No. SC2025-1020

IN THE SUPREME COURT OF FLORIDA

JON MAY,
Petitioner

v.

THE FLORIDA BAR,
Respondent

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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IDENTITY AND STATEMENT OF INTEREST

The United States respectfully submits this brief as *amicus curiae* to address important questions of federal law raised by the petition for writ of mandamus filed in the present case.[1] Petitioner seeks to compel the Florida Bar to investigate the conduct of the Attorney General for perceived violations of state legal-ethics rules in her capacity as Attorney General of the United States. Petitioner objects, in particular, to certain internal Department policies governing the conduct of litigation, and to certain Department

[1] In an abundance of caution, the Attorney General played no role in the preparation, review, or filing of this brief.

personnel decisions. *See* App. 6-8 (challenging *Memorandum from U.S. Att'y Gen. Pamela Bondi to all Dep't Emps. on Gen. Policy Regarding Zealous Advocacy on Behalf of the U.S.* (Feb. 5, 2025) and the termination or alleged forced resignation of three Department attorneys). The Bar rightly declined to conduct that investigation, and the mandamus petition is meritless for the reasons well explained by the Bar in its response.

The United States respectfully submits this brief because this mandamus petition exemplifies a recent and troubling trend: attempts by political opponents of the President's administration to weaponize the bar rules of this Court and other state supreme courts to impose personal costs on Department of Justice lawyers for discharging their federal responsibilities, and thereby to impede or regulate the actions of the federal government more generally.

As this case illustrates, private citizens and other groups who disagree with the authorized policies of the federal government can exploit the requirements of state bar licensure (and the opportunity provided by bar-complaint procedures) to challenge the Department's litigating positions and internal management practices. Petitioner's ethics complaint here challenges actions of

the Attorney General—including, ironically, her order reminding Department attorneys of their ethical obligation to provide zealous advocacy on behalf of the United States. *See* App. 6-8. But the phenomenon of ethics-complaints-as-lawfare is not limited to attacks on senior leaders like the Attorney General. Opponents of the federal government's policies have brought similar complaints against lower officials of the Department and even career attorneys in the federal civil service.

For instance, an advocacy group recently filed multiple baseless state ethics complaints against Department attorneys. The group has not been a party to the relevant litigation against the United States. It is nonetheless attempting to endanger the licensure of multiple attorneys by claiming that misconduct occurred during proceedings, even when the relevant court was fully aware of the concerns the group has raised and did not exercise its inherent authority to take action against Department counsel or state such action was warranted. Yet the ethics complaints live on, hanging over the heads of Department attorneys who merely did their jobs as advocates for the United States.

As this case and the other matter both illustrate, it is not

particularly difficult for opponents of the President's administration to dress up policy or political grievances as ethics complaints against Department attorneys, or to raise meritless ethics complaints without any serious evidentiary basis. The United States files this brief to highlight this regrettable trend for the Court's attention and to urge the Court to make clear that targeting federal attorneys with bar complaints as a means of protesting or impeding the activities of the federal government is not a proper use of this Court's bar rules.

INTRODUCTION AND SUMMARY

The Department of Justice will not tolerate efforts to use state ethics complaints as a back-door means to regulate the authorized actions of the Department or to punish individual Department attorneys for faithfully carrying out their responsibility to provide zealous advocacy for the United States. Such complaints raise profound questions about the independence of the federal government from state regulation under our Constitution. This case exemplifies those concerns. As the Florida Bar rightly recognizes, accepting petitioner's request to investigate the Attorney General for her official acts as Attorney General of the United States

"could constitute encroachment by an arm of the state court on the exclusive authorities of the executive and legislative branches of the federal government." Resp. Br. 18-20.

In urging the contrary, petitioner points to a federal statute, 28 U.S.C. § 530B(a), known as the McDade Act. That Act does not authorize petitioner or others to channel their disagreements with the policies and practices of the United States Department of Justice into state-bar ethics complaints. Federal law requires Department of Justice attorneys to be properly licensed to practice law in a State, federal territory, or the District of Columbia. The McDade Act then provides that federal attorneys "shall be subject to State laws and 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). The Department holds its attorneys to the highest standards of ethical conduct, applying the appropriate state legal ethics rules to the extent those rules are not displaced or preempted by federal law.

