No. 08-1065

IN THE

Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,
v.

CURTIS W. MCGHEE, JR. AND
TERRY J. HARRINGTON,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814

Thomas C. Goldstein
Counsel of Record
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Assistant United States Attorneys and the National District Attorneys Association submit this *amici curiae* brief in support of petitioners Pottawattamie County, Iowa, Joseph Hrvol, and David Richter.

The National Association of Assistant United States Attorneys is the voice of Assistant United States Attorneys in the Department of Justice and Congress, helping to safeguard justice and promote the interests of AUSAs. It was founded in 1993 to protect, promote, foster and advance the mission of AUSAs and their responsibilities in promoting and preserving the Constitution of the United States, encouraging loyalty and dedication among AUSAs in support of the Department of Justice, and encouraging the just enforcement of laws of the United States. It is the "bar association" for the more than 5400 AUSAs throughout the country and the U.S. territories.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7000 members, including most of the nation's local

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[1] Letters reflecting the parties' consent to the filing of this brief are being lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The association's mission is "[t]o be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement. NDAA also files *amicus* briefs on issues relevant to its members and mission, including briefs in this Court in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), and *Davis v. Washington*, 547 U.S. 813 (2006).

SUMMARY OF ARGUMENT

The Court should reverse the holding of the Eighth Circuit, which creates the very real risk that prosecutors will face litigation and potential liability imposed by civil damages over the conduct of their official duties, thereby chilling prosecutorial efforts that are necessary to combat and deter crime. The increase in litigation will impose precisely the burdens on prosecutors – in terms of both time and money – that the doctrine of absolute immunity is intended to preclude.

Nor is the remedy sought by respondents in this case necessary to deter prosecutorial misconduct. To the contrary, prosecutors who engage in misconduct are already subject to discipline by a variety of institutions, including the prosecutors' offices themselves, state bar associations, and the judges before whom they appear. In the most extreme cases, prosecutors may face criminal sanctions for their misconduct.

Finally, civil remedies have not proven to be a practical remedy for plaintiffs against government officials. Although exposing prosecutors to civil liability for acts at trial may benefit the occasional defendant, the harm done to the judicial system far outweighs any benefits.

ARGUMENT

I. The court of appeals' ruling, if not reversed, will inflict entirely predictable negative consequences on prosecutorial efforts. First and foremost, it will lead to an increase in litigation against prosecutors. Under this Court's ruling in *Imbler v. Pachtman*, 424 U.S. 409 (1976), prosecutors are afforded absolute immunity at trial. The court of appeals' ruling would allow criminal defendants to circumvent this absolute immunity by shoehorning their allegations into claims focused on the allegedly improper *procurement* of evidence by prosecutors, notwithstanding that their convictions resulted only from the prosecutor's use of that evidence *at trial*. As one district court explained in granting a motion to dismiss in a Section 1983 case alleging that prosecutors had "solicit[ed] and knowingly us[ed] perjured testimony" against a criminal defendant, "[t]o allow such an allegation to defeat the prosecutor's immunity would vitiate the *Imbler* holding. Anyone against whom perjured testimony was used could then force the prosecutor to court in a civil damage action simply by reframing the claim to allege that the perjured testimony was solicited." *Tate v. Grose*, 412 F. Supp. 487, 488 (E.D. Pa. 1976). *See also Weinstein v. Mueller*, 563 F. Supp. 923, 927 (N.D. Cal. 1982) (in case brought against then-AUSA Robert Mueller,

who currently serves as director of the FBI, citing *Tate* and finding "no difference here between the knowing use of perjured testimony and the solicitation of it. If prosecutorial immunity did not cover the latter as well as the former, the protections of *Imbler* would disappear simply by the addition of another stock allegation.").[2]

The inevitable consequence of broader civil liability will be the chilling of the essential exercise of wholly constitutional efforts to prosecute criminal defendants. Prosecutorial discretion is a foundational principle of the American judicial system. A prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest[] . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78 (1935). Prosecutors must balance demands from the courts, the police, and the people. In this role, the exercise of discretion is essential, as they are frequently required to make dozens of decisions – each of which involves the weighing of countless factors – related to the prosecution of their caseload, and each decision involves the weighing of countless

