April 3, 2026

The Honorable Todd Blanche
Acting Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: Notice of Proposed Rulemaking, RIN 1105-AB82 - Review of State Bar Complaints and Allegations Against Department of Justice Attorneys

Dear Acting Attorney General Blanche:

The undersigned attorneys – former Presidents and other former officials of the District of Columbia Bar, past and present leaders of voluntary bar associations, voluntary bar associations in the District of Columbia, and former officials of the District of Columbia Disciplinary System – respectfully submit these comments concerning the above-captioned Notice of Proposed Rulemaking (NPRM). *See* Office of the Attorney General, Department of Justice, Review of State Bar Complaints and Allegations Against Department of Justice Attorneys, 91 Fed. Reg. 10,780 (March 5, 2026).

Interest of Commenters

Commenters consist of four categories of leadership of the legal profession in the Nation's Capital. All of the individual commenters do so in their personal capacities and not as members of their law firms, companies or employers.

The first category includes former Presidents of the District of Columbia Bar, the "mandatory" or "unified" bar formed in 1972 as an official arm of the District of Columbia Court of Appeals to license lawyers and regulate the practice of law It is the second largest unified bar in the United States, with over 120,000 members. Its members practice in all 50 states and more than 80 countries. These lawyers were elected over the past fifty years by the D.C. Bar's thousands of members.

Other commenters served as Officers, Governors, committee leaders, or senior executives of the D.C. Bar.

The District of Columbia is also the venue for private voluntary bar associations, which focus on specialized professional development. The second category of commenters consists of former presidents of these associations.

The third category consists of past and present leaders of various bar associations, and various bar associations themselves.

The fourth category consists of former officials of the District of Columbia Disciplinary System.[1]

The commenters have different, sometimes conflicting, perspectives on many issues of law and policy. But as bar leaders, each of us has promoted and acted to advance the Bar's core values of increasing access to justice in our community. We are united in the view that our democracy depends on the crucial role of the Courts (and by extension lawyers, as officers of the Court) in our constitutional system of checks and balances to uphold and defend the Rule of Law. That includes the protection of the public and the judicial system through the regulation of attorney conduct.

I. Proposed Regulation Changes

The NPRM first proposes two courses of action by the Department when a Justice Department attorney is under some form of active investigation by a state attorney disciplinary system or its equivalent:

> [B]efore a current or former Department lawyer may participate in any investigative steps initiated by the bar disciplinary authority of a State, Territory, or the District of Columbia in response to allegations that a current or former Department attorney violated an ethics rule while engaging in that attorney's federal duties, the Department will have the right to review the allegations in the first instance and shall request that the bar disciplinary authority suspend any parallel investigations until the completion of the Department's review.

NPRM at 10,780. Should the relevant bar disciplinary authorities refuse the Attorney General's request, the NPRM further proposes that the Department may "take appropriate action to prevent the bar disciplinary authorities from interfering with the Attorney General's review of the allegations." *Id.* 10,781. That language indicates that the Department would intend to use its authority under the proposed rule to block an inquiry by a state or territorial disciplinary system for as long as the Attorney General or a designee(s) may choose to "review . . . the allegations," without any time limit for that review process.

[1] In the District of Columbia, the Disciplinary System is an independent arm of the District of Columbia Court of Appeals. In jurisdictions that do not have mandatory state bars, the disciplinary body may be a committee or a board of the jurisdiction's highest court.

The NPRM both proposes changes in the Department's current regulations pertaining to ethical standards for all federal government attorneys and "encourages comments on the provisions of the 1999 Rule that are not being amended by this proposed rule." NPRM at 10,786. Accordingly, these comments will address both aspects of the NPRM, bearing in mind the Department's general authority for identifying and sanctioning professional misconduct of its attorneys and the independent authority of state, territorial, and other attorney disciplinary systems for investigating and sanctioning members of their bars for professional misconduct.

II. Statutory Issues

The Department cites various federal statutes as sources of authority for creating such a rule to block disciplinary systems from investigating allegations of professional misconduct by Department attorneys. None of those statutes provides such authority.

