April 6, 2026

Submitted Via www.regulations.gov

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Docket No. OAG199, AG Order No. 6653–2026–A, RIN 1105–AB82 — Comment Urging DOJ To Strengthen Proposed Rule on Review of State Bar Complaints and Allegations Against Department of Justice Attorneys

America First Legal Foundation ("AFL") submits this comment regarding the Department of Justice's ("DOJ" or "Department") proposed rule to amend 28 C.F.R. § 77 to establish a process for the Attorney General to review bar complaints and allegations against current and former Department attorneys.[1] While AFL supports DOJ's recognition that political activists have weaponized the bar complaint process to chill zealous advocacy by current and former federal government attorneys, AFL respectfully submits that the proposed rule does not go far enough.[2] The final rule should provide substantially stronger protections against the politically motivated abuse of state bar disciplinary proceedings that have targeted attorneys at all levels of government, including senior officials such as Jeff Clark and Ed Martin, for carrying out lawful federal policy on behalf of administration officials.[3]

In the Proposed Rule, DOJ has interpreted its rulemaking authority under 28 U.S.C. § 530B(b) too narrowly in five critical respects. And, in a prior rulemaking, DOJ interpreted its rulemaking authority too broadly. First, rather than merely formalizing a right of first review, the rule should assert exclusive federal jurisdiction over ethics enforcement for complaints arising from federal attorneys' official duties, empowering DOJ to issue binding directives that halt politically motivated complaints and prohibit state bars from conducting independent investigations. Second, the rule should establish a mandatory three-stage screening mechanism to

[1] *Review of State Bar Complaints and Allegations Against Department of Justice Attorneys*, 91 Fed. Reg. 10780 (proposed Mar. 5, 2026) (to be codified at 28 C.F.R. § 77)(Docket No. OAG199, AG Order No. 6653–2026–A, RIN 1105–AB82) https://perma.cc/E3HM-K6RF. *See also* 28 C.F.R. §§ 77.2(a), (f) (defining "attorney for the government" and "Department attorney[s]").
[2] *Id.* at 10782.
[3] *See* Gregory Svirnovskiy and Jacob Wendler, *DC Bar Moves to Sanction Ed Martin for DEI Push*, POLITICO (Mar. 10, 2026) https://perma.cc/KZ46-5AS6.

identify and dismiss at the threshold complaints that are facially meritless, politically motivated, or filed by third parties with no direct connection to the alleged misconduct. Third, the rule should prohibit Department attorneys from participating in state bar proceedings without authorization. Fourth, the rule should provide affirmative legal defense to federal attorneys targeted by bar complaints arising from their official duties. Fifth, the rule should address the broader pattern of coordinated political complaint campaigns and extend its protections beyond the "Department attorney[s]" definition under 28 C.F.R. § 77.2 to any current or former federal agency attorney facing bar complaints arising from official federal service. Lastly, the rule should go further and correct 28 C.F.R. § 77.2(h)'s erroneous grant of disciplinary over authority federal attorneys to the District of Columbia.

I. Statement of Interest

AFL is a national, nonprofit organization dedicated to promoting the rule of law in the United States and ensuring due process and equal protection for all Americans.[4] AFL regularly participates in administrative rulemakings on matters of significant public concern and has a direct interest in ensuring that DOJ can fulfill its statutory mandate free from the chilling effects of politically motivated bar complaints.[5] The weaponization of state bar disciplinary processes to punish Department attorneys for carrying out lawful federal policy strikes at the heart of the rule of law and threatens the independence of the federal legal system.[6] AFL, therefore, has a strong interest in the outcome of this rulemaking.

II. Why Section 530B Authorizes a Stronger Rule

Section 530B of Title 28 establishes both the substantive obligation governing Department attorneys and the broad rulemaking authority empowering the Attorney General to enforce it.

A. The Statutory Framework: Section 530B(a) and Section 530B(b)

28 U.S.C. § 530B, commonly known as the McDade Amendment, was enacted in response to concerns that federal prosecutors were claiming immunity from state professional conduct rules. Subsection (a) of the statute establishes the substantive rule: it requires that Department of Justice attorneys comply with the state and local

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[4] *See, e.g.*, AM. FIRST LEGAL FOUND., *America First Legal Backs EPA's Plan to Implement AFL's Proposed Rule Scrapping Biden-Era "Environmental Justice" FOIA Provision* (Mar. 3, 2026) https://perma.cc/P9BE-SWT6; AM. FIRST LEGAL FOUND., *America First Legal Supports HUD's Fight Against Racial Discrimination* (Feb. 18, 2026) https://perma.cc/8FHA-58EH.

