No. 08-1196

IN THE

Supreme Court of the United States

BRUCE WEYHRAUCH,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF ALBERT W. ALSCHULER AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

ALBERT W. ALSCHULER
Counsel of Record
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-1321

September 18, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether, to convict a state official for depriving the public of its right to honest services through the nondisclosure of material information, in violation of the mail-fraud statute (18 U.S.C. Sec. 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

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INTEREST OF *AMICUS CURIAE*

I am a member of the Illinois Bar, a Professor of Law at Northwestern University, and Julius Kreeger Professor of Criminal Law and Criminology, Emeritus, at the University of Chicago. My interest in this case is simply that of a friend of the Court. The Courts of Appeals have taken at least three positions on the issues presented by this case, and the adversary presentation of only two of these positions may not apprise the Court fully of the interests at stake and the applicable law.[1]

SUMMARY OF ARGUMENT

The Courts of Appeals have offered three views of the significance of state law in federal prosecutions for honest-services mail fraud: (1) A violation of state law is necessary to establish a federal violation; (2) although a violation of state law can establish the central element of honest-services fraud (breach of fiduciary duty or misuse of office), the Government may also establish this element without proving any state law violation; and (3) state law violations are immaterial, as the term "honest services" must have a uniform national meaning. The three positions

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[1] Pursuant to Rule 37.6, I declare that no counsel for a party authored this brief in whole or in part and that I am the only person who has made a monetary contribution to the preparation and submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. I acknowledge the exceptional research assistance of Steven Art and David Baltmanis.

thus treat state law violations as (1) indispensable, (2) unnecessary but sufficient,[2] and (3) irrelevant.

This brief contends that the first two positions—both of which interpret the term "honest services" to incorporate state law—are incompatible with sound principles of federalism and with this Court's decision in *Jerome v. United States*, 318 U.S. 101 (1943). *Jerome* and its progeny require a clear statement by Congress before state law is used to define a federal crime.

The first two readings are also incompatible with another clear statement principle. *Cleveland v. United States*, 531 U.S. 12 (2000), requires a clear congressional statement before a federal statute is read to alter the federal-state balance in the prosecution of crime. Bootstrapping state regulatory violations and minor criminal offenses into twenty-year federal felonies and placing both public officials and private individuals on trial for these offenses in the federal courts unmistakably transform the federal-state balance.

Although the Ninth Circuit held correctly in this case that the federal mail fraud statute should have a uniform national meaning, this Court should not approve the sweeping, ill-defined standard of liability the Ninth Circuit announced—one that would make a serious federal crime of every material nondisclosure of a conflicting interest by a state official. The breadth and vagueness of this standard might well

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[2] At least when accompanied by proof of the other elements of an honest-services violation, which vary from circuit to circuit. They include some combination of mailing, fraudulent intent, materiality, risk of economic harm, and anticipated personal gain.

prompt a court to embrace a state-law limiting principle, especially when this principle is the only alternative the adversary system presents. In this case, however, the adversary system sets a trap. The appropriate response to the Ninth Circuit's theory of honest-services fraud is not the federalization of state ethical regulations and their transformation into twenty-year felonies. It is to declare that the non-disclosure of material information does not itself constitute honest-services fraud.

The governing standard should be no broader than the one the Second Circuit approved in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), a standard that (at least for defendants other than public officials) limits honest-services fraud to schemes to obtain bribes or kickbacks or to engage in undisclosed self-dealing capable of causing economic detriment. An even better standard would be the one Judge Easterbrook proposed in *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007). After declaring that his court might need to reduce the risk of uncertainty posed by its current standard, Judge Easterbrook noted that limiting the statute to cases of bribes and kickbacks would be consistent with its language and history. *Id*. at 883-84.

ARGUMENT

I. FEDERAL MAIL FRAUD AND STATE LAW: THREE VIEWS

The Courts of Appeals have taken three positions on the role of state law in federal honest-services mail fraud prosecutions. The Fifth Circuit and probably the Third hold that there can be no deprivation of the intangible right to honest services without a state law violation. Decisions in several other cir-

cuits declare that a state law violation can establish the central element of honest-services fraud but that a deprivation of honest services also can be established without such a violation. And decisions in still other circuits say that federal law determines when an honest services violation has occurred, so that whether a defendant has violated state law does not matter.

A. An Indispensable Element

In *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (en banc), the Fifth Circuit concluded that the term "honest services" means "services owed under state law." It held that the government could not establish a deprivation of the intangible right to honest services without proving a state-law violation. The court reserved the question whether a state *criminal* violation might be needed, and it declared that "mere violation of a gratuity statute...will not suffice." *Id*.

The court apparently saw no alternative to its position other than to afford courts and prosecutors the power to devise "an ethical regime for state employees." *Id*. Judge Higginbotham's opinion for the majority noted that although the honest-services statute reestablished the "intangible rights" doctrine that this Court had disavowed in *McNally v. United States*, 483 U.S. 350 (1987), the statute could not be read simply to approve the law that existed prior to *McNally*. This law varied greatly from circuit to circuit and "was not a unified set of rules." *Brumley*, 116 F.3d at 733.

The Third Circuit apparently has approved either the *Brumley* standard or a close relative. In *United States v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2003), it

said, "We...endorse...the decisions of other Courts of Appeals that have...required a state law limiting principle for honest-services fraud." Yet the court said at the same time, "[The defendant] urges us to address [an issue previously reserved]: Whether a violation of a state-law created fiduciary duty is *required* to sustain an honest-services fraud conviction.... [W]e do not think that this case requires us to resolve that question." *Id*. at 117. The court's second statement, viewed in context, appeared to reserve only the question whether a clearly established fiduciary duty established by *federal* law, like one established by state law, could serve as the predicate for an honest-services conviction. The Third Circuit did accept the Fifth Circuit's view that an honest-services conviction must rest on the violation of a duty imposed by a law other than the mail fraud statute itself.

