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No. SC2025-1020

IN THE

SUPREME COURT OF FLORIDA

Jon May, Petitioner

Plaintiff-Appellee,

v.

The Florida Bar, Respondent.

Defendant-Appellant.

Petitioner's Reply to The Florida Bar's Response To Petition for Writ of Mandamus

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Introduction

The Petition in this case asks this Court to order The Florida Bar ("The Bar") to follow the mandatory requirements of the Court's own disciplinary rules and to have Bar Counsel conduct an "initial," "staff" investigation of a complaint filed against Pamela J. Bondi, the Attorney General of the United States. Neither The Bar nor amici, the State of Florida and the United States of America, has interposed an argument that justifies dismissal of the petition. To the contrary, an act of Congress and decisions of the United States Supreme Court, this Court and other tribunals – and considerations of public policy – support granting the petition.

I. Petitioner Has a Clear Legal Right and the Bar Has a Clear Legal Duty to Investigate the Bar Complaint

The Florida Bar's Response provides no valid argument that refutes The Bar's legal duty to conduct a complete investigation into a sworn complaint.

The Bar begins by mischaracterizing Petitioner's position when it states that he has no clear legal right "to compel the bar to investigate and prosecute another member of the bar." Response at 4. Petitioner is not seeking to compel The Bar to prosecute Ms.

Bondi; it is obvious that Petitioner has no right to under the holdings of *Tyson v. The Fla. Bar*, 826 So. 2d 265 (Fla. 2002) and *Robinson v. Section 23 Prop. Owner's Ass'n*, 2017 Fla. LEXIS 496 (Fla. 2017). As Petitioner stated in his opening brief, he only requests a writ of mandamus directing The Bar solely to comply with its duty under Rule 3-7.3(b) to investigate the allegations in his sworn complaint and its duty under Rule 3-7.3(d) to conduct a "complete investigation."

Respondent's second challenge to Petitioner's mandamus petition is equally misleading. Respondent relies on the notion that the Bar "owes no legal duty to the petitioner with respect to attorney discipline" because disciplinary proceedings are "not designed to vindicate the rights of private parties." Response at 4. Respondent contends this "principle" is codified in Rule 3-7.4(i), which states that a "complaining witness is not a party to the disciplinary proceeding." *Id.* at 4-5.

Respondent's argument conflates the private right of an injured client to assert a civil claim against his or her attorney with the profession's longstanding, distinct goal of accountability to the public for its lawyers. This goal is expressed as the right of a person who files a bar complaint under oath to have The Bar conduct a

complete investigation. Although The Bar cites *In re Harper*, 84 So. 2d 700 (Fla. 1956), it fails to address that decision's explanation that, in the context of a disciplinary complaint, "private rights" refer to "the *rights of any injured person to maintain a civil action against the attorney,"* and the related ability of "public authorities [to] institut[e] criminal proceedings, if justified by the nature of the charges." *Id.* at 702 (emphasis added). Petitioner is not an "injured person" seeking to enforce a private right by bringing a civil action against Ms. Bondi. Petitioner seeks to vindicate the rights of a "complainant" under Rule 3-2.1(d) and Rule 3-7.3(b) that belong to "any person" who files a sworn complaint with The Bar.

Petitioner's clear legal right to require that The Bar investigate his complaint arises from The Bar's clear legal duty, created by Rule 3-7.3, to have bar counsel investigate the complaint until the "initial" investigation is completed. They are two sides of the same coin. The Bar's duty to conduct a complete "[s]taff" investigation is partly for the benefit of a complainant who has taken the important step of filing a complaint under oath. In essence, The Bar's duty to investigate a complaint sworn under oath confers a corresponding right on the complainant to have the complaint fully investigated.

Petitioner's right to require that The Bar conduct an investigation is further supported by the fact that his complaint is designed to protect the public, pursuant to his ethical duty to ensure that all members of The Bar adhere to the Rules of Professional Conduct. Rules of Professional Conduct, Preamble. As the Court stated in *Tyson*, "the purpose of an attorney disciplinary proceeding is the protection of the public. 826 So. 2d at 268. In such circumstances, it would render meaningless both the lawyer's obligations as a member of The Bar to inform The Bar when he or she becomes aware of ethical violations, and the public's right to demand that all lawyers who are members of The Florida Bar adhere to the highest standards of professional conduct, if The Bar were simply free to abandon its obligation to conduct an investigation on the grounds that a lawyer/complainant could not compel The Bar to obey this Court's rules.