[5] *See* AM. FIRST LEGAL FOUND., *America First Legal Backs EPA's Plan to Implement AFL's Proposed Rule Scrapping Biden-Era "Environmental Justice" FOIA Provision* (Mar. 3, 2026) https://perma.cc/P9BE-SWT6; AM. FIRST LEGAL FOUND., *America First Legal Supports HUD's Fight Against Racial Discrimination* (Feb. 18, 2026) https://perma.cc/8FHA-58EH.

[6] 91 Fed. Reg. at 10782.

rules of professional conduct that apply to other attorneys in the state where they are licensed or where they perform their official duties. In other words, DOJ attorneys are generally subject to the same ethics rules as private attorneys practicing in the same jurisdiction. Congress intended to ensure that federal prosecutors could not invoke federal authority to avoid accountability for genuine ethical violations.

Subsection (b), however, grants the Attorney General broad authority to implement and enforce that substantive obligation. It provides that the Attorney General "shall make and amend rules of the Department of Justice to assure compliance" with the state ethics rules made applicable by subsection (a). The critical word is "assure," a term that courts and DOJ itself have recognized as expansive, meaning to guarantee compliance rather than merely acknowledge it. Congress placed no limits on the methods or mechanisms the Attorney General may use to ensure compliance. Accordingly, the Attorney General has discretion to construct whatever regulatory framework he determines is necessary to ensure that DOJ attorneys meet the required professional standards, up to and including displacing state bar enforcement entirely and creating a wholly federal system for reviewing and resolving ethics complaints against Department attorneys. This broad grant of authority in § 530B(b) forms the legal foundation for DOJ's proposed rule and, as AFL urges below, supports the adoption of a substantially stronger and more protective final rule.

B. DOJ's Proposed Rule

DOJ proposes to add a new § 77.5 to 28 C.F.R. § 77, establishing a process by which the Attorney General may, in the first instance, review any allegation that a current or former Department attorney violated an ethics rule while performing official duties for DOJ.[7] Upon learning of a state bar complaint, DOJ, through the Office of Professional Responsibility ("OPR"), will notify the applicable state bar disciplinary authorities whether it intends to exercise this right and will request that the bar suspend any parallel investigations or disciplinary proceedings until OPR completes its review.[8] If the relevant bar disciplinary authorities refuse the Attorney General's request, the proposed rule provides that DOJ shall take "appropriate action" to prevent the bar from interfering with the Attorney General's review.[9]

C. Recent Developments Motivating the Proposed Rule

DOJ's proposal is motivated by two recent developments. First, President Trump directed the Attorney General to examine attorney discipline and its role in government weaponization, including through Executive Order 14147, *Ending the Weaponization of the Federal Government*,[10] and a subsequent memorandum

[7] *Id.* at 10780–81.
[8] *Id.* at 10784.
[9] *Id.* at 10787–88 (proposed 28 C.F.R. § 77.5(b)).
[10] Exec. Order No. 14147, 90 Fed. Reg. 8235, 8235 (Jan. 20, 2025).

directing the Attorney General to "prioritize enforcement of . . . regulations governing attorney conduct and discipline."[11] Second, over the past several years, political activists have weaponized the bar complaint and investigation process by filing complaints against senior DOJ officials, including the Deputy Attorney General, the former Acting Deputy Attorney General, the Deputy Assistant Attorney General for the Federal Programs Branch of the Civil Division, and the former interim United States Attorney for the District of Columbia, as well as career Department attorneys.[12] Even more troubling, certain state bar disciplinary authorities have undertaken investigations of Department attorneys without notifying or coordinating with OPR.[13]

D. The Broader Constitutional and Statutory Framework Supporting Federal Primacy

The constitutional and statutory framework surrounding § 530B confirms that the Attorney General has ample authority to act far more aggressively than the proposed rule contemplates. As the Supreme Court has long recognized, "the activities *of the Federal Government* are free from regulation by any State" – a principle establishing that state bars may not regulate federal attorneys engaged in their federal duties absent a clear statement from Congress.[14] The McDade Amendment provides only "limited authority" for state bars to regulate Department attorneys, confined to requiring compliance with the same substantive standards applicable to non-federal attorneys; it does not confer enforcement authority on the states.[15]