B. One Path to Conviction but not the Only Path

In *United States v. Martin*, 195 F.3d 961, 976 (7th Cir. 1999), the Seventh Circuit rejected *Brumley*'s requirement of a state law violation, but the court did so "without prejudice to reexamining [its anti-*Brumley* position]...should a full argument be mounted against it in a future case." Judge Posner's opinion for the court observed that tying the concept of honest-services fraud to state law might "allay the persistent concerns about the breadth and vagueness of the statute" but that "a uniform albeit judge-made concept of fiduciary duty might do the trick as well or better." *Id*. In later cases, the Seventh Circuit has rejected both of the paths marked by Judge Posner.

In *United States v. Segal*, 495 F.3d 826, 835 (7th Cir. 2007), the Seventh Circuit upheld jury instructions that, in its view, "fairly informed the jury that state law was to be used...to determine the nature of the defendant's legal and fiduciary duties."[3] Shortly thereafter, however, in *United States v. Warner*, 498 F.3d 666, 698 (7th Cir. 2007), the court held that the jury was not required "to find a violation of a specific state law in order to convict."[4]

Moreover, in *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008), the Seventh Circuit held that the violation of a civil consent decree forbidding patronage hiring could serve as the predicate for an honest-services conviction. It declared, "[W]e have

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[3] I was one of the defendant's counsel in *Segal*. In this case, the district court devoted fifteen pages of its jury instructions to describing Illinois insurance regulations, and it told the jury to convict if the Government established any part of the fraudulent scheme it alleged (a scheme that allegedly extended over a twelve-year period). One of the Government's claims was simply that the defendant had sold insurance at a discount in violation of a non-criminal state regulation. *See* Brief of the Appellants at 14, 39, & 41-42, *United States v. Segal*, 495 F.3d 826 (7th Cir. July 21, 2006) (No. 05-4601).

[4] The indictment in *Warner* nevertheless alleged that the defendants, one of whom was former Illinois Governor George Ryan, had violated duties imposed by state law. "Five pages of the 91-page Ryan indictment are devoted to setting forth the 'Laws, Duties, Policies and Procedures Applicable to' each of the defendants. None of the laws listed in this section are federal laws. They include provisions of the Illinois State Constitution, state criminal laws, non-criminal state regulations, a policy memorandum of the Illinois Secretary of State's office, and George Ryan's announced personal policy of not accepting gifts worth more than $50." Albert Alschuler, *The Mail Fraud and RICO Racket: Thoughts on the Trial of George Ryan*, 9 Green Bag 2d 113, 115 (2006).

never held that only state law can supply a fiduciary duty between public official and public or between employee and employer in honest services cases.... Indeed, our case law...shows that other sources can create a fiduciary obligation." *Id*. at 712 (citing *inter alia* a case that treated an employee handbook as creating fiduciary duties). The court added, "It may well be that merely by virtue of being public officials the defendants owed the public a fiduciary duty to discharge their offices in the public's best interest." *Id*.

The Seventh Circuit thus regards the violation of a state law, a federal law, a civil consent decree, or the policies of an employee handbook as a predicate for an honest services conviction, and when the Government can establish none of these things, the court has indicated that any departure from unwavering service to the public may be enough. In his dissent from the denial of certiorari in *Sorich*, Justice Scalia noted the implications of such a broad reading of the honest-services statute.[5]

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[5] Justice Scalia observed:

> If the "honest services" theory...is taken seriously and carried to its logical conclusion, presumably the statute...renders criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee's recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer. Indeed, it would seemingly cover a salaried employee's phoning in sick to go to a ball game.

Sorich v. United States, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). *See also* Dan Slater, *From Coaches to Church Officials, An Honesty Law Gets a Workout*,

The Seventh Circuit's view that a state law violation is sufficient but unnecessary is shared by other Courts of Appeals. *See*, *e.g.*, *United States v. Sawyer*, 239 F.3d 31 (1st Cir. 2001) (declaring that a violation of the Massachusetts gratuity statute "was properly charged as a predicate for honest-services mail fraud" but that "establishing honest-services mail fraud...does not require proof of a violation of any state law"); *United States v. Grubb*, 11 F.3d 426, 433 (4th Cir. 1993) (holding that evidence of the defendant's violation of the West Virginia Code of Judicial Conduct was properly received); *United States v. Bryan,* 58 F.3d 933, 940-41 (4th Cir. 1995) (holding that no state law violation is required); *cf. United States v. Jennings*, 487 F.3d 564, 577-78 (8th Cir. 2007) (holding that "a violation of a state disclosure statute is evidence of a public official's intent to defraud the state's citizens of their right to his honest services" while declining to decide whether proof of a state law violation is required).

C. Irrelevant

In the case before this Court, the Ninth Circuit held that the "duty of honesty [of public officials] is uniform rather than variable by state" and that, at least for public officials, "'state law is irrelevant in determining whether a certain course of conduct is violative of the mail fraud statute.'" *United States v. Weyhrauch,* 548 F.3d 1237, 1245 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (June 29, 2009) (No. 08-1196) (quoting *United States v. Louderman*, 576 F.3d

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Wall St. J., Feb. 5, 2009, at A14 (reporting a federal investigation of whether Cardinal Roger Mahoney violated the honest-services statute by concealing sexual misconduct by priests).

