

April 6, 2026

VIA FEDERAL E-RULEMAKING PORTAL
(www.regulations.gov)

Re: Proposed Rule: Review of State Bar Complaints and Allegations Against
Department of Justice Attorneys
Docket No. OAG199, AG Order No. 6653-2026-A; RIN 1105-SAB82

Nothing is more important to maintaining the integrity of our legal system and the public's trust in the fair administration of justice than ensuring that all lawyers adhere to the ethical rules and standards governing the legal profession and that they face consequences when they fail to do so. We, the undersigned Attorneys General of Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Virginia, and Washington, therefore oppose the Department of Justice's ("DOJ") proposed amendment to 28 C.F.R. Part 77 ("Proposed Rule"). The Proposed Rule seeks to codify a process by which DOJ would request state bar disciplinary authorities to suspend state investigations or proceedings against DOJ attorneys who are reported for professional misconduct in order to allow an opportunity for DOJ to conduct its own review first. Where states decline that request, the Proposed Rule suggests that the DOJ may attempt to label parallel state investigations or disciplinary proceedings a form of "interference" with DOJ's review of its employees, and may take undefined "action" against those state investigations. Allowing the DOJ to insulate employees accused of professional misconduct would never be appropriate, but it is particularly improper at a time when federal courts across the country have been increasingly vocal regarding departures from the professional norms previously upheld by the DOJ.¹

Although the Proposed Rule's preamble includes broad language asserting that the Attorney General may "displace state bar enforcement," the regulatory text of the Proposed Rule merely authorizes DOJ to "request" that state disciplinary authorities suspend proceedings and explicitly contemplates that states may "refuse the Attorney General's request." Review of State

¹ See, e.g., *Hueso v. Soto*, Civil Action No. 26-1455 (ZNQ), 2026 WL 539271, at *3 (D.N.J. Feb. 26, 2026) ("Sadly, the well-deserved credibility once attached to [the U.S. Attorney's Office] is now a presumption that 'has been undeniably eroded,'); see also Tierney Sneed et al., *Federal judge quashes Justice Department subpoenas of Fed Chair Jerome Powell*, CNN, Mar. 13, 2026, <https://perma.cc/R8MJ-24WB>; Matt Sepic & Jon Collins, *Two federal judges rebuke Minnesota U.S. Attorney after ICE fails to follow court orders*, MPR, Feb. 26, 2026, <https://perma.cc/8883-LSL8>; Charlie Savage & Erik Wemple, *Judge Rebukes U.S. Over Application to Search Reporter's Home*, N.Y. Times, Feb. 20, 2026 <https://perma.cc/2CSD-VXAZ>; Sarah Lynch, *Appeals court declines to order lower court to sign arrest warrants against Don Lemon, others in church protest*, CBS News, Jan. 24, 2026, <https://perma.cc/AJF9-9PMN>; *US judge finds evidence of 'government misconduct' in federal case against Comey*, The Guardian, Nov. 17, 2025 <https://perma.cc/358G-3ZK4>.

Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10,780, 10,784, 10,787 (Mar. 5, 2026). In addition, the Proposed Rule’s federalism impact statement states that the rule will have no effect on the authority of the states, which have traditionally exercised “exclusive[.]” control over “the licensing and regulation of lawyers.” *Leis v. Flynt*, 439 U.S. 438, 442 (1979). Accordingly, the undersigned Attorney Generals do not construe the Proposed Rule to authorize DOJ to preempt state bar disciplinary proceedings or to require states to comply with DOJ’s requests to suspend those proceedings.

Nonetheless, the Proposed Rule’s preamble includes sweeping assertions of authority, and language in the proposed regulation raises concerns about how DOJ intends to implement it. In particular, the preamble includes language suggesting that the Attorney General would be entitled to assume exclusive control over enforcing state ethics rules against DOJ attorneys if she so chose and language suggesting that the Attorney General can direct attorneys not to submit to interviews or provide non-public information in state bar disciplinary investigations. The regulatory text also states that:

(b) Should the relevant bar disciplinary authorities refuse the Attorney General's request [to suspend parallel investigations or disciplinary proceedings], the Department shall take appropriate action to enforce this regulation or to prevent the bar disciplinary authorities from interfering with the Attorney General's review of the allegations.