The broader statutory framework confirms the Attorney General's primacy.[16] The Attorney General is "the head of the Department of Justice" and is "vested" with all functions of officers, agencies, and employees of DOJ.[17] The Attorney General has authority to send DOJ officers to any State to "attend to the interests of the United States" and is responsible for "supervis[ing] all litigation to which the United States, an agency, or officer thereof is a party."[18] Department attorneys do not need a State's approval to discharge their federal responsibilities, [19] and Congress has created a framework under which the State whose substantive ethics rules apply may differ

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[11] 91 Fed. Reg. at 10782 (citing to *Memorandum on Preventing Abuses of the Legal System and the Federal Courts*, 2025 Daily Comp. Pres. Doc. 2 (Mar. 21, 2025)).
[12] 91 Fed. Reg. at 10782.
[13] *Id.*
[14] 91 Fed. Reg. at 10783–84; *see also Hancock v. Train*, 426 U.S. 167, 178 (1976) (quoting *Mayo v. United States*, 319 U.S. 441, 445 (1943)).
[15] 91 Fed. Reg. at 10783; *see* 28 U.S.C. § 530B(a); 28 C.F.R. § 77.1(b).
[16] *See* 91 Fed. Reg. at 10782.
[17] 28 U.S.C. §§ 503, 509.
[18] 28 U.S.C. §§ 517, 519.
[19] *See* 91 Fed. Reg. at 10783 (citing *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 384–85 (1963)).

from the State of licensure and enforcement, leaving to "the Attorney General the discretion on how to enforce substantive ethics rules."[20]

DOJ has acknowledged that the language of § 530B(b) is "broad" and that both the Supreme Court and the lower courts have "consistently instructed" that "broad, sweeping language" in statutes "should be given broad, sweeping application."[21] DOJ should exercise the full scope of this authority in the final rule, rather than adopting a minimalist approach that merely codifies existing practice and leaves federal attorneys exposed to the very weaponization the rule is designed to prevent.

III. DOJ Has Interpreted Its Rulemaking Authority Too Narrowly

AFL commends DOJ for acknowledging that the Attorney General's rulemaking authority under 28 U.S.C. § 530B(b) is broad. DOJ correctly observes that the power conferred on the Attorney General "to assure compliance" with the statute is expansive, that the verb "assure" means "to make certain the coming or attainment of" some objective, and that subsection (b) "does not impose any limitations on how the Attorney General goes about structuring the regulatory system designed to accomplish this objective."[22] DOJ further acknowledges that the Attorney General "retains the discretion to displace State bar enforcement and to create an entirely Federal enforcement mechanism, or to displace State bar enforcement in part when it is inconsistent with the Federal Government's determinations regarding the regulation of Federal attorneys."[23] Having identified this authority, DOJ should use it.

Yet DOJ proposes a rule that exercises only a fraction of that authority. The proposed rule merely formalizes a "right of first review," a process that, by DOJ's own admission, was largely "abided by in practice if not mandated by law until recently."[24]

The proposed rule requests that state bars suspend their investigations but does not require them to do so, nor does it authorize DOJ to block a bar complaint from proceeding. At a minimum, the Attorney General should be empowered to block a complaint when it is facially the product of political targeting by issuing a binding directive to the relevant state bar prohibiting further investigation or disciplinary proceedings and, should the state bar refuse to comply, by seeking injunctive relief in federal court on Supremacy Clause grounds, given that state bar proceedings that penalize federal attorneys for the performance of their official duties are presumptively subject to federal preemption.

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[20] *See* 91 Fed. Reg. at 10783–84.
[21] 91 Fed. Reg. at 10783–84 (citing *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003)).
[22] *Id.* at 10783.
[23] *Id.* at 10783–84.
[24] *Id.* at 10784.

The proposed rule also permits state bars to impose additional sanctions beyond those DOJ imposes, expressly providing that it does not "prohibit the State bar disciplinary authorities from imposing additional sanctions if DOJ determines that an attorney violated an ethics rule."[25] It further leaves former Department attorneys exposed if they decline to cooperate with OPR's review, at which point the matter reverts to the state bar.[26]

Finally, the rule applies exclusively to "Department attorneys,"[27] leaving all other federal agency attorneys who represent politically disfavored clients without any federal mechanism for relief from politically motivated bar complaints arising from their official duties.

This approach is inadequate to address the scale and severity of the weaponization problem that DOJ has identified. The final rule should exercise the full scope of DOJ's authority under § 530B(b) and adopt substantially stronger protections.

