

No. _____

In the Supreme Court of the United States

FRANCIS JAMES ACEBO, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

**PETITION FOR WRIT OF CERTIORARI TO
THE TENTH CIRCUIT COURT OF APPEALS**

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Dated: February 17, 2026

QUESTION PRESENTED:

Mr. Acebo was tried for First Degree Murder (and other offenses) in connection with the shooting death of Derek Pappan. He asserted the defense of self-defense. At his jury trial, Mr. Acebo took the stand in his own defense and sought—in support of his defense of self-defense—to testify as to specific incidents in his past with Mr. Pappan that led him to fear the victim, including threats and acts of violence against Mr. Acebo and his family. The Government, which had actual notice of all that Mr. Acebo sought to testify to, sought and obtained exclusion of this testimony by Mr. Acebo, arguing that he was required to give notice of his intent to introduce this “reverse 404(b)” evidence by the District Court’s scheduling order.

Under these facts, was the Tenth Circuit Court of Appeals’ decision in conflict with decisions of this Court (and other Courts of Appeals) by concluding that a District Court’s scheduling order (or any other local rule or practice for that matter) can effectively amend the notice requirement contained within Federal Rule of Evidence 404(b) expanding it to apply to a criminal defendant, when the Rule’s drafters expressly required such notice only from “the prosecutor”?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Francis James Acebo, Jr., respectfully petitions this Court to issue a Writ of Certiorari to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit in *United States v. Acebo*, No. 24-8035, 2025 U.S. App. LEXIS 27746 (10th Cir. Oct. 23, 2025).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit denying relief is found at *United States v. Acebo*, No. 24-8035, 2025 WL 2986043, 2025 U.S. App. LEXIS 27746 (10th Cir. Oct. 23, 2025), reh'g en banc denied. *See* Appendix A.

JURISDICTION

The Tenth Circuit Court of Appeals issued its opinion denying relief on October 23, 2025. Mr. Acebo timely petitioned the Tenth Circuit for rehearing *en banc* on November 25, 2025,¹ which Petition was denied on December 16, 2025. 28 U.S.C. § 1254(1) gives this Court jurisdiction to decide this Petition.

¹ On November 5, 2025, the Tenth Circuit issued an Order extending the time for filing a petition for rehearing from November 6, 2025 until November 25, 2025.

STATUTORY PROVISIONS INVOLVED

Mr. Acebo was convicted under 18 U.S.C. §§ 1111, 1153, 924(c)(1)(A)(iii) and 924(j)(1). The question presented also implicates the Rules Enabling Act (28 U.S.C. §§ 2071 – 2077).

STATEMENT OF THE CASE

At issue in this Petition is the fundamental principle that Congressionally promulgated rules of practice and procedure take precedence over, and preempt, local rules of practice. This applies not only to a Judicial District’s “local rules,” but also to less (or equally) formal practices of particular District Judges. The Tenth Circuit Court of Appeals held below that even though FED. R. EVID. 404(b)’s notice requirements do not apply to criminal defendants, a District Court’s Scheduling Order can, in effect, amend FED. R. EVID. 404(b) and apply its notice requirement to evidence that a defendant intends to introduce, even if the method of planned introduction is the defendant’s own testimony. In so holding, the Tenth Circuit Court of Appeals’ opinion is in conflict with prior decisions of this Court, of other Courts of Appeals. 28 U.S.C. §2072(b); FED. R. CRIM. P. 57; *see also Miner v. Atlass*, 363 U.S. 641, 650 (1960); *Stern v. United States Dist. Court*, 214 F.3d 4, 13 (1st Cir. 2000).

The importance of this case lies in the foundational nature of the issues at stake, for the Tenth Circuit Court of Appeals’ decision below offends a tenet

that is basic to our system of laws: that federally promulgated rules of practice and procedure must take precedence over local district courts' eccentricities—and an individual district judge cannot alter the requirements of the Federal Rules (at least as to a topic to which they have spoken). Certiorari should be granted to reaffirm this basic principle.