91 Fed. Reg. at 10,787. The regulatory text does not elaborate what such actions might entail.

The preamble’s broad assertions of authority are plainly inconsistent with 28 U.S.C. § 530B, which states that DOJ attorneys “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.*” Affording DOJ attorneys special immunity from state bar enforcement proceedings and a special privilege to refuse requests for information would squarely contradict that legal requirement. In addition, to the extent the regulatory text is intended to allow actions that impede or block state disciplinary proceedings, the Proposed Rule’s justification is arbitrary and capricious in numerous respects. Among other things, the Proposed Rule (1) encroaches on states’ sovereign power to regulate the conduct of attorneys licensed by and practicing in their jurisdictions; (2) lacks a rational justification; (3) lacks adequate procedural safeguards; and (4) would put DOJ attorneys in direct conflict with their affirmative responsibilities under applicable state professional rules.

Public trust in the legal profession is best served when states can exercise their independent authority over all attorneys licensed by or practicing within their jurisdiction. The undersigned Attorneys General oppose the Proposed Rule and urge the Department to withdraw it.

BACKGROUND: STATES' AUTHORITY TO LICENSE, REGULATE,
AND DISCIPLINE PRACTICING ATTORNEYS

1. State Courts' Role in Attorney Licensing and Discipline

“Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.” *Leis*, 439 U.S. at 442. The 10th Amendment to the Constitution reserves to the states those powers that are not otherwise expressly delegated to the federal government, and the licensing and regulation of professions have long been interpreted as falling within the states’ police powers which ensure for the health, safety, and welfare of their residents. *See Leis v. Flynt*, 439 U.S. at 442; *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. at 434-35 (Supreme Court recognition of the “importance of the state interest” in enforcing state attorney disciplinary rules); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460 (1978) (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (“The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’”)).

Specifically with regard to the legal profession, the authority to set licensing and regulatory standards has consistently been vested in state *courts* as an exercise of judicial power. *See Cohen v. Hurley*, 366 U.S. 117, 123-124 (1961) (“History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied.”), *overruled on other grounds by Spevack v. Klein*, 385 U.S. 511 (1967).

The precise structural framework and procedures for licensing, regulating, and disciplining practicing attorneys vary from state to state, and each of the states represented by the undersigned Attorneys General have developed their own unique procedures and standards to ensure that attorneys who are licensed by or practice in their jurisdictions adhere to prescribed ethical and professional obligations. Most, if not all, states have recognized the authority to regulate the legal profession as belonging to the judiciary, and they have structures which stem from their states’ highest courts.

For example, in Minnesota, the Minnesota Supreme Court promulgates and publishes both the Minnesota Rules of Professional Conduct (MRPC) which govern attorney conduct, and the Rules on Lawyers Professional Responsibility (RLPR), which establish procedures for attorney discipline complaints. In order to carry out its work regulating and disciplining practicing attorneys, the Minnesota Supreme Court has created three entities, each with distinct roles: the Lawyers Professional Responsibility Board (LPRB), District Ethics Committees (DECs), and the Office of Lawyers Professional Responsibility (OLPR). Members of the LPRB and DECs serve in a volunteer capacity and are appointed by the Minnesota Supreme Court, whereas the OLPR employees full-time staff attorneys who are responsible for investigating and making

recommendations with regard to discipline. All public discipline is issued by the Minnesota Supreme Court.

Similarly, in the State of Washington, the Washington Supreme Court has exclusive authority over lawyer discipline, but has delegated regulatory authority to the Washington State Bar Association. WSBA may adopt rules governing the admission to, and professional responsibility of those in, the legal profession, subject to the approval of the Washington Supreme Court. RCW 2.48.060. The disciplinary system includes the Office of Disciplinary Counsel (ODC), volunteer hearing officers appointed by the Supreme Court, the Disciplinary Board, and the Supreme Court.