A. DOJ Should Assert Exclusive Federal Jurisdiction Over Ethics Enforcement for Official Conduct and Extend Protections to All Federal Agency Attorneys

DOJ has concluded that "Congress did not expressly confer on the States enforcement authority" over Department attorneys and that the statute "otherwise preserves the authority of the Attorney General to enforce those substantive standards" found in state ethics rules.[28] DOJ has further acknowledged that it "had previously taken the position that State bars had no authority over its lawyers in the performance of their official functions."[29] If the Attorney General has the discretion to "displace State bar enforcement and to create an entirely Federal enforcement mechanism," she should exercise that discretion for all complaints arising from the official duties of any current or former federal attorney, that is, conduct performed in the attorney's capacity as a federal government lawyer.[30] The rule's assertion of federal authority is most compelling and legally defensible when it targets complaints arising from what attorneys did in their federal roles, not merely any complaint filed against someone who once served in a federal role.

Under the proposed rule, DOJ's review is merely a right of first review; state bars retain the ability to pursue their own investigations and impose sanctions even after DOJ has completed its review. This exposes federal agency attorneys to a second proceeding before a state bar that may be motivated by politics rather than genuine

[25] *Id.* at 10785.
[26] *See id.*
[27] *See* 28 C.F.R. §§ 77.2(a), (f).
[28] *Id.* at 10783.
[29] *Id.*
[30] *Id.* at 10784.

ethical concerns. The final rule should provide that DOJ's determination is conclusive as to whether any current or former federal agency attorney violated an ethics rule while performing official duties, and that state bars shall not pursue separate investigations or impose separate sanctions arising from the same conduct. Furthermore, where a complaint is facially the product of political targeting, DOJ should not be limited to requesting a courtesy suspension; it should be empowered to issue a binding directive halting the complaint entirely, without awaiting completion of a full OPR review, as discussed in Part III.B below. These protections should extend to all current and former federal agency attorneys, not only those within the current "Department attorney" definition.

B. DOJ Should Establish a Mandatory Three-Stage Screening Mechanism for Meritless and Politically Motivated Complaints

Although DOJ acknowledges that "political activists have weaponized the bar complaint and investigation process," the proposed rule applies the same process to all complaints regardless of their origin, substance, or the complainant's relationship to the alleged misconduct.[31] The proposed rule contains no mechanism for differentiating complaints based on who is filing them. A complaint filed by a third party who was not harmed by, present for, or otherwise directly involved in the alleged ethical violation is inherently more susceptible to abuse than one filed by someone with direct knowledge of and a genuine stake in the underlying conduct. Advocacy organizations, political groups, and individuals with no personal connection to the matter are among the most frequent filers of politically motivated bar complaints, yet the proposed rule provides no mechanism for early dismissal of such complaints and no heightened scrutiny of the complainant's standing or relationship to the alleged misconduct. Nor does the proposed rule authorize DOJ to make a threshold determination that a complaint is politically motivated and to block it from proceeding on that basis alone.

Where a complaint targets a federal attorney for conduct performed in an official capacity, even the full OPR review process is itself a burden; the mere pendency of such a complaint can chill the attorney's willingness to undertake sensitive representations on behalf of the government. A preliminary political-targeting determination, distinct from a full merits review, is therefore essential.

The final rule should require OPR to conduct a three-stage preliminary screening of every bar complaint referred for review. At the first stage, OPR should assess the complainant's relationship to the alleged misconduct. Where a complaint is filed by a third party, meaning a person or organization that was not a party to, present for, or otherwise directly affected by the conduct alleged to constitute an ethical violation, OPR should apply heightened scrutiny and afford the respondent attorney an early opportunity to seek dismissal before the complaint proceeds further. A third-party

[31] 91 Fed. Reg. at 10782.

complainant's lack of any direct connection to the alleged misconduct is itself a significant indicator that the complaint may be politically motivated or frivolous, and OPR should be empowered to dismiss such complaints at this threshold stage without requiring the respondent to undergo a full review.

At the second stage, for complaints that survive the threshold screen, OPR should assess whether the complaint, on its face, is the product of political targeting directed at the attorney's official federal conduct rather than a genuine belief that the attorney committed an ethical violation. If OPR so determines, it should issue a binding directive prohibiting the state bar from opening or continuing any investigation or taking any disciplinary action based on the complaint.

