

Docket No. 08-1234

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*In the Supreme Court of the United States*

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October Term, 2008

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IONIA MANAGEMENT S.A.,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

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**BRIEF FOR PETITIONER**

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TEAM 1  
*Attorneys for the Petitioner*

## QUESTIONS PRESENTED

- I. **WHETHER SUPREME COURT PRECEDENT OR FEDERAL STATUTORY LAW MANDATES THAT A CORPORATION BE HELD CRIMINALLY LIABLE FOR THE ACTS OF LOW-LEVEL EMPLOYEES THAT VIOLATE FEDERAL STATUTORY LAW, REGARDLESS OF CONGRESSIONAL INTENT?**
  
- II. **WHETHER THE INTERPRETATION OF THIS COURT’S HOLDING IN NEW YORK CENTRAL & HUDSON RIVER RAILROAD V. UNITED STATES, MANDATING THE IMPOSITION OF CORPORATE LIABILITY IN CASES INVOLVING CRIMINAL ACTS OF EMPLOYEES, IS CONSISTENT WITH GENERAL PRINCIPLES OF CRIMINAL LAW?**

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## OPINIONS BELOW

The opinion of the Second Circuit is reported as Ionia Management, S.A. v. U.S., 999 F.3d. 999 (2d Cir. 2008). That court adopted the opinion of the district court of Connecticut, which is reported as U.S. v. Ionia Management, S.A., 526 F. Supp. 2d. 319 (D. Conn. 2007).

## RELEVANT STATUTORY PROVISIONS

The pertinent section of the Act to Prevent Pollution from Ships, 33 U.S.C. § 1908 provides:

- (a) Criminal penalties; payment for information leading to conviction  
A person who knowingly violates the MARPOL Protocol, Annex IV to the Antarctic Protocol, this chapter, or the regulations issued thereunder commits a class D felony . . . .

## JURISDICTION

On December 12, 2008, this court granted the Petition for writ of certiorari. This Court has jurisdiction over this case pursuant to 28 U.S.C. 1254.

## STATEMENT OF FACTS

On September 6, 2007, shipping company Ionia Management [hereinafter “Ionia”] was convicted of violating four criminal federal statutes resulting from the illegal acts of low-level employees acting against company policy. 526 F.Supp. 2d 319, 321-22 (D. Conn. 2007). The employees’ crimes included violations of the Act to Prevent Pollution from Ships [hereinafter APPS], falsifying records, obstruction of justice, and conspiracy. Id. at 321 (citing 33 U.S.C. § 1908(a) (2000); 18 U.S.C. § 1519 (2000); 18 U.S.C. § 1505 (2000); 18 U.S.C. § 371 (2000)). The employees who were directly responsible for these violations were engine room crew members aboard the “Kriton.” Id. at 325. The chief engineer facilitated the illegal acts of these employees by permitting them to act contrary to company policy. Id. He directed the crew not to use the pollution prevention equipment, including an oily water separator purchased by Ionia for the disposal of waste, which was in good working condition. Id. Crew members subsequently

pumped oily waste overboard using a by-pass hose and disposed of the waste directly into the ocean. Id. Almost three years earlier, Ionia implemented policies specifically intended to detect and prevent violations of the APPS pursuant to probation requirements. Id. at 327. These policies included employee training programs, an employee compliance checklist, and retention of an outside firm who could to inspect Ionia's ships and records, as well as guarantee to all authorities that Ionia was implementing these policies. Id.