In Colorado, the Colorado Supreme Court regulates attorneys primarily through the Office of Attorney Regulation Counsel (OARC). OARC assists the Colorado Supreme Court in regulating all phases of the practice of law in Colorado, including enforcing the Colorado rules regarding attorney discipline. In this respect, OARC receives and investigates attorney complaints and, if warranted, prosecutes those complaints before a legal disciplinary judge. The Colorado Supreme Court then has exclusive jurisdiction over any appeal from an order arising from a disciplinary proceeding.

2. State Attorney Discipline Procedures Include Robust Screening

The states represented by the undersigned Attorney Generals have intentionally designed their attorney discipline systems to balance several important interests, including: the due process rights of practicing attorneys, the importance of ethical standards that advance public trust and the proper administration of justice, and the need to preserve court resources where discipline complaints lack sufficient merit to warrant investigation.

To that end, each state's system allows for complaints to be dismissed without investigation. This option allows for robust screening at the early stages, to ensure that attorneys are not subjected to unnecessary investigations or information requests where complaints fail to meet necessary thresholds.

State discipline authorities take this screening authority seriously, and exercise it in measurable ways. In Minnesota, for example, over half of the complaints the Minnesota OLPR received in 2025 were dismissed without investigation, because the complaints failed to meet the required threshold showing of a "reasonable belief that professional misconduct may have occurred." Other states' reporting further demonstrates that state disciplinary bodies take their screening role seriously to ensure complaints that lack merit do not result in unnecessary investigations, and that those complaints that are investigated only result in discipline where it is warranted.²

² See Washington Discipline System 2024 Annual Report, available at [2024-wa-discipline-system-annual-report.pdf](#) (denoting that Washington's discipline system opened 1,822 grievances and imposed 51 disciplinary actions). In Colorado, OARC prosecutes just a fraction of the complaints that it receives. In 2025, for example, OARC received at least 4,624 complaints. Of those complaints, just 210 were assigned to OARC's trial division. And of those cases, only 53 resulted in public discipline against an attorney.

THE PROPOSED RULE

1. The States do not construe the Proposed Rule to authorize the Attorney General to preempt state bar disciplinary procedures.

To be clear, the States do not construe the Proposed Rule, as drafted, to preempt any state bar disciplinary proceedings. It provides that, if the Attorney General wishes to review misconduct allegations against a current or former attorney for the government, “she or her designee shall *request* that the bar disciplinary authorities suspend any parallel investigations or disciplinary proceedings until the completion of the review.” 91 Fed. Reg. at 10,787 (emphasis added). It then goes on to contemplate that the relevant bar authorities may “refuse the Attorney General’s request.” *Id.* A “request” that may be “refuse[d]” is not a command with preemptive force. As the words suggest, it is an invitation that the bar disciplinary authorities have the option to accept or decline.

The proposed regulation goes on to state that if bar disciplinary authorities refuse the Attorney General’s request, the Attorney General “shall take appropriate action to enforce this regulation or to prevent the bar disciplinary authorities from interfering with the Attorney General’s review of the allegations.” 91 Fed. Reg. at 10,787. But that language merely confirms that the Attorney General’s request does not of its own force compel bar authorities to halt proceedings. Rather, it makes clear some additional “action” would be needed to halt the bar proceedings, and only if those state proceedings were serving to “interfere” with the DOJ’s review. By using the disjunctive “or,” this sentence appears to indicate that “enforc[ing] th[e] regulation” would not, on its own, “prevent the bar disciplinary authorities” from continuing their own proceedings; rather, the Proposed Rule conceives of those as two separate and distinct actions.