At the third stage, for complaints that survive the political-targeting screen, OPR should assess whether the complaint is facially meritless, that is, whether it fails to allege facts that, if true, would constitute a violation of an applicable ethics rule.[32] Facially meritless complaints should be dismissed by OPR, and the state bar should be notified that no further action is warranted. This three-stage screening process would deter the filing of politically motivated, third-party-driven, and frivolous complaints by ensuring that they are disposed of quickly and definitively, without subjecting attorneys to prolonged uncertainty.

C. DOJ Should Prohibit Department Attorneys from Participating in State Bar Proceedings Without Authorization

The proposed rule contemplates that OPR will "direct Department personnel not to provide any non-public information to any parallel investigations or disciplinary proceedings until the completion of OPR's review."[33] This provision is sound, but it should be strengthened. The final rule should make clear that no current Department attorney may participate in any state bar proceeding, including responding to complaints, submitting to interviews, or providing documents, related to that attorney's official duties, without the express authorization of the Attorney General or her designee. This prohibition should apply regardless of whether OPR has completed its review. Department attorneys should not be forced to choose between their professional obligations to their bar and their duties to DOJ or any other federal agency.[34] The Department should also make clear that its attorneys who are cleared

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[32] *Id.* at 10784 n.2 (noting that "certain bars filter obviously meritless complaints before forwarding them to the affected lawyer").

[33] *Id.* at 10784.

[34] *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) (upholding the Attorney General's authority under 5 U.S.C. § 301 to prescribe regulations governing when Department employees may provide information in outside proceedings). The Department should also make clear that it will apply its *Touhy* regulations on an even-handed basis in any bar proceedings it opts to allow to take place: in other words, if the Department releases documents or witnesses to testify in state ethics proceedings, it should release documents and authorize witnesses sought by the targeted attorney using the same

to participate in ethics proceedings in state bars should assert any privileges that the Department instructs the lawyer to take, and that such a directive shall not preclude any attorney who is the target of a disciplinary proceeding from asserting applicable privileges.

D. DOJ Should Provide Legal Defense Services to Attorneys Targeted by Politicized Complaints

The proposed rule addresses the process by which DOJ reviews complaints, but does not address DOJ's obligation to defend its attorneys against meritless attacks. When any current or former federal attorney is targeted by a bar complaint arising from official duties, that attorney was acting on behalf of the United States, and it is therefore the United States' responsibility to stand behind that attorney. DOJ should adopt a policy, codified in the final rule, providing that DOJ will furnish legal representation and bear the full costs of defense for any current or former federal attorney who is the subject of a state bar complaint or investigation arising from that attorney's official duties.[35]

E. The Rule Should Address the Specific Problem of Coordinated Political Campaigns

DOJ's proposed rule focuses on individual bar complaints. Still, it does not address the phenomenon of coordinated complaint campaigns, in which political organizations file mass bar complaints against multiple current or former federal attorneys as part of a deliberate strategy to harass and intimidate those attorneys for conduct performed in their official federal capacity.[36]

The final rule should include a provision requiring OPR to assess whether a bar complaint is part of a coordinated campaign targeting attorneys for their official federal conduct and, if so, to notify the state bar that the complaint is the product of a political campaign rather than a genuine ethical concern. DOJ should make clear that it views coordinated complaint campaigns directed at attorneys for their official federal duties as an unlawful interference with the Attorney General's exclusive authority to supervise Department attorneys and regulate the professional conduct of federal lawyers.

As the Supreme Court has recognized, "government action which chills constitutionally protected speech or expression contravenes the First Amendment,"

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measuring stick. No Department attorney should be placed in a position where only incriminatory material and adverse witnesses are authorized but not exculpatory material or pro-defense witnesses.

[35] 28 U.S.C. § 2679(d); *see* 28 C.F.R. § 50.15; *Osborn v. Haley*, 549 U.S. 225, 229–30 (2007).

[36] *See, e.g.*, Katelynn Richardson, *Exclusive: Conservative Org Turns Tables by Hitting Ethics Official Investigating Ed Martin with Bar Complaint*, DAILY CALLER (Mar. 27, 2026) https://perma.cc/UVM6-H944 (describing coordinated filing strategies by advocacy organizations).

and "retaliatory actions may tend to chill individuals' exercise of constitutional rights."[37] Coordinated bar complaints targeting current or former federal attorneys for carrying out lawful federal policy are the functional equivalent of such retaliatory action, and DOJ has both the authority and the obligation to protect Federal Government attorneys from this chilling effect.[38]

