Nos. 00-425 and 00-444

In the Supreme Court of the United States

DANIEL C. CRANE, PETITIONER

v.

DONALD K. STERN

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, ET AL., PETITIONERS

v.

DONALD K. STERN

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Local Rule 3.8(f), which was adopted by the United States District Court for the District of Massachusetts to govern subpoenas directed to attorneys in grand jury or other criminal proceedings, exceeded the district court's rulemaking authority.

2. Whether a court of appeals may require the affirmative vote of a majority of all active circuit court judges to rehear a case en banc under 28 U.S.C. 46(c), regardless of whether one or more of those judges have recused themselves from consideration of the en banc petition.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a[1]) is reported at 214 F.3d 4. The opinion of the district court (Pet. App. 32a-50a) is reported at 184 F.R.D. 10.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2000. A petition for rehearing was denied on

[1] All references to "Pet. App." are to the appendix to the petition for a writ of cetiorari in No. 00-425.

June 22, 2000 (Pet. App. 27a-28a). The petition for a writ of certiorari in No. 00-425 was filed on September 18, 2000, and the petition for a writ of certiorari in No. 00-444 was filed on September 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the authority of a district court to promulgate a local district court rule. The United States District Court for the District of Massachusetts, pursuant to its authority under 28 U.S.C. 2071[2] and Federal Rule of Criminal Procedure 57(a)(1)[3], promulgates local rules to govern its day-to-day business. Under Local Rule 83.6(4)(B), conduct of federal prosecutors admitted to practice before the District Court that "violate[s] the ethical requirements and rules concerning the practice of law of the Commonwealth of Massachusetts, shall constitute misconduct and shall be

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[2] Section 2071 provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.
>
> * * * * *
>
> (f) No rule may be prescribed by a district court other than under this section.

[3] Federal Rule of Criminal Procedure 57(a)(1) provides in pertinent part:

> Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072.

grounds for discipline." Rule 83.6(4)(B) also allows the district court to opt out of any particular Massachusetts rule "by specific rule of this court."

In 1997, the Supreme Judicial Court for the Commonwealth of Massachusetts amended Rule 3.8 of the Massachusetts Rules of Professional Conduct to provide in pertinent part:

> The prosecutor in a criminal case shall:
>
> * * * * *
>
> (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:
>
> (i) the information sought is not protected from disclosure by any applicable privilege;
>
> (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
>
> (iii) there is no other feasible alternative to obtain the information; and
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> (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.[4]

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[4] As quoted in text, the Rule was identical to the 1990 American Bar Association (ABA) Model Rule of Professional Conduct 3.8(f). ABA Standing Committee on Ethics and Professional Responsibility and Section of Criminal Justice, Report 118, at 1 (1990). The ABA rule, however, was accompanied by a comment stating that "an adversarial hearing is afforded in order to assure an independent determination that the applicable standards are

Pet. App. 3a-4a.

Respondent Donald K. Stern, the United States Attorney for the District of Massachusetts, asked the district court not to adopt Rule 3.8(f) via Local Rule 83.6(4)(B). The District Court declined the request, and Rule 3.8(f) as adopted went into effect in the district court on January 1, 1998. Pet. App. 5a.

On May 13, 1998, respondent filed in the United States District Court for the District of Massachusetts a complaint for declaratory and injunctive relief against the district court, the judges of the district court, and Bar Counsel for the Board of Bar Overseers for the Commonwealth of Massachusetts, an attorney who enforces the Massachusetts Rules of Professional Conduct.[5] Respondent alleged that Local Rule 3.8(f)

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met." Pet. App. 4a. That comment was not included with the Massachusetts rule.

As the court of appeals noted, "[a]fter the Third Circuit struck down a bar rule patterned on [ABA] Model Rule 3.8(f), * * * the ABA retreated: it removed the judicial preapproval requirement by deleting both subparagraph (2) and the second sentence of the comment." Pet. App. 4a (citing *Baylson* v. *Disciplinary Bd.*, 975 F.2d 102 (3d Cir. 1992), cert. denied, 507 U.S. 984 (1993)). Indeed, the ABA committee that recommended the change in 1995 noted that there was "a fundamental and widespread doubt about the suitability of Rule 3.8(f) in its current form as a rule of ethics," and that subparagraph (2) in particular "is an anomaly" because "it sets out a type of implementing requirement that is properly established by rules of criminal procedure rather than established as an ethical norm" and "while nominally addressed to the conduct of the prosecutors, subparagraph (2) affects the operation of courts and grand juries." ABA, Standing Committee on Ethics and Professional Responsibility, *Report with Recommendation to the House of Delegates* 7-8 (Aug. 1995).