The preamble confirms this reading. Like the text of the proposed regulation, the preamble repeatedly states that the regulation grants the Attorney General authority to “request” that states suspend disciplinary proceedings and acknowledges that states may “refuse” that request. 91 Fed. Reg. at 10,780, 10,781, 10,784. Moreover, DOJ’s statement of compliance with Executive Order 13,132 asserts that the Proposed Rule would not have a “substantial direct effect on the states” or “on the distribution of power and responsibilities among the various levels of government” because it would “merely better reflect the *existing* balance of responsibilities between State bar authorities and the Department, where the state bar authority *should* wait for OPR to conduct its review of the allegations and reach a conclusion before deciding whether to pursue its own disciplinary investigation.” *Id.* at 10,786 (emphases added). A rule that preempted state bar disciplinary procedures would unquestionably have a “substantial direct effect” on the states and would require a federalism impact statement under Executive Order 13,132. *See* Exec. Order No. 13,132, § 4(e) (“When an agency proposes to act through adjudication or rulemaking to preempt State law, the agency shall provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.”); *id.* § 6(c)(2) (“To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications and that preempts State law, unless the agency, prior to the formal promulgation of the regulation . . . provides . . . a federalism summary impact statement”). And a rule with preemptive effect would not merely

reaffirm an “existing” process under which DOJ claims that states “should”—but are not required to—wait for OPR to review misconduct allegations first.

To the extent the proposed text and preamble leave any doubt, background legal considerations strongly favor against a reading that the regulation is intended to have preemptive force. Section 530B provides that attorneys for the government “shall be subject” to state rules governing attorneys “to the same extent and in the same manner” as any other attorney. 28 U.S.C. § 530B(a). As discussed in detail below, this statute plainly prohibits DOJ from granting its attorneys immunity from state bar disciplinary proceedings that other attorneys do not enjoy. Further, “the licensing and regulation of lawyers,” including the responsibility to “discipline . . . lawyers,” has long been a matter “left exclusively to the States and the District of Columbia within their respective jurisdictions.” *Leis*, 439 U.S. at 442. Absent some clearer expression of intent, the proposed regulation should not be read in a manner that would flout a federal statute and “supplant state law[s] . . . regulating a subject of traditional state power.” *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 325 (2016).

2. To the extent the Proposed Rule invites the DOJ to displace or interfere with state bar disciplinary proceedings, it is contrary to law.

Although the Proposed Rule does not preempt bar disciplinary proceedings against DOJ employees, various statements in the preamble assert that the Attorney General would have authority to “displace” such proceedings if she wished. 91 Fed. Reg. at 10,784. In addition, the Rule contemplates that the Office of Professional Responsibility (OPR) will issue separate directives instructing DOJ attorneys not to participate in interviews related to parallel investigations or disciplinary proceedings until the completion of OPR’s review. *Id.* Those assertions of authority are contrary to law. Section 530B(a) unequivocally prohibits DOJ from temporarily exempting its attorneys from state bar disciplinary processes. And neither Section 530B(b) nor any other statute grants DOJ authority to confer such an immunity.

- A. *Section 530B(a) prohibits DOJ from temporarily exempting attorneys from state disciplinary procedures.*

The plain text of Section 530B(a) conclusively precludes the Proposed Rule from having any preemptive effect. It provides:

An 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). This provision is not difficult to parse. It applies to any “attorney for the Government,” a term defined to include essentially any DOJ attorney. *See id.* § 530B(c); 28 C.F.R. § 77.2(a). It provides that those attorneys are “subject to State laws and rules . . . governing attorneys”—meaning that they are subject to any state laws or rules that bind attorneys. *See* 64 Fed. Reg. 19,273, 19,273-74 (1999) (construing the statute to extend to “codes of professional responsibility adopted by states”). And it states that they are subject to those rules “to the same

extent and in the same manner as other attorneys in the State”—that is, that DOJ attorneys are subject to state ethics rules both to the same “degree” and in the same “way” as other attorneys. Webster’s Encyclopedic Unabridged Dictionary of the English Language 504 (1996), <https://tinyurl.com/43d5drmw> (defining “extent” as “the space or degree to which a thing extends”); *id.* at 872 (defining “manner” as “way of doing, being done, or happening”).