1383, 1387 (9th Cir. 1978)).[6] The court observed, "[C]onditioning mail fraud convictions on state law means that conduct in one state might violate the mail fraud statute, whereas identical conduct in a neighboring state would not. Congress has given no indication it intended the criminality of official conduct under federal law to depend on geography." *Id*.[7]

The Ninth Circuit's view that the honest-services statute establishes a uniform national standard is

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[6] Petitioner urges the Court to reject this holding of the Court of Appeals, and it is not clear that the Government endorses it. One paragraph of the Government's brief in opposition to the grant of certiorari does appear to support the view that "state law is irrelevant":

> Nor is there any evidence that Congress intended the uniform federal honest-services prohibition to turn on separate state-law requirements, with the consequence that "conduct in one state might violate the mail fraud statute, whereas identical conduct in another state would not."... Congress proscribed schemes to deprive others of "*the* intangible right to honest services,"...not a multiplicity of rights.

Brief for the United States in Opposition at 8, *Weyhrauch v. United States* (U.S. 08-1196). The remainder of the brief, however, opposes only "a state-law limiting principle," suggesting that the Government may favor the "heads I win, tails you lose" position of the Seventh Circuit and other courts.

This amicus brief urges the Court to approve the Ninth Circuit ruling that the term "honest services" has a uniform national meaning but to reject the broad standard of liability the Ninth Circuit announced.

[7] Surprisingly, the court indicated that it might still allow the guilt of federal defendants other than public officials to turn on geography. "[W]e express no opinion on the role of state law in honest-services fraud prosecutions in the *private* context." *Weyhrauch*, 548 F.3d at 1245 n.5.

shared by the Sixth and Eleventh Circuits. *See United States v. Frost*, 125 F.3d 346, 366 (6th Cir. 1997) ("Federal law governs the existence of fiduciary duty under the mail fraud statute."); *United States v. deVegter*, 198 F.3d 1324, 1329 (11th Cir. 1999) ("The nature and interpretation of the duty owed [under the honest-services statute] is a question of federal law.").

The Second Circuit apparently favors a uniform national standard as well. Formally addressing only the duties of private individuals and not public officials, it declared in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), that honest-services fraud consists only of bribes, kickbacks, and undisclosed self-dealing that risks economic harm.[8] The court concluded that the honest-services statute

> prohibits a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to

[8] Just as the Ninth Circuit limited its ruling in this case to public officials, the Second Circuit limited its ruling in *Rybicki* to private defendants. Neither court suggested any reason why the principles it articulated should not apply to all defendants. The Second Circuit wrote, "The meaning of the phrase 'scheme or artifice to defraud' with respect to public corruption cases is not at issue in the matter before us, and, although we have been given no reason to doubt that it is susceptible to a similar mode of analysis, we do not consider it." 354 F.3d at 138-39. *See United States v. Bruno*, No. 09-CR-29, 2009 U.S. Dist. LEXIS 74278 at *5 (N.D.N.Y. 2009) ("The Second Circuit has categorized honest-services fraud cases as either 'bribery' or 'self-dealing.'... While the Second Circuit has not definitively said that this categorization applies to public officials, it has clearly intimated as much.").

> act for and in the interest of his or her employer (or of the person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer.

Id. at 127.

Nothing in the court's formulation looks to state law, and in the years since *Rybicki*, neither trial nor appellate courts in the Second Circuit have referred to state law in assessing the duties of honest-services defendants. *See*, *e.g*., *United States v. Ganim*, 510 F.3d 134, 147-50 (2d Cir. 2007) (Sotomayor, J.) (examining only federal precedents in evaluating the claim that an honest-services defendant's conduct did not amount to quid pro quo bribery, apparently because both parties agreed that "honest services" bribery did not differ from bribery under other federal statutes).

If honest-services fraud were limited to cases of quid pro quo bribes and kickbacks as this brief will propose, the choice between state and federal standards would diminish in importance. The statute would then apply only to plainly culpable conduct that every state and the federal government presumably condemn.

II. TWO CLEAR STATEMENT PRINCIPLES

Despite the remarkable disarray of the rulings of the Courts of Appeals, two decisions of this Court make the answer to the question it posed in its order granting certiorari[9] extraordinary clear. The mean-

[9] "Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the

ing of the term "honest services" cannot vary from state to state. This term must be read to establish a uniform national standard.

A. *Jerome v. United States*

On July 14, 1941, Jerome Parker Jerome entered a bank in Burlington, Vermont and borrowed $500. A jury later determined that he had forged the signature of a purported co-signer. A Vermont statute made his crime a felony, but Jerome was not charged with violating this statute. Instead, he was prosecuted for and convicted of violating Section 2(a) of the Federal Bank Robbery Act, which read, "Whoever shall enter...any bank...with intent to commit in such bank...any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both." 48 Stat. 783 (1934); 50 Stat. 749 (1937).[10]

This Court held that the word "felony" in Section 2(a) did not incorporate state law, and it reversed Jerome's conviction. *Jerome v. United States*, 318 U.S. 101, 104 (1943). The Court said:

> [W]e must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on

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nondisclosure of material information, in violation of the mail-fraud statute..., the government must prove that the defendant violated a disclosure duty imposed by state law." *Weyhrauch v. United States*, 129 S. Ct. 2863 (2009).

[10] The facts of Jerome's case are reported in *United States v. Jerome*, 130 F.2d 514 (1942), *rev'd*, 318 U.S. 101 (1943). The defendant's symmetrical name appears in *Jerome v. United States*, 317 U.S. 606 (1943) (granting the defendant's pro se petition for certiorari).

> state law. That assumption is based on the fact that the application of federal legislation is nationwide...and at times on the fact that the federal program would be impaired if state law were to control.... When it comes to federal criminal laws such as the present one, there is a consideration in addition to the desirability of uniformity of application which supports the present principle.

Id.