[5] Originally, Craig C. Donsanto, a member of the Massachusetts bar and Director of the Election Crimes Branch in the Criminal Division of the United States Department of Justice,

exceeded the district court's rulemaking authority under Section 2071 and Federal Rule of Criminal Procedure 57(a)(1), because the Rule is not consistent with two provisions of the Federal Rules of Criminal Procedure. Specifically, respondent claimed that the requirement in Rule 3.8(f)(2) of "prior judicial approval after an opportunity for an adversarial proceeding" conflicts with Federal Rule of Criminal Procedure 6(e), which requires grand jury secrecy, and Federal Rule of Criminal Procedure 17, which governs the issuance of grand jury subpoenas. Respondent informed the court

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joined as a plaintiff in the action. Donsanto was to represent the interests of those federal prosecutors who were members of the Massachusetts bar practicing outside Massachusetts and who therefore might be subject to State Rule 3.8(f) based on subpoenas issued in other jurisdictions. Also, plaintiffs originally named as defendants the Massachusetts Board of Bar Overseers and the Supreme Judicial Court for the Commonwealth of Massachusetts, the state bodies that would hear a state action brought by Bar Counsel under Rule 3.8(f). Pet. App. 5a-6a.

By affidavit dated June 17, 1998, then-Bar Counsel Arnold R. Rosenfeld (petitioner Crane's predecessor) stated that he would initiate any Rule 3.8( ) proceedings against federal prosecutors "pursuant to the applicable Local Rules of [the United States District Court], not before the Board of Bar Overseers or a state court." C.A. App. 98. He also stated that "[p]rosecutors who are members of the bar of the Commonwealth of Massachusetts practicing in a state or federal court outside the Commonwealth who direct the service of a subpoena on a lawyer seeking information about a client will not face any disciplinary action by the Board of Bar Overseers based on Rule 3.8(f)." *Id.* at 99; see Pet. App. 6a. The Supreme Judicial Court for the Commonwealth of Massachusetts then filed a Stipulation of Facts stating that it would hear a 3.8(f) action only as an appeal from the Board of Bar Overseers. C.A. App. 82. Based on those representations, the parties stipulated to the dismissal of Donsanto, the Board, and the Supreme Judicial Court. See *id.* at 101, 102-103.

that his office had suspended the issuance of attorney subpoenas in light of the Rule. Pet. App. 5a.

2. On October 21, 1998, Congress passed an Act entitled Ethical Standards for Attorneys for the Government, and known as the Citizens' Protection Act, Pub. L. No. 105-277, § 801, 112 Stat. 2681-118. The Act is now codified at 28 U.S.C. 530B (Supp. IV 1998). The Act 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."

3. Because all of the district court judges in the District of Massachusetts were named defendants, they were all recused from presiding over the case. C.A. App. 80; see 28 U.S.C. 455(b)(5)(i). Judge Brody of the United States District Court for the District of Maine was designated to preside instead. C.A. App. 81. On January 20, 1999, the district court issued an order and memorandum denying respondent's motion for a preliminary and permanent injunction and for declaratory relief. Pet. App. 32a-50a. Based on that order and memorandum, the court later entered a final judgment for petitioners. C.A. App. 142.

In its order and memorandum, the district court first construed Rule 3.8(f). It noted that Rule 3.8(f) has two parts: Rule 3.8(f)(2), which requires an adversary hearing before a subpoena could be served on an attorney, and Rule 3.8(f)(1), which requires the prosecutor to have a reasonable belief that the information sought is not privileged, that the evidence sought is essential, and that there is no feasible alternative to the subpoena to obtain the evidence. Pet. App. 42a. The court noted that petitioners "do not seriously challenge [respon-

dent's] assertion that Rule 3.8(f) was invalidly adopted if Rule 3.8(f)(2) incorporates the requirements of Rule 3.8(f)(1)," *i.e.*, if the issue at the Rule 3.8(f)(2) adversary hearing is whether the subpoena satisfies the substantive standards of Rule 3.8(f)(1). *Ibid.* The district court, however, adopted state Bar Counsel's contrary interpretation of the Rule, finding that the Rule "does not require that a prosecutor demonstrate the criteria enumerated in 3.8(f)(1) to secure the judicial approval of an attorney subpoena required by 3.8(f)(2)." *Id.* at 43a. The court also noted that the judges of the district court had themselves refused to construe the Rule, but that "[t]o the extent that [respondent's] requests for * * * relief are premised on the *possibility* that other courts will interpret Rule 3.8(f) differently * * * such conflicts appropriately may be resolved at the Circuit level." *Id.* at 44a-45a.

In light of that interpretation of Rule 3.8(f), the district court concluded that the Rule does not conflict with existing federal law. The court noted that the First Circuit had already approved a local rule requiring prior judicial approval—but not imposing any new substantive standards—before a prosecutor could subpoena an attorney in a criminal case.[6] Pet. App. 46a.