It follows that DOJ attorneys cannot be exempted from state bar disciplinary procedures whenever DOJ wishes to conduct its own investigation of alleged attorney misconduct. For one thing, the rules subjecting attorneys to state bar disciplinary procedures are “rules . . . governing attorneys.” The American Bar Association (ABA) model rule on attorney discipline, for instance, provides that “[a] lawyer admitted to practice in this jurisdiction is *subject to the disciplinary authority of this jurisdiction*, regardless of where the lawyer’s conduct occurs.” ABA Model Rule on Professional Conduct 8.5(a). Numerous states have adopted provisions that follow that model language verbatim. *See, e.g.*, Minn. Rule of Professional Conduct 8.5; D.C. Rule of Professional Conduct 8.5(a); Colo. Rule of Professional Conduct 8.5(a). Other attorneys in the country do not enjoy immunity from these procedures when his or her employer announces that it would like to assess allegations of misconduct first. DOJ attorneys therefore cannot be granted that immunity, either. Otherwise, they would not be subject to those rules “to the same extent and in the same manner” as other attorneys.

The substantive provisions of state ethics rules dictate the same result. Every state has numerous ethics rules governing attorney conduct: they provide, for instance, that attorneys must exhibit candor with the courts, *see, e.g.*, ABA Model Rule of Professional Conduct 3.3, and that prosecutors cannot withhold material exculpatory evidence, *see, e.g., id.* 3.8. As DOJ’s own longstanding rules recognize, the principal “manner” in which attorneys are “subject” to these rules is that they may be disciplined by the state bar for violations of them, and face sanctions up to and including suspension or disbarment. *See* 28 C.F.R. § 77.2(h) (interpreting Section 530B to apply to rules “that prescribe ethical conduct for attorneys *and that would subject an attorney, whether or not a Department attorney, to professional discipline*” (emphasis added)). If DOJ attorneys are exempt from the threat of those sanctions, potentially for an indefinite period of time, then they are not subject to the substantive prohibitions “to the same extent and in the same manner” as other attorneys. Rather, for DOJ attorneys, those prohibitions operate as mere hortatory injunctions that they can violate for an extended period of time without facing any risk of suspension or disbarment.

DOJ’s responses to these problems lack merit. In the rule’s preamble, DOJ appears to concede that ABA Model Rule 8.5 and analogous state bar rules are “rules . . . governing attorneys” that fall within the scope of Section 530B. *See* 91 Fed. Reg. at 10,785. But it suggests that the Proposed Rule does not conflict with these requirements because “Department attorneys will still be subject to the disciplinary authority of the bars of the States in which they are licensed and in which they engage in their official duties.” *Id.* Section 530B, however, does not merely require that DOJ attorneys be “subject” to the disciplinary authorities of the states; they must be subject to that authority “to the same extent and in the same manner as other attorneys.” 28 U.S.C. § 530B. That command is plainly not satisfied if DOJ attorneys enjoy immunity, whether temporary or indefinite, from state disciplinary authority that other attorneys cannot claim.

DOJ also suggests that Section 530B only subjects attorneys for the government to “the same substantive State ethics rules” as other attorneys, but not “the same procedures for enforcing those rules.” 91 Fed. Reg. at 10,785. That is doubly incorrect. First, the rules requiring that attorneys be subject to a state bar’s disciplinary authority are *themselves* “rule[s] . . . governing attorneys” that fall within Section 530B—a point that DOJ appears to acknowledge in the very next paragraph of the preamble. *Id.* Second, the “manner” in which attorneys are “subject” to state substantive rules necessarily includes their means of enforcement. DOJ’s attempt to reinterpret the phrase “subject . . . in the same manner” to refer only to the “circumstances” that give rise to a violation is contrary to ordinary rules of English. *See id.* One would not say, for instance, that a foreign diplomat and a U.S. resident are “subject to” a state’s traffic laws “in the same manner,” if only the foreign diplomat may violate those laws without threat of enforcement. Nor would one say that a juvenile and an adult are “subject to” criminal prohibitions “in the same manner” if one may be prosecuted in criminal court and the other is subject to juvenile disciplinary proceedings. DOJ’s interpretation would essentially read the words “in the same manner” out of the statute and collapse them with the phrase “to the same extent.”