Ionia's employees were well aware of the company's dedication to preventing pollution. Id. at 322. In addition to being aware of their intentions, Ionia made sure that employees were aware of its policies, and had the equipment and training necessary to comply. Id. An engine room crew member responsible for committing the violations here testified that, "Ionia had a strict policy against the improper discharge of oily waste and bilge water, and they were each trained and promised to abide by this policy." Id. at 323. Nonetheless, the crewmembers decided not to use the oil pollution prevention equipment provided by Ionia. Id. at 325. To further disguise their unwillingness to follow Ionia's policy, the crewmembers falsely stated in the oil records books that they had complied with Ionia's policies and used the pollution prevention equipment. Id. As a result, the employees received the personal benefit of making their job easier and not being subject to discipline by Ionia, who was unaware that this conduct was taking place. See id. at 323. Moreover, the acts of the engine room crew were to Ionia's detriment, as they contradicted its policies and exposed Ionia to possible liability. Their actions also damaged Ionia financially because Ionia had already paid for the equipment and employee training. Id. at 326.

In the government's case against Ionia, where Ionia was charged with criminal liability for the employee's illegal acts, the district court's jury charge allowed Ionia to be convicted without the government having to prove that Ionia, distinct from its employees, violated the law:

As a legal entity, a corporation can only act vicariously through its agents; that is, through its directors, officers, and employees or other persons authorized to act for it. A corporation may be held criminally liable for the acts of its agent done on behalf of and for the benefit of the corporation, and directly related to the performance of the duties the employee has authority to perform.

Id. The court further elaborated that the government must prove, in part:

that Ionia, through its agents, was in charge of operating the oil pollution prevention and discharge equipment for the M/T Kriton, including the Oily Water Separator and Oil Content Monitor; [and] that for the M/T Kriton, Ionia, through the acts of its agents, knowingly, meaning intentionally or voluntarily, failed to fully discharge and accurately maintain an Oil Record Book in which the required disposal and discharge operations were recorded.

Id. The district court further explained agency principles, instructing the jury that the government must prove that the agents were acting in the scope of their employment, namely that they were acting within their authority and intended to benefit Ionia, even if Ionia did not benefit. Id. Following its conviction for the criminal acts of its employees, Ionia appealed to the United States Court of Appeals for the Second Circuit, which affirmed. This Court granted Ionia's petition of certiorari on December 12, 2008.

### **SUMMARY OF ARGUMENT**

This Court should reverse the holding of the Second Circuit because the instruction provided by the district court on corporate criminal liability was neither authorized by the precedent of this Court nor federal statutory law. This Court's precedent and federal law authorize such an instruction when it imposes corporate criminal liability only when Congress has expressly indicated intent to do so.

In the case of New York Central & Hudson River Railroad v. U.S., this Court held that Congress has the constitutional authority to impose liability on a corporation for the illegal acts of its employees. However, the Court specifically required that Congress demonstrate the intent to hold corporations criminally liable in the language of the statute in question. Lower courts

have vastly misinterpreted the limited New York Central holding, which only applies when there is express statutory intent. Instead, they have imposed corporate liability as a default even without congressional intent. In doing so, these courts ignore stare decisis and erroneously extend the Supreme Courts precedent on criminal corporate liability.

Here, the instruction of the district court was contrary to the holding of New York Central as the district court used overbroad and erroneous circuit court precedent to formulate its standard for corporate criminal liability. These cases impose liability to corporations whenever a corporate employee commits a crime while on the job when any possible benefit to the corporation could exist. Contrary to this broad implication, such liability should only be imposed on a corporation when the statute in question explicitly dictates the need for it, as was the case in New York Central. Thus, in relying on the misguided views of the lower courts, the district court's instruction is unauthorized by the mandatory precedent of this Court.

The instruction of the district court is also unauthorized by federal law, as none of the statutes under which Ionia Management has been charged contain language indicating congressional intent to impose vicarious criminal liability, like that found in the statutory provision interpreted in New York Central. Even though corporations can commit crimes in some circumstances, the imposition of criminal liability to a corporation with no showing of fault is unauthorized by federal law without specific language to the contrary.