I. The Evidence Mr. Acebo Sought to Introduce to Support the Defense of Self-Defense.

Mr. Acebo faced three charges related to the shooting death of Mr. Pappan. At the jury trial of this matter, Mr. Acebo took the stand in his own defense and sought himself to testify as to specific incidents in his past with Mr. Pappan that led him to fear the victim, namely: Mr. Acebo's belief that Pappan was responsible for a shooting at Mr. Acebo's grandmother's house, Mr. Acebo's knowledge that Pappan had previously threatened to "take out" Mr. Acebo and his children, and that Pappan had threatened to physically assault Mr. Acebo unless he admitted to allegedly sexually abusing his daughters. (R. Vol. III at 479-481, 483).

The Government, demonstrating actual notice that Mr. Acebo would attempt to introduce this self-defense evidence, filed a trial brief in which it argued for the exclusion of it. (R. Vol. I at 234-251). During Mr. Acebo's testimony, the Government moved to exclude any specific instances of Mr. Pappan's past violent conduct and threats toward Mr. Acebo. As relevant here,

the Government argued that the evidence should be excluded because Mr. Acebo was required to give notice of his intent to introduce this “reverse 404(b)” evidence by the District Court’s scheduling order, which provided, in part:

NOTICE OF INTENT TO USE EVIDENCE AT TRIAL PURSUANT TO FED. R. EVID. 404(b) AND 807: [a]ny party intending to introduce evidence at trial under Federal Rules of Evidence 404(b) or 807 shall file a notice of such intent no later than fourteen (14) days prior to trial. Any response to such notices shall be filed no later than seven (7) days after the notice is filed.

The District Court adopted the Government’s arguments for exclusion at trial, without endorsing any specific argument. (R. Vol. III at 753). Mr. Acebo was permitted to testify only that he generally feared Mr. Pappan, but the jury never learned of Mr. Pappan’s several prior instances of violent, threatening behavior toward Mr. Acebo, i.e., those acts that informed Mr. Acebo’s very real fear of Pappan.

II. Mr. Acebo’s Subsequent Appeal to the Tenth Circuit.

On appeal to the Tenth Circuit Court of Appeals, Mr. Acebo raised several arguments. As pertinent here, Mr. Acebo argued that the District Court erred in excluding Mr. Acebo’s proffered evidence that he was subjectively aware of various violent threats that Pappan had made concerning Mr. Acebo because this evidence was admissible “reverse 404(b)” evidence and was offered for a non-propensity purpose. Further, Mr. Acebo argued, to the extent that the District Court excluded such evidence for failure to provide notice, this too

was error, as the text of FED. R. EVID. 404(b) expressly does not require a criminal defendant to give notice of intent to introduce 404(b) evidence.

With little discussion, the Tenth Circuit Court of Appeals upheld the exclusion of this “reverse 404(b)” evidence on the basis that the District Court’s Scheduling Order “created a notice requirement beyond what Rule 404(b)(3) imposes” and, because Mr. Acebo did not file such a notice, his self-defense evidence was excludable. *Acebo*, 2025 U.S. App. LEXIS 27746, at *7. As a result of this analysis, the Tenth Circuit did not reach other arguments regarding the exclusion—particularly including that its exclusion violated Mr. Acebo’s constitutional right to present a defense.

REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit Court of Appeals offends a principle of established law that is fundamental to our entire system of laws: while a district court has power to regulate procedure and practice, that power is constrained by any applicable statute or federal rule. Even though Federal Rule of Evidence 404(b)(3) contains a notice requirement that is unequivocally imposed upon the prosecution *only* (and for good reason), the District Court, under the guise of a scheduling order, created a novel requirement that criminal defendants give notice of 404(b) evidence (even if it comes from the defendant’s own testimony).

The precedent of this Court is clear: a district court is not permitted to create such a novel procedural innovation in an area already squarely and completely addressed by the Federal Rules of Evidence. The Tenth Circuit Court of Appeals upheld the District Court’s decision with little analysis, and, in doing so, it subverted this Court’s clear precedent and undermined tenets that are foundational to the regulation of courts and the practice of law.

Allowing this to stand would subvert the Rules Enabling Act (28 U.S.C. §§ 2071 – 2077) entirely, raising serious separation-of-powers concerns.² A local district court could chose to implement (or remove) a requirement of a procedural rule that Congress and/or this Court chose to reject.

I. District Courts’ Power to Regulate Practice and Procedure is Necessarily Constrained by Federal Law—Particularly when there are Federal Rules on Point.