Indeed, until now, DOJ itself has long taken the position that Section 530B subjects its attorneys to state bar disciplinary proceedings. Contrary to its attempt to recast its 1999 rule as agnostic on the question of enforcement, that rule explicitly interpreted Section 530B as applying to rules “that would subject an attorney, whether or not a Department attorney, to professional discipline.” 28 C.F.R. § 77.2(h). This longstanding construction of the statute, dating nearly to the time of its enactment, by those charged with its implementation is entitled to “very great respect.” *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 386 (2024); *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (requiring agencies to acknowledge and explain their change in position).

B. Neither Section 530B(b) nor any other statute authorizes DOJ to exempt its attorneys from state bar disciplinary proceedings.

In addition to violating Section 530B(a), a rule granting DOJ attorneys temporary immunity from state bar disciplinary proceedings would exceed the Attorney General’s rulemaking authority under Section 530B(b). That provision states: “[t]he Attorney General shall make and amend rules of the Department of Justice to *assure compliance* with this section.” 28 U.S.C. § 530B(b) (emphasis added). As DOJ acknowledges, the verb “assure” means to “make (something) certain to happen.” 91 Fed. Reg. at 10,783; *see Webster’s Unabridged Dictionary* at 91. “Compliance,” in turn, means “the act of conforming, acquiescing, or yielding.” Webster’s Unabridged Dictionary at 301. Putting these terms together, Section 530B(b) thus grants DOJ the power to adopt regulations designed to make certain that its attorneys conform to rules governing attorneys “to the same extent and in the same manner” as other lawyers. *Cf. PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 711-14 (1994) (similarly construing statute granting authority to “assure that any applicant . . . will comply with” certain legal provisions).

A rule that temporarily immunized DOJ attorneys from state bar disciplinary processes would thwart—not advance—that statutory objective. As noted above, the rules subjecting attorneys to state bar disciplinary processes are themselves “rules . . . governing attorneys” under Section 530B(a). A grant of temporary immunity would prevent, rather than assure, compliance

with that requirement. But even if DOJ were correct that Section 530B(a) applies only to “substantive State ethics rules,” 91 Fed. Reg. at 10,785, a grant of temporary immunity would not serve to “assure compliance” with those rules; instead, it would promote *non*compliance, by indefinitely delaying the imposition of the most serious and significant penalties for violations. Just as the federal government could not plausibly claim that it was “assur[ing] compliance” with the criminal laws by exempting its employees from prosecution for their crimes, DOJ cannot plausibly contend that it is “assur[ing] compliance” with rules of ethical conduct by preventing bar authorities from disciplining attorneys for violations of those rules.

The statute’s background and history confirm that Congress did not grant the Attorney General authority to displace state bar disciplinary proceedings at will. Congress enacted Section 530B specifically to prevent DOJ from issuing rules that purported “to exempt its lawyers from state ethical rules.” *N.Y. State Bar Ass’n v. FTC*, 276 F. Supp. 2d 110, 133 (D.D.C. 2003). And its supporters repeatedly emphasized the need for the legislation in light of “the ineffectiveness of existing preventive and remedial measures” employed by DOJ to police misconduct. Cong. Research Serv., *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys* 4-5 & n.14 (Dec. 18, 2001) (summarizing statements of the statute’s proponents, including complaints that DOJ “always [does] nothing” in response to ethics complaints). Reading Section 530B to allow DOJ to exempt its attorneys from state bar disciplinary proceedings at will would negate those core objectives and restore the very system the statute’s proponents sought to eliminate.

