No. 16-1323

# In The Supreme Court of the United States

SUPREME COURT OF NEW MEXICO,
THE DISCIPLINARY BOARD OF NEW MEXICO,
AND OFFICE OF THE DISCIPLINARY
COUNSEL OF NEW MEXICO,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF OF ASSOCIATION OF CORPORATE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## INTEREST OF THE *AMICUS CURIAE*[1]

The Association of Corporate Counsel ("ACC") (www.acc.com) is a global bar association composed of over 42,000 in-house attorneys who practice in the legal departments of more than 10,000 organizations located in at least 85 nations. The entities that employ ACC's members vary greatly in size, industry, and geographic region.

For 35 years, ACC has sought to educate courts, legislatures, regulators, bar associations, and other law or policy-making bodies on matters that concern corporate legal practice and the ability of ACC members to fulfill their multifarious in-house counsel functions. Vigorous judicial application of the attorney-client privilege, work-product doctrine, and other confidentiality protections needed to foster robust attorney-client relationships that encourage full and frank communication between corporations and their in-house counsel long has been one of ACC's most important objectives.

The question presented in this case—whether federal prosecutors must comply with State-imposed

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* ACC certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. As required by Supreme Court Rule 37.2(a), Petitioners' and Respondent's counsel of record received timely notice of ACC's intent to file this *amicus* brief. Counsel for Petitioner has lodged a blanket consent for the filing of *amicus* briefs. Counsel for Respondent has consented to the filing of this brief.

professional conduct rules which establish reasonable standards for prosecutors' issuance of grand jury subpoenas that seek evidence from lawyers about past or present clients—has significant implications for in-house counsel, as well as for outside attorneys. ACC, the voice of the in-house bar, is uniquely qualified to discuss the impact of this issue, and the Tenth Circuit's holding, on maintaining effective attorney-client relationships between in-house counsel and their corporate clients.

For in-house counsel to advise and represent their corporate clients in a productive as well as professional manner, an attorney-client relationship based on open communication, candor, and trust is vital. The same is true for the working relationship between a company's in-house and outside attorneys. Promoting the free flow of communications between corporations and their in-house counsel, particularly regarding sensitive matters such as corporate compliance and internal investigations, serves the interests of justice and is essential for cultivating and preserving a forthright attorney-client relationship. *See Upjohn Co. v. United States*, 449 U.S. 383, 389-90 (1981).

## SUMMARY OF ARGUMENT

New Mexico Rule of Professional Conduct 16-308(E), like the same or similar rules in many other States, broadly applies to "[a] prosecutor in a criminal case" who seeks to "subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client." N.M. R. Prof'l Conduct 16-308(E). That rule, based on ABA

Model Rule of Professional Conduct 3.8(e), is intended to protect the attorney-client relationship between any lawyer and client, including between in-house counsel and the corporate clients that they advise and represent.

The Tenth Circuit's opinion, however, impairs the communication of information between corporations and their attorneys, including with in-house counsel. According to the panel majority, despite the McDade Amendment's mandate subjecting federal prosecutors to State ethics rules, *see* 28 U.S.C. § 530(B), the "obstacle" (i.e., "purposes and objectives") form of implied conflict preemption bars enforcement of Rule 16-308(E) as to federal prosecutors in grand jury settings. App. 70a. This means that merely by believing that issuance of an attorney-subpoena satisfies a much more lenient federal standard, *see* App. 73a, federal prosecutors, at least in the Tenth Circuit, can issue grand jury subpoenas compelling lawyers—*including in-house counsel*—to provide potentially incriminating testimony or other evidence about current or former clients.