The problem of coordinated political campaigns targeting attorneys extends well beyond complaints against Department attorneys. It encompasses a broader pattern of weaponizing state bar disciplinary processes against any attorney who represents disfavored political clients or candidates. A particularly egregious example of this phenomenon is the 65 Project, a dark-money organization created by Democratic operatives with the stated goal of disbarring and "shaming" attorneys who represented former President Trump or challenged the results of the 2020 presidential election.[39] The group's founder, David Brock, a close ally of Hillary Clinton and founder of Media Matters for America, candidly stated that the 65 Project would "not only bring the grievances in the bar complaints, but shame them and make them toxic in their communities and in their firms."[40] One employee described the project's objective as seeking to "kill the pool of available legal talent going forward."[41]

The 65 Project has filed nearly 100 ethics complaints against attorneys affiliated with President Trump, targeting more than 111 lawyers across 26 states.[42] Attorney John Eastman characterized the group's aims as seeking "to render [lawyers] so toxic in their firms and communities that no one will want to take on these kinds of cases again," calling this "a direct threat to the rule of law and our adversarial system of justice."[43] DOJ should not permit such abusive tactics to go unchecked; tolerating coordinated complaint campaigns of this kind directly undermines the federal government's ability to attract and retain the legal talent necessary to carry out its functions.

The politically motivated nature of these coordinated complaint campaigns is further evidenced by the disparate treatment of attorneys based on their political affiliations.

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[37] *See Bruner v. Baker*, 506 F.3d 1021, 1027 (10th Cir. 2007); *Am. Civil Liberties Union, Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993).

[38] 91 Fed. Reg. at 10782 (noting that the weaponization of bar complaints "risks chilling the zealous advocacy by Department attorneys on behalf of the United States, its agencies, and its officers").

[39] *See* Lachlan Markay & Jonathan Swan, *Scoop: High-Powered Group Targets Trump Lawyers' Livelihoods*, AXIOS (Mar. 7, 2022) https://perma.cc/92MT-XZC3; Monique Beals, *Group Trying to Disbar Lawyers Who Worked on Trump's Post-Election Lawsuits*, THE HILL (Mar. 7, 2022) https://perma.cc/X4PN-XJHJ.

[40] Markay & Swan, *supra* note 32.

[41] *Id.*

[42] *See* AM. FIRST LEGAL FOUND., *America First Legal Fights Back Against Leftist 'Lawfare,' Files Bar Complaint Against 65 Project Director for Abusing the Attorney Grievance Process to Target Lawyers Affiliated with President Trump* (Oct. 28, 2024) https://perma.cc/SX8R-R3ML.

[43] *See* Kaelan Deese, *DOJ Urged to Investigate Dark Money Group Targeting Trump Attorneys*, THE DENVER GAZETTE (Apr. 4, 2025) https://perma.cc/43X6-X7VB.

Sidney Powell, an attorney who represented President Trump and filed lawsuits challenging the 2020 election results in Arizona, Georgia, Michigan, and Wisconsin, was the subject of a disciplinary petition by the State Bar of Texas Commission for Lawyer Discipline, which alleged professional misconduct and sought sanctions, including disbarment.[44] The disciplinary action stemmed from her involvement in litigation related to the election and was filed after the 65 Project and other groups had submitted complaints against her.[45] As attorney Cleta Mitchell, herself a target of the 65 Project, has noted, the group has not pursued any Democratic-aligned attorneys, such as Mark Elias, who has challenged election results.[46]

This asymmetric application of the disciplinary process, where attorneys representing Republican candidates or serving Republican administrations are subjected to coordinated complaint campaigns while attorneys engaging in comparable conduct on behalf of Democrats face no such scrutiny, demonstrates that the bar complaint process has been weaponized as a tool of political intimidation.[47] DOJ should address this broader pattern of politically motivated bar complaints by establishing a process to review and investigate complaints that, on their face, appear to be politically motivated targeting of federal attorneys for their official conduct. As with the other protections urged in this comment, this process should not be limited to Department attorneys. DOJ should establish a referral mechanism by which any current or former federal agency attorney may seek a DOJ determination that a bar complaint constitutes political targeting of official conduct, with DOJ empowered to block the bar proceeding and prohibit independent investigation upon such a finding.

F. The Rule Should Conform to § 530B's Exclusion of the District of Columbia from Having any Disciplinary Authority Over Federal Lawyers.