It does not logically follow, however, that state bars—or private complainants urging action by state bars—may therefore weaponize

bar licensure requirements to harass, intimidate, or regulate the Attorney General or other Department attorneys in the lawful discharge of their federal responsibilities. Nor are state ethics proceedings the appropriate forum for petitioner's individual grievances or political objections to Departmental policies or positions. Under well-settled principles of federalism, no State may regulate the federal government acting within its lawful sphere.

Consistent with these longstanding principles, the Florida Bar properly declined to investigate petitioner's complaint against the Attorney General. This Court should protect the integrity of state ethics proceedings from those who would misuse those proceedings to attempt to impede the Department of Justice's official actions and harass its attorneys. The petition for a writ of mandamus should be denied.

LEGAL BACKGROUND

1. The United States Supreme Court has long held that, under the Supremacy Clause of the U.S. Constitution, "the activities of the Federal Government are free from regulation by any state" unless Congress clearly authorizes state regulation. *Hancock v. Train*, 426 U.S. 167, 178 (1976) (quoting *Mayo v. United States*, 319 U.S 441,

445 (1943)).

In particular, the Supreme Court has recognized that state law regulating the practice of law "must yield when incompatible with federal legislation." *Sperry v. Florida*, 373 U.S. 379, 384 (1963) (internal quotation marks omitted); *see also United States v. Idaho*, 508 U.S. 1, 9 (1993) (holding that principles of federal supremacy prohibit state courts from assessing litigation fees against the federal government, absent an express and specific waiver of sovereign immunity); *Johnson v. Maryland*, 254 U.S. 51, 57 (1920) (rejecting a state's effort to require a federal government truck driver to obtain a state license, referring to the "immunity of the instruments of the United States from state control in the performance of their duties," and emphasizing that a state may not "require[] qualifications in addition to those that the [federal] Government has pronounced sufficient").

Accordingly, under these longstanding precedents and this Court's own practice, the Attorney General's selection of attorneys to represent the United States cannot be subject to additional licensing or other similar requirements under state law. *Cf.* Order of Aug. 18, 2025 (waiving pro hac vice and filing fee requirements

for Department of Justice attorneys).

2. Congress has by statute required that federal attorneys must be licensed bar members. In particular, Congress has specified that funds provided to the Attorney General may not be used to pay attorneys who are not "duly licensed and authorized to practice as an attorney under the law of a State, a territory of the United States, or the District of Columbia." 28 U.S.C. § 530C(c)(1). This provision does not, however, require Department attorneys to be licensed in every State in which they practice, or even in the State in which their federal job is located. Department attorneys do not require authorization from a State court to practice law on behalf of the federal government in that State. Rather, Department of Justice attorneys are authorized by federal statute to practice law on behalf of the United States. *See* 28 U.S.C. § 517 ("The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.").

Congress has also provided that federal attorneys shall be subject to state ethics rules in the States in which they practice under the McDade Act, 28 U.S.C. § 530B, where those rules do not conflict with federal law or otherwise interfere with federal sovereignty. Enacted in 1998 and entitled "[e]thical standards for attorneys for the Government," the Act provides that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a).

Before enactment of the McDade Act, the United States Department of Justice (DOJ) had itself determined whether and to what extent federal attorneys were required to comply with state rules of professional conduct. In 1994, for example, the Department issued a regulation exempting federal prosecutors from rules of professional conduct limiting attorney contacts with represented parties. 59 Fed. Reg. 39,910 (Aug. 4, 1994). The regulation specified that it was "intended fully to preempt and supersede the application of state and local court rules" to federal

prosecutors. *Id.* at 39,912; see 28 C.F.R. § 77.12 (1995). Congress abrogated that regulation in the McDade Act, specifying that Department attorneys shall generally be subject to the same ethics rules as nonfederal attorneys. When ethics issues arise in the practice of law by Department attorneys, therefore, the Department instructs its employees to conform their conduct to the applicable state ethics rules and provides the resources necessary to ensure that they can adhere to those rules.

Congress did not define the scope of the state ethics rules covered by the McDade Act or what it means for federal government attorneys to be subject to those requirements "to the same extent and in the same manner as other attorneys in the State." Instead, Congress authorized the Attorney General to issue regulations implementing the Act, specifying that "[t]he Attorney General shall make and amend rules of the Department of Justice to assure compliance" with the Act's requirements. 28 U.S.C. § 530B(a), (b).

