United States Senate
WASHINGTON, DC 20510

April 6, 2026

The Honorable Pamela J. Bondi
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Attorney General Bondi:

We write to submit the attached comment in response to Docket No. OAG199: Review of State Bar Complaints and Allegations Against Department of Justice Attorneys. Congress has a constitutional obligation to conduct oversight of the Department of Justice, and part of that responsibility is to ensure that DOJ does not exceed its statutory authority in its rulemaking and maintains policies that enable the transparency and accountability necessary to properly serve the American people.

Sincerely,

Richard J. Durbin
United States Senator

Sheldon Whitehouse
United States Senator

Amy Klobuchar
United States Senator

Christopher A. Coons
United States Senator

Richard Blumenthal
United States Senator

Mazie K. Hirono
United States Senator

Cory A. Booker
United States Senator

Alex Padilla
United States Senator

Peter Welch
United States Senator

Adam B. Schiff
United States Senator

Catherine Cortez Masto
United States Senator

Ben Ray Luján
United States Senator

Enclosure: (1)

COMMENT OF SENATORS DURBIN, WHITEHOUSE, KLOBUCHAR, COONS, BLUMENTHAL, HIRONO, BOOKER, PADILLA, WELCH, SCHIFF, CORTEZ MASTO, AND LUJÁN CONCERNING THE PROPOSED RULE ON REVIEW OF STATE BAR COMPLAINTS

INTRODUCTION AND SUMMARY

The Department of Justice (DOJ) has proposed amending its regulations for ensuring compliance with the McDade Amendment, a federal statute that subjects DOJ lawyers to the ethics rules and disciplinary procedures of state bar authorities.[1] The Proposed Rule should be rejected for several reasons:

- The Proposed Rule violates the express statutory language of the McDade Amendment by subjecting DOJ attorneys to a wholly different process for adjudicating ethics complaints than is applicable to other attorneys in the state where a DOJ lawyer is barred;
- DOJ has no authority to impose regulations or conditions on state bar disciplinary authorities;
- The Proposed Rule gives the Attorney General a tool to sabotage state bar inquiries into the conduct of DOJ lawyers;
- The Proposed Rule would allow senior DOJ political appointees to insulate themselves from professional consequences for unethical conduct committed while serving at DOJ; and
- The Proposed Rule is arbitrary and capricious, as it is unnecessary, and DOJ has provided no evidentiary support for its claims.

I. BACKGROUND

A. THE McDADE AMENDMENT

In 1998, Congress mandated that any 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.*"[2] According to the Congressional Research Service, Congress enacted this provision, commonly referred to as the McDade Amendment, after almost a decade of consideration: "the statute is a remnant of concerns that extend back to 1990 when the House Government Operations Committee recommended among other things a thorough examination of the ethics rules applicable to Department [of Justice] attorneys *and expressed concern over 'the problems inherent in any system of self-policing and regulation.'*"[3]

[1] Docket No. OAG199, AG Order No. 6653-2026-A, 91 Fed. Reg. 10,780 (Mar. 5, 2026) (hereinafter "Proposed Rule").
[2] 28 U.S.C. § 530B(a) (emphasis added).
[3] Charles Doyle, *Justice Department Ethics and the McDade-Murtha Citizens Protection Act*, CONG. RESEARCH SERV. (Feb. 17, 1999), https://www.crs.gov/Reports/pdf/RS20064/RS20064.pdf (citing H.Rept. 101-986, at 35 (1990)) (emphasis added).

At the time, concerns were raised about continuing to subject government attorneys to ethical standards that vary among the states, prompting Congress and legal scholars to debate other paradigms for the imposition of ethical rules on DOJ attorneys.[4] Ultimately, Congress did not adopt these other approaches. Rather, as the House Appropriations Committee report explained, the McDade Amendment as enacted "was designed to confirm that *the Attorney General did not have the authority to exempt Department attorneys from the ethical standards to which other attorneys were held.*"[5]

The McDade Amendment also mandated the Attorney General (AG) to "make and amend rules. . . to ensure compliance with this section."[6] Accordingly, DOJ first promulgated rules that "recognize[d] that [its] attorneys are principally subject to discipline by their state of licensure and the courts before which they practice," while also subjecting them to potential concurrent internal investigation by DOJ's Office of Professional Responsibility (OPR) and discipline by its Professional Misconduct Review Unit (PMRU).[7]

For almost 28 years, the statute has made legally explicit a practical reality that had existed for decades longer: states exercise disciplinary jurisdiction over their barred attorneys.[8] Yet DOJ now seeks to impose new regulations that violate the express language of the statute, in order to shield its attorneys from the same state investigative and disciplinary rules to which all other attorneys in this country must adhere.