District courts have authority to regulate procedure and practice but that authority is constrained by any applicable statute or federal rule. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51 (1991). In keeping with this principle, FED. R. CRIM. P. 57(b), entitled “Procedure When There is No Controlling Law,” provides that, “A judge may regulate practice in any manner

² Among other things, the Rules Enabling Act provides for promulgation of proposed rules by this Court (often after use of committees that it can (and does) appoint), public notice and comment in some circumstances, and the submission of proposed new or amended rules to Congress, which has the authority to take action in response.

consistent with federal law, these rules, and the local rules of the district.” When there *is* controlling law, it follows that a district court may *not* further regulate practice and procedure. *See* 28 U.S.C. § 2071(f).

This Court and multiple Circuit Courts of Appeal have routinely struck down rules and orders that purport to regulate matters that are already properly addressed by federal law. *Miner v. Atlass*, 363 U.S. 641, 650 (1960) (admiralty court could not make rule permitting discovery depositions, when such discovery was not permitted by General Admiralty Rules); *Black v. United States*, 561 U.S. 465, 473-474 (2010) (Court could not add a requirement for preservation of Defendant’s objection that was “unmoored” from any federal statute or rule); *United States v. Supreme Court N.M.*, 839 F.3d 888, 927-928 (10th Cir. 2016) (ethical rule could not place regulations upon federal prosecutors as concerned the issuance of grand jury subpoenas); *Stern v. United States Dist. Ct.*, 214 F.3d 4, 18-19 (1st Cir. 2000).

II. The District Court’s Order purported to regulate a matter that is governed squarely by the Federal Rules of Evidence.

Federal Rule of Evidence 404(b)(3) contains a clear, unambiguous requirement that “the prosecutor” must give notice before seeking to introduce evidence under Rule 404(b). This is not a situation in which “there is no controlling law,” and FED. R. CRIM. P. 57 would permit the district court to create procedures regarding who must give notice under FED. R. EVID. 404(b):

Rule 404(b)(3) *is* the “controlling law.” Congress could have easily imposed the same requirement on a criminal defendant or otherwise indicated that the notice requirement was subject to district court discretion, and it chose not to do so. Such an “advertent declination of the opportunity to include” the defendant within the ambit of Rule 404(b)(3) must be acknowledged and respected. *Miner*, 363 U.S. at 648. The District Court’s attempt to impose a notice requirement upon Mr. Acebo was a novel, and ultimately prejudicial, procedural innovation in an area already regulated by FED. R. EVID. 404(b)(3).

“The Federal Rules of Evidence are congressional enactments, so [courts] apply the traditional tools of statutory interpretation to determine their meaning and scope.” *United States v. Bauzó-Santiago*, 867 F.3d 13, 18 (1st Cir. 2017) (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988)). Thus, courts may not “add words to the law’ to achieve what some . . . might think ‘a desirable result.’” *Muldrow v. City of St. Louis*, 601 U.S. 346, 358 (2024); *Matson Navigation Co. v. United States*, 284 U.S. 352, 356 (1932) (when “the words of [a statute] are plain, we are not at liberty to add to or alter them to effect a purpose which does not appear on its face or from its legislative history.”). Here, the District Court’s novel position was directly contrary to this authority and also entirely subverted the procedural and substantive requirements of the Rules Enabling Act.

Indeed, the District Court’s novel position (which the Tenth Circuit ratified) did just that—it added a requirement of *defense* notice to FED. R. EVID. 404(b)(3), when that section—by its terms—applies *only* to “the prosecutor.”³ Further, the District Court created from whole cloth a requirement of notice for self-defense when it is based, in part, on prior instances of the decedent’s conduct to the defendant (and involving conduct of which the defendant is aware). The Federal Rules of Criminal Procedure require notice of an alibi defense (FED. R. CRIM. P. 12.1), an insanity defense (FED. R. CRIM. P. 12.2), and a public authority defense (FED. R. CRIM. P. 12.3). They also require notice of expert testimony. (FED. R. CRIM. P. 16(b)(1)(C)). For good reason, they specifically exempt statements by the defendant (FED. R. CRIM. P. 16(b)(2)), as well as materials developed by the defendant’s attorney (*id.*) under such notice requirements. Indeed, “when [the] rules and precedents don't require the defendant to give notice, he's entitled to remain silent as to what defense he will present, and the government must anticipate any issues he might raise.” *United States v. Hernandez-Meza*, 720 F.3d 760, 765 (9th Cir. 2013).