In 1999, pursuant to that grant of authority, the Attorney General promulgated regulations interpreting the statutory phrase "state laws and rules and local federal court rules

governing attorneys" to mean "rules enacted or adopted by any State * * * that prescribe ethical conduct for attorneys." 28 C.F.R. § 77.2(h); *see* 64 Fed. Reg. 19,273 (Apr. 20, 1999). The regulations further specify that the ethics rules encompassed by the McDade Act do not include "[a]ny statute, rule, or regulation which does not govern ethical conduct, such as rules of procedure, evidence, or substantive law, whether or not such rule is included in a code of professional responsibility for attorneys." 28 C.F.R. § 77.2(h)(1). And the regulations clarify that the McDade Act "should not be construed in any way to alter federal substantive, procedural, or evidentiary law." 28 C.F.R. § 77.1(b); *see* 28 C.F.R. § 77.1 *et seq.* These regulations collectively ensure that the McDade Act is applied in a manner consistent with the Supremacy Clause and with the autonomy and independence of the federal government acting within its lawful sphere.

3. The Department of Justice takes its obligations under the McDade Act seriously. The Department's Professional Responsibility Advisory Office conducts trainings to provide government attorneys "with the tools to make informed judgments about the circumstances that require their compliance with 28

U.S.C. 530B," and also provides individualized advice to government attorneys on professional-responsibility issues to assist them in conforming their conduct to the applicable bar rules. *See* Prof. Resp. Advisory Off., U.S. Dep't of Justice, *About the Office*, www.justice.gov/prao/about-office (last updated Aug. 28, 2023). And the Office recognizes that some ethics rules may vary by State and thus advises attorneys on "choice-of-law issues." *Id.* In addition, the Department's Office of Professional Responsibility ensures that Department attorneys comply with professional responsibility standards and investigates allegations that Department attorneys have committed professional misconduct. *See* Off. of Prof. Resp., U.S. Dep't of Justice, *FAQs*, https://www.justice.gov/opr/frequently-asked-questions (last updated June 11, 2024). The Professional Misconduct Review Unit in the Office of the Deputy Attorney General reviews any findings of misconduct and imposes discipline when appropriate. *Id.* Through these offices, the Department ensures that its attorneys abide by the ethical rules applicable to them under the McDade Act and imposes appropriate discipline on its attorneys in the rare circumstances in which they do not.

ARGUMENT

State ethics proceedings against individual DOJ attorneys cannot be used to challenge federal government litigating positions or DOJ internal management practices.

Petitioner's complaint against the Attorney General exemplifies a disturbing recent trend in which political opponents of the President have sought to weaponize state bar licensure rules to impede or regulate the activities of the federal government by punishing or deterring the zealous advocacy of its attorneys. The deployment of state bar ethics rules as a backdoor means of regulating the federal government raises profound federalism concerns. The Florida Bar rightly recognized that launching the sort of investigation demanded by petitioner here would risk inverting our system of vertical federalism by allowing State officials to police and punish the authorized conduct of federal officials under federal law. This Court should deny the petition for a writ of mandamus.

A. The Supremacy Clause guarantees the autonomy and independence of the federal government from State regulation.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the

supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. In applying the Supremacy Clause over many decades, the United States Supreme Court has held repeatedly that States may not regulate, restrict, or interfere with the activities of federal officials carrying out their federal responsibilities, unless Congress has clearly and unambiguously authorized the States to do so. *See Hancock v. Train*, 426 U.S. 167, 179 (1976) ("Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is a clear congressional mandate, specific congressional action that makes this authorization of state regulation clear and unambiguous." (quotation marks and footnotes omitted)); *Mayo v. United States*, 319 U.S. 441, 445 (1943) (stating that the "corollary" of the Supremacy Clause is "the activities of the Federal Government are free from regulation by any state"); *Johnson v. Maryland*, 254 U.S. 51, 55–56 (1920) (noting the "entire absence of power on the part of the States to touch . . . the instrumentalities of the United States").