B. THE PROPOSED RULE

The Proposed Rule gives the AG the right to review "in the first instance" any ethics complaint against current and former DOJ lawyers.[9] Specifically, when the AG learns that a state disciplinary authority has received a complaint or initiated an investigation against a DOJ attorney, the AG must decide whether to refer the matter to OPR for further review.[10] While the AG or OPR review is ongoing, DOJ personnel would be forbidden to cooperate with any state bar proceedings, and the AG "*shall* request that the bar disciplinary authorities suspend *any* parallel investigations or disciplinary proceedings until the completion of the [DOJ] review."[11] If the bar authority refuses to suspend proceedings, "[DOJ] shall take appropriate action to enforce this regulation or to prevent the bar disciplinary authorities from interfering with the [AG's]

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[4] These included, among other ideas, nationwide provisions that regulate the practice of law; creation of a code of ethics specifically for federal attorneys; and delegating the regulation of federal attorneys to the federal courts. *See* Charles Doyle, *McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys*, CONG. RESEARCH SERV. (Dec. 18, 2001), https://www.crs.gov/Reports/pdf/RL30060/RL30060.pdf.

[5] Doyle, *supra* note 3 (emphasis added).

[6] 28 U.S.C. 530B(b).

[7] Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19273 (Apr. 20, 1999) (codified as amended at 28 C.F.R. 77 ("1999 Rule"). For ease of reference, both the OPR and PMRU reviews will be referred to hereafter as "OPR review."

[8] *See* Doyle, *supra* note 4.

[9] Proposed Rule, 91 Fed. Reg. 10,780 (Mar. 5, 2026).

[10] Proposed Rule § 77.5(a).

[11] *Id.* (emphasis added). The commentary accompanying the Proposed Rule suggests that the state bar disciplinary authority may pursue aspects of the investigation that do not involve DOJ personnel or information. *See* 91 Fed. Reg. 10,780, 10,781 (Mar. 5, 2026). However, the Proposed Rule itself allows for no such exception and calls for the suspension of "*any* parallel investigation." Proposed Rule 77.5(a) (emphasis added).

review of the allegations."[12] The Proposed Rule does not specify what that enforcement action might be.

Significantly, the new rule contains no deadline for either the AG to make their determination or for OPR to conclude its inquiry. The Proposed Rule thus gives the AG the power to block indefinitely any state disciplinary action against a DOJ attorney, simply by not acting on the complaint.

II. THE PROPOSED RULE MUST BE REJECTED AS UNLAWFUL

A. THE NEW RULE VIOLATES THE EXPRESS LANGUAGE OF THE McDADE AMENDMENT

The McDade Amendment is clear: government attorneys are subject to the same ethics regime as any other attorney in the state where they are admitted to practice, including the same process for investigating and adjudicating complaints that is followed for non-government attorneys in that state. As set out above, Congress made this policy choice because it wanted an independent body, and not solely DOJ, to resolve ethics complaints against its attorneys. The Proposed Rule is contrary to both the language and intent of the McDade Amendment in several ways:

- The Proposed Rule contravenes the plain language of the statute;
- The Proposed Rule unlawfully substitutes the AG's policy choice for one already made by Congress where Congress provided no discretion; and
- The Proposed Rule gives the AG a "kill switch" to suspend state bar ethics inquiries into the conduct of DOJ attorneys.

1. The Proposed Rule Contravenes the Plain Language of the McDade Amendment

The Proposed Rule is contrary to the plain language of the McDade Amendment, which states in Section 530(B)(a) that any attorney for the Government "shall be subject to State laws and rules, and local Federal court rules . . . *to the same extent and in the same manner* as other attorneys in that State**.**"[13] According to DOJ, as long as its attorneys are required "to conform to the same substantive standards of conduct as non-Federal attorneys in the States in which they are practicing," the statute doesn't concern itself with whether DOJ or the state bar authority is applying those state standards.[14] This is patently false. The McDade Amendment requires that state law and rules be applied to government lawyers "to the same extent *and in the same manner*" as other attorneys in the state.