The panel majority's preemption ruling is directed to the New Mexico rule's "essentiality" and "no-other-feasible-alternative" prongs. *See* Rule 16-308(E)(2) & (3) (prohibiting prosecutors from subpoenaing lawyers to present evidence about past or present clients in both trial and grand jury settings "unless the prosecutor reasonably believes . . . the evidence sought is essential to the successful completion of an ongoing investigation [and] there is no other feasible alternative to obtain the

information"). *See* App. 73a. The United States is not challenging the New Mexico rule's first prong—prohibiting issuance of attorney-subpoenas unless a prosecutor "reasonably believes [that] the information sought is not protected from disclosure by any applicable privilege." Rule 16-308(E)(1); *see* Pet. App. at 10a n.5. But because federal government lawyers consistently attack attorney-client privilege between corporations and their in-house counsel, the rule's first prong provides little comfort to corporations and their in-house lawyers.

Although the attorney-client privilege applies to certain communications between in-house counsel and their corporate clients, federal government lawyers' continual challenges to the scope and/or application of the attorney-client privilege and other privileges asserted in connection with communications to or from in-house counsel cause much uncertainty about the extent of the privilege in the in-house counsel context. For this reason, the heightened attorney-subpoena criteria imposed by Rule 16-308(E) and parallel rules in other States—criteria which apply to federal prosecutors by virtue of the McDade Amendment—provide important additional protections for the relationship between in-house attorneys and their clients.

If allowed to stand, the Tenth Circuit's preemption ruling will not only upend the McDade Amendment, but also seriously impair the ability of in-house counsel (as well as outside attorneys) to serve their clients. Sensitive communications between company personnel and in-house counsel

regarding subjects such as corporate compliance and internal investigations—including communications whose privileged status federal prosecutors may attempt to challenge—would be stifled due to the uncertainty of whether federal prosecutors will subpoena in-house counsel to provide grand juries with potentially incriminating evidence that has been communicated to them during the course of business.

The lower court majority's purposes-and-objectives (i.e., obstacle) preemption analysis, sharply criticized in Chief Judge Tymkovich's dissenting opinion, not only is vague, but also precluded by the McDade Amendment. That federal statute functions as a "saving" provision, expressly preserving the application of States' rules of professional conduct, such as New Mexico's Rule 16-308(E), to federal government attorneys.

## ARGUMENT

### I. THE PREEMPTION ISSUE IS IMPORTANT TO IN-HOUSE COUNSEL

The Tenth Circuit's ruling has a potentially devastating impact on the attorney-client relationship between in-house counsel and their corporate clients. This is a compelling reason why the Court should grant certiorari and decide whether federal prosecutors must comply with State-imposed ethics rules such as New Mexico Rule of Professional Conduct 16-308(E) when issuing attorney-subpoenas seeking client-related evidence in a grand jury context.

More than 25 years ago this Court recognized the importance of fostering the attorney-client relationship between a corporation and its in-house counsel. *See Upjohn*, *supra* (applying the attorney-client privilege to communications between corporate personnel and in-house counsel). The Court indicated that "encourag[ing] full and frank communication between attorneys and their clients . . . promote[s] broader public interests in the observance of law and administration of justice." 449 U.S. at 389. "[S]ound legal advice depends upon the lawyer's being fully informed by the client." *Ibid.*; *see also In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 150 (D.C. Cir. 2015), *cert denied sub nom. United States ex rel. Barko v. Kellogg Brown & Root, Inc.*, 136 S. Ct. 823 (2016) (citing *Upjohn* and referring to the need to "promote candid communications with counsel").

In recent years the role of in-house counsel has become even more crucial to corporate operations. *See*, *e.g.*, Larry R. Ribstein, *Delawyering the Corporation*, 2012 Wis. L. Rev. 305, 308 (discussing "the emergence of in-house counsel as the corporation's most important legal advisor"). "With the changing legal landscape"—particularly the emphasis on "[f]ederal corporate criminal law . . . criminal regulations targeting business practices like corruption, consumer and employee safety, and environmental protection"—"the need for in-house legal counsel increased significantly." Jonathan C. Lipson, Beth Engel & Jami Crespo, *Who's In The House? The Changing Nature and Role of In-House and General Counsel*, 2012 Wis. L. Rev. 237, 241-42.