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[6] In *Whitehouse* v. *United States District Court for the District of Rhode Island*, 53 F.3d 1349 (1995), the First Circuit upheld a state court rule adopted as a local district court rule by the United States District Court for the District of Rhode Island. The rule provided:

> The prosecutor in a criminal case shall * * * not, without prior judicial approval, subpoena a lawyer for the purpose of compelling the lawyer to provide evidence concerning a person who is or was represented by the lawyer when such evidence was obtained as a result of the attorney-client relationship.

And it decided that the adversarial hearing required by Rule 3.8(f)(2) would "present no more risk of disclosure than did former practice under Rule 3.08 or present practice on a motion to quash" and would therefore not threaten grand jury secrecy. *Id.* at 47a.

The district court adverted to Section 530B briefly at the conclusion of its opinion, stating that "the enactment of 28 U.S.C. [530B] signals Congress's * * * desire that the states and the federal courts play a greater role in governing the conduct of government attorneys." Pet. App. 50a. But the court also acknowledged that "[i]f Rule 3.8(f) is inconsistent with the Federal Rules of Criminal Procedure or federal common law governing a district court's power to regulate a grand jury, as [respondent] alleges, it cannot legitimately be adopted by the District Court," because "section 530B cannot empower district courts to adopt rules governing the behavior of attorneys that squarely conflict with * * * federal law." *Id.* at 37a-38a n.14.

4. The court of appeals reversed. It rejected the district court's "artificial construction" of Local Rule 3.8(f), holding that the Rule required that an attorney

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Id. at 1366. The rule also included a comment stating that "prior judicial approval should be withheld unless" the subpoena satisfies essentially identical standards to those imposed by Rule 3.8(f)(1) of lack of privilege, essentiality, and lack of feasible alternatives. *Ibid.* The First Circuit upheld the Rhode Island rule, but only after concluding that the substantive standards mentioned in the comment are not part of the rule and need not be satisfied for a subpoena to be valid. See *id.* at 1357 (stating that the Rhode Island rule "merely authorizes district courts to reject a prosecutor's attorney-subpoena application for the traditional reasons justifying the quashing of a subpoena"); see also *id.* at 1358 n.12 ("To the extent that the Comment * * * suggests a broader basis for rejecting a subpoena application, we point out that the Comment cannot substantively change the text of the Rule.").

establish the substantive standards of 3.8(f)(1) at the adversarial hearing provided in 3.8(f)(2). Pet. App. 13a. The court of appeals noted that the Rule must be construed as a "unified whole," *ibid.*, and that "the original drafters certainly intended that the two subparagraphs * * * be harmonized, not balkanized," *id.* at 14a. It also observed that the provision for an adversarial hearing would serve "no purpose" if "courts evaluated subpoena applications solely on the basis of traditional motion-to-quash standards." *Ibid.* Since the rule requires an adversarial hearing, "the targeted attorney would have to be told in advance of the content of the testimony or materials sought," thereby "driv[ing] a wedge of distrust between lawyer and client." *Ibid.* The net result "would mirror existing quashal procedure and generate no ethics benefits whatsoever." *Ibid.* Finally, the court observed that it was doubtful that Bar Counsel's "litigation position [regarding the meaning of the Rule] is entitled to any deference," *id.* at 15a, that the district court judges charged with applying the Rule had "pointedly refused to endorse" the interpretation offered by Bar Counsel and adopted by the district court, *ibid.*, and that "any deference that might normally be due is overcome here by the availability of a much more logical reading and a clear statement of the drafters' intent." *Id.* at 15a-16a.

Under the proper interpretation of Local Rule 3.8(f), the court of appeals concluded that the Rule exceeded the district court's rulemaking authority. The court held that the Rule creates "new substantive requirements for judicial preapproval of grand jury subpoenas," and in so doing, "alters the grand jury's historic role, places it under overly intrusive court supervision, curbs its broad investigative powers, reverses the presumption of validity accorded to its subpoenas,

undermines the secrecy of its proceedings, and creates procedural detours and delays." Pet. App. 18a-19a. The court emphasized that this Court had held that "the government could not be required to demonstrate that the materials sought by a grand jury subpoena were relevant," *id.* at 19a (citing *United States* v. *R. Enters., Inc.*, 498 U.S. 292 (1991))—a holding in conflict with the provision of Rule 3.8(f) "[r]equiring a prosecutor to show that subpoenaed evidence is essential and not otherwise feasibly obtainable," *ibid.*

The court of appeals also held (Pet. App. 19a-24a) that Local Rule 3.8(f) was beyond the district court's rulemaking power even outside the grand jury context, because it addressed more than the mere "matters of detail" authorized by Federal Rule of Criminal Procedure 57(a)(1). See Fed. R. Crim. P. 57 advisory committee's notes, cmt. 2; *Miner* v. *Atlass*, 363 U.S. 641, 650 (1960). The requirements of Rule 3.8(f) that a prosecutor establish "essentiality" and "no feasible alternative," the court held, "work changes too fundamental" in the standards governing trial subpoenas under Federal Rule of Criminal Procedure 17 to withstand scrutiny. Pet. App. 21a. Moreover, the court concluded, the Rule would impose "novel requirements that threaten to preclude the service of otherwise unimpeachable subpoenas and thus restrict the flow of relevant, material evidence to the factfinder." *Id.* at 22a.[7]