DOJ improperly reads "in the same manner" to mean that state ethics rules would "apply to Department attorneys *under the same factual circumstances* as they would to non-Department

[12] *Id.* § 77.5(b).
[13] 28 U.S.C. § 530B(a) (emphasis added).
[14] 91 Fed. Reg. 10783.

attorneys under identical or similar circumstances – *i.e.*, in the same manner."[15] This is nonsensical under any plain English reading of the statutory text, and it violates the canon of statutory interpretation against surplusage by collapsing "to the same extent" and "in the same manner" to mean the same thing.[16]

It is the phrase "to the same extent" that addresses the even application of the rules to similar facts, given that by definition, "extent" refers to the "scope," "magnitude," or "range."[17] "Manner" here, as always, refers to "a characteristic or customary mode of *acting,*" or a "mode of *procedure* or way of *acting*."[18] Thus, "in the same manner" means in the same way or pursuant to the same procedure as is applied to non-Department attorneys. It does not refer to the substantive factual circumstances giving rise to an ethics investigation, but to the employment of the same procedures. By imputing the same meaning to both phrases, DOJ's interpretation renders the second clause superfluous: there would be no need to include the phrase "in the same manner" if it were also a reference to the factual circumstances of a case.[19]

The bottom line is this: it is not possible to read the statutory language as DOJ does.

2. The Proposed Rule Usurps a Policy Choice Already Made by Congress

DOJ further asserts that the McDade Amendment gives the AG the authority to "select from a range of policy choices" for implementing the statute, and that DOJ "retains the discretion to displace State bar enforcement and to create an entirely Federal enforcement mechanism."[20] The choice to "displace State bar enforcement" is not available to DOJ, however, because Congress already made the choice: from among a number of policy alternatives available to it,[21] Congress chose state bar authorities, and not DOJ solely, to provide and enforce ethics standards for DOJ attorneys in the first and last instance.

The statute says DOJ lawyers "*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. . . ,"[22] not that they "*may* be" subject to such laws and rules only if and when the AG permits it. There is no statutory language that confers upon the AG the discretion to make alternative policy choices regarding the jurisdiction of state bars, much less wholly displace Congress's policy choice here.

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[15] 91 Fed. Reg. 10,780, 10785 (emphasis added).
[16] *See Marx v. General Revenue Corp.*, 568 U.S. 371 (2013). While not absolute, the canon against surplusage assists "where a competing interpretation gives affect to every clause and word of a statute." *Id.* at 385.
[17] "Extent," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/extent.
[18] "Manner," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/manner (emphasis added).
[19] *See, e.g.*, *Ratzlaff v. U.S.*, 510 U.S. 135, 140-41 (1994) (courts should hesitate to treat statutory terms as surplusage in any setting) (citations omitted).
[20] 91 Fed. Reg. 10,780, 10,783-84 (Mar. 5, 2026).
[21] *See* Doyle, *supra* note 4.
[22] 28 U.S.C. § 530B(a) (emphasis added).

3. The Proposed Rule Gives the AG a "Kill Switch" to Shut Down State Bar Ethics Investigations Against DOJ Attorneys

The Proposed Rule contains no deadline for the AG to decide whether to investigate an ethics complaint or for OPR to complete an investigation. While internal DOJ review is pending, the state bar authority cannot proceed.[23] Consequently, the Proposed Rule would allow the AG to ensure that ethics allegations against DOJ lawyers never see the light of day, simply by sitting on a complaint until the end of a presidential administration. This clearly is contrary to the McDade Amendment's requirement that state bar authorities be able to adjudicate ethics complaints against DOJ lawyers.

The Proposed Rule also empowers the AG to actively hamper a state bar inquiry in several other ways. It prohibits DOJ employees from providing testimony or other evidence to state bar authorities without the AG's approval.[24] Additionally, the explanation accompanying the Proposed Rule notes that DOJ can refuse to cooperate in any state bar ethics inquiry by withholding voluntary witnesses, documents, and other information from such proceedings when in its discretion it decides that doing so is "precluded by . . . a significant law enforcement interest."[25]

In sum, the Proposed Rule completely undercuts the McDade Amendment, where Congress legislatively protected the power of state bars to continue to independently investigate and discipline DOJ attorneys.

B. DOJ IS NOT AUTHORIZED TO REGULATE STATE BAR AUTHORITIES UNDER THE McDADE AMENDMENT

Nothing in the language or history of the McDade Amendment confers authority on DOJ to order state bar authorities to hold their investigations in abeyance until DOJ completes an investigation. Moreover, nothing in our federalist system gives the federal government general authority over the internal disciplinary procedures of state judicial systems. Yet DOJ contends that it is authorized to do just that and take unspecified action against state bar authorities to enforce this Proposed Rule.