Respondent's discussion of Rule 3-7.4(i) ("The complaining witness is not a party to the disciplinary proceeding.") also confuses the issues. The fact that a complaining witness is not a party to a disciplinary proceeding and has no right of appeal has no bearing on a bar complainant's right to require that The Bar conduct a complete investigation pursuant into the allegations in his

complaint and to seek enforcement of his right by filing a mandamus petition pursuant to Rule 3-7.7(e).

The State brushes past Rule 3-7.3 as "set[ting] out procedures for complaints, and then looks at other rule provisions in isolation and purports not to find a clear legal right contained in any of them. *See* FL Brief at 5-10. But the State never grapples with the argument of the Petition: read together, Rule 3-2.1(d) entitles any person to file a complaint, Rule 3-7.3(b) obliges Bar Counsel to investigate the allegations in a sworn complaint, and Rule 3-7.3(d) requires that investigation to be "complete." These related obligations create a clear legal right on the part of a complainant to compel The Bar to take those steps. Nor is this conclusion a "novel theor[y] of law," FL Brief at 10; it is a straightforward reading of three related rule provisions.[1]

[1] The "novel theory of law" cases cited by the State never actually use that term. Both do, however, involve highly complex legal questions with profound and uncertain consequences for large numbers of people not before the Court. *See Fla. League of Cities v. Smith*, 607 So. 2d 397, 400-401 (Fla. 1992) (whether to remove constitutional amendment from a statewide ballot) and *State ex rel. Hester v. State Bd. of Admin.*, 30 So. 2d 356, 359 (Fla. 1947) (liability of county for pass-through certificates in light of multiple changes in relevant statutes).

The State focuses particularly on Rule 3-7.7(e), arguing that Rule 3-7.7(a)(1) limits the entirety of Rule 3-7.7 to "reviews" sought by "parties." FL Brief at 9-10. It is true that Subsections (a) through (d) and (f) all use the term "review." But Subsections (e), (g), and (h) do not. In particular, Subsection (e) is in the passive voice and states broadly, without limitation, that "[a]ll applications for extraordinary writs that are concerned with disciplinary proceedings under these rules of discipline must be made to the Supreme Court of Florida." And this makes sense: if only "parties" could seek mandamus, then a person who filed a sworn complaint would have no remedy if The Bar simply refused to act. The writ of mandamus must be available to prevent such an outcome.

After all the misdirection discussed above, The Bar finally acknowledges Petitioner's reading of The Bar's disciplinary rules as requiring that "the bar must completely investigate every allegation in the underlying complaint submitted to the bar" (Response at 6). At that point, The Bar states as its sole justification for not investigating the allegations in Petitioner's complaint as follows:

> The bar closed out this matter without such a complete investigation based on R. Regulating Fla. Bar 3-7-16(d).

Id. This response implicitly concedes that apart from Rule 3-7.16(d), Petitioner has a "clear legal right" to require, and the Bar has a "clear legal duty" to conduct, a complete investigation into Petitioner's allegations against Ms. Bondi. As explained next, however, Rule 3-7.16(d) does not apply to Petitioner's complaint. Accordingly, his mandamus application should be granted.

II. Rule 3-7.16(d) Does Not Apply to Petitioner's Complaint

A. Respondent's Recitation of Rulemaking History Has No Relevance to Whether Rule 3-7.16(d) Applies to Ms. Bondi

Respondent begins its argument that Rule 3-7.16(d) applies to Ms. Bondi by contending that the Rule is intended to avoid a "separation of powers" issue: it assertedly prevents The Florida Bar from conducting a disciplinary proceeding against a constitutional officer because doing so would encroach on the exclusive right of "the legislative branch" to impeach a constitutional officer. Response at 8-11. The only legislative history cited by Respondent in support of this contention is this Court's Order adopting rule changes proposed by The Florida Bar, including the addition of Rule 3-7.16(d). *Amendments to the Rules Regulating the Fla. Bar*, 763 So. 2d 1002, 1005 (Fla. 2000). But the Court's explanation of the

purpose of Rule 3-7.16(d) does not address whether the rule applies to an "officer" appointed under the federal constitution. We show below that another part of the legislative history of the rule, which Respondent fails to bring to the Court's attention, demonstrates that it is *not* intended to apply to a federal appointee.

Significantly, Respondent's "separation of powers" argument also fails because that constitutional doctrine does not apply as between a State and the federal government. As Justice Scalia stated in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 719 (2010), "[t]his Court has held that the separation-of-powers principles that the Constitution imposes upon the Federal Government do not apply against the States." Respondent's attempt to deflect a statutory interpretation question with inapplicable separation of powers concerns is a tacit admission that it has no answer to Petitioner's statutory analysis.