The most problematic local weaponization of bar disciplinary proceedings against federal attorneys occurs in the District of Columbia. The D.C. Bar Office of Disciplinary Counsel (ODC) has prosecuted multiple federal attorneys on transparently false and pretextual grounds, including most notably Jeff Clark and Ed Martin, but they are certainly not the only victims. Left-wing groups articulate

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[44] *See* Alison Durkee, *Texas State Bar Alleges Sidney Powell Committed Professional Misconduct with Election Lawsuits—Could Lead to Disbarment*, FORBES (Mar. 9, 2022) https://perma.cc/9KR4-CNEN.
[45] *See* Tierney Sneed, *Inside the Effort to Disbar Attorneys Who Backed Bogus Election Lawsuits*, CNN (Mar. 10, 2022) https://perma.cc/WR9W-B8ZF; James Barragán, *Texas state bar files professional misconduct lawsuit against Ken Paxton for attempt to overturn 2020 presidential elections*, THE TEXAS TRIBUNE (May 25, 2022) https://perma.cc/Q3DW-MULA.
[46] *See The 65 Project*, INFLUENCEWATCH https://perma.cc/X5GP-4BY7.
[47] *See* Arthur Kane, *Nonprofit Files Complaints Against Trump Attorneys but Almost No Public Discipline*, CTR. SQUARE (Aug. 25, 2025) https://perma.cc/FEK5-KF9J (noting nearly 80 complaints filed by the 65 Project).

their political differences as bar complaints, and ODC has weaponized these complaints against the Trump Administration.

The premise of the D.C. Bar's claim of authority is that Congress in 28 U.S.C. § 530B included the District of Columbia in its grant of disciplinary jurisdiction over federal attorneys. This premise is invalid on the simplest of grounds.

Section 530B grants disciplinary jurisdiction over federal attorneys to States but makes no reference to granting any such authority to the District of Columbia. Congress has demonstrated in many contexts that when it wants to include the District of Columbia in a statute it does so explicitly, either in a definitional code section, or by use of phrases like "States, territories or the District of Columbia." In fact, in the very Omnibus legislation that adopted what is now Section 530B, Congress repeatedly uses exactly such terms, making it all the more conspicuous that there are no such terms specifying the inclusion of the District of Columbia in Section 530B itself. The *expressio unius* canon thus clearly applies. The District of Columbia is not a "state" and Congress intended that the District would operate as a municipal corporation.[48] And clearly, no other municipal corporation would be able to wield Section 530B powers.

The D.C. Bar argues, and the D.C. Court of Appeals held in *In re Clark*, 311 A.3d 882, 888 (D.C. 2024) that the word "State," as it appears in §530B, includes the "District of Columbia" on the grounds that Congress lacked any sound reason for excluding D.C. This reasoning does not withstand scrutiny.

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[48] Judges Rao and Katsas explained this uncontroversial set of points well, as they are rooted in elementary principles about the limited legal nature of the District:

> To begin with, a theory of sovereign injury is inconsistent with the District's legal status. The District is a federal district and congressionally created municipal corporation. *See* U.S. Const., art. I, § 8, cl. 17 (enabling Congress to "exercise exclusive Legislation in all Cases whatsoever, over such District" that "become[s] the Seat of Government of the United States"); D.C. Code § 1-102 ("The District ... [may] exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States."). We have long recognized that the District enjoys no sovereign status separate from the federal government. *See Croson v. District of Columbia*, 2 F.2d 924, 924 (D.C. Cir. 1924) ("The District of Columbia, as a municipal corporation, has the right to sue and be sued, but it possesses no sovereign power."). And the Supreme Court has explained that the District's "sovereign power ... is not lodged in the corporation of the District of Columbia, but in the government of the United States." *Metro. R.R. Co. v. District of Columbia*, 132 U.S. 1, 9 (1889).

D.C. v. Trump, No. 25-5418, 2025 WL 3673674, at *13 (D.C. Cir. Dec. 17, 2025) (Rao & Katsas, J.J., concurring).

Controlling decisions of the U.S. Supreme Court preclude curing Congress' omission by judicial fiat:

> We decline the Government's invitation to add an extra clause to the text of § 16913(a). As we long ago remarked in another context, "[w]hat the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, ***presumably by inadvertence***, may be included within its scope. ***To supply omissions transcends the judicial function.***" *Iselin v. United States,* 270 U.S. 245, 251 (1926). Just so here.