The Court then noted that "there is no common law offense against the United States," that "the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress," and that the Double Jeopardy Clause does not bar successive prosecutions by state and federal governments for a single criminal act. For all of these reasons, it declared that "where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offense beyond the clear requirements of the terms of the statute." *Id*. at 104-05.

This Court has relied on *Jerome* in holding that the term "domicile" in the Indian Child Welfare Act must have a uniform national meaning, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43-46 (1989); that the meaning of the term "political subdivision" in the National Labor Relations Act is determined by federal rather than state law, *NLRB v. Natural Gas Utility Dist.*, 402 U.S. 600, 602-03 (1971); and that federal rather than state law determines the meaning of the word "employee" in the National Labor Relations Act, *NLRB v. Hearst Publs*., 322 U.S. 111, 123-24 (1944).

Moreover, this Court has given special weight to *Jerome*'s clear-statement principle in criminal cases. Just as this Court held in *Jerome* that courts should not look to state law to define the word "felony" in the Bank Robbery Act, it held in *United States v. Nardello*, 393 U.S. 286, 293-94 (1969), that state law does not determine the meaning of the word "extortion" in the Travel Act. It held in *United States v. Turley*, 352 U.S. 407, 410-11 (1957), that federal rather than state law determines whether an automobile has been "stolen" within the meaning of a statute forbidding the transportation of a stolen automobile across a state line. And it held in *Taylor v. United States*, 495 U.S. 575, 590-92 (1990), that state law does not determine the meaning of the word "burglary" in the enhanced-punishment provision of a federal gun law.

The mail fraud statute contains no clear statement (or even a hint) that state law determines whether a federal defendant has failed to provide "honest services." When the Fifth Circuit held in *Brumley* that "honest services" means "services owed under state law," 116 F.3d at 734, it failed to cite *Jerome* or to explain how its position could be reconciled with the clear-statement principle of that decision. Indeed, *none* of the dozens of appellate and district court decisions that have looked to state law to establish the central element of honest-services fraud have cited *Jerome* or explained how their position could be reconciled with it. In fact, no reconciliation is possible.

B. *Cleveland v. United States*

To violate the mail fraud statute, a person must scheme to deprive another of either property or the intangible right to honest services. *See* 18 U.S.C.

§§1341 & 1346; *McNally v. United States*, 483 U.S. 350 (1987). In *Cleveland v. United States*, 531 U.S. 12 (2000), this Court held that obtaining a state license by fraud does not deprive a state of property.

Cleveland articulated a uniform national standard. If the legislature of State A had declared that unissued licenses were property while the legislature of State B had said that they were not, the variation would not have mattered. Similarly, *Carpenter v. United States*, 484 U.S. 19 (1987), held that confidential information constitutes property throughout the United States and can be the subject of federal mail fraud. There is no greater reason to use state law to define the term "honest services" in the mail fraud statute than there is to use this law to define "property."

The Court's ruling in *Cleveland* did not rest entirely on an abstract consideration of the nature of property:

> We reject the Government's theories of property rights not simply because they stray from traditional concepts of property. We resist the Government's reading of §1341 as well because it invites us to approve a sweeping expansion of federal jurisdiction in the absence of a clear statement by Congress. Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities. We note in this regard that Louisiana's video poker statute typically and unambiguously imposes criminal penalties for making false statements on license applications.... As we reiterated last Term, "unless Congress conveys its purpose clearly, it

> will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 340 (1971)).

Cleveland, 531 U.S. at 24-25.

Reading the mail fraud statute to federalize every state's regulation of its public officials and every state's law of private fiduciary obligation would alter the federal-state balance far more than simply providing a duplicative federal sanction for the fraudulent acquisition of state licenses. The twenty-eight words of 18 U.S.C. §1346 provide no clear statement—indeed they provide no indication at all—that Congress favored this breathtaking expansion of federal criminal jurisdiction.

III. STANDING FEDERALISM ON ITS HEAD

The district court in this case endorsed the Fifth Circuit's view that establishing a deprivation of the intangible right to honest services requires proof of a state-law violation. *United States v. Kott*, No. 07 CR 56, 2007 U.S. Dist. LEXIS 66125 at *11-18 (D. Alaska Sept. 4, 2007), *rev'd*, 548 F.3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (June 29, 2009) (No. 08-1196). Finding no provision in the Alaska Code of Legislative Conduct requiring a state legislator to disclose his negotiation for employment with a firm interested in state tax legislation, the court concluded that the government could not ground a charge of honest-services fraud on the failure of the defendant, a member of the Alaska House of Representatives, to disclose his negotiation for employment with an oil field services company. *Id*. at *3-10, 18.

Although the Alaska Code contained no provision requiring the defendant to disclose his negotiation for employment, it does contain a provision requiring a legislator to disclose membership on a corporate board. Alaska Stat. §24.60.030(f) (2008) ("A legislator...who serves on a board of an organization...shall disclose the board membership to the committee."). The code provides no judicial remedy for a violation of this provision or for a violation of any of its provisions. Instead, when someone files a complaint, Alaska's Select Committee on Legislative Ethics investigates it, initially on a confidential basis. *Id*. §24.60.170. Then, "[i]f the committee investigation determines that a probable violation of this chapter exists that may be corrected by the action of the subject of the complaint and that does not warrant sanctions other than correction, the committee may issue an opinion recommending corrective action." *Id*. §24.60.170(g). The committee itself may not impose a more severe sanction, but it may advise a branch of the legislature to do so. Potential sanctions include private reprimand, public reprimand, censure, "imposition of a civil penalty of not more than $5000 for each offense or twice the amount improperly gained, whichever is greater," removal from a leadership position or a committee membership, and expulsion. *Id*. §24.60.178.