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[7] As an example of the "fairly typical * * * situation in which a prosecutor might wish to serve an attorney subpoena," the court cited a subpoena seeking billing information from a defense attorney who "received a lump-sum advance payment for services in the precise amount of * * * purloined funds from a client with no visible means of support," where there is "other evidence linking the client to the robbery, so the billing information could

The court of appeals also examined the impact of Section 530B. The court rejected Bar Counsel's arguments that Section 530B "cures any conflict between Local Rule 3.8(f) and other federal law," Pet. App. 24a, explaining that "it simply cannot be said that Congress, by enacting section 530B, meant to empower states (or federal district courts, for that matter) to regulate government attorneys in a manner inconsistent with federal law," *id.* at 24a-25a. The court also held that "Section 530B applies only to ethical standards," and that Local Rule 3.8(f) "is more than an ethical standard" because "[i]t adds a novel procedural step—the opportunity for a pre-service adversarial hearing—and to compound the matter, ordains that the hearing be conducted with new substantive standards in mind." *Id.* at 26a. The court also noted that the ABA committee that recommended repeal of the Rule 3.8(f) provision for an adversary hearing, see note 4, *supra*, acknowledged that "[r]ather than stating a substantive ethical precept, [the Rule sets] out a type of implementing requirement that is properly established by rules of criminal procedure rather than established as an ethical norm." *Id.* at 26a-27a (quoting ABA Standing Committee on Ethics and Professional Responsibility, Report 101, at 7 (Aug. 1995)).

5. The court of appeals denied a petition for rehearing en banc filed by petitioners here. Judge Torruella filed an opinion dissenting from denial of rehearing en banc, joined by two other judges. Pet. App. 28a-31a.

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not fairly be described as 'essential' to the prosecution." Pet. App. 22a. The court explained that "Local Rule 3.8(f) would prohibit the prosecutor from serving a subpoena on the defense attorney, notwithstanding the unarguable materiality and relevancy of the retainer information." *Ibid.*

Judge Torruella stated his belief that the panel opinion was inconsistent with the First Circuit's previous decision in *Whitehouse* v. *United States District Court for the District of Rhode Island*, 53 F.3d 1349 (1995). Pet. App. 28a-30a. He also noted that, under the First Circuit's decision in *United States* v. *Leichter*, 167 F.3d 667 (1999), "recused judges are counted for purposes of determining what constitutes the absolute majority of the active members deemed necessary for en banc hearing." Pet. App. 28a. The First Circuit has six judges in active service, and the votes of four judges are accordingly necessary to obtain rehearing en banc. Judge Lynch was recused, *id.* at 27a, and the two active judges on the panel apparently did not vote to grant rehearing en banc. The votes of the three judges joining in the dissenting opinion were therefore insufficient to grant the suggestion for rehearing en banc.

ARGUMENT

Petitioners contend that, even given the holding of the court of appeals (which they do not challenge) that Rule 3.8(f) conflicts with the requirements of the Federal Rules of Criminal Procedure, 28 U.S.C. 530B renders Rule 3.8(f) valid and enforceable as a regulation of ethics of government attorneys. 00-425 Pet. 10-20; 00-444 Pet. 11-16. Bar counsel also seeks review of the court of appeals' interpretation of Rule 3.8(f). 00-425 Pet. 20-21. Petitioners' claims do not warrant further review.

1. Petitioners claim (00-425 Pet. 10; 00-444 Pet. 14) that this Court should review the court of appeals' determination that Local Rule 3.8(f) is not an "ethical standard" within the scope of Section 530B. They assert that the court of appeals' conclusion creates a conflict with *United States* v. *Colorado Supreme Court*,

189 F.3d 1281 (10th Cir. 1999), which will "allow[] federal prosecutors in Massachusetts to serve subpoenas to lawyers under circumstances that would subject federal prosecutors in Colorado to professional discipline." 00-425 Pet. 10. That contention is incorrect.

a. The court of appeals held that Rule 3.8(f) is not an "ethical standard" within Section 530B because it conflicts with the uniform federal requirements governing subpoena practice in the Federal Rules of Criminal Procedure, interferes with the grand jury, and imposes procedural and substantive requirements on federal practice that extend far beyond the "realm of ethics." Pet. App. 24a-27a. The court found support for that conclusion in the acknowledgement of the ABA that requirements for a judicial hearing and substantive prerequisites for issuance of a subpoena are matters to be "properly established by rules of criminal procedure rather than established as an ethical norm." *Id.* at 27a (quoting ABA Standing Committee, *supra*, at 7).