Because the President and his Cabinet are responsible to the entire Nation, and not merely to people of any particular State, the federal government must have complete autonomy and independence from State control in the exercise of its federal responsibilities. In our Nation of laws, those responsibilities include enforcing federal law, prosecuting federal crimes, executing the immigration laws, and defending the President's policy decisions from legal challenge. No State may impede, through state law or regulation, the President's duty to take care that federal law is faithfully executed. *See In re Neagle*, 135 U.S. 1, 60-62 (1890) ("The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." (quoting *Martin v. Hunter's Lessee,* 14 U.S. 304, 363 (1816))).

As the Supreme Court has emphasized, moreover, this autonomy and independence from State control extends not merely to the Federal Government as such, but also to the officers and agents of the federal government discharging their federal functions. The United States cannot act except through its officers and agents, and those officers and agents unavoidably act within the States. "If, when thus acting, and within the scope of their

authority, those officers can be arrested and brought to trial in a state court for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection[]—if their protection must be left to the action of the state court[]—the operations of the general government may at any time be arrested at the will of one of its members." *Neagle*, 135 U.S. at 60-62 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)).

B. State courts may not supervise, regulate, or impede the Attorney General's execution of federal law through state licensing or ethics rules.

Federal law requires that attorneys for the United States must be licensed members of the bar of at least one State, federal territory, or the District of Columbia, and that federal attorneys generally must conform their conduct to the ethics rules governing all attorneys in the State in which they practice. It does not follow, however, that States may supervise, regulate, or impede the authorized activities of the Attorney General or the Department of Justice under the rubric of enforcing state ethics rules.

a. Congress has enacted two statutes that subject federal attorneys to certain requirements that apply to private citizens who

practice law. Congress has required federal attorneys to be licensed to practice law in at least one State (or territory or the District of Columbia). *See* 28 U.S.C. § 530C(c)(1). Congress thus chose to take advantage of States' existing processes for vetting applicants for the bar and determining which individuals have the appropriate credentials to practice law.

Congress did not, however, require federal attorneys to be admitted to the bar in every jurisdiction in which they practice, as private attorneys must be. That omission strongly suggests that Congress did not anticipate States would play an active role in regulating the conduct of federal attorneys practicing in federal court. Indeed, the Department of Justice has long specified that its attorneys must be licensed in at least one qualifying jurisdiction, but that they need *not* be licensed in each State in which they may practice law on the federal government's behalf.

That longstanding practice reflects fundamental principles of federalism. Department attorneys do not require bar licenses in each State in which they practice—and are not liable for the unlicensed practice of law when they do so—because the Department's officers and agents do not need approval from a State

to discharge their federal responsibilities. *See Sperry*, 373 U.S. at 384. Rather, Department of Justice attorneys are authorized by federal statute to practice law on behalf of the United States. *See* 28 U.S.C. § 517 ("The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."). And that is all the authorization they need.

b. Under the McDade Act, 28 U.S.C. § 530B, federal attorneys must conform their conduct to the ethics rules in the State in which they practice. The Act thus ensures that, as a general rule, federal attorneys must play by the same set of ethics rules that governs the other parties in litigation.

As discussed above, the Department of Justice has robust mechanisms to ensure that its attorneys comply with those requirements. Department attorneys are thoroughly advised on the state ethics rules both as a general matter and as applied in individual cases. Failure to follow the governing ethics rules can result in discipline within the Department of Justice.

c. Contrary to petitioner's view, neither of these federal statutes suggests that State bars enjoy a roving commission to police the conduct of the Attorney General or regulate the internal management and personnel practices of the Department of Justice.

In the regulation of attorneys as in any other legal field, the Supremacy Clause requires that state regulation must yield to conflicting federal requirements. Thus, while the McDade Act 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. *See, e.g.*, *United States v. Supreme Ct. of New Mexico*, 839 F.3d 888, 923 (10th Cir. 2016) (state professional responsibility rule preempted by federal law, notwithstanding the McDade Act). And in no event can a State properly use the threat of bar sanctions to impede or deter federal attorneys in the discharge of their federal offices. Put differently, a State cannot accomplish indirectly—through the putative regulation of attorney bar licensure—what the Supremacy Clause would prohibit it from accomplishing directly.

