious letter addressed to Noonan's counsel, the letter "did not invoke the authority of the District Court or contain any forged

signatures, the letter was not addressed to [petitioner], and the letter in no way purported to compel any action or inaction on [petitioner's] behalf." *Id.* at A34.

Finally, the court noted that the enactment of the McDade Amendment did not change the analysis of what the state rules prohibit, because "Congress did not enlarge on the type of conduct that state rules forbid," but only made the state rules applicable to federal prosecutors. Pet. App. A33.

b. The court of appeals also agreed with the district court's holding that suppression would not be the appropriate remedy "even if there had been an ethical violation." Pet. App. A35 n.23. The court noted that although the Second Circuit in *Hammad* had found that recorded statements were obtained in violation of the state ethical rule, it had reversed the suppression of those statements. *Ibid.* (citing 858 F.2d at 841-842).

6. The court of appeals denied rehearing en banc without recorded dissent. Pet. App. C1-C2.

7. On remand, while the instant petition for a writ of certiorari was pending, the district court resentenced petitioner to 90 months of imprisonment, to be followed by two years of supervised release. Am. Judgment 3-4. Petitioner's appeal from that judgment is pending.

ARGUMENT

Petitioner renews (Pet. 10-28) his claim that suppression of his statements to the government's confidential informant was required under the Pennsylvania Rules of Professional Conduct and the McDade Amendment. The court of appeals correctly rejected that claim, and its interpretation of the Pennsylvania rule does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 11-22) that the prosecutor violated Rule 4.2 of the Pennsylvania Rules of Professional Conduct when he used a confidential informant to obtain pre-indictment statements from petitioner. That contention is incorrect and does not warrant further review in any event.

a. Rule 4.2 prohibits communication with a represented party except (as relevant here) when the communication is "authorized by law." As the court of appeals correctly held, when a prosecutor investigating a crime makes contact with a suspect who has not been charged, that contact is authorized by law. Accord, *e.g.*, *United States* v. *Balter*, 91 F.3d 427, 435-436 (3d Cir.) (Alito, J.), cert. denied, 519 U.S. 1011 (1996); *United States* v. *Ryans*, 903 F.2d 731, 739 (10th Cir.) ("We agree with the majority of courts which have considered the question that [the no-contact rule] was not intended to preclude undercover investigations of unindicted suspects merely because they have retained counsel."), cert. denied, 498 U.S. 855 (1990). Neither the Fifth Amendment nor the Sixth Amendment prohibits such contact, and petitioner does not contend otherwise.[4] See, *e.g.*, *Hoffa* v. *United States*, 385 U.S. 293, 303-304 (1966) (holding that a "necessary element of compulsory self-incrimination is some kind of compulsion"); *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966) (applying procedural safeguards to custodial interrogation of a criminal defendant); *United States* v. *Henry*, 447 U.S. 264, 269 (1980) (holding that the Sixth Amendment right to counsel attaches upon the initiation of the "'critical stages' of the prosecution"). The court

[4] A separate provision of the Pennsylvania rules, Rule 4.4(a)—which is not at issue here—restricts attorneys from "us[ing] methods of obtaining evidence that violate the legal rights of [a person who is not his client]."

of appeals therefore properly concluded that the prosecutor in this case did not violate Rule 4.2.

Petitioner observes (Pet. 15-16) that no Pennsylvania case has yet specifically addressed the type of contact involved here.[5] But in the absence of such a Pennsylvania decision, the court of appeals was not required (as petitioner suggests) to infer that no such authorization exists. Rather, the court of appeals properly looked to other federal decisions interpreting state rules that are identically or similarly worded and derived. Because the contact was constitutionally permissible and sanctioned by several courts, the court of appeals properly concluded that it was likewise "authorized" under Rule 4.2. Commentary to American Bar Association (ABA) Model Rule 4.2, in effect at the time of the contact in this case, confirms as much:

> Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is *applicable judicial precedent* that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.

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[5] After the conduct at issue in this case, however, Pennsylvania amended the commentary to Rule 4.2 to state: "Communications authorized by law may also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." Pa. R. Prof'l Conduct 4.2 cmt. 5 (effective Jan. 1, 2005).