To the extent the Proposed Rule claims that other, general provisions in DOJ’s organic statute authorize it to enact such an exemption, that argument is also incorrect. *See* 91 Fed. Reg. at 10,782 (citing 28 U.S.C. §§ 503, 509, 515(a), 516, 517, 519). Most of those provisions simply allocate supervisory and litigating authority within DOJ; they do not confer any sort of rulemaking authority, let alone grant DOJ the power to preempt contrary state ethics rules. And the one provision DOJ cites that does confer rulemaking authority—5 U.S.C. § 510—is a provision known as the “housekeeping statute” that the Supreme Court has long emphasized cannot be the source of any substantive rules. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979). Shortly before the enactment of Section 530B, the Eighth Circuit struck down DOJ’s attempt to rely on these general provisions as the basis for rules exempting its attorneys from state rules governing attorneys, finding that none conferred that authority. *U.S. ex rel. O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1254-57 (8th Cir. 1998). It is inconceivable that, after the enactment of Section 530B—which sought to eliminate any lingering uncertainty about whether such exemptions were lawful, *see United States v. Supreme Ct. of New Mexico*, 839 F.3d 888, 933-34 (10th Cir. 2016) (Tymkovich, J., concurring in part and dissenting in part)—the Attorney General could appeal to these same general regulations to enact the very sort of regulations Congress intended to bar.

3. The Proposed Rule is arbitrary and capricious.

A. *DOJ has not Identified a Rational Justification or Legitimate Need for the Proposed Rule*

As set forth above, the current state bar oversight procedures are functioning well, and include adequate screening mechanisms to ensure that any attorneys who receive state bar

complaints that arise from political animus rather than good-faith allegations of professional or ethical rule violations can be screened and, where appropriate, dismissed without investigation.

The Proposed Rule nonetheless suggests that it is critical to allow DOJ to conduct its own investigation as a matter of first review because the state complaint procedures have been “weaponized,” and may “chill” DOJ attorneys’ “zealous advocacy.” However, the Proposed Rule fails to identify any particular instances in which the state systems have been inadequate or have been wielded improperly. Nor does the Proposed Rule deny that DOJ attorneys have acted as zealous advocates for many decades under the precise system the Proposed Rule seeks to amend. Accordingly, the Proposed Rule lacks a rational justification.

Moreover, the Proposed Rule’s scope—which would include the same “right of first review” for complaints involving former DOJ attorneys, rather than just current DOJ attorneys—conflicts with the claimed justification. An agency decision is arbitrary and capricious where an agency explanation for the action is implausible, or lacks a rational connection between the facts found and the choice made.” *See Motor Vehicle Manufacturers Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, the Proposed Rule’s scope (which includes not only current DOJ attorneys, but also former DOJ attorneys) is too divorced from the justification claimed for the Proposed Rule to satisfy the need for a rational connection. DOJ’s ability to effectively investigate allegations against former attorneys is limited by its inability to compel former employees to participate in ethics investigations. And even if the result of a DOJ-led investigation confirmed a former DOJ attorney had engaged in rule violations warranting discipline, DOJ’s disciplinary authority is limited to admonishment or termination from employment. Once someone is no longer employed by DOJ, there would be nothing DOJ could do to discipline them. Accordingly, any DOJ-led investigation into former DOJ attorneys would serve, at most, as a tool to delay consequences of state disciplinary proceedings. Whatever false equivalency the Proposed Rule seeks to draw between a DOJ review and state disciplinary proceedings is misplaced: the power to publicly reprimand, suspend a law license, or disbar an attorney, are important authorities designed to redress serious violations and are distinct from private, employment-based powers DOJ exerts over attorneys while they are employed by the agency.

B. The Proposed Rule Ignores Its Impact on Federalism and States’ Rights to Set Standards

The Proposed Rule does not include an assessment of its impact on federalism, and instead generically states that “in compliance with Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), the Department has determined that this Proposed Rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.”

However, to the extent that DOJ’s intent is to try to interfere with or attempt to suspend state bar disciplinary proceedings by prohibiting cooperation of DOJ personnel, the Proposed Rule directly encroaches on States’ authority to establish and enforce standards of attorney discipline. Even when framed as a “request” rather than an enforceable mandate that state disciplinary bodies pause investigations or defer to DOJ’s right to first review, the expressed intent to prohibit employees and former employees from cooperating with state disciplinary bodies is a significant form of interference with the states’ authority over attorney discipline. Executive Order 13132 admonishes that federal agencies shall, “where possible, defer to the States to establish standards.”

Here, deference is owed to the states, which already establish and enforce standards for attorney discipline procedures.