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[2] Similarly, whenever a court orders evidence suppressed (or, alternatively, whenever an appellate court holds that admitted evidence should have been suppressed), that holding could serve as the basis for a lawsuit alleging that a prosecutor was attempting to admit evidence that was subsequently found to be obtained in violation of the defendant's constitutional rights. Such lawsuits could disrupt a pending criminal case and, moreover, impose enormous litigation costs on small prosecutors' offices.

factors. "The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their . . . official functions." *Yaselli v. Goff*, 12 F.2d 396, 406 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927) (per curiam). The prospect of civil liability effectively gives the prosecutor a personal stake in every case, a conflict of interest directly at odds with his role as public servant. This conflict exists even for the most honest of prosecutors, because litigation can create significant burdens even in frivolous cases.[3]

As this Court has acknowledged, the prospect of liability for these decisions creates "the possibility that [the prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust."[4] *Imbler*, 424 U.S. at

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[3] And indeed, evidence suggests that the majority of claims of prosecutorial misconduct *are* frivolous. *See* U.S. Dep't of Justice, Office of Professional Responsibility Annual Report: 2005, at 4, 7 (noting that out of 827 complaints in 2005, only twenty-five cases of professional misconduct were found); *see also* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 677 (1986) (finding that constitutional tort plaintiffs succeed in only fourteen percent of cases)

[4] A study of the analogous context of illegal police searches and seizures provides a compelling illustration. When Chicago narcotics officers were asked about the potential effect of civil liability for Fourth Amendment violations, ninety-five percent responded that they would become afraid to conduct searches that they knew they should make. Myron W. Orfield, *The*

423; *see also id.* at 424-25 ("A prosecutor is duty bound to exercise his best judgment . . . . The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."). If this occurs, "[t]he work of the prosecutor would . . . be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement." *Id.* at 424 (citing *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. App. 1935)). Indeed, the work of a prosecutor would be completely stymied if a defendant could file suit claiming a civil rights violation whenever prosecutors seek to convince reluctant witnesses to testify notwithstanding efforts by the defendant to intimidate them – efforts that are unfortunately all too common in cases involving, for example, gangs, organized crime, or domestic violence.

An increase in litigation will also impose significant burdens on prosecutors in terms of both time and money – precisely the burdens that absolute immunity is intended to remove. In *Imbler*, 424 U.S. at 425, this Court reasoned that absolute immunity was appropriate because, "if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." These burdens are particularly acute in constitutional tort cases, which typically spend more time on the docket and are more

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Exclusionary Rule and Deterrence, 54 U. Chi. L. Rev. 1016, 1053 (1987).

likely to generate discovery than other civil cases. Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 694 (1986). Furthermore, because prosecutors must often continue to handle a full caseload even while litigation is pending against them, these burdens will extend not only to individual prosecutors, but also to the justice system as a whole.

Indeed, this Court has recognized that absolute immunity is particularly appropriate for prosecutors because "suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor," who "would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials" because he "frequently act[s] under serious constraints of time and even information" and thus "inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Imbler*, 424 U.S. at 425-26.

II. Contrary to respondent McGhee's assertion that "bad police and bad prosecutors are held accountable in civil rights cases like this one or not at all," McGhee BIO 20, the remedy sought by respondents (and upheld by the Eighth Circuit in this case) is not necessary "to deter objectionable prosecutorial conduct," because there are other "means more narrowly tailored" to do so. *United States v. Hasting*, 461 U.S. 499, 506 (1983). *Compare also, e.g.*, McGhee BIO 19 (positing that "[p]rosecutors would be free to fabricate evidence

during criminal investigations because they would know there was virtually no possibility of ever being punished for it").