That holding does not conflict with the holding in *Colorado Supreme Court*. There, the Tenth Circuit addressed a Colorado state rule (adopted by the United States District Court for the District of Colorado as part of its local rules, see 189 F.3d at 1283) governing the issuance of attorney subpoenas. The rule contained substantive standards governing attorney subpoenas in criminal cases that were identical to those in Rule 3.8(f)(1). The rule differed from Rule 3.8(f), however, in important respects. Based on an unappealed district court holding that the Colorado rule's application to the grand jury setting would violate the Supremacy Clause, the Colorado rule as it came before the Tenth Circuit had no application to the grand jury setting. 189 F.3d at 1284. That setting is the primary one in which issues regarding attorney subpoenas arise, and there is plainly

no disagreement between *Colorado Supreme Court* and the decision in this case, see Pet. App. 15a-17a, concerning the application of attorney subpoena rules in that important setting. In addition, as the Tenth Circuit noted, the Colorado rule at issue in *Colorado Supreme Court* did not include a provision for an adversarial hearing, as does Local Rule 3.8(f). 189 F.3d at 1284.

The Tenth Circuit held in *Colorado Supreme Court* that "the question whether [the Colorado rule] violates the Supremacy Clause * * * turns on whether the rule is a rule of professional ethics clearly covered by [Section 530B], or a substantive or procedural rule that is inconsistent with federal law." 189 F.3d at 1284. The court held that the Colorado rule was "a rule of professional ethics," relying on an analysis that classified the rule as an ethical one if it bars conduct "recognized by consensus within the profession as inappropriate," reads "like a commandment dealing with morals and principles," is "quite vague in its nature" in contrast to rules of substantive or procedural law, and "is directed at the attorney herself." *Id.* at 1287. The Tenth Circuit did not consider whether the Colorado rule would alter rules of practice, procedure, or evidence in federal courts or conflict with federal statutes or duly promulgated federal judicial rules. Cf. 28 C.F.R. 77.1(b) (stating that Section 530B "should not be construed in any way to alter federal substantive, procedural, or evidentiary law").

While we disagree with the analysis and result in *Colorado Supreme Court*, it does not conflict with the First Circuit's decision in this case. The court of appeals in this case held that Local Rule 3.8(f) could not qualify as an "ethical standard" under Section 530B because it added the "novel procedural step" of an

adversarial hearing, and "compound[ed] the matter" by imposing new substantive standards on the issuance of subpoenas. Pet. App. 26a. The Colorado rule at issue in *Colorado Supreme Court*, however, did not require an adversary—or any—hearing. Indeed, the Tenth Circuit relied on that fact in concluding that the Colorado rule was valid, explaining as one basis for holding that the Colorado rule was a rule of ethics that it "does not concern itself with the actual procedural steps to satisfy the rule." 189 F.3d at 1288. Accordingly, the Tenth Circuit did not pass on a rule like Rule 3.8(f), and its holding in *Colorado Supreme Court* does not mean that it would conclude that Rule 3.8(f), with its requirement for an adversary hearing, is a rule of ethics.[8]

b. Petitioner Crane argues that further review is warranted because the court of appeals "ignore[d] the plain language of [Section 530B]." 00-425 Pet. 13. Petitioner does not appear to disagree with the court of appeals' conclusion that Section 530B "applies only to ethical standards." Pet. App. 26a. See, *e.g.*, 00-425 Pet. 14 ("[Section 530B] represents the first time Congress has specifically addressed the question of the ethical standards that federal lawyers must obey."). He does disagree with the court of appeals' conclusion that Rule 3.8(f) is not such an "ethical standard." That disagreement, however, cannot be resolved by appeal to the "plain language of [Section 530B]." Indeed, petitioner

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[8] Petitioner Crane also claims (00-425 Pet. 12) that the court of appeals' decision conflicts with its own opinion in *Whitehouse* v. *United States District Court for the District of Rhode Island*, *supra*. The court of appeals in this case distinguished *Whitehouse*, see Pet. App. 17a-18a, rather than overruling it. In any event, further review would not be warranted to resolve an intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

himself offers no alternative to the court of appeals' explanation that Rule 3.8(f) cannot be viewed as a mere rule of ethics, because it imposes new procedural requirements on federal courts and new substantive requirements on the issuance of subpoenas in federal grand jury and other criminal proceedings.[9]

Petitioner Crane asserts that "[i]n enacting [Section 530B], Congress clearly meant to require federal prosecutors to conform their behavior to state and local district court ethical rules even in situations where those rules present some degree of conflict with pre-existing federal law." 00-425 Pet. 18. The court of appeals in this case stated that Section 530B does not "grant[] states and lower federal courts the power, in the guise of regulating ethics, to impose strictures that are inconsistent with federal law," Pet. App. 25a, although its decision also rested on the ground that Rule 3.8(f) was not a genuine rule of ethics under Section 530B in any event, see Pet. App. 26a. No other court of appeals has reached a contrary conclusion regarding the effect of an ethics rule under Section 530B that conflicts with some other federal rule or statute. The only other court of appeals decisions to address Section 530B are *United States* v. *Colorado*