Model Rules of Prof'l Conduct R. 4.2 cmt. 2 (2001) (emphasis added). The Third Circuit properly looked to its own precedent applying the similar New Jersey rule.[6] Thus, contrary to petitioner's contention (Pet. 15-16), the court of appeals was not required to find an ethical violation in the absence of a *Pennsylvania* decision specifically authorizing the type of contact at issue here.

b. Petitioner incorrectly argues (Pet. 17-22) that the question presented has divided the courts of appeals. There is no circuit conflict warranting this Court's review. Every court of appeals to have considered the question has concluded that pre-indictment, non-custodial contact with a represented party does not violate a state no-contact rule. See *Balter*, 91 F.3d at 435-436; *United States* v. *Powe*, 9 F.3d 68, 69 (9th Cir. 1993) (per curiam); *United States* v. *Heinz*, 983 F.2d 609, 612-613 (5th Cir. 1993); *Ryans*, 903 F.2d at 739; *United States* v. *Sutton*, 801 F.2d 1346, 1365 (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).

Petitioner's chief authority, *United States* v. *Hammad*, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990), does not conflict with the consensus view that the court of appeals applied in this case. In *Hammad*, the Second Circuit agreed with the general proposition at issue here, *i.e.*, that "a prosecutor is 'authorized by

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[6] Petitioner suggests here (Pet. 17 n.9), and argued below (Pet. C.A. Reply Br. 25), that *Balter* was inapposite because the defendant in that case had not yet been indicted and so was not a "party" under the New Jersey rule at issue in that case. The court of appeals in *Balter* squarely held that the prosecutor did not violate the New Jersey rule *both* because the prosecutor's conduct was "authorized by law" *and* because Balter was not yet a "party." See 91 F.3d at 436.

law' to employ legitimate investigative techniques in conducting or supervising criminal investigations, and the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization," *id.* at 839. The court then stated that, "[n]otwithstanding this holding," "in some instances" a government prosecutor may violate the no-contact rule through pre-indictment conduct. In the case before it, the court concluded that the prosecutor had engaged in misconduct by issuing a sham grand jury subpoena for the confidential informant designed to "create a pretense that might help the informant elicit admissions from a represented suspect." *Id.* at 840; see also *id.* at 836. Noting that an ABA standard for prosecutors considered the use of sham subpoenas to secure testimony to be improper, see *id.* at 840 n.1, the court concluded that the prosecutor's contact with the defendant was not authorized by law. The court then noted that it was not purporting to state a general rule; rather, the determination of whether a contact violates a no-contact rule "is best accomplished by case-by-case adjudication." *Id.* at 840. The court also reiterated that "the use of informants by government prosecutors in a preindictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the 'authorized by law' exception to [the ABA model rule] and therefore will not be subject to sanctions." *Ibid.* Indeed, just one year later, the Second Circuit made clear that its holding in *Hammad* was "limited * * * to the circumstances of that case." *United States* v. *Schwimmer*, 882 F.2d 22, 29 (2d Cir. 1989), cert. denied, 493 U.S. 1071 (1990); accord *Grievance Comm.* v. *Simels*, 48 F.3d 640, 642 n.1, 649 (2d Cir. 1995). Accordingly,

the fact-bound decision in *Hammad* does not conflict with the court of appeals' decision in this case.[7]

Petitioner also cites (Pet. 20) *United States* v. *Lopez*, 4 F.3d 1455 (9th Cir. 1993), but he acknowledges that that case involved *post*-indictment contact. See *id.* at 1460-1461 (distinguishing cases involving contact before the Sixth Amendment right to counsel attaches upon indictment). Indeed, the Ninth Circuit has expressly distinguished *Lopez* on this basis. See *Powe*, 9 F.3d at 69.[8] Petitioner seeks to minimize that crucial distinction by claiming (Pet. 20) that *Lopez* held more generally that specific statutory or case law must authorize a contact for it to fall under an "authorized by law" exception. That is incorrect. The California disciplinary rule at issue there noted that an express statutory scheme, case law, *or* "the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law," all could authorize a particular contact. *Lopez*, 4 F.3d at 1461. The *Lopez* court stated that "general enabling statutes" do not con-

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[7] Petitioner argues (Pet. 19-20) that the prosecutor's creation of a false letter here is analogous to the prosecutor's creation of a false grand jury subpoena in *Hammad*. The court of appeals correctly rejected that argument: a letter from a real prosecutor to a third party is meaningfully different from a false subpoena, with a fake signature, purporting to bear the imprimatur of the grand jury and the district court. Pet. App. A34. For those reasons, the court of appeals held that the prosecutor's actions here did not "fall[ ] outside the realm of acceptable pre-indictment investigation." *Ibid.*; see also *id.* at B19 (district court finding that "no prosecutorial misconduct occurred here").