Additionally, the implications of the district court's instruction are inconsistent with the general principles of criminal law of intent, fault, deterrence, and retribution. Under these instructions, the court can impose criminal liability on a corporation without a showing of fault or intent, as liability can result from the criminal act of any level of employee, when there is some possible intent to benefit the corporation. Here, under the district court's instruction, Ionia

can be criminally liable for the act of low-level, rogue employees with no connection to the “brain” of the corporation whatsoever. This can occur even when Ionia had no intent or fault, takes steps to prevent the illegal acts, and no proof of a real benefit to Ionia from the illegal acts exists. Thus, liability in this case betrays the principles of fault and intent.

Further, the standards reflected in the district court’s instruction on imposing corporate liability are inconsistent with the principles of deterrence and retribution in failing to recognize the lack of moral blameworthiness and giving no credit for steps taken by the corporation to prevent the illegal acts in question. This policy fails to further deterrence, as the corporation has already done everything it can to avoid the unlawful conduct. Further, the policy fails to further retribution since there is no allocation of culpability to Ionia. Here, since Ionia had specific policies against violations of the APPS and could take no further reasonable steps to prevent this criminal behavior, the standards reflected in the district court’s instruction that would impose vicarious liability actually hinder deterrence and retribution.

Finally, this Court should revisit the holding of New York Central to the extent needed to clarify the requirements for an imposition of corporate criminal liability and promote fairness in criminal law. Such clarification would correct the lower courts’ failure to recognize the significance of congressional intent regarding corporate criminal liability. Further, such a revisit would address the current standard’s hindrance of the criminal law principles and restore justice to this area of law by recognizing corporate efforts to combat criminal activity. For these reasons, this court should overturn the holding of the Second Circuit and seize this opportunity to correct the overbroad and unjust view of corporate criminal liability reflected in the instruction of the district court.

## ARGUMENT

Regarding the concept of corporate criminal liability it has been said, “many weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these weeds is corporate criminal liability ... nobody bred it, nobody cultivated it, nobody planted it. It just grew.” Gerhard O.W. Mueller, Mens Rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability, 19 U. Pitt. L. Rev. 21 (1957). In the present case, Ionia Management [hereinafter “Ionia”] has been charged with violations of federal law, based on the unlawful conduct of rogue employees, through the doctrine of corporate criminal liability. The first issue before the court is whether Supreme Court precedent and federal law authorized the instruction of the district court mandating the imposition of corporate liability upon Ionia. Even if precedent authorized this instruction, the second issue is whether the implications of this instruction are consistent with the general principles and goals of criminal law. The proper standard of review on these issues is de novo, as the court must examine the validity and sufficiency of the jury instruction as a question of law.

### **I. THE DISTRICT COURT’S INSTRUCTION MANDATING CORPORATE CRIMINAL LIABILITY WAS NEITHER AUTHORIZED BY SUPREME COURT PRECEDENT NOR FEDERAL LAW.**

The instruction of the District Court regarding the standards of vicarious liability to impose on a corporation for the acts of employees was an erroneous and overbroad application of Supreme Court precedent and federal statutory law. An instruction imposing default criminal liability on a corporation for the acts of an employee is authorized by Supreme Court precedent when such an imposition is made pursuant to Congressional direction to create such liability. N.Y. Cent. & Hudson River R.R. v. U.S., 212 U.S. 481, 492 (1909); Andrew Weissmann and David Newman, Rethinking Criminal Corporate Liability, 82 Ind. L.J. 411, 440 (2007).

[hereinafter, Rethinking Criminal Corporate Liability.] Since this Court introduced the concept of corporate criminal liability in New York Central, lower courts have vastly expanded it. Rethinking Criminal Corporate Liability, at 433.

Lower courts have maintained the default position that corporations are to be held vicariously liable for the criminal acts of employees committed in the scope of employment on behalf of the corporation. Preet Bahara, Corporations Cry Uncle and their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants, 44 Am. Crim. L. Rev. 53, 61-62 (2007). [hereinafter Corporations Cry Uncle.] In actuality, this overextends this Court's decision in New York Central, where clear congressional intent was required to impose corporate criminal liability. 212 U.S. at 492. Now, regardless of anything corporations do to discourage unlawful actions, they are held strictly liable for illegal acts of employees committed on the job if some benefit to the corporation can be inferred. Id. In actuality, the holding of New York Central only applies corporate liability when Congress has explicitly shown the intent to do so in the statute in question. Id. These narrower implications are far better equipped to serve public welfare and promote the goals of criminal law. Rethinking Criminal Corporate Liability, at 440.