A. 28 U.S.C. §530B

The Department principally relies on 28 U.S.C. §530B, popularly known as the "McDade Act" or "McDade Amendment." Section 530B, which bears the title, "Ethical standards for attorneys for the Government", contains two pertinent provisions. First, subsection 530B(a) states in its entirety: "An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." Second, subsection 530B(b) states in its entirety: "The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section."

Subsection 530B(a) clearly establishes that federal attorneys, including Department attorneys, must comply with all rules governing attorneys in the jurisdictions where the attorneys practice, including rules governing disciplinary procedures, to the exact same extent as private practitioners who are members of those bars. As the Congressional Research Service has noted, section 530B

> requires federal prosecutors to follow state and federal rules of professional responsibility in effect in the states where they conduct their activities. It also continues in place the sixty year old directive that federal prosecutors follow the ethics rules promulgated by the states in which they are licensed to practice.

Charles Doyle, Congressional Research Service, McDade-Murtha Amendment: Ethical Standards for Justice Department Attorneys, RL30060 at 1 (December 18, 2001).

Subsection 530B(b) must be read in the light of the provisions of subsection 530B(a). The grant of authority to the Attorney General under subsection 530B(b) extends only to authority to adopt or amend any Department rules that would implement the provisions of subsection 530B(a). By its terms, that subsection does not confer any authority on the Attorney General to remove or block Department attorneys from accountability to their state or territorial bars for misconduct that would violate any rule of professional conduct or disciplinary procedural rule applicable to all members of those bars. Such a construction is entirely consistent with the Supreme Court's admonition that in interpreting federal laws, those laws are to be given their "plain meaning." *See, e.g., Berk v. Choy*, 607 U.S. ----, 146 S. Ct. 546, 552 (2026).

The NPRM, however, purports to construe subsection 530B(b) as authority to block disciplinary systems' inquiries into Department attorneys' alleged professional misconduct. In doing so, it turns section 530B on its head.

As shown above, section 530B contains no language indicating that Congress granted the Attorney General discretion to claim exclusive authority for disciplinary actions against Department attorneys. Yet the NPRM asserts that subsection 530B(b) "does not impose any limitations on how the Attorney General goes about structuring the regulatory system designed to accomplish this objective" and that the Attorney General "may select from a range of policy choices" in structuring that system as she sees fit." NPRM at 10,783.

That "range of policy options," as the NPRM's terms make clear, includes the purported authority to interfere with or block an ongoing disciplinary system inquiry against any Department attorney, regardless of rank or title, or to assert that any internal investigation it may conduct precludes or takes precedence over a state disciplinary system inquiry.

In one respect, this position is entirely consistent with litigating positions that the Department has lately taken in connection with alleged misconduct by Department attorneys. For example, the Department has argued categorically that state courts "may not supervise, regulate, or impede the Attorney General's execution of federal law through state licensing or ethics rules." *See* Brief for the United States of America as Amicus Curiae in Support of Respondent, *May v. Florida Bar*, No. SC2025-1020, at 16 (filed September 8, 2025) (hereinafter May Amicus Brief). But

that argument is foreclosed by the specific language of section 530B, and by the application of the Tenth Amendment to the Constitution as discussed below.

B. 28 U.S.C. §530C(c)(1)

Under 28 U.S.C. §530C(c)(1), the Department may not pay its attorneys who are not licensed to practice law in a state, territory or the District of Columbia. In addition, the Department requires its attorneys annually to certify membership in good standing of a bar. With these requirements, the McDade Act could not have been intended to allow the Department to preempt disciplinary proceedings.

C. Title 28 Statutes

To bolster its claim of authority, the NPRM also cites various sections of Title 28 in the United States Code that pertain to "the broad statutory authority of the Attorney General to manage and supervise Department attorneys." NPRM at 10,782. These include:

- A declaration that the Attorney General is ""the head of the Department of Justice" (28 U.S.C. §503);
- 'A statement that the Attorney General, with certain exceptions, is "vested" with "[a]ll functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice" (28 U.S.C. §509);
- A statement that these functions include "conduct[ing] any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct" (28 U.S.C. §515(a));
- A statement that conducting litigation on behalf of the United States or its officers "is reserved to officers of the Department of Justice, under the direction of the Attorney General" (28 U.S.C. §516);
- A statement that the Attorney General has the authority to send these officers "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" (28 U.S.C. §517);
- A statement that the Attorney General is responsible for "supervis[ing] all litigation to which the United States, an agency, or officer thereof is a party" (28 U.S.C. §519); and

- A statement that to fulfill these responsibilities, the Attorney General is authorized to "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General" (28 U.S.C. §510).