B. The Bar Misapplies Rule 3-7.16(d) in Arguing that The Bar Cannot Investigate Federal Officers. That Rule Only Applies to State Constitutional Officers Required to be Members of the Florida Bar

The sole basis for The Bar's refusal to conduct an investigation into the allegations raised by the Complaint was Rule 3-7.16(d), which states:

> (d) Constitutional Officers. Inquiries raised or complaints presented by or to The Florida Bar about the conduct of a constitutional officer who is required to be a member in good standing of The Florida Bar must be commenced within 6 years after the constitutional officer vacates office.

As the text reflects, and as explained further below, this exception is not simply limited to "constitutional officers," it is limited to constitutional officers who must be a member of the Florida Bar. A proper understanding of this rule requires the conclusion that The Bar must entertain complaints against Ms. Bondi because she is a member of the Florida Bar, and cannot rely on the rule to avoid investigating her.

At the outset, The Bar's Response mischaracterizes the Petitioner's argument as seeking "indirectly . . . the attorney general's removal from office." Response at 11-12. Petitioner makes no such argument. To quote from the complaint (at 19), Petitioner only "urge[d] The Florida Bar to investigate the allegations made here and to take appropriate action." The complaint never suggests what sanctions might be appropriate. That is an issue for The

Florida Bar to address if it determines that Ms. Bondi violated her ethical duties.

Respondent then argues that the duties of the Attorney General require that she give legal advice and that a restriction on her ability to do so could prevent her from fulfilling her duties and thereby create "the potential for encroachment of a power situated with the federal government" which "supports the application of Rule 3-7.16(d)." Respondent's argument is predicated on the contention that Rule 3-7.16(d) was designed to avoid a "judicial bypass of another branch of government's exclusive impeachment or removal power, resulting in a separation of powers issue." *Id.* at 9. But there is nothing in the text of the rule or its history to suggest that its purpose was to avoid some effect on the federal government.

This Court has emphasized that a Florida court must "give effect to every clause and word of the statutory provisions at issue." *Tsuji v. Fleet*, 366 So. 3d 1020, 1030 (Fla. 2023); *see also Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946 (Fla. 2020) ("In interpreting the statute, we follow the 'supremacy-of-text principle' — namely, the principle that '[t]he words of a governing

text are of paramount concern, and what they convey, in their context, is what the text means.'") (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 56 (2012)); *Advisory Opinion to the Governor re: Implementation of Amen. 4, The Voting Restoration Amend.*, 288 So. 3d 1070, 1078 (Fla. 2020) (same).

In order for Rule 3-7.16(d) to apply in this case, Ms. Bondi would have to be required, by federal or state law, to be a member in good standing of The Florida Bar. But, as noted in our Petition and acknowledged by Respondent (at 11 n.3), she is not required by any law to be a member of *any* bar. As stated in *Ham*, "[i]t is readily apparent that the argument presented by [Petitioner] closely tracks the text of the statute while [The Bar's] argument . . . diverges from the text." Rule 3-7-16(d) says "required to be a member in good standing of The Florida Bar." Ms. Bondi is not so required. Therefore, Rule 3-7.16(d) does not apply to her.

C. "Constitutional Officer" Under Florida Law and Rule 3-7.16(d) Refers Only to Individuals Holding Offices Named in the Florida Constitution

Respondent does not cite any authority refuting Petitioner's argument that the provisions of Florida's constitution, statutes and

case law cited in his opening brief demonstrate that the term "constitutional officer" in Rule 3-7.16(d) does not apply to a federal appointee. Instead, Respondent argues that Petitioner's reading of the Rule adds words to the Rule. But plainly Respondent is impermissibly adding words to the Rule by contending that "constitutional officer" should be read to include a federal officer.[2]

Respondent then argues that Petitioner's reliance on Florida Supreme Court opinions and the Florida constitution's use of the term "constitutional officers" is "immaterial, and not particularly noteworthy." Response at 15. Yet, these are the same categories of sources that Respondent relies on in its brief to support its argument that Rule 3-7.16(d) was enacted to "avoid judicial encroachment by The Florida Bar on impeachment matters explicitly reserved to the legislative branch." *Id.* at 8.[3]

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[2] While the phrase "constitutional officer" is a familiar one in Florida law, it is not commonly used in federal jurisprudence. It appears to have been used by the Supreme Court to refer to an "Officer of the United States" (U.S. Const., art. II, § 2, cl. 2) only six times prior to Rule 3-7.16(d)'s adoption in 2000.