[8] The Ninth Circuit subsequently stated in dictum that it thought "[*Hammad's*] approach to be the proper one" and that it could look case-by-case rather than categorically at whether the no-contact rule applies before indictment, but it ultimately found no violation in that case. *United States* v. *Talao*, 222 F.3d 1133, 1139 (2000).

stitute "'express statutory schemes'" within the meaning of the rule, and that "'the authority of government prosecutors and investigators to conduct criminal investigations'" therefore "is 'limited by the relevant decisional law' to contacts conducted prior to indictment in a noncustodial setting." *Ibid.* (emphasis omitted). That holding is fully consistent with the decision below.

c. Petitioner has styled his claim as one under the pre-2005 version of Pennsylvania's Rule 4.2, as made applicable by the McDade Amendment. See, *e.g.*, Pet. 2, 15; Pet. C.A. Br. 66, 69. The courts below treated the claim as such. See Pet. App. A34, B21-B22. Thus, the first question presented comes to this Court framed as an issue of state law.[9]

This case does not call for an exception to this Court's general policy against granting certiorari to review a regional court of appeals' interpretation of the law of a State within the circuit. See *Leavitt* v. *Jane L.*,

[9] Although the courts below had no occasion to address choice-of-law issues, it appears that under Pennsylvania's choice-of-law rule, the applicable rule would in fact be a federal court rule that incorporates Pennsylvania's. At the time of the conduct at issue here, Pennsylvania specified by rule that when the conduct at issue occurs "in connection with a proceeding in a court or agency before which a lawyer has been admitted to practice," the rules of that court may specify which rules apply. Pa. R. Prof'l Conduct 8.5(b)(1) (1996) (amended 2005). The investigation here was in connection with a proceeding to be filed in the United States District Court for the Middle District of Pennsylvania. The rules of that court specify that the Pennsylvania Rules of Professional Conduct apply. M.D. Pa. R. 83.23.2. The interpretation of a federal court rule, even one that borrows state law, is a question of federal law, and the authority to promulgate such rules is limited by federal law. See, *e.g.*, *Balter*, 91 F.3d at 435 & n.5; *Simels*, 48 F.3d at 642 n.1, 645-646. Nonetheless, there is no dispute at this point in the case that if the prosecutor's conduct did not violate the state rule, then petitioner is not entitled to suppression or to reversal.

518 U.S. 137, 144 & n.5 (1996) (per curiam) (noting rare exceptions). Indeed, even when state law becomes an issue in a case before this Court on the merits for other reasons, the Court's general practice is to defer to the regional court of appeals' reading of state law. See, *e.g.*, *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998); *Bishop* v. *Wood*, 426 U.S. 341, 346 & n.10 (1976). This Court's policy of restraint stems in part from recognition that this Court's limited resources are not best spent interpreting state law, because a decision of this Court about the content of state law could be immediately superseded by a decision of the state high court. Cf. *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 235 n.3 (1991). And since the conduct at issue in this case, the Pennsylvania rule has since been modified in relevant respects. See note 5, *supra*. Further review of the court of appeals' interpretation of the Pennsylvania rule therefore is not warranted for that reason as well.

d. Petitioner also relies in part (Pet. 13-17) on the notion that the McDade Amendment itself should affect how federal courts interpret state ethical rules. But as the courts below noted, Pet. App. A33, B21-B22, the McDade Amendment does nothing more than incorporate otherwise applicable state law; it does not impose any restrictions of its own. No reported case has held otherwise; indeed, most of the cases discussed in the petition were decided *before* the McDade Amendment was enacted.[10]

2. Petitioner apparently recognizes that even if this Court were to review the case and hold that the prosecutor violated the Pennsylvania rule, that holding would be

[10] As noted above, irrespective of the McDade Amendment, the conduct at issue in this case was subject to a federal court rule making state rules applicable. See note 9, *supra*.

of no benefit to him in his criminal case unless he can also establish entitlement to a suppression remedy. Petitioner therefore urges (Pet. 22-28) this Court to also review the court of appeals' alternative holding that the district court would not have been required to suppress the statements if it had found a violation of Rule 4.2. Petitioner's arguments lack merit.