a. First, as the United States has recently explained, "[p]rosecutorial offices . . . often have their own internal mechanisms to address prosecutorial misconduct and ensure that prosecutors, including supervisors, meet the highest standards of ethical misconduct." Br. *Amicus Curiae* of U.S., *Van de Kamp v. Goldstein* (No. 07-854) at 32. At the federal level, the Department of Justice's Office of Professional Responsibility ("OPR") has responsibility for investigating "allegations of professional misconduct made against Department of Justice ("DOJ") attorneys where the allegations relate to the exercise of the attorney's authority to investigate, litigate, or provide legal advice," including allegations similar to those at issue in this case. U.S. Dep't of Justice, Office of Professional Responsibility Annual Report: 2005, at 1 ("OPR 2005 Annual Report") (OPR investigates allegations that include violations of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and Federal Rule of Criminal Procedure 16, as well as allegations of improper coercion or intimidation of witnesses); *id.* at 14 (describing an investigation of a prosecutor's failure to disclose a witness's conflicting statements that ended in sanction and referral to state bar authorities); *see also Hasting*, 461 U.S. at 506 n.5 ("Here, for example, the court could have dealt with the offending argument by asking the Department of Justice to initiate a disciplinary proceeding against him . . . ."). OPR – which is made up of twenty-two permanent career attorneys and several detailees

from various U.S. Attorneys' offices – operates independently within the Department of Justice, reporting directly to the Attorney General. *See* U.S. Dep't of Justice, *Office of Professional Responsibility*, *available at* www.usdoj.gov/opr/ (visited July 12, 2009).

OPR's investigations of prosecutorial misconduct may arise from complaints from a variety of sources, including private attorneys and parties, judicial referrals, and self-reporting by Department employees. *See* OPR 2005 Annual Report 5. OPR itself also conducts regular searches of electronic databases to locate any judicial criticism of federal prosecutors. It reports the results of its investigations to the Office of the Deputy Attorney General and the relevant DOJ management officials, including "a recommended range of discipline" for attorneys who are found to have engaged in misconduct. DOJ officials are then responsible for imposing "any disciplinary action that may be appropriate," although they cannot depart from OPR's recommendations without advance notification to the Office of the Deputy Attorney General. *Id.* at 2. In the cases in which OPR found professional misconduct, disciplinary action that included suspensions and reprimands was initiated in nearly two-thirds of them. As a further deterrent, these disciplinary actions were disclosed to the general public.

b. At the federal, state, and local levels, prosecutors are also subject to discipline by state bar associations. As this Court explained in *Imbler*, 424 U.S. at 429, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of

constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."

When OPR concludes that federal prosecutors have engaged in misconduct – by finding either intentional misconduct or "that a subject attorney acted in reckless disregard of a professional obligation or standard," it automatically notifies "the bar counsel in each jurisdiction in which an attorney found to have committed professional misconduct is licensed," OPR 2005 Annual Report 3, of both the finding and any discipline imposed. The bar association (which, of course, could also learn of potential misconduct by federal prosecutors from independent sources, including the bar counsel's own review of judicial opinions) may conduct its own investigation of the misconduct, and may also decide to impose its own discipline. *See* 28 U.S.C. § 530B(a) ("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."); *see also United States v. Grass*, 239 F. Supp. 2d 535 (M.D. Pa. 2003) (applying Pennsylvania Rules of Model Conduct to an Assistant United States Attorney, under Section 530B(a)); *United States v. Acosta*, 111 F. Supp. 2d 1082 (E.D. Wis. 2000) (applying Wisconsin Supreme Court Rules to an Assistant United States Attorney, under Section 530B(a)).