Section 530B(b) of the McDade Amendment directs DOJ to promulgate rules to effectuate Section 530B(a). But 530(B)(a) contains no language that confers on DOJ the unprecedented authority to regulate state bar authorities, expressly or not. Nonetheless, DOJ asserts that it may do so because (1) "the statute 'is silent on enforcement mechanisms,'" and (2) there is nothing in the statute that "should be construed in any way to alter federal substantive, procedural or evidentiary law."[26]

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[23] "Before the bar disciplinary authorities . . . undertake any investigative steps that seek information or otherwise require participation from an attorney for the government. . . the [AG] shall have the right to review the allegations in the first place. . . . [S]he or her designee shall request that the bar disciplinary authorities suspend any parallel investigation or disciplinary proceeding." Proposed Rule § 77.5(a).

[24] *Id.*

[25] 91 Fed. Reg. 10,780, 10,782 (Mar. 5, 2026).

[26] 91 Fed. Reg. 10,780, 10,783 (Mar. 5, 2026) (citing 28 C.F.R. § 77.1(b).)

It is simply false that the statute is silent on enforcement mechanisms regarding state bars, given that Section 530(B)(a) expressly recognizes state bar enforcement mechanisms through the language "to the same extent and in the same manner as other attorneys in that State."

But even if the McDade Amendment were silent on this issue, it is illogical for DOJ to conclude that "because Congress did not expressly confer to the States enforcement authority, the statute otherwise preserves the authority of the Attorney General to enforce" the substantive provisions of state ethics rules.[27] A federal statute's silence or ambiguity cannot be employed to pre-empt an area of law—in this case, the regulation of the legal profession—that since the founding of the Republic has been left to state authorities.[28] This is especially so where, as here, the statute expressly places authority to act in the hands of states. Additionally, as the Supreme Court has consistently recognized, when Congress means to confer extraordinary power on the Executive, it does so explicitly.[29] Principles of federalism thus foreclose DOJ's attempt to require state bar authorities to do anything, let alone to suspend disciplinary enforcement proceedings.

When DOJ first promulgated rules shortly after passage of the McDade Amendment, it recognized that Section 530B(b) did not authorize it to regulate state bar authorities, but rather that DOJ was to implement rules to "provide[] guidance to all Department of Justice employees who are subject to section 530B regarding their obligations and responsibilities under this new provision."[30] Consistent with that understanding, the 1999 Rule (currently in effect) does not purport to regulate or assert any authority over state bars, but rather is addressed solely to DOJ employees to primarily provide guidance about how to resolve conflicts of law when rules of multiple state bars and federal courts are implicated.[31] DOJ's contemporaneous understanding of the McDade Amendment at the time of its enactment is the correct one.

C. THE PROPOSED RULE HURTS TRANSPARENCY AND ACCOUNTABILITY IN CONTRADICTION OF THE McDADE AMENDMENT'S INTENT

The Proposed Rule undermines transparency and accountability for DOJ attorneys at a time when the trust of the public and the federal judiciary in representations made by DOJ is at an all-time low. As a practical matter, the Proposed Rule insulates political appointees at DOJ

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[27] 91 Fed. Reg. 10,780, 10,783 (Mar. 5, 2026).

[28] *Lorillard v. Reilly,* 533 U.S. 525, 541–542 (2001) (we "wor[k] on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress") (citations omitted); *Leis v. Flynt,* 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers"). *See also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (states have a compelling interest in the practice of professions within their boundaries, since lawyers are essential to the primary governmental function of administering justice) (citations omitted).

[29] *Learning Resources, Inc. v. Trump*, 146 S.Ct. 628 (2026) ("We have long expressed 'reluctan[ce] to read into ambiguous statutory text' extraordinary delegations of Congress's powers.").

[30] 64 Fed. Reg. 19,273 (Apr. 20, 1999).

[31] *See* 28 C.F.R. § 77.1*; id.* § 77.4 (providing guidance to DOJ attorneys to resolve conflicts of ethical rules).

from independent, objective accountability for their role in unethical conduct, while removing an important mechanism for career attorneys to resist pressure to engage in unethical acts.

1. The Proposed Rule Effectively Immunizes Political Appointees at DOJ from Independent Accountability for Directing Attorney Misconduct

The Proposed Rule is particularly egregious as applied to political appointees at DOJ because it puts the wolves in charge of guarding the proverbial henhouse, which is clearly not what the McDade Amendment envisions. Under the Proposed Rule, the AG or their delegate is empowered to delay indefinitely the review and resolution of state ethics complaints against their fellow political appointees, thereby shielding those appointees' conduct from scrutiny.