[3] Whether or not Rule 3-7.16(d) is intended to prevent the possible encroachment by the *Florida* judiciary on the *Florida* legislature has no bearing on whether the Rule is intended to prevent Florida's judicial branch from conducting disciplinary investigations concerning a federal officer.

There *is* legislative history for the Rule that provides guidance on its intended scope. *See Koile v. State*, 934 So. 2d 1226, 1231 (Fla. 2006) ("[I]f the statutory intent is unclear from the plain language of the statute, then 'we apply rules of statutory construction and explore legislative history to determine legislative intent.'") (quoting *BellSouth Telecomms., Inc.*, 863 So.2d 287 at 289 (Fla. 2003)). Although Respondent points to this Court's statement of the Rule's purpose when it was approved by the Court (which is irrelevant to the statutory interpretation issues in this case), Respondent tellingly fails to include in its legislative history a reference to an amendment to the Rule proposed by The Florida Bar's Disciplinary Committee and approved by the Board of Governors. This component of the Rule's legislative history demonstrates that the phrase "constitutional officer" only refers to individuals elected or appointed to offices identified in the Florida constitution.

In 2021, The Bar's Board of Governors approved a recommendation in a report of the Florida Disciplinary Committee that a new comment to Rule 3-7.16(d) be added that "clarifies that the governor has the authority to remove constitutional officers."

Florida Bar Board of Governors, Regular Minutes, (July 23, 2021) at 10, available at https://www-media.floridabar.org/uploads/2021/10/Regular-Minutes-July-23-2021-meeting-Revised.pdf. Since Florida's governor does not have any authority to remove any federal employee, much less an officer appointed under the U.S. Constitution, the proposed amendment implicitly acknowledges that the Rule only applies to Florida constitutional officers.[4]

The Bar appears to be attempting to conceal this fact by refusing to produce any documents relating to the Rule's legislative history. On June 17, 2025, Petitioner submitted a public records request to the Deputy General Counsel of The Florida Bar seeking:

> Any documents relating to any action, recommendation, discussion or publication by the Board of Governors of the Florida Bar or any committee or subcommittee thereof relating to Rule 3-7.16(d) (the "Rule") including, but not limited to, the rationale, meaning and scope of the Rule, any proposed amendments to the Rule, any interpretation of the Rule subsequent to its adoption, and any action, recommendation or discussion by the Florida Board of Governors within the last 180 days relating to the Rule.

See Exhibit A.

[4] The Court did not approve the proposed amendment. *See In Re: Amendments to Rules Regulating The Florida Bar – Chapters 3 and 14*, 369 So. 3d 228, 230 (Fla. 2023).

On June 20, 2025, the Bar replied by denying Petitioner's request, stating:

> The Florida Bar has determined that under Florida law, the records requested are confidential or exempt from disclosure requirements and has been redacted. Exemptions identified as follows:
> • RRTFB 1-14.1 (a): Attorney work product or attorney-client communications

See Exhibit B. On August 1, 2025, Petitioner wrote The Bar to request information supporting its claim that all documents relating to the legislative history of Rule 3-7.16(d) were work product or attorney-client communications. In his request, Petitioner noted that the requested documents are relevant to this case. *See* Exhibit C. The Bar subsequently refused to identify what records fall within the scope of the request (Exhibit D), further suggesting that it is seeking to conceal documents that undermine the legislative intent arguments it is making in its Response. Petitioner respectfully requests that the Court order The Bar to produce any documents relating to the legislative purpose of Rule 3-7.16(d) that are not work product or are not protected by the attorney-client privilege to help ensure that The Bar is not litigating this case unfairly. But even without the Bar documents requested by Petitioner, the Bar's

proposed amendment to Rule 3-7.16(d) supports interpreting the Rule to apply exclusively to Florida constitutional officers.

III. The McDade Amendment Fully Resolves Any Concerns Involving the Supremacy Clause

A. Congress Has Spoken Clearly and Unambiguously Through the McDade Amendment

Respondent and both amici argue that applying Florida's Rules of Professional Conduct to Ms. Bondi would disrupt the balance of authority between the federal and state governments. As shown below, Congress has spoken clearly and unambiguously to authorize states, including Florida, to enforce their ethical rules against Justice Department lawyers subject to those rules.