The difficulty with this line of argument is that none of these statutory grants of authority even remotely suggests that they confer on the Attorney General or Department components any authority to interfere with state, territorial, or other disciplinary systems that receive complaints or allegations against Department attorneys. Each of these broad grants of authority must be read *in pari materia* with the provisions of section 530B.

Indeed, as the NPRM acknowledges, when the Department promulgated the 1999 Rule, it "concluded that the enactment of section 530B did "not alter, amend, or supersede" these statutes, nor did it "in any way interfere with the Attorney General's authority to determine who may represent the United States in any proceeding'." NPRM at 10,782, *citing* Department of Justice, Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19,273, 19,274 (April 20, 1999). Moreover, the 1999 Rule states that the regulations "recognize that attorneys are principally subject to discipline by their state of licensure and the courts before which they practice", while acknowledging that "Department attorneys are also subject to discipline by the Office of Professional Responsibility." *Id*.

Under these circumstances, the Department has no basis to rely on these Title 28 statutes as a basis for seeking to displace state, territorial, and other disciplinary systems from carrying out their legally authorized functions for overseeing their bar members' conduct and, as appropriate, investigating and sanctioning instances of professional misconduct.

III. Executive Order Issues

As a separate basis to justify its proposed rule, the NPRM cites two sets of directives by the President that it asserts have prompted it "to consider whether it is necessary to restructure the enforcement of ethical rules by OPR and the bar disciplinary authorities."

First, it refers to Executive Order 14,147, "Ending the Weaponization of the Federal Government", in which the President announced that the policy of the United States is "to identify and take appropriate action to correct past misconduct by the Federal Government related to the weaponization of law enforcement." Exec. Order No. 14,147, 90 Fed. Reg. 8235, 8235 (January 20, 2025). In that Executive Order, the President further ordered the Attorney General to "take appropriate action to

review the activities of all departments and agencies exercising civil or criminal enforcement authority of the United States," including the Department. *Id*.

Second, by a Presidential Memorandum the President directed the Attorney General "to prioritize enforcement of . . . regulations governing attorney conduct and discipline." Memorandum on Preventing Abuses of the Legal System and the Federal Courts, 2025 Daily Comp. Pres. Doc. 2 (March 21, 2025) (hereinafter Presidential Memorandum).

Two observations on these Presidential directives are in order. First, Executive Order 14,147 says nothing about needing to create new protections for Department attorneys who themselves have allegedly engaged in professional misconduct. "Review[ing] the activities" of any and all federal attorneys participating in federal criminal or civil enforcement, in any Administration, requires only that the Attorney General and any subordinates ensure that any attorneys representing the Department conform to all applicable bar regulations.

Second, the Presidential Memorandum specifically directs the Attorney General, in addition to other actions directed at attorneys and law firms litigating against the federal government,

> to take all appropriate action to refer for disciplinary action any attorney whose conduct in Federal court or before any component of the Federal Government appears to violate professional conduct rules, including rules governing meritorious claims and contentions, and particularly in cases that implicate national security, homeland security, public safety, or election integrity.

Presidential Memorandum. By the logic of these Presidential directives, the Attorney General is directed to prioritize action by state, territorial or other disciplinary authorities against private attorneys in litigation against the government for alleged professional misconduct. But the Attorney General now seeks to shield Department attorneys from such disciplinary authorities for alleged professional misconduct.

This clearcut disparate treatment of practicing attorneys cannot be justified under any principle of statutory construction or evenhanded public policy. It is therefore an arbitrary and capricious action that provides no principled support for the NPRM.

IV. Constitutional Issues

A. Tenth Amendment

The most fundamental objection to the proposed rule is that any rule purporting to block a disciplinary system inquiry against a Department attorney, of any rank, would violate the Tenth Amendment to the U.S. Constitution. The Tenth Amendment states in full: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

It is important to note that even before the enactment of the Tenth Amendment, the Constitution itself was intended in part to cabin the authority of the federal government as against the states. As Madison stated in Federalist 45, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." THE FEDERALIST NO. 45, at 328 (B.F. Wright ed. 1961).