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[9] The court of appeals' opinion does not render Section 530B "superfluous," as petitioner Crane contends. 00-425 Pet. 13. Many state or district court ethical rules do not conflict with any federal law and therefore clearly govern federal attorneys under Section 530B. The mere labeling of a rule by state authorities or a federal district court as an "ethical standard," however, does not make it one. And nothing suggests that Congress intended in Section 530B to give federal district courts (and state authorities) the power to alter or displace fundamental substantive, procedural, and evidentiary rules in federal courts by adopting "ethical rules" governing attorneys in federal courts.

Supreme Court, *supra*; *United States* v. *Lowery*, 166 F.3d 1119 (11th Cir.), cert. denied, 528 U.S. 889 (1999), and *United States* v. *Condon*, 170 F.3d 687 (7th Cir.), cert. denied, 526 U.S. 1126 (1999). The court in *Colorado Supreme Court* addressed only the question whether the rule at issue in that case was a rule of ethics under Section 530B, and it did not discuss whether the rule before it conflicted with any provision of federal law. See 189 F.3d at 1284. In *Lowery*, the Eleventh Circuit held that a district court could not exclude evidence otherwise admissible under the Federal Rules of Evidence on the basis that it was obtained in violation of a state court "ethical" rule. Accord *Condon*, 170 F.3d at 690 ("Like the eleventh circuit in *Lowery*, we doubt that a [district court's] local rule can require the exclusion of evidence."). Thus, *Lowery* and *Condon* provide support for the court of appeals' conclusion that Section 530B does not authorize a district court to apply a rule that conflicts with existing federal law.

c. Petitioners United States District Court et al. claim that Section 530B "require[s] federal prosecutors to abide by *state* rules governing attorney conduct that are inconsistent with other federal law or rules." 00-444 Pet. 12 (emphasis added). Petitioners argue that, because state prosecutors are required to abide by the Massachusetts Rule of Professional Responsibility governing attorney subpoenas, the rule governs federal prosecutors appearing in federal court, regardless of whether the federal court has adopted or is authorized to adopt the rule as a local district court rule under federal statutory law and the Federal Rules of Criminal Procedure.

Petitioners' claim is not properly before the Court. As explained above, see note 5, *supra*, petitioner Bar

Counsel stated that he would initiate proceedings under Local Rule 3.8(f) only "pursuant to the applicable Local Rules [the United States District Court for the District of Massachusetts], not before the Board of Bar Overseers or a state court." C.A. App. 98. Respondent Stern expressly relied on that statement to dismiss from this action both the Supreme Judicial Court of Massachusetts and the Board of Bar Overseers, the two entities authorized to consider proceedings under the Massachusetts Rules of Professional Responsibility. See *id.* at 101, 102 (dismissals were "based upon the Affidavit of [Bar Counsel]"). The only issue presented to or decided by either court below was therefore whether the United States District Court for the District of Massachusetts has the power to promulgate Local Rule 3.8(f) as a local district court rule. No question regarding the independent force or effect of the state bar rule is properly before this Court.

2. Petitioner Crane claims (00-425 Pet. 20-21) that this Court should review the court of appeals' interpretation of Local Rule 3.8(f), because by "reject[ing] a construction of the rule * * * that would have preserved its validity," the court has "ignore[d] the approach that every other court has taken" to evaluating local district court rules. As the court of appeals noted (Pet. App. 16a), however, there is a point at which a court cannot cure a conflict between a district court rule and federal statutes and rules by interpretation. Even in the far more delicate context in which the rule of constitutional doubt applies—a context that, as the court of appeals noted, "implicate[s] separation of powers or countermajoritarian concerns" not present here, *ibid.*—this Court has repeatedly emphasized that "[a]voidance of a difficulty will not be pressed to the point of disingenuous evasion." *George Moore Ice*

Cream Co. v. *Rose*, 289 U.S. 373, 379 (1933). See, *e.g.*, *Miller* v. *French*, 120 S. Ct. 2246, 2255 (2000); *United States* v. *Locke*, 471 U.S. 84, 96 (1985). Likewise, a court of appeals cannot ignore the plain meaning of a local district court rule to preserve its validity under Section 2071.