The allocation of authority between the state and federal governments is governed by the Supremacy Clause of the U.S. Constitution (U.S. Const. art. VI, cl. 2), and is addressed through the doctrine of preemption. Preemption can be either express or implied, with implied preemption in turn encompassing "field" and "conflict" preemption. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Respondent and both amici invoke the latter concept: "In the regulation of attorneys as in any other legal field, the Supremacy Clause requires that state regulation must yield to

conflicting federal requirements." U.S. Brief at 19; *see also* Response at 18; FL Brief at 16.

Preemption has no application, however, where Congress has provided states with "clear and unambiguous authorization" to regulate an activity. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988); *see also United States v. Washington*, 596 U.S. 832, 835 (2022) (characterizing the issue as one of "intergovernmental immunity," but applying the same test);)*Chamber of Com. of the United States v. Whiting*, 563 U.S. 582, 606-607 (2011). That is precisely what Congress has done in the McDade Amendment.

The McDade Amendment was enacted in 1998 to resolve a significant disagreement between state regulators and Department prosecutors concerning the legitimacy of state ethics regulation. Justice had attempted to exempt its prosecutors from state ethics rules, particularly "no contact" rules enacted by most states. Congress rejected the Department's position via the McDade Amendment. 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). As

interpreted by Justice Department regulations (28 C.F.R. § 77.4(c)(1)), the Act requires federal prosecutors to comply with the ethics rules of the state in which they are admitted to practice. Moreover, the statute expressly includes the Attorney General in its definition of "an attorney for the government." *See* 28 U.S.C. § 530B(a)); 28 C.F.R § 77.2(a).[5]

Goodyear Atomic Corp., *supra*, addressed a statute remarkably like the McDade Amendment: it authorized states to impose workers compensation laws on government-owned installations "in the same way and to the same extent as" they would apply to state-owned facilities. In that case, *no party disputed* that this language "provides the requisite clear congressional authorization for the application of the provision to workers at the Portsmouth facility." *See* 486 U.S. at 180-183.[6] *See also United States v. Washington*, 596 U.S. at 835 (applying the same statute).

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[5] For a history of the Amendment, *see* Hopi Costello, *Judicial Interpretation of State Ethics Rules Under the McDade Amendment: Do Federal or State Courts Get the Last Word?*, 84 Fordham L. Rev. 201, 211-232 (2015).

[6] The dispute turned on whether this language also justified an enhanced award when an injury resulted from a violation of state worker safety regulations. The Court held that it did. *See* 486 U.S. at 183-188.

The U.S. Brief cites *United States v. Supreme Ct. of New Mexico*, 839 F.3d 888 (10th Cir. 2016) for the proposition that, while the McDade Amendment "specifies that Federal attorneys must conform their conduct to generally applicable state ethics rules, those rules apply only to the extent that federal law does not require a different result, whether categorically or as applied in the circumstances of a particular case." U.S. Brief at 19. *Supreme Court of New Mexico* involved whether federal prosecutors could subpoena defense lawyers despite a contrary state ethics prohibition. Importantly, the court there *upheld* the challenged state ethics rule in the trial (i.e., non-grand-jury) context. *Id.* at 922. It found the rule to be preempted in the grand-jury context only because the rule conflicted with the grand jury clause of the Fifth Amendment. *Id.* at 923-928. The court declared that, "[g]enerally speaking, "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." 839 F.3d at 918. But here, neither the Bar, the State of the Florida nor the United States has identified any federal statute or constitutional provision that conflicts with the Florida Rules of Professional Conduct cited in the complaint: Rules 4-5.1, 4-8.4(a) and 4-8.4(d). Rather, the Bar challenges the very idea of the state applying its ethical rules to the

Attorney General, raising the specter of "potential state government encroachment on the federal government's authority" (Response at 16), and arguing that this "interference" would constitute "an actual conflict with some provision of federal law." Response at 16-18; *see also* U.S. Brief at 5 (endorsing that statement; FL Brief at 16 (citing "potential for disruption"). Under *Supreme Court of New Mexico,* such broad, abstract speculation is not sufficient for preemption. As the U.S. Supreme Court explained in *Chamber of Commerce*: "Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives. . . ." 563 U.S. at 607.

The Response (at 18) cites a 1990 Florida Bar opinion stating that "regulation of the legal profession is a proper exercise of state power and [ ] a Supremacy problem would arise only if the state's rule regulated the federal attorneys' conduct in a manner that created an actual conflict with some provision of federal law." The Response then muses that "licensure action against a political appointee could hamper the appointee's ability to perform his or her legal duties." *Id.* That speculation is hardly an "actual conflict with [a] provision of federal law." And this opinion was issued nine years before the McDade Amendment was enacted.