Nichols v. United States, 578 U.S. 104, 110 (2016) (emphasis added). *Nichols* and *Iselin* make even a mistake by Congress irrelevant. Similarly, in *Rotkiske v. Klemm,* a 2019 decision of the Supreme Court:

> It is a fundamental principle of statutory interpretation that "absent provision[s] cannot be supplied by the courts." A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 94 (2012). To do so "'is not a construction of a statute, but, in effect, an enlargement of it by the court.'" *Nichols v. United States*, 578 U.S. ——, ——, 136 S.Ct. 1113, 1118 (2016) (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)).
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> Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.

Rotkiske v. Klemm, 140 S. Ct. 355, 360–61 (2019) (emphasis added). The rule was applied again in 2020 in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020).

Here, the language omitted from Section 530B is found in several other provisions ***in the very same piece of legislation***. *Compare* H.R. Conf. Rep. No. 105–825 (Oct. 19, 1998), Title VIII, p. 123 (which does not include the District of Columbia) *with id.* at pp. 8, 9, 752, 865, 890, and 902 (which does include the District of Columbia).[49] When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (cleaned up).

[49] In the finally adopted version of this legislation, Public Law 105-277, 112 Stat. 2681 (Oct. 21, 1998), the parallel page references are 112 Stat. 2681-118 which does not refer to the District of Columbia, vs. pp. 6, 7, 726, 836, 860 and 871, which do. In all contexts, the term "District of Columbia" appears 456 times in the conference report and 391 times in the Public Law. The bill included annual appropriations for D.C. for 1999. 112 Stat. 2681-121. This was not a bill in which Congress forgot about the District of Columbia.

Section 530B's distinction between the States and D.C. is neither absurd nor surprising. Congress might have conferred greater authority on the States out of respect for their sovereign status—a status D.C. lacks. And empowering D.C. to regulate government attorneys would, given the immense number of D.C.-based attorneys in the Department, give a politically hostile municipal bar association immense power to influence the operations of the national government, an untenable and unthinkable interference with federal supremacy and a violation of separation of powers as well given that D.C. is a creature of Congress. If D.C. is a "State," then ***all*** Department of Justice attorneys who practice in D.C.—including the Attorney General—would be subject to the D.C. Bar's oversight, ***regardless*** of whether they are barred in D.C. Congress could have rationally decided against vesting so much power over the national government in the local bar of a single city, especially given the monolithic political orientation of the District's residents.

The proposed rule does not address the D.C. Bar's unfounded claim of authority over federal lawyers, a major oversight in achieving the purpose of protecting federal lawyers from harassing and politically motivated bar discipline. The D.C. Bar is the worst offender in the country, a problem that should be corrected by a regulation that conforms to the language of Section 530B.

IV. Conclusion

For the foregoing reasons, AFL urges DOJ to finalize the proposed rule with substantially stronger protections against the weaponization of state bar complaints targeting federal attorneys for their official conduct. DOJ has correctly identified the problem and has articulated the legal authority to address it, but the proposed rule exercises only a fraction of that authority.

The final rule should: (i) assert exclusive federal jurisdiction over ethics enforcement for all federal government attorneys' official conduct, with DOJ's determination being conclusive and state bars prohibited from conducting independent investigations or imposing separate sanctions; (ii) establish a mandatory three-stage screening mechanism, where at the first stage, applying heightened scrutiny to complaints filed by third parties with no direct connection to the alleged misconduct and affording respondent attorneys an early opportunity for dismissal; at the second stage, permitting DOJ to issue a binding directive blocking any facially politically motivated complaint directed at an attorney's official federal service before any full investigation is conducted, with state bars prohibited from conducting any independent investigation in cases so designated; and at the third stage, requiring dismissal of any facially meritless complaint; (iii) prohibit Department attorneys from participating in state bar proceedings without authorization; (iv) provide affirmative legal defense to targeted attorneys for complaints arising from their official federal work; (v) address the specific problem of coordinated political complaint campaigns

targeting federal attorneys for their official conduct; (vi) create a referral mechanism by which any current or former federal agency attorney subjected to a politically motivated bar complaint for conduct performed in an official federal capacity may refer that complaint to DOJ for review, with DOJ empowered to block the bar proceeding and prohibit independent bar investigation upon a finding of political targeting; and (vii) completely exclude the District of Columbia from any disciplinary authority over federal attorneys. DOJ should not be timid in the face of an unprecedented assault on the independence and integrity of the legal profession and the federal government's ability to attract and retain talented attorneys.

Sincerely,

/s/ Trey Donathan
Trey Donathan
Attorney
AMERICA FIRST LEGAL FOUNDATION