For evidence that the current DOJ would use the Proposed Rule in this fashion, one need look no further than its handling of a complaint against then-Acting Deputy AG Emil Bove III, which was filed with the New York Bar by ten Members of the Senate Committee on the Judiciary.[32] As described in the complaint, Bove directed DOJ attorneys in the Southern District of New York to dismiss criminal charges without prejudice against then-New York Mayor Eric Adams to effectuate a political quid pro quo, related to Adams cooperating with the Trump Administration's federal immigration enforcement policies.

Rather than carry out an action that they deemed unethical, then-Acting U.S. Attorney Danielle Sassoon, an Assistant U.S. Attorney, and at least five career prosecutors in DOJ's Criminal Division resigned.[33] The New York Bar's Attorney Grievance Committee on its own initiative referred the complaint it received to DOJ's OPR—a remarkably inappropriate action given the allegations of the complaint, but nonetheless one that an independent disciplinary body voluntarily chose to do.[34] Unsurprisingly DOJ's internal inquiry went nowhere, given that the misconduct alleged was at the direction of DOJ's political leadership, and Bove himself was rewarded with a lifetime appointment to the U.S. Third Circuit Court of Appeals. In the end, no disciplinary body has conducted an independent review of the misconduct allegations against Bove.[35] But state bar complaints and investigations against Trump Administration attorneys have

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[32] Letter from Senate Judiciary Comm., to Att'y Grievance Comm., Supreme Court, Appellate Div., Dep't Disciplinary Comm. for the First Judicial Dep't, Re: Request for Disciplinary Investigation of Emil Joseph Bove, III (Mar. 4, 2025), https://www.judiciary.senate.gov/imo/media/doc/2025-03-04%20SJC%20Bar%20Complaint%20re%20Bove.pdf.

[33] Larry Neumeister, Alanna Durkin Richer & Eric Tucker, *Order to Drop New York Mayor Adams' Case Roils Justice Department as High-Ranking Officials Resign*, AP NEWS (Feb. 13, 2025), https://apnews.com/article/new-yorkcity-us-attorney-0395055315864924a3a5cc9a808f76fd; Hannah Rabinowitz, Kara Scannell & Evan Perez, *Seventh Prosecutor in Eric Adams Case Resigns and Calls Out Trump's Former Lawyer in Scathing Letter*, CNN (Feb. 14, 2025), https://www.cnn.com/2025/02/14/politics/justice-department-eric-adams-case-new-york-southern-district/index.html; Jeremy Roebuck, Shayna Jacobs, Mark Berman & Carol D. Leonnig, *Justice Officials Move to Drop Adams Case After 7 Lawyers Refuse, Resign in Protest*, WASH. POST (Feb. 14, 2025), https://www.washingtonpost.com/national-security/2025/02/14/justice-prosecutors-resignation-trump-eric-adams-corruption.

[34] *See* Letter from Attorney Grievance Comm., State of New York, Supreme Court Appellate Division, First Judicial Department to Off. of Professional Responsibility, Dep't of Justice (May 27, 2025) (on file with Committee).

[35] The DOJ Inspector General's Office also reportedly ignored a whistleblower complaint alleging that Bove instructed a career attorney to mislead a court and ignore court orders, until after Bove was confirmed. D. Barrett,

not been isolated to Bove; former interim U.S. Attorneys Ed Martin and Lindsey Halligan both face state bar investigations for their conduct during their short tenures in office,[36] and there is abundant evidence that other senior DOJ attorneys may have sanctioned or mandated conduct that would warrant ethics investigations. Dozens of courts have found that DOJ attorneys representing the Trump Administration have lied to or misled the court, misrepresented the record or the law, violated the rules of grand jury proceedings,[37] sought to evade court orders,[38] or otherwise abused the justice system.[39]

In many of these cases there is evidence that the directive to gaslight the court or evade court orders came from senior DOJ officials.[40] And numerous non-partisan career DOJ attorneys, along with politically appointed attorneys, have resigned or been fired for refusing to engage in unethical conduct at the direction of higher-ups, including for refusing to bring baseless indictments against President Trump's critics.[41] Erik Siebert, who had been nominated by President Trump to be U.S. Attorney for the Eastern District of Virginia, resigned after President Trump said, "I want him out," because Siebert refused to follow the President's directive to indict New York Attorney General Letitia James due to the lack of evidence behind the claims.[42] Halligan, the President's hand-picked replacement for Siebert, subsequently brought the baseless indictments against James and another Trump critic, former FBI Director James Comey, that were thrown out by the courts.[43]

This problem is compounded by the current Administration's neutering of OPR and by the jurisdictional limitations of DOJ's Office of Inspector General (OIG). As discussed above,

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Unnoticed Whistle-Blower Document Alarms Justice Department Veterans, N.Y. TIMES (Jul. 31, 2025), https://www.nytimes.com/2025/07/31/us/politics/emil-bove-whistle-blower.html.