Because "[t]he role of the in-house counsel has become extremely complex in recent years," he or she is "expected to maintain open communication not only with other in-house counsel, but also with other business units." Note, *Ethical Conflicts Facing In-House Counsel*, 20 Geo. J. Legal Ethics 849, 851-52 (2007).

Earlier cases have recognized the harm that issuance of attorney-subpoenas can inflict on open communications between clients and their lawyers. For example, in litigation which upheld enforcement of Colorado's attorney-subpoena rule as to federal prosecutors acting outside the grand jury context, the Tenth Circuit emphasized that "the service of 'an attorney-subpoena may cause irreparable damage to the attorney-client relationship,'" including by "undermin[ing] the trust and openness so important to the attorney-client relationship." *United States v. Colorado Supreme Court*, 189 F.3d 1281, 1288 (10th Cir. 1999) ("*Colorado Supreme Court II*") (quoting *Whitehouse v. U.S. Dist. Ct. for the Dist. of R.I.*, 53 F.3d 1349, 1358 (1st Cir. 1995)).

*Whitehouse*, which the First Circuit decided even without the benefit of the McDade Amendment, upheld a Rhode Island ethics rule concerning federal prosecutors' issuance of attorney-subpoenas in both the grand jury and trial contexts. The First Circuit explained that service of an attorney-subpoena "will immediately drive a chilling wedge between the attorney/witness and his client . . . . From the moment that the subpoena is served on counsel, until the issue of its validity is resolved, the client resides

in a state of suspended animation, not knowing whether his attorney will testify against him and perhaps be required to withdraw his representation." *Whitehouse*, 53 Fed.3d at 1358 (internal quotation marks omitted). "In addition, service of a subpoena opens a second front which counsel must defend with her time and resources, thus diverting both from the client." *Ibid.*; *see also id.* at 1354 (summarizing "the ethical and legal implications of prosecutors subpoenaing attorneys for the purpose of compelling evidence concerning their clients").

The Tenth Circuit recognized these concerns both in *Colorado Supreme Court II*, *see* 189 F.3d at 1288, and in the present litigation. In its opinion here, the court of appeals, discussing *Colorado Supreme Court II*, explained "that the Colorado rule . . . sought to safeguard the attorney-client relationship." App. 59a. The court acknowledged that the New Mexico rule "contains identical language" and "is intended to limit the issuance of attorney subpoenas to only 'those situations in which there is a genuine need to intrude into the client-lawyer relationship.'" *Id.* 59a-60a (quoting N.M. R. of Prof'l Conduct 16-308(E) cmt. 4); *see generally Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) ("In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.").

Allowing federal prosecutors to issue attorney-subpoenas in the grand jury context merely if there is a "'reasonable *possibility* that the [information] . . . [is] relevant to the general subject of the grand jury's

investigation,'" App. 73a (quoting *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991)) (emphasis added by Tenth Circuit), can "drive a chilling wedge" into the heart of the attorney-client relationship between in-house counsel and their corporate clients. Consider the following hypothetical examples:

- A senior executive discovers information causing her to believe that certain individuals in her division have engaged in bribery of foreign officials on behalf of the company. Deeply concerned about this apparent corporate wrongdoing, and also worried about whether she could be personally culpable for not discovering and reporting the information sooner, the executive wants to consult promptly with her company's in-house counsel.

But the executive has learned that the U.S. Attorney's office in her State—based merely on a belief there is a "reasonable possibility" that an in-house attorney has non-privileged information about his corporate client that is relevant to a grand jury investigation—can subpoena the in-house lawyer to provide potentially incriminating testimony about the company and its executives. Not knowing whether the in-house counsel will be compelled to testify before a grand jury, the executive refrains from requesting a meeting with him to pass along the information that she has gathered.

Suppose instead the executive is unaware that there is a lax federal standard for issuing a subpoena compelling an in-house counsel to appear before a grand jury. So she phones the in-house attorney to explain that she would like to meet with him for the

purpose of conveying information about apparent unlawful activity. What should the in-house counsel do? Should he express concern that he may be compelled to present grand jury testimony about the information that the executive conveys, including information that could make her culpable, and thereby dissuade her from meeting with him?