Through the McDade Amendment, Congress has expressly subjected Department lawyers to state ethical rules and authorized the states to police the ethical compliance of those lawyers—specifically including the Attorney General herself. The statute rules out of bounds any consideration of the abstract potential for "encroach[ing] on the authority of the federal government," and no federal statute or constitutional provision relevant to this case conflicts with it. If the Bar's investigation of the complaint consumes some portion of Ms. Bondi's time, that is consistent with what Congress intended by making federal government lawyers subject to the disciplinary authority of state bars. What would "encroach on the authority of the federal government" would be for a state to *ignore* the will of Congress, as expressed in the McDade Amendment, and refuse to exercise its powers of ethical oversight over lawyers for the federal government.

B. The Department's Novel Position Divesting State Supreme Courts of Ethical Oversight Is Unsupported by and Contrary to Decades of Law and Practice

The United States goes further than The Florida Bar or the State of Florida and announces an astonishing new position: the potential for conflict between state ethical oversight and the

activities of Department lawyers prevents states from overseeing the ethical compliance of Department lawyers. *See* U.S. Brief at 16-19. This radical position conflicts with case law from the United States Supreme Court and other courts, the Department's own rules and practice since the enactment of the McDade Amendment in 1998, and Florida rules. It would largely restore the status quo that the McDade Amendment was enacted to abolish.

Even before passage of the Amendment, the U.S. Supreme Court clarified that

> [s]ince 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. The States prescribe the qualifications for admission to practice and the standards of professional conduct. *They also are responsible for the discipline of lawyers.*

Leis v. Flynt, 439 U.S. 438, 442 (1979) (emphasis added). Consistently, federal and state courts – including this Court – have disciplined Department lawyers. For example, in *Florida Bar v. Cox*, this Court imposed a one-year suspension upon an Assistant U.S. Attorney for concealing the true identity of a witness for the prosecution, to the detriment of the defendant. *See* 794 So. 2d 1278 (Fla. 2001). The United States did not appear in the case, and the opinion gives no indication that the respondent argued that the

Court did not have jurisdiction to sanction her. To the contrary, the opinion emphasized that "prosecutors are held to the highest standard because of their unique powers and responsibilities." *Id.* at 1285-1286. In support of its position, the *Cox* opinion cites *Berger v. United States*, 295 U.S. 78, 88 (1935) (The "interest" of "[t]he United States Attorney . . . is not that it shall win a case, but that justice shall be done. . . ."), Florida Rule 4-3.8 ("Special responsibilities of a prosecutor"), and Standard 5.2 of the Florida Standards for Imposing Lawyer Sanctions (setting special standards for lawyers in an "official or government position"). *Id.*

Even before the McDade Amendment, courts rejected the argument that Assistant U.S. Attorneys could not be subject to state ethical oversight. Most notably, in *United States v. Ferrara*, a federal district court held that the Thornburgh Memorandum – "a policy memorandum issued by the head of an executive agency" – was "simply is not the equivalent of 'federal law'" that could conflict with state oversight. To the extent the issue was characterized as "intergovernmental immunity" the court held:

> [S]tate law is nullified under this doctrine only when "there is a conflict between state law and conduct that is *necessary and proper* to the performance of a federal duty" . . . . The Court simply cannot find AUSA Doe's violation of state ethical

> requirements "necessary and proper" to the performance of his duties as a federal prosecutor.

847 F. Supp. 964, 968-969 (D.D.C. 1993) (emphasis in original).

Similarly, in *Matter of Howes*, the New Mexico Supreme Court stated:

> Respondent has not cited and cannot point to any federal law which requires him to carry out his duties as an AUSA in an unethical manner or to any intent of Congress that he even be permitted to do so. To the contrary, the intent of Congress still appears to be that respondent and others in his position should adhere to the ethical standards prescribed by their licensing courts.

940 P.2d 159, 169 (N.M. 1997).

Cases since McDade are even more definitive. *See, e.g., In re Clark*, 311 A.3d 882, 887-889 (D.C. 2024) (citing the McDade Amendment and rejecting claim that the D.C. Bar did not have jurisdiction to sanction Department lawyer admitted there); *In re Kline*, 113 A.3d 202, 206 (D.C. 2015) ("The discipline of attorneys, including determination of appropriate sanctions, is the responsibility of this court."); *In re Nowacki, D.C. Bar Docket No. 2008-0339*, Office of Bar Counsel (July 23, 2009), https://www.dcbar.org/ServeFile/GetDisciplinaryActionFile?fileName=20090723Nowacki.pdf (Bar Counsel issued "informal admonition" to Department lawyer for drafting a proposed response

to media inquiry which he knew to be inaccurate, as well as for failing to disclose that Department staff used political affiliation in accessing candidates.)