Although the district court apparently would have upheld an honest services prosecution grounded on the failure of an Alaska legislator to disclose his membership on a corporate board, states other than Alaska do not require legislators to disclose every board membership. *See*, *e.g.*, 5 ILCS 420/4A-102 (2009). A legislator in one of these states who failed to disclose a board membership would be guilty of neither a state nor a federal offense. Moreover,

Alaska itself might punish a legislator's nondisclosure only by recommending correction or by issuing a reprimand. Nevertheless, if the government could establish the other elements of mail fraud (which *Weyhrauch* indicates are mailing, materiality, and fraudulent intent), the district court apparently would convict the Alaska legislator of scheming to deprive the public of the intangible right to his honest services, a federal crime carrying a maximum penalty of twenty years. *See* 18 U.S.C. §1341; Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 §903, 116 Stat. 745, 800 (2002) (increasing the maximum penalty for mail and wire fraud from five to twenty years). Mail fraud, moreover, is a predicate offense under RICO, 18 U.S.C. §1961(1), and the money laundering statute, 18 U.S.C. §1956(c)(7)(A).

Courts have argued that reading the term "honest services" to incorporate state standards promotes federalism. The Fifth Circuit referred in *Brumley* to "[t]he tension inherent in federal criminalization of conduct by state officials innocent under state law," 116 F.3d at 735, and it said, "We will not lightly infer that Congress intended to leave to courts and prosecutors, in the first instance, the power to define the range and quality of services a state employer may choose to demand of its employees." *Id*. at 734. As the next section of this brief will explain, the court seriously misconceived its options.

In fact, using state law to define the federal right to honest services not only causes federal law to vary from state to state but also frustrates state interests. Every state's regulatory policy is a blend of prohibition, punishment, and forbearance. Federalizing a state's substantive regulations without its accompanying penalty structure and enforcement mechan-

isms diminishes state power. When a federal district court effectively substitutes itself for the Alaska Select Committee on Legislative Ethics, when it effectively tries state officials for regulatory violations and state crimes in the federal courts, and when it punishes these state violations much more severely than the state legislature and state administrative authorities consider appropriate, it deprives the state of the ability to govern itself.

IV. COMPARED TO WHAT? THE APPROPRIATE FEDERAL STANDARD

The federal courts that have looked to state law to define the intangible right to honest services have bemoaned what they regard as the only alternative to their approach—empowering federal judges and prosecutors to devise "an ethical regime for state employees." *Brumley*, 116 F.3d at 734. They have feared turning honest-services fraud into "a federal common-law crime, a beastie that many decisions say cannot exist." *United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998) (Easterbrook, J.); *see also Martin*, 195 F.3d at 966 (Posner, J.) ("The fear that motivated the *Brumley* decision is that if federal courts are free to devise fiduciary duties the breach of which violates the mail fraud statute, the result will be the creation in effect of a class of federal common law crimes,...something federal courts have steadily refused to do."). A chancellor's-foot concept of honest-services fraud would indeed be even more terrifying than converting state regulatory violations into twenty-year federal felonies.

There are, however, better options. An appropriate standard of honest-services fraud (i) would be uniform throughout the United States; (ii) would be

simple and clear; (iii) would be limited to culpable conduct of the sort that every state and the federal government presumably condemn; and (iv) would accomplish the only goal that Congress clearly manifested when it enacted 18 U.S.C. §1346—that of "overruling" *McNally v. United States*, 483 U.S. 350 (1987). *McNally* held that federal mail fraud encompasses only schemes to deprive people of property.

This section evaluates three potential standards. In this case, the Ninth Circuit described "two core categories of conduct" that it said were "sufficient to support an honest services conviction." They were "(1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion and (2) nondisclosure of material information." *Weyhrauch*, 548 F.3d at 1247.

In *Rybicki*, the Second Circuit also described two core categories of honest-services fraud, but its categories were different. They were "cases involving bribes or kickbacks, and cases involving self-dealing." 354 F.3d at 139.

Judge Easterbrook's opinion in *Thompson*, 484 F.3d at 883, spoke of a need to reduce the vagueness of his court's current standard. He then declared, "The history of honest-services prosecutions is one in which the 'private gain' comes from third parties who suborn the employee with side payments, often derived via kickbacks skimmed from a public contract. Treating §1346 as limited to such situations is consistent with its language." *Id*. at 884.[11]

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[11] Shortly after the decision in *Thompson*, the Seventh Circuit took the law of federal mail fraud in a very different direction from the one to which Judge Easterbrook had pointed. See the descriptions of *Segal*, *Warner*, and *Sorich* at pages 6-7 of this brief.

Weyhrauch, *Rybicki*, and *Thompson* agree that improper side payments—bribes and kickbacks—are at the core of honest-services fraud. *Thompson*, moreover, sees nothing else at the core. Although *Weyhrauch* and *Rybicki* perceive a second core category, they differ on what it is.

A. Nondisclosure of Material Information

When regulators attempt to devise an ethical code for legislators, they quickly discover that they cannot block every way in which people may attempt to curry political favor. Prohibiting bribes, kickbacks, and non-trivial gifts to legislators is a good start, but then the questions grow difficult. When a legislator serves part-time, as Alaska legislators do, who may patronize his law firm or insurance agency? Who may offer employment to his spouse or adult children? Who may give his daughter a very nice wedding present?

A *New York Times* story indicates how people currying favor are likely to outrun any prohibition the regulators might plausibly enact. It reports that several major defense contractors have made large contributions to the Johnstown Symphony, an orchestra in Western Pennsylvania. Their gifts might have been prompted by the fact that this orchestra is the favorite charity of the wife of a powerful member of Congress. *Keeping Lawmakers Happy Through Gifts to Pet Charities*, N.Y. Times, Oct. 19, 2008, at A1.