What the Tenth Amendment does is to reinforce and strengthen that cabining of federal authority, by "designat[ing] in whose favor (the states) powers not delegated to the United States are reserved." William Van Alstyne, *Federalism, Congress, the States, and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 770 n.5.

As the Supreme Court recognized in *Printz v. United States,* 521 U. S. 898 (1997), that designation embodies the division of power between state and federal governments as part of the constitutional system of "dual sovereignty." In particular, as *Printz* and other Tenth Amendment decisions by the Court establish, the federal government may not "commandeer" state governments to perform, or in this case stop them from performing, functions that violate that division of power, as the Tenth Amendment "imposes no limitations on the exercise of *delegated* powers but merely prohibits the exercise of powers "*not* delegated to the United States." *Id*. at 923 (emphasis in original).

The Court certainly recognized in *Printz* "the duty owed to the National Government, on the part of all state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law." *Id.* at 913. Until this Administration, however, no Attorney General has ever sought to adopt a rule authorizing the Department to block the longstanding right of the states to enforce their codes of professional responsibility concurrently with the Department's internal disciplinary processes when a Department attorney is involved, or to

suggest that state disciplinary processes would somehow obstruct the Department's ability to conduct its own internal disciplinary processes in such cases.

B. Supremacy Clause

Although the NPRM nowhere mentions or cites any provisions of the Constitution in support of its proposed rule, we assume that the Department is implicitly relying on the Supremacy Clause in support of its arguments. *See* May Amicus Brief at 13 (arguing that the Supremacy Clause "guarantees the autonomy and independence of the federal government" from state bar regulation).

The Supremacy Clause states, in pertinent part, that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

While the Supremacy Clause "supplies a rule of decision when federal and state laws conflict", *Martin v. United States*, 605 U.S. 395, 409 (2025), that rule applies only when either a specific provision of the Constitution or a federal law "made in Pursuance thereof" vests the federal government with some form of authority that purportedly conflicts with a state law or regulation.

In this case, there is no applicable federal constitutional provision, either in Article II or elsewhere, that would authorize the Department to take action to block the operation of a state, territorial, or other attorney disciplinary system in investigating reported professional misconduct by a Department attorney. Nor, for the reasons stated above, is there a federal statute that would provide such authorization.

That absence of Constitutional or statutory authority for the NPRM constitutes a fatal weakness in the justification of the NPRM. As Hamilton noted in explaining the scope of the Supremacy Clause in Federalist 33, "acts of the larger society [the national government] which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies [states]" do not become the supreme law of the land. Indeed, he characterized such acts as "merely acts of usurpation, and will deserve to be treated as such." THE FEDERALIST No. 33, at 247 (B.F. Wright ed. 1961). For that reason, the Supremacy Clause needs to be recognized not only as a source of authority for federal government action, but as a constraint on assertions of federal power. *See* Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91 (2003).

In contrast, there is strong evidence that regulation of attorneys' conduct under state, territorial, or other disciplinary systems, as authorized by the laws of their jurisdictions, has long been part of their "residuary authorities." After the American Revolution, disciplinary jurisdiction "was universally assumed . . . to be the business of the states and not the federal government," although the absence of established bar associations or prosecutive agencies meant that judges typically were the authorities to pursue disciplinary actions against miscreant lawyers. Charles R. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469, 477 & n. 42 (2001).

By the end of the nineteenth century, bar associations began to play a more dominant role in sanctioning attorneys for misconduct, serving "as the recognized and authoritative prosecutorial body" for such proceedings. *Id*. 476. In the twentieth century, disciplinary systems authorized by their highest courts in various states and territories, as well as the District of Columbia, became still more committed to enforcing professional codes of ethics, pursuant to legal authority in their respective jurisdictions, without any effort by the Department during that same period to assert any kind of exclusive authority over allegations of misconduct by its own attorneys. Indeed, during the Watergate and Iran Contra crises, the D.C. disciplinary system was robust in investigating, prosecuting and imposing discipline in difficult cases.