[36] Devlin Barrett, *D.C. Bar Begins Disciplinary Proceedings Against Ed Martin*, N.Y. TIMES (Mar. 10, 2026), https://www.nytimes.com/2026/03/10/us/politics/dc-bar-ed-martin-disciplinary-hearing.html; *Lindsey Halligan Is Under Investigation by the Florida Bar*, N.Y. TIMES (Mar. 5, 2026), https://www.nytimes.com/2026/03/05/us/politics/lindsey-halligan-investigation-florida-bar.html.

[37] *See* Christine Berger and Joe Gaeta, *The Department of Justice's Broken Accountability System*, THE BRENNAN CENTER, (Oct. 20, 2025), https://www.brennancenter.org/our-work/research-reports/department-justices-broken-accountability-system (collecting cases).

[38] *See, e.g.*, R. Goodman *et al.*, *The Presumption of Regularity in Trump Administration Litigation,* JUST SECURITY (Mar. 19, 2026), https://www.justsecurity.org/120547/presumption-regularity-trump-administration-litigation (citing more than 300 cases where courts have expressed concern or found that the Trump administration had failed to comply with court orders); Justin Jouvenal, *Trump officials accused of defying 1 in 3 judges who ruled against him,* WASH. POST (Jul. 21, 2025), https://www.washingtonpost.com/politics/2025/07/21/trump-court-orders-defy-noncompliance-marshals-judges.

[39] Berger and Gaeta, *supra* note 37.

[40] *See, e.g.*, Jessica Piper, Myah Ward & Kyle Cheney, *The Trump Administration's Conflicting Messages to the Public and the Courts*, POLITICO (Apr. 14, 2025), https://www.politico.com/interactives/2025/trump-administration-messaging-public-courts-discrepancies-tracker.

[41] Devlin Barrett, *Justice Dept. Whistle-Blower Warns of Trump Administration's Assault on the Law*, N.Y. TIMES (Jul. 10, 2025), https://www.nytimes.com/2025/07/10/us/politics/trump-bove-reuveni-whistleblower-doj-deportations.html.

[42] Salvador Rizzo, Perry Stein & Jeremy Roebuck, *Top Virginia prosecutor resigns amid criticism over Letitia James investigation*, WASH. POST (Sep. 20, 2025), https://www.washingtonpost.com/national-security/2025/09/19/trump-letitia-james-erik-siebert-virginia.

[43] Holmes Lybrand, Devan Cole, Kara Scannell, Katelyn Polantz, *Federal Judge Dismisses Indictments Against Letitia James and James Comey, Saying Lindsay Halligan Appointment Was Unlawful*, CNN (Nov. 24, 2025), https://www.cnn.com/2025/11/24/politics/james-comey-letitia-james-indictments-dismissed.

while OPR has never been an independent body, inexperienced political appointees currently run OPR, instead of nonpartisan career officials. At the same time, the jurisdiction of DOJ OIG, an independent body, does not extend to attorney professional misconduct outside of certain limited circumstances.[44] According to recent reports, DOJ OIG has ignored 20 whistleblower complaints alleging misconduct on the part of DOJ leadership that would fall into those limited circumstances.[45] Moreover, DOJ OIG has been without a permanent Inspector General for months.[46] As a result, no independent, non-political mechanism exists for reviewing ethical transgressions by DOJ attorneys, including political appointees, outside of state bars—but under the Proposed Rule, state bars could be foreclosed from reviewing an ethics complaint at the discretion of DOJ political appointees.

Additionally, when an attorney, whether career or political, leaves DOJ, DOJ acknowledges that it no longer has jurisdiction to effectively investigate or discipline them.[47] Although DOJ suggests it "may" terminate its review when a subject employee leaves, the Proposed Rule does not require it to do so, and DOJ elsewhere suggests that it may nonetheless continue to deny state bar authorities access to relevant information and witnesses.[48] There is no reason for DOJ to continue to preclude or impede state bar authorities from pursuing a complaint at that point. Yet the Proposed Rule would permit the AG to stymie state bar proceedings indefinitely based on an assertion that allowing them to go forward—even against a former employee—somehow intrudes upon an interest of DOJ. And if a new and different Administration subsequently permitted a state bar disciplinary process to go forward, that alone could create an appearance of the further politicization of DOJ and exacerbate mistrust in the system.