Whether the Pennsylvania Congressman votes aye or nay on, say, a health care measure, he is likely to benefit someone who once made a contribution to the Johnstown Symphony. Presumably the Ninth Circuit would not convict the Congressman of federal mail fraud simply because he failed to disclose that his

vote would benefit a contributor to his wife's favorite charity, but one can only guess how far short of absurdity the court would draw its line.

The word "material" does not help.[12] Once, when fraud consisted of obtaining property by lying, a lie was considered material if it was likely to influence a person to part with his property. *See* Restatement of Torts Second §583; 1 Marshall Shapo, The Law of Products Liability §2.02[4], at 1013 (4th ed. 2001) ("Materiality often merges with the causation issue to the point of practical equivalence."). When the public is deprived of the intangible right to honest services, however, it takes no affirmative action. A "material" nondisclosure need not cause anything. It may be simply the nondisclosure of something one would like to know.

The words "intent to defraud" do not help either, for if fraud consists simply of nondisclosure, an intent not to disclose appears to satisfy this mental-state requirement. *See United States v. Kincaid-Chauncey*, 556 F.3d 923, 950 (9th Cir. 2009) (Berzon, J., concurring).

Regulators must draw difficult lines, and legislatures can draw sharper lines than courts can. The Alaska Code of Legislative Conduct, for example, declares that legislators and members of their immediate families may not be parties to or have interests in state contracts or leases, but it then establishes several exceptions, including an exception when "the total annual amount of the contract or lease is $5000 or less." Alaska Stat. §24.60.040 (2008).

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[12] Materiality is an invariable element of federal mail fraud. *See Neder v. United States*, 527 U.S. 1, 20-25 (1999).

The Alaska Code also declares that "a legislator may not vote on a question if the legislator has an equity or ownership interest in a business, investment, real property, lease, or other enterprise if the interest is substantial and the effect on that interest of the action to be voted on is greater than the effect on a substantial class of persons to which the legislator belongs as a member of a profession, occupation, industry, or region." *Id*. §24.60.030(g). The Code, however, does not preclude voting when a member of the legislator's family has a substantial interest in a business that might be affected by his vote. Would the Ninth Circuit convict a legislator of mail fraud if he voted without disclosing a family member's substantial interest? If so, how would the court define "substantial"? *Cf*. Cal. Gov't Code §87103(a) (declaring that a public official has a financial interest in a decision if the decision will affect a business entity in which he has a direct or indirect investment worth $2,000 or more). How would the court define family? The D.C. Code includes in the term "immediate family" all parents, children, and siblings of the legislator and their spouses as well. D.C. Code §1-1106.01(i)(5). The Alaska Code, however, when it restricts family members at all, omits the spouses of parents, children, and siblings. Moreover, it includes the parents, children, and siblings themselves only when they reside with the legislator, are financially dependent on him, or share a substantial financial interest with him. Alaska Stat. §24.60.990(a)(6). The California Code omits parents and siblings altogether. Cal. Gov't Code §82029. And how prominent a disclosure would the Ninth Circuit require?

State legislatures should be allowed to draw reasonable lines in the area of legislative ethics without

being overridden by a judicially improvised law of honest-services mail fraud. When, in this case, the Ninth Circuit mandated a disclosure that the detailed Alaska Code of Legislative Conduct did not require, it revealed why common law crimes are disfavored and validated the worst fears of the courts that have endorsed a state-law limiting principle. Moreover, as Judge Berzon noted in an opinion critical of her court's decision in this case, "The conflict of interest theory, unhinged from an external disclosure standard, places too potent a tool in the hands of zealous prosecutors who may be guided by their own political motivations...[and who] might also feel political pressure to pursue certain state or local officials." *United States v. Kincaid-Chauncey*, 556 F.3d 923, 949-50 (9th Cir. 2009) (Berzon, J., concurring).

The *Weyhrauch* opinion offered virtually no support for its claim that the nondisclosure of material information was a core category of honest-services fraud. Declaring that its pre-*McNally* cases supported this claim, the opinion invited readers to see *United States v. Bohonos*, 628 F.2d 1167, 1171 (9th Cir. 1980), which the court said cited relevant cases. *Weyhrauch*, 548 F.3d at 1247. In none of the pre-*McNally* cases cited by *Bohonos*, however, were defendants convicted simply because they failed to disclose conflicts of interest.

Bohonos noted, "Most often [intangible rights] cases have involved bribery of public officials." 628 F.2d at 1171. Then it made a statement that apparently misled the *Weyhrauch* court: "A public official's nondisclosure of material information has also been held to satisfy the *fraud element*." *Id.* (emphasis added). Following this statement, *Bohonos*

cited only a case of self-dealing, *United States v. Bush*, 522 F.2d 641 (7th Cir. 1975); a case in which the defendants had affirmatively "misrepresented themselves over the telephone as postal or phone company employees in order to gather confidential information," *United States v. Louderman*, 576 F.2d 1383 (9th Cir. 1978); three cases in which the defendants had accepted kickbacks, *United States v. Hassenstab*, 575 F.2d 1035 (2d Cir. 1978); *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975); *United States v. George*, 477 F.2d 508 (7th Cir. 1973); and one strange case in which the defendant had persuaded someone to steal maps, *Abbott v. United States*, 239 F.2d 310 (5th Cir. 1956). The defendants in these cases may indeed have failed to disclose material information (for example, that they were taking kickbacks), but the cases did not suggest that every undisclosed conflict would support a conviction.

Justice Stevens's dissent in *McNally* described the pre-*McNally* intangible rights doctrine in detail. 483 U.S. at 362-65. In all of the honest-services cases that he described, the defendants had received bribes or kickbacks. Justice Stevens listed no cases of self-dealing and no cases of nondisclosure of material information.[13] Nothing in the language or history of the honest-services statute indicates that the nondisclosure of material information was a core category of honest-services fraud or indeed a category of honest-services fraud at all.