C. The Proposed Rule Lacks Adequate Procedural Safeguards

The Proposed Rule lacks procedures to ensure that DOJ's review of allegations of misconduct by DOJ attorneys would be conducted in a fair, thorough, and timely manner. First, the Proposed Rule imposes no time limits on the Attorney General's review of complaints involving DOJ attorneys. Under the Proposed Rule, as drafted, DOJ could conduct an indefinite review, during which time it could continue to direct its personnel to refuse to participate in parallel state investigations. As with any type of investigation, extended delay can jeopardize the efficacy of future investigations: witnesses may no longer be available, memories fade, and records or other evidence can be destroyed or otherwise compromised. And in states where state disciplinary authorities are limited by statutes of limitations, such extended delay could permanently immunize DOJ attorneys from state discipline. This possibility is particularly concerning, given that DOJ's interpretation of applicable ethics rules can differ from those of the states.

Moreover, the Proposed Rule does not memorialize any protections or notice rights owed to any complainant (who may be an individual claiming direct harm arising from purported misconduct) and fails to define the standards or criteria guiding a DOJ review. The Proposed Rule does not require DOJ to disclose the substance of its findings to the state disciplinary authority or a complainant, nor does the Proposed Rule require disclosure of the factual or legal basis for a DOJ determination that no ethics violation occurred. The lack of such safeguards may leave complainants in a state of indefinite waiting, and may cause state disciplinary bodies to pause investigations expecting helpful, redundancy-reducing fact-finding from the DOJ, only to then find themselves having to start an investigation from scratch. Moreover, while state disciplinary proceedings typically carry state-to-state reciprocity, there is no safeguard within the rule that would require DOJ to notify *all* states in which a DOJ employee is licensed of pending reviews or of the findings from those reviews.

D. The Proposed Rule would Affirmatively Require DOJ Attorneys to Violate State Rules of Professional Conduct

The Proposed Rule states that where state discipline authorities do not agree to pause or delay their investigations, the Attorney General should be given authority to take "action" to "prevent" bar disciplinary authorities from "interfering" with the DOJ's review of attorney misconduct allegations.

The Proposed Rule's regulatory language does not enumerate the specific actions the Attorney General is authorized to take, nor does the Proposed Rule define what would constitute "interference." However, the preamble to the Proposed Rule suggests that this could include authority for the Attorney General to direct DOJ personnel not to participate in interviews or provide any non-public information to state discipline bodies until DOJ's review is complete.

Such a prohibition would be in direct conflict with many states' professional rules of conduct, which create a separate, standalone, and affirmative duty to respond to demands for

information from disciplinary authorities.³ Failure to abide by these professional rules can, on their own, be grounds to subject a licensed attorney to discipline.

CONCLUSION

For the reasons set forth above, the undersigned Attorneys General oppose the Proposed Rule and urge the Department to withdraw it.

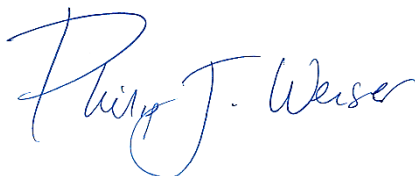
Sincerely,



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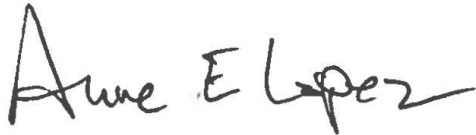
³ See, e.g., Minnesota Rules of Professional Conduct, R. 25; Illinois Rules of professional Conduct 8.1(b); Washington Rules of Professional Conduct 8.1(b); Washington Rules for the Enforcement of Lawyer Conduct 1.5; Colorado Rules of Professional Conduct 8.1(b); District of Columbia Rules of Professional Conduct 8.1(b); New Jersey Rules of Professional Conduct 8.1(b).



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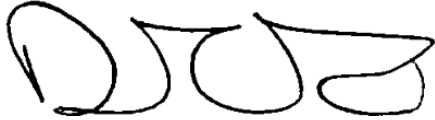
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