The notion that states cannot discipline Department lawyers also conflicts with the Department's own regulations and practice. Those regulations provide—

> The phrase *state laws and rules and local federal court rules governing attorneys* means rules enacted or adopted by any State or Territory of the United States or the District of Columbia or by any federal court, that prescribe ethical conduct for attorneys *and* that would subject an attorney, whether or not a Department attorney, to professional discipline, such as a code of professional responsibility.

28 U.S.C. § 77.2(h) (emphasis in original). Moreover, the preamble to those regulations declares that "Section 530B does not change the enforcement authority of the Department of Justice's Office of Professional Responsibility, *state authorities*, or the federal courts. 64 Fed. Reg. 19274 (April 20, 1999) (emphasis added).

The United States emphasizes that the Department's Office of Professional Responsibility (OPR) reviews allegations of misconduct by Department lawyers. U.S. Brief at 12. It omits to state, however, that where an OPR investigation concludes with a finding of intentional misconduct and that finding is approved by the Deputy Attorney General, OPR's practice is to notify the relevant state bar.

See Gov't Accountability Office, GAO-00-187, DEPARTMENT OF JUSTICE: INFORMATION ON THE OFFICE OF PROFESSIONAL RESPONSIBILITY OPERATIONS 13-14 (2000), available at https://www.gao.gov/assets/ggd-00-187.pdf. It is also unclear whether OPR is even functional at the moment, since Ms. Bondi removed the Director and Chief Counsel of OPR, Jeffrey Ragsdale, last spring. *See* Perry Stein, Shayna Jacobs, and et. al., *Several top career officials ousted at Justice Department*, WASH. POST (Mar. 7, 2025), https://www.washingtonpost.com/national-security/2025/03/07/justice-department-trump-firings/, and he has not been replaced. *See Office of Professional Responsibility*, DOJ https://www.justice.gov/opr (last visited Sept. 18, 2025).

The Department also highlights "trainings" and "advice" provided by its Professional Responsibility Advisory Office. U.S. Brief at 11-12. It fails to note that Stacy Ludwig, the Office's former Director, left her position in March. *See Former Director of Professional Responsibility Advisory Office Stacy Ludwig*, Archives DOJ, https://www.justice.gov/archives/prao/staff-profile/former-director-ludwig (last visited Sept. 18, 2025). A replacement has still not been appointed, six months later.

The McDade Amendment was enacted to ensure that Department lawyers were governed by state ethics rules to the same extent and in the same manner as other attorneys in that state. There is no basis, in law or practice, for the Department to evade that purpose by reserving to itself the power to decide whether and how to apply those rules.

C. The McDade Amendment Clarifies That the Florida Disciplinary Process Applies Now

The Response contends (pp. 18-19) that the McDade Amendment does not address "when state rules of professional conduct attach," and argues that Rule 3-7.16(d) answers that question by saying that Florida ethical oversight attaches at the time a federal officer who is a Florida lawyer leaves office. But the McDade Amendment *does* address this question: it says that lawyers for the government, including the Attorney General, shall be subject to state ethical oversight "to the same extent and *in the same manner* as other attorneys in that State." 28 U.S.C. § 530B (a) (emphasis added). As noted above, the parties in *Goodyear Atomic Corp.*, *supra*, all conceded that virtually identical language ("in the same way and to the same extent") clearly and unambiguously

subjected federal facilities to the same workers compensation rules that applied to state-owned facilities. *See* 486 U.S. at 180-183.

The dictionary definition of "manner" is "[a] way of doing something or the way in which a thing is done or happens." *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992). Applied to this case, "in the same manner" most naturally means that this Court's disciplinary process should apply the rules of professional conduct to federal government lawyers according to the same timetable as they are applied to non-government lawyers, and just as other courts have done. In other words, while Chapter Four of the Rules Regulating the Florida Bar (the Disciplinary Rules) is not a set of "ethics" rules, McDade requires its application along with Chapter Three (the Rules of Professional Conduct). A special Florida rule that exempted the Attorney General of any ethical oversight for the duration of his or her term – which could be for years – would conflict with Congress's direction that government lawyer officials be regulated "in the same manner" as other Florida lawyers. It would defeat the purpose of the McDade Amendment.