In this case, the court of appeals concluded that both the plain meaning of Local Rule 3.8(f) and the drafters' intent dictated reading the Rule to require the establishment of Rule 3.8(f)(1)'s substantive standards at the adversarial hearing prescribed in Rule 3.8(f)(2). A contrary reading, the court held, would not resolve some latent ambiguity, but would instead render Rule 3.8(f)(2) a nullity.[10]

Petitioner points to no case, and we have found none, in which a court of appeals interpreted a district court rule contrary to its plain language. See *John* v. *Louisiana*, 757 F.2d 698, 707 (5th Cir. 1985) ("Obviously, a local rule that is inconsistent *on its face* with the Federal Rules cannot stand." (emphasis added)). The court's refusal to place an "artificial" construction on Local Rule 3.8(f), Pet. App. 13a, in order to preserve its validity, therefore, does not conflict with any other circuit court decision and is in accord with the decisions of this Court.

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[10] The cases relied on by petitioner Crane (Pet. 20-21) all involve ambiguous rules that were clearly open to alternative interpretations. See *Marshall* v. *Gates*, 44 F.3d 722, 725 (9th Cir. 1995) (interpreting a local rule to place a condition on a right guaranteed by federal rules, not to eliminate it altogether); *Jaroma* v. *Massey*, 873 F.2d 17, 20 (1st Cir. 1989) (interpreting the phrase "the court may act on the motion" to allow particular actions, but not others); *John* v. *State of Louisiana*, 757 F.2d 698, 707 (5th Cir. 1985) (refusing to read into local rule a sanction that was not explicitly provided and that would conflict with Federal Rules).

Petitioner Crane also suggests (00-425 Pet. 21) that by failing to adopt the district court's interpretation, the court of appeals did not give proper deference to the district court judges that promulgated the rule. The judges of the United States District Court for the District of Massachusetts, however, specifically *declined* to interpret Local Rule 3.8(f) in the courts below, see Pet. App. 15a, and they do not challenge the court of appeals' interpretation in this Court. Instead, the district court's interpretation was based on the proffer of state Bar Counsel, a litigating position that, as the court of appeals correctly held (*ibid.*), deserves no deference.

In any event, further review would not be warranted to determine whether the court of appeals correctly construed the particular local rule at issue in this case. No other court of appeals has addressed the correct interpretation of that rule. Moreover, if petitioners disagree with the court of appeals' construction of Rule 3.8(f), they retain the authority to promulgate a new rule that clearly embodies whatever lawful construction they prefer.

3. Finally, petitioners United States District Court et al. argue (00-444 Pet. 16) that this Court should review the court of appeals' denial of petitioners' request for rehearing en banc. Further review of that issue is not warranted.[11]

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[11] It is noteworthy that, although Judge Torruella, joined by two other judges, dissented from denial of rehearing en banc in this case and referred to the First Circuit's rule requiring an absolute majority of active judges to grant a petition for rehearing en banc, he did not suggest that that rule was wrong or should be changed. In a similar circumstance involving a decision of the Eleventh Circuit denying rehearing en banc, Judge Carnes recently argued extensively that "there is no good reason why a uniform rule

The First Circuit requires the vote of a majority of all active judges to rehear a case en banc, regardless of whether one or more have recused themselves from consideration of the petition. See *Leichter*, 167 F.3d at 667. The court based that rule on its construction of 28 U.S.C. 46(c), which provides that "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges * * *, unless a hearing or rehearing before the court in banc is ordered *by a majority of the circuit judges of the circuit who are in regular active service*" (emphasis added). See also Fed. R. App. P. 35(a) ("A majority of the circuit judges *who are in regular active service* may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.") (emphasis added). In this case, as in *Leichter*, the petition for rehearing en banc failed to garner a majority vote. As petitioners correctly note (00-444 Pet. 17), several other, larger circuits allow a case to be reheard en banc on the majority vote of only non-recused judges.

Petitioners concede (00-444 Pet. 18) that "this Court implicitly rejected the argument that the language of

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should not be followed in all the circuits" and that therefore "Rule 35(a) should be clarified *through amendment*." *Gulf Power Co.* v. *FCC*, 226 F.3d 1220, 1225 (11th Cir. 2000) (emphasis added); see also *id.* at 1221 (absolute majority rule "needs to be changed *by Congress or by the Supreme Court through the Rules Enabling Act*") (emphasis added). He did not, however, suggest that the Eleventh Circuit's absolute majority rule, which mirrors the rule followed by the First Circuit in this case, was incorrect as a matter of interpretation of the current governing statute and rule. (We have filed a petition for a writ of certiorari from the underlying decision of the court of appeals in *Gulf Power*, as has a private party. See *FCC* v. *Gulf Power Co.*, No. 00-843; *National Cable Television Ass'n* v. *Gulf Power Co.*, No. 00-832. Neither petition presents any question regarding the court's en banc procedure.)

§ 46(c) compels a specific method of vote-counting for determining whether a majority of judges in regular active service have ordered rehearing" (citing *Shenker* v. *Baltimore & Ohio Ry. Co.*, 374 U.S. 1 (1963)). In *Shenker*, the Court held that the absolute-majority rule used by the court of appeals here was "clearly within the scope of the court's discretion" and that to hold otherwise "would involve [the Court] unnecessarily in the internal administration of the Courts of Appeals." *Id.* at 5. See also *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, 626 (1974); *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685, 688 (1960).[12] Thus, petitioners' claim is foreclosed.