There can be no doubt that the authority delegated by courts to disciplinary systems at state, territorial, and other levels to conduct investigations into alleged attorney misconduct rests on firm legal foundations in the laws of their jurisdictions. For example, in New York State, attorneys are guided by a code of conduct, the New York Rules of Professional Conduct, as adopted by the Appellate Division of the New York State Supreme Court. The Appellate Division appoints the grievance and discipline committees for various counties in the state, and has the ultimate authority to direct an attorney's disbarment from the New York State Bar. *See, e.g*., New York State Bar Association, A Guide to Attorney Disciplinary Procedures in New York State; *In the Matter of Rudolph W. Giuliani*, No. 2021-00506 (N.Y. State Supreme Court, App. Div., 1st Dept., July 2, 2024).

In the case of various United States territories and in the District of Columbia, it is important to recognize that the highest courts in those jurisdictions derive their authority from Congressional enactments:

- *Territories*: For example, for the United States Virgin Islands, Congress "authorized the establishment of an appellate court for the Virgin Islands to

be created by the Legislature in its discretion", and the Virgin Islands, acting on that Congressional authority, "established the Supreme Court of the Virgin Islands as the highest court of the Virgin Islands." That Supreme Court "has exclusive jurisdiction over members of the legal profession and of admissions to the bar" and has established rules governing discipline of attorneys. Supreme Court of the Virgin Islands, *Supreme Court of the Virgin Islands*, https://visupremecourt.hosted.civiclive.com/about_us. Similarly, for Puerto Rico, Congress, through several pieces of legislation, established the judicial structure of Puerto Rico and ultimately made possible the adoption of the Puerto Rican Constitution (contingent on Congressional approval). *See* Rafael Cox Alomar, *The Puerto Rico Constitution: A Unique Territorial Framework*, State Court Report, June 30, 2025, https://statecourtreport.org/our-work/analysis-opinion/puerto-rico-constitution-unique-territorial-framework.

- *District of Columbia*: The District has a unique Constitutional status, as Article I, section 8 of the Constitution empowers Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. CONST. art. I, §8, cl. 17. Pursuant to that authority, Congress has established courts for the District of Columbia on multiple occasions – most recently in the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473 (1970). That Act created the District of Columbia Court of Appeals and the Superior Court of the District of Columbia. Pursuant to that authority, the District of Columbia Court of Appeals, which has inherent jurisdiction over members of the legal profession admitted to practice in the District,

  > established the District of Columbia Bar and the Board on Professional Responsibility. The Court has the power to promulgate the rules regarding attorney discipline and to impose discipline upon attorneys. The Board on Professional Responsibility is the disciplinary arm of the Court, which administers the attorney discipline system and supports the adjudication of disciplinary cases.

  District of Columbia Courts, *Attorney Discipline*, https://www.dccourts.gov/court-of-appeals/dc-bar-admissions/attorney-discipline (updated February 4, 2026).

This history of Congressional action shows that the United States territories and the District of Columbia may rely affirmatively on the Supremacy Clause with regard to bar discipline, as their courts derive their authority to promulgate bar rules and oversee bar discipline from Congressional action.

C. Necessary and Proper Clause

As a backup Constitutional rationale for the NPRM, the Department may be considering whether to argue that the proposed rule would be a valid exercise of power under the Constitution's Necessary and Proper Clause. That Clause, in Article I of the Constitution, gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art I, §8, cl. 18.

The NPRM argues, in reliance on Executive Order 13132, "Federalism", 64 Fed. Reg. 43,255 (August 10, 1999), that it

> will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. It does not dictate the substance of the ethical standards a State may adopt. The proposed rule would merely better reflect the existing balance of responsibilities between State bar authorities and the Department . . . .

NPRM at 10,786.

This contention, with respect, borders on the meretricious. Far from "merely better reflect[ing] the existing balance of responsibilities" between state bars and the Department, the NPRM proposes an entirely new and unprecedented set of actions by the Department, at times solely of its choosing, that would dramatically upset that balance and undercut the longstanding authority of state disciplinary systems to address misconduct by their state bars' members.