By giving the AG the power to shut down state bar investigations concurrent with their power to hamstring OPR and OIG, the Proposed Rule would provide the political leadership of DOJ the opportunity to choose to evade and obstruct any independent, objective mechanism for policing ethics violations during their tenure, contrary to the substance and intent of the McDade Amendment.

2. The New Rule Disables an Important Mechanism for Resisting Pressure to Engage in Misconduct

Properly implemented, the McDade Amendment operates as an important tool for career attorneys to resist orders from superiors to engage in unethical conduct. The Proposed Rule disables this tool. As discussed above, in the second Trump Administration alone, there have been several examples of DOJ personnel being pressured by political appointees to engage in conduct that implicates individual ethical obligations. Under current regulations, if a supervisor or political appointee pressures a career attorney to do something improper, the employee can at least point to the risk of being disciplined by his or her state bar as a reason to decline such

[44] *See* 5 U.S.C. § 413(b)(3) & (4).
[45] Devlin Barrett, *Justice Dept. Watchdog Has Gone Silent, Lawyers for Whistle-Blower Say*, N.Y. TIMES (Mar. 30, 2026), https://www.nytimes.com/2026/03/30/us/politics/trump-administration-doj-watchdog-reuveni.html.
[46] *Id.*
[47] 91 Fed. Reg. 10785 (Mar. 5, 2026).
[48] *Id.*

directives. The Proposed Rule, however, disables this tool for resisting unethical directives because, perversely, it allows the political appointee to remove the threat of and offer protection from state bar discipline, by ensuring state bar proceedings never move forward. This is certainly not a result intended by Congress when it passed the McDade Amendment.

D. THE PROPOSED RULE IS ARBITRARY AND CAPRICIOUS

There are no issues with the current rules that implement the McDade Amendment that would necessitate a change in regulations. The reasons DOJ gives to purportedly justify dramatically breaking with this well-established regime are all pretextual with no evidentiary basis.

Pursuant to the Administrative Procedures Act (APA), an agency's action is unlawful if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[49] When, as here, the agency is modifying an existing rule, its justifications for changing it are subject to more rigorous scrutiny under the APA.[50] We have already shown that the new rule is not in accordance with the law. A proposed rule is also "arbitrary and capricious" because it is not supported by evidence,[51] is illogical,[52] and the reasons given are pretextual.[53] The Proposed Rule fails to meet these standards as well.

First, DOJ asserts that the rule change is necessary because "over the past several years, political activists have weaponized the bar complaint and investigative process"[54] and that the Proposed Rule is needed to "deter[] bad actors from turning the State bar disciplinary process itself into a tool to punish department lawyers and impede unpopular initiatives."[55] But it provides no example of a single such case, let alone quantifiable evidence that such cases are on the rise.[56] This contention appears to rely on the further unsupported presumption that complaints against DOJ attorneys are all baseless and implicitly imputes bad faith to all state bar authorities by assuming they would countenance baseless complaints, again without even one citation. This is illogical on its face. Some misconduct complaints have merit, and the mere fact that an ethics complaint is filed by someone who disagrees with an Administration politically does not mean the complaint is unfounded. And even if it were, state bar authorities are competent and capable of rooting out unfounded complaints. Indeed, DOJ does not and cannot explain why it would be better suited than state bar disciplinary authorities to identify baseless complaints.

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[49] 5 U.S.C. § 706(1)(A).
[50] *Encino Motorcars LLC v. Navarro*, 579 U.S. 211, 221–222 (2016) (when agency changes policy, it must provide a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy) (citations omitted).
[51] *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992) ("An agency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence.").
[52] *BowmanTruck Lines Inc. v. U.S.*, 419 U.S. 281, 285 (1974) ("The agency must articulate a '*rational connection* between the facts found and the choice made.'") (emphasis added) (citations omitted).
[53] *Dept. of Commerce v. New York*, 588 U.S. 752, 785 (2019) (". . . we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.' . . . The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important.") (citations omitted).
[54] 91 Fed. Reg. 10782 (Mar. 5, 2026).
[55] *Id.* at 10,785.
[56] *See id.* at 10,782, 10,785.

DOJ also asserts that change is warranted because "recent complaints and disciplinary proceedings that target internal Department deliberations undoubtedly intrude on the Attorney General's statutory responsibility to carry out the functions of the [DOJ] in a way unknown in the late 1990s."[57] Again, DOJ fails to cite any instance where state bar disciplinary rules or proceedings have "intruded on its functions" or that this is happening to a greater extent than in the past.[58]

In any event, as DOJ acknowledges,[59] the 1999 Rule already protects against this possibility, as it states that the regulations "should not be construed in any way to alter federal substantive, procedural, or evidentiary law or to interfere with the Attorney General's authority to send Department attorneys into any court in the United States."[60] And in the rare instance that a state bar takes action that does impede substantive federal law enforcement interests, courts have not hesitated to protect DOJ's interests based on applicable law and fact.[61] Accordingly, there is no need to change the rule to prevent intrusion on DOJ's functions when the current paradigm already provides appropriate protections for DOJ.