Petitioners ask (00-444 Pet. 19) that this Court "reexamine" *Shenker* because there are now more courts that grant en banc review based upon the decision of a majority of non-recused judges than there were when *Shenker* was decided. See *Gulf Power Co.* v. *FCC*, 226 F.3d 1220, 1222 (11th Cir. 2000) (Carnes, J., concerning the denial of rehearing en banc) (stating that five circuits now follow the absolute majority rule followed by the First Circuit here, while eight do not); see also note 11, *supra*. Petitioners do not explain, however, why that shift would require the Court to revisit its holding in *Shenker*. The same differences among local en banc procedure existed when *Shenker* was decided. The fact that fewer courts use the absolute-majority rule now

[12] The problems with prescribing a uniform rule are obvious because the courts of appeals are themselves non-uniform. In the First Circuit, for instance, there are currently six active judges, while in the Ninth Circuit, there are nearly thirty. If the First Circuit were required to convene an en banc court upon the majority vote of only non-recused judges, therefore, the equivalent of a circuit panel (three judges) could force a rehearing en banc whenever even a single judge is recused.

does not affect the conclusion that the courts of appeals may differ on the appropriate rule to govern en banc procedure.[13]

Petitioners also suggest (00-444 Pet. 19) that the different local rules on en banc procedure have "creat[ed] the appearance of rights determined by happenstance" (quoting *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 920 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984)). A litigant, however, has no right to have his case heard by the entire court. See *Western Pac. R.R. Corp.* v. *Western Pac. R.R. Co.*, 345 U.S. 247, 252 (1953). Section 46(a) deals "not with rights, but with power." *Id.* at 259; see also *id.* at 250 (statute is "not addressed to litigants. It is addressed to the Court of Appeals."). It allows the court of appeals to oversee its own operations and to prevent internal conflict and incoherence. But it does not *require* the court of appeals to exercise the en banc power in certain situations; it only provides the power to do so if the court wishes. See *NLRB* v. *Cambria Clay Prods. Co.*, 229 F.2d 433 (6th Cir. 1955) (when original appeal was heard by panel of three regular Sixth Circuit judges,

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[13] Petitioners suggest (00-444 Pet. 19 n.9) that this Court should revisit *Shenker* because Congress has since passed "strict financial disqualification rules." Those rules were enacted in 1976. See *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 930 n.6 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984). Since then, this Court has consistently denied petitions for certiorari requesting review of the court of appeals' internal en banc procedures. See, *e.g.*, *United States* v. *Nixon*, 827 F.2d 1019 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); *In re Ahlers*, 794 F.2d 388 (8th Cir. 1986), cert. granted limited to other grounds, 483 U.S. 1004 (1987), rev'd on other grounds, 485 U.S. 197 (1988); see also *In re American Broad. Cos.*, 464 U.S. 1006 (1983) (denying petition for writ of mandamus to force en banc review).

court would not consider rehearing case en banc); *United States* v. *Nixon*, 827 F.2d 1019 (5th Cir. 1987) (rejecting argument that if so many judges recuse themselves that it is impossible for an absolute majority to vote for en banc rehearing, litigant is entitled to remedy allowing consideration of suggestion for en banc rehearing), cert. denied, 484 U.S. 1026 (1988). Thus, although a litigant may have a right of notice regarding the court's procedures and a right that the court follow them, *Shenker*, 374 U.S. at 5, he does not have the right to demand certain procedures.

Finally, petitioners complain (00-444 Pet. 20) that the First Circuit's rule "makes the important mechanism of en banc review too rare an occurrence." Before this Court's decision in *Textile Mills Sec. Corp.* v. *Commissioner*, 314 U.S. 326 (1941), however, it was unclear that the courts even had authority to convene en banc. And although en banc hearings are now widely accepted and approved by Section 46(a), "[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered." Fed. R. App. P. 35(a); see also *American-Foreign S.S. Corp.*, 363 U.S. at 689 ("*En banc* courts are the exception, not the rule."). The Rules and the statute favor the infrequency of en banc review.[14]

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[14] This Court is not the only forum for evaluation of en banc rules. Under 28 U.S.C. 2071(c)(2), the Judicial Conference has the power to modify or abrogate rules promulgated by the courts of appeals. In addition, "general rules of practice and procedure" promulgated by this Court supersede "[a]ll laws in conflict with such rules." 28 U.S.C. 2072(a) and (b). If there is to be reconsideration of appellate en banc procedure, it should be undertaken in the context of a proposal to revise the federal rules, not on certiorari review of the court of appeals' decision in this case. See note 11, *supra*.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted.

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