³ The application of FED. R. EVID. 404(b) *vel non* to the excluded evidence is *not* the issue, as the Tenth Circuit wrongly concluded. *See Acebo*, 2025 U.S. App. LEXIS 27746, at *7 n.2. The *notice* provisions of FED. R. EVID. 404(b)(3) are distinct from the other portions of the rule, and the lack of notice is the sole basis on which the Tenth Circuit upheld exclusion of the portions of Mr. Acebo’s proposed testimony primarily here at issue.

This is *particularly* applicable here since most of the subject evidence would have come from Mr. Acebo himself. FED. R. CRIM. P. 16(b)(2)(B)(i) makes clear that a statement by the defendant is *not* subject to disclosure. A requirement otherwise would likely violate the Constitution. As one court aptly summarized the relevant legal principles:

The Government's proposition would in effect prohibit a criminal defendant from presenting an affirmative defense unless he agreed to disclose the substance of his testimony to the Government before trial. Such a rule would have the effect of forcing a criminal defendant to choose between his Fifth and Sixth Amendment rights. *See Simmons v. United States*, 390 U.S. 377, 393-394, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) (holding that when an accused is required to provide testimony in order to exercise a Constitutional right, the testimony has been "compelled" within the meaning of the Fifth Amendment, and that the government may not force an accused to choose between his Constitutional rights); *United States v. Hickey*, 185 F.3d 1064, 1065 (9th Cir. 1999); *United States v. Hardwell*, 80 F.3d 1471, 1484 (10th Cir. 1996).

United States v. Murillo, No. ED CR 05-69 (B) VAP, 2008 U.S. Dist. LEXIS 131302, at *70 (C.D. Cal. May 23, 2008); *United States v. Gurolla*, 333 F.3d 944, 953 n.11 (9th Cir. 2003) ("If we were to find for the government here, we would in effect be adopting a rule that would allow a district court to prohibit a criminal defendant from presenting an entrapment defense unless he agreed to disclose the substance of his testimony to the prosecution prior to trial. Such a rule might be unconstitutional, because it might have the effect of forcing a criminal defendant to choose between his Fifth and Sixth Amendment rights.").

The novelty of the District Court’s position (which the Tenth Circuit ratified)—and a further important reason why no objective observer (such as Mr. Acebo’s trial counsel) would have concluded that the Scheduling Order was applicable to Mr. Acebo—is the significant authority finding that such evidence offered by a criminal defendant is *not within the scope of Fed. R. Evid. 404(b) at all*. See, e.g., *United States v. Saenz*, 179 F.3d 686, 688 (9th Cir. 1999) (“Rule 404(b) does *not* apply when a defendant seeks to introduce evidence *that he knew of* a victim’s other acts to show the *defendant’s state of mind*.”) (emphasis in original); *United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983) (“Rule 404(b) does not specifically apply to exclude . . . evidence [that] involves an extraneous offense committed by someone other than the defendant [because] the evidence was not introduced to show that the defendant has a criminal disposition . . . so the policies underlying Rule 404(b) are inapplicable.”); *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 583 (1st Cir. 1987) (“Rule 404(b) does not exclude evidence of prior crimes of persons other than the defendant.”); *United States v. Sepulveda*, 710 F.2d 188, 189 (5th Cir. 1983) (holding that Rule 404(b) only applies to acts by the defendant individually). Against this legal backdrop, a reasonable observer would not have believed the Scheduling Order applicable to defense evidence.

Miner is instructive to a lower court’s authority to vary Federal Rules. This Court was confronted with the question of whether an admiralty court

had the authority to order discovery depositions, even though the practice was not expressly adopted by the admiralty rules. *Miner*, 363 U.S. at 643. The Court examined Admiralty Rule 44, an Admiralty Rules analog to FED. R. CRIM. P. 57, which permitted the Court to adopt rules regulating practice not inconsistent with other federal rules. *Id.* at 646-47. The Court held that such a “basic procedural innovation” should not be introduced through local practice regulations when discovery depositions were not expressly addressed by the Admiralty Rules. *Id.* at 650.