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[13] Justice Stevens did discuss intangible rights other than the right to honest services, particularly the right to an honest election. Congress did not resurrect these rights in 18 U.S.C. §1346.

B. Self-Dealing

Under the law of trusts, "transactions involving trust property entered into by a trustee for the trustee's own personal account [are] voidable without further proof." Unif. Trust Code §802 comment. An Ohio court explained in 1875 that a trustee's self-dealing is prohibited "not because there *is* fraud, but because there *may be* fraud." *Piatt v. Longworth's Devisees*, 27 Ohio St. 159, 195-96 (1875). The prohibition of self-dealing is weaker in corporation law, for this law allows non-conflicted directors to approve a transaction with a conflicted director. The "sole interest rule" remains strong, however, in the law of agency. *See* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 958-63 (2005).

Prohibiting self-dealing by trustees can disadvantage beneficiaries. For example, when the owner of a farm died fifteen days before the planting season was to begin, her executor and trustee, Colbrook, leased and worked the farm himself. Although it was unlikely that Colbrook could have found another tenant, an Illinois court awarded the profits he earned to the trust. Neither the trustee's "good faith and honesty," nor his disclosure of the transaction, nor the absence of financial harm mattered. *In re Will of Gleeson*, 124 N.E.2d 624 (Ill. App. Ct. 1955).

America's preeminent trusts scholar would abandon the prohibition of self-dealing and "allow a conflicted trustee to defend on the ground that the particular transaction was prudently undertaken in the best interest of the beneficiaries." Langbein, *supra*, at 989. Whether or not this scholar is persuasive, Colbrook's breach of fiduciary duty by

renting a farm to himself does not warrant a conviction for federal mail fraud.

Although the Second Circuit described self-dealing as an established area of pre-*McNally* honest-services fraud, it would not permit Colbrook's conviction. It wrote, "In the self-dealing cases, the defendant typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a *secret* interest, undisclosed to his employer." *Rybicki*, 354 F.3d at 140 (emphasis added). The criminalization of self-dealing becomes more plausible when it is limited to cases of *undisclosed* self-dealing.

The Second Circuit failed to demonstrate, however, that even undisclosed self-dealing was a well-established form of honest-services fraud before *McNally*. It cited only six pre-*McNally* cases from throughout America, and in three of them, the defendants' convictions were reversed. *Id*. at 140-41. One reversal came because the defendant's mailing was inadequate. In the other two cases, courts reversed because the government failed to establish an economic detriment to the defendants' employers. In one of these cases, the Sixth Circuit declared, "[I]t must...be concluded that the failure to make...disclosure [of the defendant's ownership interest] did not clothe this otherwise fair course of dealing with intentional fraud, dishonest in purpose, and inconsistent with moral uprightness." *Epstein v. United States*, 174 F.2d 754, 768 (6th Cir. 1949). In at least two of the three cases in which courts affirmed the defendants' convictions, moreover, economic harm to the defendants' employers was apparent. *See United States v. Barta*, 635 F.2d 999 (2d Cir. 1980); *United States v. McCracken*, 581 F.2d

719 (8th Cir. 1978). The Second Circuit concluded, "In the self-dealing context, though not in the bribery context, the defendant's behavior must...cause, or at least be capable of causing, some detriment—perhaps some economic or pecuniary detriment—to the employer." *Rybicki*, 354 F.3d at 141.

When a prohibition of self-dealing is limited in the way the Second Circuit limits it, the prohibition reaches only culpable conduct, but there is neither an evident federal interest in punishing this conduct nor any reason to believe that Congress intended to punish it. Treating self-dealing as honest-services fraud requires epicycles that are not needed in other honest-services cases—notably, a requirement of proof of economic harm that, as the Second Circuit noted, has no place in cases of bribes and kickbacks. Although the *Rybicki* standard is far closer to the mark than the *Weyhrauch* standard, a better standard would leave the regulation of self-dealing to the states.

C. Quid Pro Quo Bribes and Kickbacks

Weyhrauch, *Rybicki*, and *Thompson* treat undisclosed side payments as the heart of honest-services fraud, and they are not alone. *See*, *e.g.*, *deVegter*, 198 F.3d at 1327-28 ("[T]he paradigm case of honest-services fraud is the bribery of a public official."); *Sorich*, 523 F.3d at 707 ("[I]n most honest services cases, the defendant violates a fiduciary duty in return for cash kickbacks, bribes, or other payments."). Treating only schemes to obtain quid pro quo bribes or kickbacks as honest-services fraud would satisfy the four criteria noted earlier. It would establish a uniform national standard, define honest services with clarity, reach only seriously culpable

conduct, and accomplish Congress's goal of "overruling" *McNally*.

The proposed standard would resolve the three-way conflict among the circuits over the appropriate role of state law by establishing a uniform national standard. It would not, however, empower judges and prosecutors to devise an ethical regime for state employees and would not punish borderline conduct that some states might choose not to criminalize.

This standard would effectively resolve two other circuit conflicts as well. First, it would obviate the need for a distinction between public-sector and private-sector cases—a distinction that only some circuits have found appropriate.[14] Because accepting bribes and kickbacks constitutes hard-core corruption whether the recipients are public officials or private fiduciaries, there would be no need to distinguish between these classes of defendants.

Second, this standard would effectively resolve a circuit conflict over whether the law of honest-services fraud should focus on gain to the defendant or economic harm to the victim—a conflict this Court may address in *Black v. United States* (No. 08-876). Although the Seventh Circuit requires "misuse of office...for personal gain" in every case, *see Bloom*, 149 F.3d at 655, the First, Second, Fourth, Sixth, Eighth, and Eleventh Circuits require intended or foreseeable harm, at least in some cases. *See United*

[14] The Seventh Circuit, for example, has never distinguished public officials from private fiduciaries. The Eighth Circuit, however, has required proof of intended or actual "harm to the victims' tangible interests" in private-sector but not public-sector cases. *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996).