State prosecutors are similarly subject to discipline by state bar associations for their misconduct. In Iowa, for example, petitioners as practicing attorneys were subject to several applicable Iowa Court Rules, including Rule 32.3.8(a) (prohibiting prosecutor from prosecuting a charge that he knows is not supported by probable cause) and Rule 32.3.8(d) (prohibiting a prosecutor from knowingly failing to disclose exculpatory evidence). There is no statute of limitations for the filing of an attorney disciplinary complaint, which may be filed by "any person, firm, or other entity," Iowa Ct. R. 34.1, with the Iowa Supreme Court Attorney Disciplinary Board – which may also initiate an investigation or disciplinary action on its own, Iowa Ct. R. 34.5. Possible sanctions could include a private admonition, public reprimand, or suspension or revocation of the prosecutor's law license. Iowa Ct. Rs. 34.11, 35.9, 36.16. *See, e.g.*, *Iowa S. Ct. Att'y Disciplinary Bd. v. Borth*, 728 N.W.2d 205 (Iowa 2007) (publicly reprimanding assistant county attorney with no prior ethical violations for misconduct that included violation of rule prohibiting prosecutors from undertaking criminal defense work and violating ethical rules in negotiating plea bargains); *Iowa S. Ct. Att'y Disciplinary Bd. v. Barry*, No. 08-1214, 2009 WL 415528, at *12 (Iowa Feb. 20, 2009) (law license of county attorney – who had already been removed from office – suspended indefinitely, with no possibility of reinstatement for one year; misconduct included making a series of illegal plea agreements that required defendants to donate money to sheriff's office, which then used money to "purchase weapons for the department, to

pay [attorney's] cell phone bills, and to purchase a vehicle for [his] use").[5]

The courts of last resort in virtually every state have enacted similar rules to those in Iowa, usually by adapting standards established by the American Bar Association ("ABA"). *See* Model Rules of Prof'l Conduct (2009). Like the Iowa Court Rules, the ABA Model Rules contain several provisions to which petitioners may be subject as a result of their alleged misconduct. *See id.* R. 3.8(d) (requiring prosecutors to disclose exculpatory evidence to the defense); *id.* R. 3.8(h) (requiring prosecutors to "remedy" a conviction if it becomes apparent that the defendant did not commit the crime). Federal courts have also incorporated the ABA standards into their local rules. *See, e.g.*, *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 624 (S.D.N.Y. 1990) (noting that an attorney may be subject to discipline for "conduct violative of the Codes of Professional Responsibility of the American Bar Association or the New York Bar Association").[6]

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[5] *See also* John Stevenson, *Nifong May Be Ouster No-Show,* Durham Herald-Sun, June 28, 2007, at A1 (prosecutor in Duke lacrosse case stripped of law license by North Carolina state bar); Dee J. Hall, *Clash of Lawyers Coming To A Head*, Wis. St. J., July 8, 2007, at A1 (prosecutor under investigation by state authorities for lying and withholding evidence from defense; could face public reprimand); Bill Moushey, *He's Free After 4 Hard Years*, Pittsburgh Post-Gazette, Dec. 2, 2006, at A1 (fired district attorney also reported to state disciplinary board for investigation).

[6] These court rules have been adopted by reference by the Department of Justice and may provide the basis for

c. Prosecutors may also face a variety of additional sanctions as a consequence of their misconduct. First and foremost, they may lose their jobs. This is true not only for line attorneys, but also for the chief prosecutor in a jurisdiction, who may be subject to removal from office under state law or – if elected – may be defeated at the polls. *See, e.g.*, Bill Moushey, *He's Free After 4 Hard Years,* Pittsburgh Post-Gazette, Dec. 2, 2006, at A1 (assistant district attorney fired for misconduct during cross-examination of key witness; charges against defendant dropped); *Iowa S. Ct. Att'y Disciplinary Bd. v. Barry*, 2009 WL 415528, at *1 (county attorney removed by county district court in light of finding that attorney had "breached his duties knowingly and with a purpose to do wrong"); John Stevenson, *Nifong May Be Ouster No-Show*, Durham Herald-Sun, June 28, 2007, at A1 (reporting on effort to seek removal of Duke lacrosse prosecutor under North Carolina law permitting chief judge in a jurisdiction to remove district attorneys for certain types of misconduct).

Second, prosecutors may be sanctioned by the judges before whom they appear. *See, e.g.*, *Hasting*, 461 U.S. at 506 ("The Court also could have publicly chastened the prosecutor by identifying him in his opinion."); *see also Kyles v. Whitley*, 514 U.S. 419

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disciplinary action by OPR. *See* 28 C.F.R. § 77.4 ("A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.").