As in *Miner*, the District Court’s adoption of a novel Rule 404(b) notice requirement was a “basic procedural innovation.” The District Court’s Scheduling Order (as ultimately interpreted and applied) was more squarely contrary to FED. R. EVID. 404(b) than was the rule in *Miner*: whereas the Court in *Miner* grappled with ambiguity in the Admiralty Rules concerning depositions, FED. R. EVID. 404(b)(3) squarely addresses the issue of who must give notice under the Rule.

Federal Rule of Evidence 404(b)(3) is not silent on the issue of defendant’s notice obligation—it speaks clearly and unambiguously by *not* including the defendant within its ambit and in the precise same subsection in which it defines the requirement of “notice *in a criminal case*.”⁴ There are two

⁴ There is good reason for this limitation. Requiring a criminal accused to disclose his trial strategy pre-trial to the prosecution would cause grave

parties in such cases: Congress chose to include one in the requirement of pretrial notice and exclude the other. *United States v. Jones*, 160 F.3d 641, 644 (10th Cir. 1998) (“In some cases, Congress intends silence to rule out a particular statutory application” (quoting *Burns v. United States*, 501 U.S. 129, 136 (1991))). That should be particularly true here where Congress and the Supreme Court expressly chose to speak to “notice in a criminal case” and chose to only apply that notice requirement to “the prosecutor” within a subsection where “the defendant” was mentioned in other pertinent ways. *See supra* n.1.

To hold otherwise would be to sanction any number of other idiosyncratic local changes to the Federal Rules. Suppose the District Court’s scheduling order in Mr. Acebo’s case included the following language: “the parties are reminded of this Court’s local practice that law enforcement reports deemed reliable by this Court are not hearsay.” Obviously, such a reworking would never pass muster; but FED. R. EVID. 801(d)—which defines statements that are not hearsay—is “silent” as to any other such hearsay exceptions just as

constitutional concerns. *See, e.g., United States v. Daniels*, 95 F. Supp. 2d 1160, 1164 (D. Kan. April 5, 2000) (citations omitted) (“Forcing any defendant to confront the choice between issuing a pre-trial subpoena duces tecum and disclosing his defense to the government places an unconstitutional limitation on the defendant’s right to compulsory process”); *United States v. Tomison*, 969 F. Supp. 587, 594 (E.D. Cal. 1997); *United States v. Reyes*, 162 F.R.D. 468, 470 (S.D.N.Y. 1995).

FED. R. EVID. 404(b)(3) is “silent” as to a defendant’s obligation to disclose 404(b) evidence. Such absurdities are only avoided because it is axiomatic that when the Federal Rules directly and authoritatively address a subject, district courts are not free to supplement or vary from those rules—by a scheduling order or otherwise. This axiom here—for whatever reason—was disregarded.

Rule 404(b)(3) is unambiguous and leaves no room for interpretation, amendment, or supplementation at the discretion of individual district courts. The Tenth Circuit’s conclusion that the District Court was free to impose a novel Rule 404(b) notice requirement upon Mr. Acebo was clear error, and the grant of certiorari is necessary, so that this Court can affirm the appropriate relationship between a district court’s orders and rules and the congressionally promulgated federal rules.

III. This Case Presents an Appropriate Vehicle to Review the Issue.

The issue presented is and was of substantial importance to this case, which is a murder case (carrying a mandatory sentence of life (without parole)). The evidence excluded was exceedingly important to Mr. Acebo’s defense. It was resolved by the Tenth Circuit *solely* on the basis of lack of notice. The Tenth Circuit thus avoided confronting other arguments presented by Mr. Acebo regarding this evidence, including that its exclusion violated his constitutional right to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *United States v. Tapaha*, 891 F.3d 900, 905 (10th Cir. 2018).

Here, the question of exclusion very well could have made the difference between mandatory life without parole and a much lesser, if any, prison sentence. Given that the case comes to the Court with the lack of notice as the *sole* stated basis for exclusion (the District Court never explained any particular rationale), this matter squarely presents the issue in a way it rarely would otherwise be presented.

CONCLUSION

For the reasons detailed in this Petition, this Court should grant a Writ of Certiorari to review the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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Dated: February 17, 2026