States v. Martin, 228 F.3d 1, 17-18 (1st Cir. 2000) (requiring an independent business risk or reasonably foreseeable economic harm); *United States v. Rybicki*, 354 F.3d 124, 141 (2d Cir. 2003) (requiring "some detriment—perhaps some economic or pecuniary detriment" in self-dealing cases but not other cases); *United States v. Vineyard*, 226 F.3d 320, 326 (4th Cir. 2001) (requiring foreseeable economic harm); *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997) (same); *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996) (requiring "harm to...tangible interests" in private-sector but not public-sector cases); *United States v. deVegter*, 198 F.3d 1324, 1328-29 (11th Cir. 1999) (requiring foreseeable economic harm).

Schemes to obtain bribes and kickbacks are by definition schemes to obtain personal gain, and nothing more should be necessary. By failing to disaggregate the various forms of misconduct they have swept into the honest-services net, the Seventh Circuit and most other courts have missed the mark. The Second Circuit, however, did disaggregate. *Rybicki* recognized that a requirement of foreseeable economic loss makes sense in self-dealing cases. Colbrook, the trustee who rented a farm to himself rather than allow it to lie fallow, sought his own gain as well as a benefit to the trust, and a requirement of foreseeable economic loss seems necessary to block his conviction. As *Rybicki* also recognized, however, a requirement of economic loss makes no sense in bribe and kickback cases.

Indeed, the very point of the honest-services statute was to eliminate any requirement of economic loss in these cases. A paradigmatic pre-*McNally* case of honest-services fraud was that of Illinois Governor

Otto Kerner, who allegedly obtained racetrack stock at far less than its value in exchange for approving additional racing days. These extra racing days did not cost the taxpayers of Illinois money. To the contrary, they brought additional revenue into the state treasury. Kerner argued that he "could not have violated the mail fraud statute because the indictment failed to charge that [he] had defrauded State of Illinois, its citizens, or the racing associations out of something of definable value, money or property." *United States v. Isaacs*, 493 F.2d 1124, 1149 (7th Cir. 1974). Kerner lost his case, but the defendant in *McNally* made the same argument and won. The Congress of the United States did not like it.

Representative Conyers, the sponsor of the honest-services statute in the House, declared, "This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended." He explained what overturning *McNally* meant: "Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property." 134 Cong. Rec. Hl1251 (daily ed. Oct. 21, 1988).

A Senate Judiciary Committee report said the same thing:

> This section overturns the decision in *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials.

134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 1988) (Senate Judiciary Committee Report).[15]

The legislative history says only what anyone who read the statute and compared it with *McNally* would realize. Under the statute, a person who has taken a bribe or kickback cannot assert as a defense that his wrongful act caused no economic harm. The deprivation of the fiduciary's honest services is enough. A requirement of tangible loss even in bribe and kickback cases puts back into the mail fraud statute what Congress meant to take out.

Limiting honest-services fraud to cases of bribes and kickbacks would kill several ugly beasts with one stone. Federal trials for state offenses, chancellor's-foot standards, and lengthy prison sentences for regulatory violations would disappear. The proposed standard would make the statute comprehensible by taking seriously what Congress meant to do—overrule *McNally* and no more.

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[15] These sources also declared that the statute would "restore[] the mail fraud provision to where that provision was before the *McNally* decision." 134 Cong. Rec. at Hl1251. Presumably, however, Congress did not mean to validate every pre-*McNally* decision in every court. Restoring all pre-*McNally* law, for example, would resurrect the Sixth Circuit's judgment that the honest-services doctrine should not apply at all to private individuals. *See United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986), *rev'd*, *McNally v. United States*, 483 U.S. 350 (1987). Congress's goal was presumably to restore the pre-*McNally* honest-services doctrine with the same potential for development and clarification it had before the Supreme Court rejected it, not to block this Court from resolving circuit conflicts, reining in outliers, and making the doctrine more coherent.

CONCLUSION

Federal judges have criticized the expansion of federal criminal law. *See*, *e.g.*, William H. Rehnquist, *Remarks on the Federalization of Criminal Law*, Address Before the American Law Institute (May 11, 1998), *in* 11 Fed. Sentencing Rep. 132 (1998). As Stephen Smith observes, however, "Far from being innocent bystanders in the federalization of crime, federal judges have been all too willing to construe federal crimes expansively." Stephen F. Smith, *Proportionality and Federalization*, 91 Va. L. Rev. 879, 884 (2005). Smith describes federal mail fraud as an "example of courts taking a bad situation created by Congress and making it worse." *Id*. at 923.

This case presents an opportunity to rein in a sprawling statute, not by adding whistles, epicycles, and gimmicks, but by observing long-standing clear-statement principles and by considering carefully what this statute was meant to accomplish. This Court should endorse the sensibly limited *Rybicki* standard of honest-services liability or, even better, should treat only schemes to obtain quid pro quo bribes and kickbacks as honest-services fraud.[16]

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[16] This Court's grant of certiorari poses the issue, roughly, as whether the standard of honest-services fraud should incorporate state law. The Court, however, might invite the parties to submit supplemental briefs on what uniform national standard would be appropriate if the Court were to adopt one. Incorporating state law is only one of several alternatives, and these alternatives cannot be judged effectively in isolation from one another. Sadly, in the absence of some judicial prompting, the adversary system is likely to present only two at a time.

Respectfully submitted,

ALBERT W. ALSCHULER
Counsel of Record
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-1321

September 18, 2009