Under either of these scenarios, the non-disclosure of information from the executive to the in-house counsel seriously interferes with his ability to investigate and advise the company in connection with possible unlawful activity. And in the event there actually was wrongdoing by particular employees, the executive's reluctance to disclose the information she has discovered also may harm the company by preventing it from obtaining "cooperation credit" from the Department of Justice. *See* Memorandum from Deputy Attorney General Sally Q. Yates entitled "Individual Accountability for Corporate Wrongdoing" (Sept. 9, 2015) ("To be eligible for any cooperation credit, corporations must provide the Department all relevant facts about the individuals involved in corporate misconduct."), *available at* https://goo.gl/F4A2FG.

- In-house counsel for the U.S. subsidiary of a European-headquartered corporation is assisting the company's European in-house and outside attorneys by collecting information from the U.S. subsidiary relevant to an internal investigation of possible criminal antitrust violations in Europe. During the course of the internal investigation, the Department of Justice initiates a grand jury investigation of the

U.S. subsidiary. Federal prosecutors subpoena the U.S. in-house counsel based merely on the "reasonable possibility" that she possesses non-privileged information relevant to the grand jury proceeding. After learning about issuance of the subpoena, the European in-house and outside attorneys sharply curtail contact with the U.S. in-house counsel, thereby depriving the company of the ability to fully investigate the European allegations and defend their corporate client.

In these and similar scenarios, a company's understanding or expectation that confidential or other sensitive internal communications to or from in-house counsel are privileged or otherwise protected from disclosure will not deter overly zealous federal prosecutors from issuing grand jury subpoenas that intrude into the attorney-client relationship by compelling disclosure. *See generally Upjohn*, 449 U.S. at 393 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."). Even in the wake of *Upjohn*, where the Internal Revenue Service sought documents relating to an in-house counsel-directed internal investigation, federal government attorneys continue to view with skepticism, and actively oppose, assertions of privilege involving in-house counsel.

For example, in a long-running legal battle, the Federal Trade Commission recently filed a D.C. Circuit brief challenging "overly broad privilege claims" relating to communications made to or by an

in-house attorney who, by negotiating "potentially anticompetitive business deals," had "acted as a businessperson, not a legal advisor." FTC Brief at 1, *Federal Trade Comm'n v. Boehringer Ingelheim Pharmaceuticals, Inc.*, Nos. 16-5356 & 165357 (D.C. Cir. filed Mar. 27, 2017), *available at* https://goo.gl/JXR8Xm. The attorney vs. businessperson distinction advocated by the Federal Trade Commission "rest[s] on a false dichotomy," *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014), which ignores the reality that legal and business advice often are inextricably linked. In-house counsel often fulfill these dual roles by simultaneously providing consolidated legal and business advice that is inseparable, and thus, privileged.

Nonetheless, because federal prosecutors can be expected to possess and/or advocate a narrow view of the privileged status of communications to and from in-house counsel—and also because federal prosecutors may seek information from in-house counsel that is not necessarily privileged—the stringent requirements embodied by the "essentiality" and "no other feasible alternative" prongs of New Mexico Rule of Professional Conduct 16-308(E)(2) & (3) (and similar rules in 30 other States) are critical. Those safeguards are needed to protect the attorney-client relationship between corporations and their in-house (as well as outside) counsel from the chilling and disruptive effects of attorney-subpoenas in grand jury proceedings.

In view of the fact that many States *outside* of the Tenth Circuit have adopted a form of ABA Model Rule of Professional Conduct 3.8(e), the court's preemption ruling is problematic for thousands of corporations that conduct business throughout the United States. Those corporations depend on their in-house counsel to render legal advice to subsidiaries, divisions, departments, facilities, and personnel located within many different jurisdictions. Uncertainty about whether, where, and under what circumstances in-house counsel can be haled into grand jury proceedings to testify about their corporate clients deepens the need for this Court to answer the question of whether federal prosecutors must comply with New Mexico's rule, and other States' identical or substantially similar rules, when subpoenaing attorneys to provide grand jury evidence about their clients.