DOJ also fails to provide any reason whatsoever why state bar ethics investigations must cease during the pendency of an internal DOJ investigation. In the event DOJ feels compelled to conduct its own internal investigation, both can proceed simultaneously. It is not unheard of for attorneys who are barred in more than one jurisdiction to face concurrent ethics proceedings, and there is not a qualitative difference between concurrent state and internal DOJ investigations that would justify not allowing them to proceed simultaneously as well; in fact, this is what already occurs. Indeed, the proposed requirement that state bar disciplinary authorities stand down until DOJ gives them the green light gives away the game: the Proposed Rule is just a pretext to shut down state bar investigations.

DOJ suggests that there may be information in its possession pertinent to an ethics investigation, and for that reason it should examine the matter before the state bar authority does.[62] This too is a specious argument. If DOJ has information or evidence relevant to an ethics investigation, it is always free to share that with the state authority. To the extent it believes that information is privileged, it can decide whether to waive any privilege or when and how to exert that privilege.

DOJ acknowledges as well that under current practice, many state bars are solicitous of DOJ's interests and already refer complaints against DOJ attorneys to DOJ or defer adjudication when they deem it more appropriate for the Department to investigate in the first instance.[63] The voluntariness of this by state bars is key to maintaining the integrity of the system and, consequently, trust in the system; it ensures an independent body made an independent choice.

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[57] *Id.* at 10783.
[58] See *id.*
[59] *Id.* at 10783.
[60] 28 C.F.R. § 77.1(b).
[61] *See, e.g.*, *Stern v. U.S. District Court for the District of Massachusetts,* 214 F.3d 4 (1st Cir. 2000) (striking down a state bar rule that purported to create substantive standards for issuance of a grand jury subpoena).
[62] 91 Fed. Reg. 10785 (Mar. 5, 2026).
[63] 91 Fed. Reg. 10784 (Mar. 5, 2026).

Altering the current rules to mandate that state bar authorities stand down while DOJ investigates itself undermines this equilibrium.

In total, not a single justification put forth by DOJ for the Proposed Rule has any evidentiary basis, and many are inherently illogical. Because DOJ fails to articulate any examples to support its flawed reasoning, the Proposed Rule is arbitrary and capricious. Given these and the foregoing fatal issues, the only logical inference that can be made for DOJ's promulgation of the Proposed Rule is that DOJ's real motivation is to immunize its lawyers from being called to account by state disciplinary authorities. The Proposed Rule is therefore pretextual as well.

III. CONCLUSION

Because the 1999 Rule implementing the McDade Amendment has operated without serious issue for more than two decades, one must ask why DOJ has proposed changing it now. DOJ asserts that it is because state attorney disciplinary proceedings have become "weaponized".[64] In reality, it is the Trump Administration that has "weaponized" the legal system against those who disagree with or criticize the current Administration.

As discussed above, as part and parcel to this Proposed Rule's attempt to prevent DOJ attorneys from being called to account for misconduct by independent state bar authorities, the current Administration has dismantled internal mechanisms for accountability inside the Department.[65] This monthslong process makes clear that the true motive behind the Proposed Rule is to shield high-ranking political appointees at DOJ from any inquiry into their misconduct by state bar disciplinary authorities.

The Proposed Rule is thus put forward in bad faith, but it also seeks to turn a longstanding regime for adjudicating ethics complaints against DOJ lawyers on its head: instead of ensuring their conduct is subject to state ethics rules and disciplinary procedures as mandated by the McDade Amendment, the Proposed Rule would violate the law in order to effectively immunize them from scrutiny for misconduct.

The Proposed Rule is ultimately nothing more than a transparent effort to continue the Trump Administration's weaponization of the justice system against its political enemies. If the AG truly wants DOJ lawyers to avoid discipline proceedings before state bar authorities, there is a better solution: take care to see that DOJ attorneys conduct themselves according to the highest ethical standards, and do not ask them to mislead courts or evade court orders.

[64] 91 Fed. Reg. 10782 (Mar. 5, 2026).
[65] *See* Berger & Gaeta, *supra* note 37 (detailing all the ways DOJ has stifled internal dissent and dismantled internal checks on unethical conduct by its personnel).