On this latter point, it should be noted that the NPRM asserts that state bars historically have only infrequently followed up on referrals of Department attorney conduct:

> Based on OPR's experience interacting with State bar disciplinary authorities over several decades, most State bars do not take additional action after referrals are made concerning current or former Department attorneys. State bars have limited resources to oversee all the attorneys licensed in their respective jurisdictions, and they may determine that the Department

> attorney's conduct does not warrant the use of their resources. They may also decline to take further action because they view the Department's disciplinary actions as sufficient to accomplish the purposes of attorney discipline, including deterring future misconduct.

NPRM at 10,782. But even if that statement is accurate, it actually undercuts the Department's argument here. If it is true that most state disciplinary systems do not take disciplinary action after the Department refers certain Department attorneys, the infrequency of such action into those attorneys' conduct is a reflection of "the existing balance of responsibilities." Any efforts by the Department to block state disciplinary systems' investigations into alleged misconduct by Department attorneys would therefore upset that existing balance.

It is necessary to point out that in the past, that existing balance has included active coordination and collaboration between disciplinary authorities and the Department's internal professional responsibility oversight mechanisms. For example, the Disciplinary Counsel in the District of Columbia and the Department have consulted with each other when they had knowledge of any disciplinary-related investigation so that they could decide which approach by which organization made sense.

As part of that process, District of Columbia Bar Disciplinary authorities sometimes received referrals of potential misconduct by a Department attorney either directly by the courts or in court opinions that indicated purported misconduct. In such cases, those disciplinary authorities would notify a representative of the Department's Office of Professional Responsibility (OPR) and often found that they and OPR had common interests.

In contrast, the proposed rule states that the Department "shall inform the appropriate bar disciplinary authorities of the completion of her review." However, it also states that "as appropriate," the Department will share the results of the review. NPRM at 10,787. This language makes clear that the Department, based on unspecified criteria of what circumstances would be "appropriate", can block a disciplinary system's receipt of information pertinent to that system's ongoing investigation for as long as the Department chooses.

Disciplinary systems can temporarily suspend attorneys for specific reasons, such as reciprocal discipline based on discipline imposed in other jurisdictions or conviction of a crime, during the pendency of disciplinary cases. With no time limits set for the Department's review and no assurances that the disciplinary authorities

would receive the results of the review or any substantive investigative file, there is no defensible basis for forcing disciplinary systems to suspend their proceedings. In this regard, it is important to note that in any state disciplinary system, no attorney, including a Department attorney, is subjected to any discipline without all of the trappings of due process, including notice and an opportunity to respond, and in some circumstances an evidentiary hearing followed by judicial review. These procedural guarantees far exceed any procedural guarantees that a Department attorney would face under the Department's internal investigative process.

In any event, the legal authority that the Necessary and Proper Clause confers on Congress provides no basis for the Department to adopt any rule or regulation that it considers "necessary and proper" to carry out policy or political initiatives. As *Printz* indicated, when a law purportedly "for carrying into Execution" a constitutional provision violates the principle of state sovereignty, "it is not a 'La[w]... proper for carrying into Execution' that provision "and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such'." *Printz*, 521 U.S. at 923-924. And as the Supreme Court previously held in *New York v. United States* (505 U. S. 144, 166 (1992)),

> [E]ven where Congress has the authority under the Constitution to pass laws requiring or *prohibiting* certain acts, it lacks the power directly to compel the States to require or *prohibit* those acts.... [T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce. (Emphasis supplied)

V. Recommendation

A. Proposed Rule

If the Department were to enact a final rule that includes the asserted authority to block inquiries by state, territorial or other disciplinary systems into Department attorney misconduct, any state, territorial, or District bar or disciplinary system that the Department sought to block would have several statutory and constitutional bases for challenging the Department's action under the Administrative Procedure Act.

Subsection 706(2) of the APA authorizes a federal court to

> hold unlawful and set aside agency action, findings, and conclusions found to be—

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity; [or]
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]

5 U.S.C. §706(2).

Even if the Department were to claim, in defiance of the express language of section 530B, that it has a valid delegation from Congress to enact the rule, federal courts are likely to adhere to the Supreme Court's directions that under the APA, they must not only fix the boundaries of the authority purportedly delegated by Congress but "ensur[e]" that the Department "has engaged in 'reasoned decisionmaking' within those boundaries." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 1, 18 (2024). In this case, as the Department lacks such a valid delegation from Congress, reviewing courts are likely to conclude that the Department has failed to engage in such "reasoned decisionmaking."