## II. THE COURT SHOULD DECIDE WHETHER "OBSTACLE" PREEMPTION SUPPLANTS THE MCDADE AMENDMENT'S EXPRESS MANDATE

The McDade Amendment, enacted in 1998 and entitled "Ethical standards for attorneys for the Government," provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530(B). This statute "conclusively establish[es] that a state rule governing attorney conduct is applicable to federal attorneys practicing in the

state." *Colorado Supreme Court II*, 189 F.3d at 1284. In its opinion below, the majority recognized that "under *Colorado Supreme Court II*, [New Mexico] Rule [of Professional Conduct] 16-308(E) is an ethics rule of the sort covered by the McDade Act." App. 60a. Chief Judge Tymkovich's dissent argues that "whether the rule is one governing ethics" is "the first and only question" that needs to be answered. App. 79a (Tymkovich, J., concurring in part and dissenting in part). In his view, *"if* a state rule is an ethics rule, the McDade Amendment clearly and unambiguously authorizes its application to federal prosecutors." *Id.* 80a.

The panel majority nonetheless undertook an implied preemption analysis and concluded that "Rule 16-308(E)'s challenged provisions are conflict-preempted in the grand-jury setting because the essentiality and no-other-feasible-alternative requirements pose an obstacle to the accomplishment and execution of the full purposes and objectives of the federal legal regime governing grand-jury practice." App. 63a-64a (internal quotation marks omitted). This holding is not viable. Chief Judge Tymkovich explains in his dissent that "after the McDade Amendment, regulation of federal prosecutors via rules that are truly ethical in nature is expressly authorized by, and therefore consistent with, the dictates of federal law." *Id.* 87a. "It would be perverse to say states act in a manner inconsistent with federal law when they act as federal law instructs." *Ibid.*

In preemption terms, the McDade Amendment functions as a "saving" provision—not only expressly making State ethics rules applicable to federal government attorneys, but also "saving" such rules from federal preemption. By its very nature, the McDade Amendment is necessarily consistent with the State ethics rules with which it requires government attorneys to comply.

The majority's resort to the controversial "obstacle" or "purposes-and-objectives" form of implied conflict preemption makes its holding even more problematic. *See* App. 91a & n.11; Petition at 30. In a lengthy separate opinion in *Wyeth v. Levine*, 555 U.S. 555 (2009), an obstacle preemption case, Justice Thomas contended (and continues to contend) that "[t]his Court's entire body of 'purposes and objectives' pre-emption jurisprudence is inherently flawed." *Id.* at 594 (Thomas, J., concurring in the judgment). According to Justice Thomas, the purposes-and-objectives approach to conflict preemption is "based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Id.* at 583.

Here, the Tenth Circuit majority's invocation of "the federal legal regime governing grand-jury practice," App. 64a, its excursion into "the fertile and robust soil of the Anglo-American legal tradition and the Constitution itself," *ibid.*, and its supposition that subjecting federal prosecutors to Rule 16-308(E) "would impede the grand jury's broad investigative

mandate," *id.* 73a, cannot supplant what *is* embodied within the text of federal law—the McDade Amendment. That state-law-saving federal statute precludes any consideration of whether the State ethics rule involved in this case—or any other State ethics rule applicable to federal prosecutors in the grand jury context—conflicts with federal law. If the Tenth Circuit's obstacle preemption analysis is allowed to stand, however, additional State ethics rules applicable to federal prosecutors in the grand jury context also may be called into question. *See, e.g.*, N.M. R. Prof'l Conduct 16-300 *et seq.* (Advocate) & 16-400 *et seq.* (Transactions With Persons Other Than Clients) (modeled on ABA Model R. Prof'l Conduct 3.1 to 3.9 & 4.1 to 4.4). In effect, the Tenth Circuit panel majority will have nullified the McDade Amendment and the congressional intent that it embodies.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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