These federalism principles are of vital importance to ensuring the independence and autonomy of the federal government within its proper sphere. Every week, federal attorneys at every level take positions on controversial matters that may be unpopular in certain quarters. Taking such positions when necessary is a part of federal service, and in doing so federal attorneys do not advance their personal views but instead act in accordance with the decisions of politically accountable leadership of the Executive Branch.

d. A disturbing practice has arisen, however, of private citizens and advocacy organizations attempting to use state legal ethics authorities as a mechanism to challenge positions or practices of the federal government. For example, an advocacy organization that opposed the positions that Department attorneys were taking in litigation recently filed bar complaints against both political and career attorneys in the Department of Justice. This case presents another example, and petitioner notes that it is not the only ethics complaint lodged against the Attorney General herself. *See* App. 6. Such complaints could be an attractive mechanism for those seeking to discourage Department attorneys from taking certain controversial positions or, even worse, to make

it more difficult for the Department to attract attorneys to carry out the Department's mission. Such complaints can be brought by individuals with no connection to the relevant matter, or by individuals seeking to gain an advantage in their dealings with the Department; either factual circumstance is highly problematic.

In many cases it will be possible for opponents of the President's administration to couch their policy objections as allegations that Department attorneys violated the ethics rules, such as by urging that legal positions were not merely erroneous but sufficiently unfounded as to be precluded by the ethics rules; that factual statements were untrue or misleading; or that any number of other ethics rules were violated. Even if such allegations are quickly dismissed by bar authorities as meritless, their very filing can be highly damaging. At a minimum, state bar authorities should view allegations of ethical lapses by federal attorneys exercising their federal responsibilities with a skeptical eye and recognize the significant likelihood that such allegations are merely a collateral attack on the activities or policies of the federal government, repackaged as an attorney-ethics complaint.

The petition currently before this Court involves a meritless complaint against the Attorney General of the United States for her official actions on behalf of the Department. Petitioner challenges, among other things, an internal memorandum sent to Department attorneys to remind them of their obligation to provide zealous advocacy on behalf of the United States, as well as certain personnel actions. The suggestion that it was unethical for the Attorney General to insist that Department attorneys engage in zealous advocacy on behalf of the United States, their client, highlights the defects in the petition and in the legal theory on which it is premised more broadly. A state ethics complaint against the Attorney General is not the appropriate forum for objections to internal matters of agency policy or management. Nor is it a proper concern of state bar authorities whether the Attorney General exercised the powers of her federal office to take a particular personnel action. Complaints about the management of the Department as a whole, or of positions the Department's senior leaders elect to take, are better addressed through the political process.

The Attorney General, of course, is not likely to be influenced by this sort of petition. The broader trend of weaponizing state bar licensure rules against Department attorneys, however, is deeply concerning. The bar complaints mentioned above are entirely without merit. As discussed, however, just the fact of their filing risks chilling zealous advocacy on behalf of the United States.

The Florida Bar recognized the problematic nature of the disciplinary inquiry that petitioner requested and properly declined to investigate his complaint against the Attorney General. *See* App. 30 ("The Florida Bar does not investigate or prosecute sitting officers appointed under the U.S. Constitution while they are in office," reasoning that "[s]uch proceedings by The Florida Bar, as an arm of the Florida Supreme Court, could encroach on the authority of the federal government concerning these officials and the exercise of their duties."); Resp. Br. 18-20 ("Disciplinary action against someone appointed to the office of [U.S.] attorney general could constitute encroachment by an arm of the state court on the exclusive authorities of the executive and legislative branches of the federal government."). This Court should deny the mandamus petition and, in doing so, make clear that targeting federal attorneys

with bar complaints as a means of protesting or impeding the activities of the federal government is not a proper use of this Court's bar rules.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of mandamus.

Respectfully submitted,

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SEPTEMBER 2025

CERTIFICATE OF SERVICE

I hereby certify that, on the 8th day of September, 2025, this document was e-filed with the Clerk of the Supreme Court of Florida and served via e-service to petitioner Jon May at jonmay@jonmaycriminaldefense.com and Mark Largo Mason, Bar Counsel, at mmason@floridabar.org

s/ Jaynie Lilley
Jaynie Lilley

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing computer-generated brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2) and the word-count requirements of Rule 9.370(b). This brief was prepared in Bookman Old Style 14-point font and contains 4,369 words.

s/ Jaynie Lilley
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