In addition, there may be other legal bases on which federal, state, or territorial courts may entertain challenges to Department efforts to block disciplinary inquiries, or consideration of suspension of attorneys pending their cooperation with disciplinary authorities.

For the foregoing reasons, we respectfully submit that the Department should refrain from issuing a final rule that incorporates any of the provisions of the NPRM.

B. Review of the 1999 Rule

Based on the foregoing analysis, we recommend that the Department review the comments that the public submits between now and the April 6 deadline in light of the 1999 Rule, and, after considering those comments and the comments previously submitted on the 1999 Rule, adopt the 1999 Rule as final with no further changes.

The Department has functioned quite capably for more than 25 years under the terms of that Rule, and is entirely capable of continuing to do so.

Respectfully submitted,

Past Presidents of The District of Columbia Bar

(appearing in their individual capacities)

Charles R. Work (1976-1977)

Marna Tucker (1984-1985)

Philip Allen Lacovara (1988-1989)

Andrew H. Marks (1998-1999)

Joan H. Strand (1999-2000)

John W. Nields, Jr. (2000-2001)

John C. Cruden (2005-2006)

James J. Sandman (2006-2007)

Andrea C. Ferster (2013-2014)

Annamaria Steward (2016-2017)

Patrick McGlone (2017-2018)

Charles R. Lowery, Jr. (2023-24)

Former Officers and Governors of The District of Columbia Bar

(appearing in their individual capacities and listed alphabetically)

H. Guy Collier, Board of Governors, 2010-2013

Ann K. Ford, Board of Governors, 2015-2018

Rebecca M. McNeill, Secretary, 2007-2008, Board of Governors, 2008-2011

Amy E. Nelson, Treasurer, 2018-2019, Board of Governors, 2019-2022

Martha Purcell Rogers, Board of Governors, 2002-2005

Benjamin F. Wilson, Board of Governors, 2008-2011 and 2014-2018

Former Committee Leaders of The District of Columbia Bar

Dwight D. Murray, Member, Legal Ethics Committee; President, Washington Bar Association, 1996-1997

Jonathan J. Rusch, Chair, Continuing Legal Education Committee

Former Senior Executive Staff of The District of Columbia Bar

Katherine A. Mazzaferri, Executive Director, 1982-2010; Chief Executive Officer, 2010-2017

Cynthia D. Hill, Assistant Executive Director for Programs, 1990-2010, Chief Programs Officer, 2010- 2017

Maureen Thornton Syracuse, D.C. Bar Pro Bono Center, Director/Executive Director, 1992-2011

Former Officials of the District of Columbia Disciplinary System

Allen Snyder, Chair, D.C. Board of Professional Responsibility, 1982-1984

Wallace E. Shipp, Jr., Assistant Bar Counsel, 1980-1983; Deputy Bar Counsel, 1983-2005; Bar Counsel/Disciplinary Counsel, 2005-2017

Elizabeth Herman, D.C. Office of Disciplinary Counsel (originally Office of Bar Counsel), 1984-2018; Deputy Disciplinary Counsel, 2006-2018

Myles V. Lynk, Senior Assistant Disciplinary Counsel, D.C. Office of Disciplinary Counsel, 2019-2022; D.C. Bar President, 1996-1997

Past Presidents of Voluntary Bars

(appearing in their individual capacities and listed alphabetically)

Jessica E. Adler, President, Women's Bar Association of the District of Columbia (2013-2014)

Ralph P. Albrecht, President, Bar Association of the District of Columbia (2008-2009)

Mark W. Atwood, President, DC Chapter, InterAmerican Bar Association (2025-2026)

Alfred F. Belcuore, National President, Federal Bar Association (1991-1992); DC Chapter President, American Board of Trial Advocates (2018-2024); President, The Counsellors, District of Columbia (2024-2025)

Constance L. Belfiore, President, Bar Association of the District of Columbia (1997-1998)

Robert L. Bell, President, Washington Bar Association (2007-2008)

Joel P. Bennett, President, Bar Association of the District of Columbia (1992-1993)

Mary L. Blatch, President, Women's Bar Association of the District of Columbia (2024-2025)

Traci Buschner, President, Trial Lawyers Association of Metropolitan Washington, DC (2024-2025)