First, petitioner contends (Pet. 25-26) that federal courts *may* use their supervisory power to order suppression even in the absence of a constitutional violation. But the court of appeals did not suggest otherwise, and in any event, that general proposition does not establish that the district court would have been *required* to order suppression had it found a violation of Rule 4.2 in this case. See, *e.g.*, *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006) ("Suppression of evidence * * * has always been our last resort, not our first impulse."). Indeed, as the Second Circuit concluded in reversing a suppression order in *Hammad*—despite having found a rule violation based on affirmative "misconduct"—the "unsettled" nature of the law governing prosecutors' investigative contact with represented parties is enough to make "an exclusionary remedy * * * inappropriate." 858 F.2d at 840, 842.[11] Nor is a suppression remedy necessary to give effect to the McDade Amendment, as petitioner suggests (Pet. 26); that provision clarifies that federal prosecutors are subject to discipline when they violate state rules, but says nothing to suggest that deterring

[11] Petitioner notes (Pet. 24) that the Second Circuit, in dictum, opined that a suppression remedy for misconduct might *sometimes* be warranted in the district court's discretion. See also *Powe*, 9 F.3d at 69 (dictum). Nothing in the Third Circuit's brief discussion—which cited *Hammad*—is to the contrary. See Pet. App. A35 n.23. And the district court made clear that it thought suppression was not warranted here.

such violations requires the "substantial social costs" of the exclusionary rule. *Hudson*, 547 U.S. at 591 (citations omitted); see *Ryans*, 903 F.2d at 740; cf. *Lopez*, 4 F.3d at 1464 (reversing dismissal of indictment because sanctions against individual prosecutor would be adequate remedy for violation).

Second, petitioner contends (Pet. 24-25) that this case implicates a circuit conflict on this question. That contention is incorrect. No court of appeals "has ever suppressed evidence in a criminal case because a prosecutor on the prosecutorial team * * * violated [a no-contact rule] in the course of an investigation and before the grand jury indicted the defendant." *Heinz*, 983 F.2d at 613; see also *United States* v. *Lowery*, 166 F.3d 1119, 1125 (11th Cir. 1999) (under Rule 402 of the Federal Rules of Evidence, neither state ethical rules nor district courts' local rules can be a basis for suppressing relevant evidence).

Petitioner's 37-year-old principal authority is inapposite, because it involved statements obtained while the defendant had already been charged and thus potentially implicating constitutional protections as well as professional-conduct rules. See *United States* v. *Thomas*, 474 F.2d 110, 111 (10th Cir.) (statement was obtained by state police officer from defendant who had been charged and was in pretrial custody), cert. denied, 412 U.S. 932 (1973). And although the court suggested that it was discussing a rule of inadmissibility, it affirmed the conviction nonetheless, because "[a] violation of the canon of ethics as here concerned need not be remedied by a reversal of the case wherein it is violated." *Id.* at 112. Petitioner's other cases also involved defendants who had been charged and had counsel, and neither case actually handed down a holding about sup-

pression. See *United States* v. *Killian*, 639 F.2d 206, 208, 210 (5th Cir.) (suggesting in dictum that "[s]uppression of the statements would probably have been the appropriate sanction in this case, were it not for the refusal of the government to use those statements"), cert. denied, 451 U.S. 1021 (1981); *United States* v. *Durham*, 475 F.2d 208, 209-211 & n.2 (7th Cir. 1973) (noting, in course of Sixth Amendment discussion, that prosecutor's conduct also "would appear to raise ethical questions"). Indeed, the portion of the *Durham* opinion that petitioner cites received the vote of only one member of the three-judge panel. See *id.* at 212; *ibid.* (Pell, J., concurring in part and dissenting in part); *id.* at 213 (Castle, J., dissenting). None of these cases ordered suppression based on violation of an ethical rule, and none supports petitioner's claim of a circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010