IV. The Concept of Qualified Immunity Is Not Relevant to This Proceeding

The State of Florida urges the Court to find that the doctrine of qualified immunity prevents this Court from disciplining the U.S. Attorney General for violations of the Rules of Professional Conduct. FL Brief at 11-16. The State devotes much discussion to federal offices whose holders are entitled to absolute immunity, but that doctrine is addressed to immunity from civil liability from damages, not professional regulation of lawyer conduct. In fact, what the heads of executive departments (like the Attorney General) are entitled to is "qualified immunity." Under this doctrine, such officers are immune from the imposition of damages in civil cases for actions that taken within the scope of their authority. If the official knew or should have known that their actions were illegal, they enjoy no immunity. *See generally*) *Butz v. Economou*, 438 U.S. 478, 506-508 (1978). This is wholly distinct from disciplinary action against a lawyer who has violated the profession's proscriptions. Petitioner is not aware of any decision by any court providing a federal officeholder with immunity from discipline for violating legal ethics rules, and the State has not provided any.

The Court should also consider the practical consequences of concluding that the U.S. Attorney General is immune from ethical oversight. What would it say about our Nation if its highest-ranking lawyer, who is responsible to upholding the rule of law, were uniquely insulated from accountability for ethical conduct – or in charge of his or her own review?

V. The Complaint in this Case Is Not "Lawfare"

Both the State and the United States characterize the complaint giving rise to this case as an example of "lawfare"; *i.e.,* where "opponents of the President's administration . . . dress up policy or political grievances as ethics complaints against Department attorneys, or . . . raise meritless ethics complaints without any serious evidentiary basis." *See* FL Brief at 1; U.S. Brief at 2-4, 20-24. While this characterization is disappointing, it is sadly the discourse now commonly employed in public debate. It is also incorrect.

Explicit in the "lawfare" contention is that the complaint at issue here is "baseless" (FL Brief at 4) or "meritless" (U.S. Brief at 22). The Petition was clear (at 7) that it was not asking this Court to address the merits, a position that The Bar has endorsed (Response

at 2 n.1). Petitioner continues to urge this Court to adopt that approach, and to assume for purposes of this litigation that the complaint could be meritorious. Obviously, if it is not, Bar Counsel will reject it pursuant to Rule 3-7.3(d). Petitioner will note, however, that many of the signatories of the complaint have a track record of filing ethics complaints that have been meritorious. *See, e.g., Matter of Chesebro,* 239 A.3d 1223 (N.Y. 2025); *Matter of Giuliani*, 230 A.3d 101 (N.Y.S. 2024); *In re Clark*, 311 A.3d 882, 887-889 (D.C. 2024).

Finally, the Department might do well to be cautious about making accusations of "weaponizing" the ethics process, U.S. Brief at 22, given its recent practice of launching OPR investigations of its own lawyers when they have cited ethics rules as a reason for not following directives from superiors. *See, e.g.,* Benjamin Weiser, *Seven Former Manhattan U.S. Attorneys Voice Support for Sassoon*, NEW YORK TIMES (Feb. 14, 2025), available at https://www.nytimes.com/2025/02/14/nyregion/manhattan-us-attorneys-sassoon.html.

VI. Mandamus Is Appropriate in this Case

The State emphasizes that mandamus is a discretionary remedy, FL Brief at 3, and highlights that the Court enjoys similar

discretion if it were to treat the Petition as a request that the Court exercise its exclusive jurisdiction over attorney discipline. *Id.* at 25. This Court does indeed have complete discretion to grant or deny the Petition in this case. In considering how to act, though, the Court should bear in mind that it has before it a petition raising significant ethical issues involving the most powerful lawyer in the Nation's government and the personification of the rule of law. Whether it acts through The Florida Bar or purely on its own, the Court has an immense responsibility. No doubt it will be criticized however it decides this case. But surely history will regard it with greater respect if it allows the process established by its own rules play out as those rules require – rather than allowing The Bar – and itself – simply to defer the issue. Surely the public will have greater confidence in, and respect for, a legal system where no person – especially the Attorney General of the United States – is above the law.

Conclusion

For all the foregoing reasons, the Petition for Writ of Mandamus should be granted.

Petitioner requests oral argument.

Respectfully signed and submitted electronically this 18th day of September, 2025.

_____/s/_____
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Certificate Of Compliance

I hereby certify that this brief was typed in 14-point Bookman Old Style. The body of the reply is less than 6,500 words long.

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