(1995) (identifying the prosecutor responsible for a *Brady* violation); *United States v. Flores-Chapa*, 48 F.3d 156 (5th Cir. 1995) (identifying the prosecutor responsible for an improper closing argument). Indeed, in the recent trial of Senator Ted Stevens, the district court held several federal prosecutors in contempt for their failure to turn over documents relating to alleged prosecutorial misconduct. Del Quentin Wilber, *6 Prosecutors No Longer Part Of Legal Team in Stevens Case*, Wash. Post, Feb. 18, 2009, at A6.[7] The effect of these sanctions should not be underestimated. In issuing sanctions, judges may bring the alleged misconduct to the attention of the prosecutor's supervisors and the public at large. Because prosecutors appear regularly before the court, they have a significant incentive to respond to these sanctions and correct any potential misconduct. The trial process itself also functions as a significant check on prosecutorial misconduct, because the adversarial system ensures that a prosecutor's allegations and conduct are contested. Reversal on appeal acts as an additional sanction, and an effective one. *See* James S. Liebman et al., *A Broken System: Error Rates in Capital Cases* (2000) (finding that sixteen percent of all capital cases are reversed on appeal due to prosecutorial misconduct).

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[7] Those prosecutors were subsequently removed from the government's legal team addressing misconduct allegations, and OPR is apparently investigating the misconduct allegations and contempt findings. Mike Scarcella, *Sealed Court Records, Transcripts Released in Stevens Case*, The BLT: The Blog of Legal Times, Feb. 18, 2009.

Third, in truly egregious cases, prosecutors may themselves face criminal sanctions for their misconduct. *See* 18 U.S.C. § 242 ("Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both . . . ."). One recent example is the case of four Muslim men accused of being part of a "sleeper" terrorist cell in Detroit. When allegations of prosecutorial misconduct that included suppression of evidence later surfaced, the Department of Justice not only sought dismissal of all terrorism charges against the defendants, but it also brought criminal charges against the prosecutor himself for conspiring "to present false evidence at trial and to conceal inconsistent and potentially damaging evidence from the defendants." Eric Lichtblau, *Ex-Prosecutor In Terror Inquiry Is Indicted*, N.Y. Times, Mar. 30, 2006, at A18.

d. There is no evidence that the further prospect of civil liability is necessary to deter prosecutorial misconduct. To the contrary, evidence suggests that civil liability will not be an effective remedy for would-be plaintiffs. The most thorough study of constitutional tort claims found that "constitutional tort plaintiffs do significantly worse than non-civil

rights litigants in every measurable way." Eisenberg & Schwab, *supra*, at 677.[8]

There should be serious consequences for prosecutors whose misconduct deprives a criminal defendant of his or her constitutional rights. But a civil remedy will create the worst of both worlds: it will chill legitimate prosecutorial conduct while at the same time failing to provide a substantial remedy to those who have been wronged. A defendant who believes that he has been the subject of unlawful or unconstitutional actions by a prosecutor has complete and unfettered access to the existing disciplinary regimes applicable to state and local prosecutors. State officials, state bars, and judges all stand ready to ensure the proper functioning of the prosecutorial system. By contrast, the prospect that a prosecutor's interactions with a witness may later be second-guessed by a civil jury – often many years later, when recollections have failed and relevant evidence is no longer available – poses a direct threat to the orderly prosecutorial function.

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[8] Overall, plaintiffs prevailed in only fourteen percent of constitutional claims, compared to fifty-nine percent in all other civil claims (excluding default judgments). Eisenberg & Schwab, *supra*, at 677. Another study of 12,000 analogous lawsuits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (which recognized a cause of action under the Constitution for those subject to unreasonable searches and seizures), found that only thirty of these resulted in judgments for the plaintiffs, and that judgments had been paid by only four of the defendants. Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. Rev. 337, 344-45 (1988).

CONCLUSION

For the foregoing reasons, as well as those outlined by the petitioners, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814

Thomas C. Goldstein
Counsel of Record
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

July 20, 2009