Paulette E. Chapman, President, Women's Bar Association of the District of Columbia (2003-2004); President, Bar Association of the District of Columbia (2007-2008)

L. Palmer Foret, President, Trial Lawyers Association of Metropolitan Washington, DC (2003-2004); D.C. Chapter President, American Board of Trial Advocates (2011-2013)

Ronald C. Jessamy, Sr., President, Washington Bar Association, 2008-2010

Nancy Aliquo Long, President, Women's Bar Association of the District of Columbia (1996-1997); Women's Bar Association Foundation (2014-2016)

Victor E. Long, President, Trial Lawyers Association of Metropolitan Washington, DC (2013-2014)

Patrick Malone, President, Trial Lawyers Association of Metropolitan Washington, DC (2004-2005)

Lorelei S. Masters, President, Women's Bar Association of the District of Columbia (2007-2008)

Christopher T. Nace, President, Trial Lawyers Association of Metropolitan Washington, DC (2017-2018)

Patrick M. Regan, President, Trial Lawyers Association of Metropolitan Washington, DC (1991-1992)

Gregory S. Smith, President, Bar Association of the District of Columbia (2011-2012); President, Atlanta Bar Association (1998-1999)

Lucy L. Thomson, President, Women's Bar Association of the District of Columbia (1988-1989); Women's Bar Association of the District of Columbia Foundation (1989-1991)

District of Columbia Voluntary Bar Associations

Hispanic Bar Association of the District of Columbia (HBA-DC)

HBA-DC is a non-profit established in 1977 serving lawyers and law students in the D.C. region. Committed to fostering professional growth, the HBA-DC runs multifaceted initiatives through scholarships, advocacy, pro bono activities, and community outreach. The HBA-DC is dedicated to the principles of promoting equal justice and opportunity; educating the community about relevant legal issues; and promoting the professional development of lawyers and law students, including those of Hispanic heritage.

Metropolitan Washington Employment Lawyers Association (MWELA)

MWELA is a non-profit organization comprised of over 350 lawyers who regularly advise and represent employees in employment and civil rights disputes. MWELA is the local chapter of the National Employment Lawyers Association, a national organization of more than 3,000 lawyers dedicated to the advancement of employee rights.

National Bar Association (NBA)

The National Bar Association (NBA), founded in 1925, is a non-profit voluntary bar association representing the interests of more than 65,000 African American lawyers, judges, law professors, and law students worldwide. The NBA is dedicated to advancing the administration of justice, protecting civil and political rights, and ensuring equal justice under law. The NBA's interest in this matter reflects its long-standing commitment to defending access to justice, safeguarding the independence of the legal profession, and protecting marginalized communities from discrimination.

Trial Lawyers Association of Metropolitan Washington, D.C. (TLA-DC)

The Trial Lawyers Association of Metropolitan Washington, D.C. (TLA-DC) is a nonprofit voluntary bar association dedicated to preserving the civil justice system and promoting the rule of law. TLA-DC champions the constitutional right to trial by jury, supports access to justice for all, and works to protect public safety through

legal accountability. The organization is a strong advocate for ethical advocacy, the independence of the legal profession, and the integrity of the courts.

Washington Council of Lawyers

Washington Council of Lawyers (WCL) is a voluntary bar association committed to ensuring that our legal system treats everyone fairly, regardless of money, position, or power. Our members represent the legal community's diversity: They come from law firms, law schools, private and nonprofit organizations, and the government.

WCL promotes pro bono and public-interest law by building partnerships between the public, private, and nonprofit sectors; volunteering to provide legal services to those who need them; training and mentoring the next generation of public-interest advocates; and supporting policies that expand access to justice.

Women's Bar Association of the District of Columbia

The mission of the Women's Bar Association of the District of Columbia (WBADC) is to maintain the honor and integrity of the profession, promote the administration of justice, and advance and protect the interest of women lawyers. The WBADC envisions a world in which all women lawyers are empowered to achieve personal and professional success and satisfaction, where all members are meaningfully connected, engaged, and mentored, and where diversity, equity, and inclusion are hallmarks of our programming and leadership. WBADC works through its advocacy voice and community service to improve the legal profession and society as a whole and promote the rule of law.