No. 16-1450

In the Supreme Court of the United States

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

SUPREME COURT OF NEW MEXICO, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The application of the McDade Act to rules like New Mexico Rule of Professional Conduct 16-308(E) is an issue that has seldom arisen and that has not divided the courts of appeals. Accordingly, as the government explained in its brief in opposition in No. 16-1323, the issue does not warrant this Court's review. But if the Court takes up the question in the context of grand-jury subpoenas, it should grant the conditional cross-petition so that it can consider the trial-subpoena context as well.

Cross-respondents agree (Resp. Br. 1) that the Court should grant the cross-petition if it grants their petition. But they contend (*id.* at 5-9) that the McDade Act authorizes the application of Rule 16-308(E) to punish federal prosecutors for serving trial subpoenas that are authorized by and enforceable under federal law. Cross-respondents' arguments lack merit, and they further confirm that cross-respondents' sweeping interpretation of the McDade Act is unsound.

1. Cross-respondents first assert that the McDade Act subjects federal prosecutors to *any* state rule that "governs attorneys"—"with no need to consider whether [that rule] would otherwise conflict with federal law." Resp. Br. 5-6 (brackets omitted). That is a startling proposition. If it were correct, it would allow States to adopt and enforce against federal prosecutors rules prohibiting, to take just a few examples:

- Disclosing grand-jury material for law-enforcement purposes, cf. Fed. R. Crim. P. 6(e)(3)(A);
- Entering into a plea agreement that waives a defendant's right to appeal, cf. Fed. R. Crim. P. 11(b)(1)(N);
- Agreeing to dismiss other charges against a defendant who pleads guilty, cf. Fed. R. Crim. P. 11(c)(1)(A); or
- Agreeing to recommend a reduced sentence for a defendant if he provides substantial assistance to law enforcement, cf. 18 U.S.C. 3553(e).

Indeed, under cross-respondents' interpretation of the McDade Act, a state ethics authority could adopt and enforce a rule barring federal prosecutors from charging any offense that carries a mandatory minimum sentence, or from introducing evidence obtained in reliance on a warrant later held invalid, cf. *United States* v. *Leon*, 468 U.S. 897, 922-925 (1984).

Congress has not surrendered such far-reaching authority to States. The McDade Act's title—"Ethical standards for attorneys for the Government," 28 U.S.C. 530B—makes clear that it is limited to state rules of *ethics*. See *Almendarez-Torres* v. *United States*, 523 U.S.

224, 234 (1998). The McDade Act thus does not authorize the application of state requirements that, in substance, function as "rules of procedure, evidence, or substantive law." 28 C.F.R. 77.2(h)(1). And even with respect to a State's ethics rules, Congress directed that federal prosecutors are subject to such rules only "to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. 530B(a). As cross-respondents do not and could not dispute, no other attorney may be subjected to state ethics rules that conflict with—and are thus preempted by—federal law. See *Sperry* v. *Florida*, 373 U.S. 379, 385 (1963). Accordingly, federal prosecutors are not subject to such rules either.

That straightforward interpretation of the McDade Act's text accords with its history. Congress enacted the McDade Act in response to a dispute about the Department of Justice's assertion of authority to exempt its attorneys from State ethics rules. See 59 Fed. Reg. 39,910 (Aug. 4, 1994). Congress resolved the dispute by making clear that the Department lacks authority to grant such exemptions. But nothing in the McDade Act's history supports cross-respondents' assertion that Congress intended to cede to the States *its own* authority (and the authority of this Court) to prescribe the rules that govern federal criminal cases.

2. In the alternative, cross-respondents assert (Resp. Br. 6-9) that Rule 16-308(E) does not conflict with federal law. They do not deny that the rule establishes a stricter standard for attorney subpoenas than the one reflected in Federal Rule of Criminal Procedure 17, or that the rule deters federal prosecutors from serving subpoenas that are authorized by and enforceable under federal law—and thus prevents federal judges

and juries from considering relevant, admissible evidence. See Cross-Pet. 7. But cross-respondents nonetheless contend that the divergent standards in Rule 16-308(E) and federal law do not create the sort of conflict that gives rise to preemption. That is incorrect.

It is of course true (Resp. Br. 7-8) that state ethics rules, such as the rule against contacting represented parties, may sometimes make it more difficult for a federal prosecutor to obtain evidence that would be admissible in federal court. But unlike a typical ethics rule, Rule 16-308(E) does not merely have an indirect and incidental effect on federal proceedings. Instead, as applied to federal prosecutors, its purpose and direct effect is to restrict the circumstances under which those prosecutors may invoke a federal procedure for serving federal-court process. Cf. Fed. R. Crim. P. 17(a) ("A subpoena must state the court's name * * * , include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies.").

The conflict created by Rule 16-308(E)'s direct regulation of federal subpoenas is particularly stark because the rule deals with matters that are already addressed by federal law. Under federal law, an attorney who receives a subpoena may withhold privileged information or seek to quash the subpoena on the grounds that "compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). But unless compliance would be unreasonable or oppressive, federal law requires the enforcement of an attorney subpoena that seeks nonprivileged information. See *United States* v. *Nixon*, 418 U.S. 683, 698 (1974); Cross-Pet. 7 & n.2.

Rule 16-308(E) reflects a different judgment about the appropriate balance between protecting the attorney-client relationship and ensuring the availability of evidence, and it seeks to enforce that judgment by threatening federal prosecutors with disciplinary sanctions if they do not adhere to the rule's more stringent standards. It therefore conflicts with federal law. And such a rule is not saved from preemption merely because it operates on attorneys rather than by purporting to supply a rule of decision for federal courts. Cf. Resp. Br. 6. The same could be said about each of the hypothetical rules described above, which are likewise framed as rules governing attorneys. See p. 2, *supra*. Despite that framing, those rules would plainly be preempted because they seek to use state disciplinary proceedings to enforce standards inconsistent with federal substantive, procedural, or evidentiary law. Rule 16-308(E) does the same thing, and it is therefore preempted as well.

* * * * *

If this Court grants the petition for a writ of certiorari in No. 16-1323, it should also grant the government's cross-petition. If the Court denies the petition in No. 16-1323, it should deny the cross-petition.

Respectfully submitted.

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