Here, the appellate court precedent used by the district court to support its instructions on the imposition of criminal liability continues the erroneous application of New York Central and misconstrues statutory precedent. This application is thus erroneous in two respects. First, in mandating the default application of *respondeat superior* even when Congress has given no direction to do so, the District Court's application of these principles improperly expands the scope of the decision in New York Central. Second, the instructions fail to adequately examine and respect Congressional direction on the imposition of vicarious criminal liability.

**A. This Court's Holding in New York Central & Hudson River Railroad v. U.S. Does Not Mandate Broad Imposition Of Corporate Criminal Liability Through *Respondeat Superior* Principles.**

The issue in New York Central was the constitutionality of the Elkins Act. 212 U.S. at 491 (citing and discussing Elkins Act, Pub. L. No. 57-103, ch. 708, § 3, 32 Stat. 847, 880, codified at 41 U.S.C. § 41-45 (1903)). In that statute, Congress adopted the tort theory of *respondeat superior* and applied it to the criminal context, explicitly decreeing that common carriers were to be held criminally liable for the illegal granting of shipping rebates by their agents, officers, and employees. New York Central, 212 U.S. at 492. Congress provided that:

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed to be the act, omission, or failure of such carrier, as well as that person.

Pub. L. No. 57-103, ch. 708 (1903); See New York Central, 212 U.S. at 492 (showing the court's use of this language). This language unambiguously indicated Congress' intent to impute criminal liability to common carriers for the unlawful acts of employees. Thus, this Court held that Congress had the constitutional authority to impose vicarious liability on a corporate principle for the illegal acts of employees. Id. Contrary to the interpretation usually applied in the lower courts, New York Central does not mandate that this liability is to be imputed to a corporation in *all* cases of illegal conduct by employees. 212 U.S. at 494. (emphasis added). Rather, this holding dictates only that Congress *may* choose to impose liability when it deems it necessary, and it thus does so by demonstrating such an intention in the construction of the statute; as demonstrated in the language of the Elkins Act. Id. (emphasis added).

In approving Congress' decision to extend civil liability standards to the criminal context, the Supreme Court reasoned that the laws against granting shipping rebates could not be effectively enforced if only individuals were subject to punishment. New York Central, 212 U.S.

at 495. The Court also recognized the unique function of the Elkins Act in ensuring equal rights to all engaged in interstate commerce. Id. Thus, in assessing a clear expression of congressional intent shown in the statute, the Court agreed that the imposition of corporate liability was necessary to adequately address the societal ill targeted in the creation of the Act. Id. at 495-96. The specific reasoning used by the court highlights the need for specific Congressional direction to find a corporation vicariously liable. Id. Despite the distinct nature of the analysis in New York Central, lower courts have subsequently failed to acknowledge the importance of Congressional intent. V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve?, 109 Harv. L. Rev. 1477, 1483 (1996). [hereinafter Corporate Criminal Liability.] Instead, they maintain a mistaken view of this decision by mandating vicarious corporate liability in all criminal cases through a liberal application of *respondeat superior*. Id.

Additionally, many lower courts have improperly expanded the limited provisions set forth in New York Central that acted as prerequisites for imposing liability. Id. An example of this is the reduction of the required level of authority the offending employee must have in order for his or her actions to result in corporate liability. See, e.g., Standard Oil Co. of Tex. v. U.S., 307 F.2d 120, 127 (5th Cir. 1962). This watering down of vicarious liability requirements has allowed the criminal act of any employee to result in the imputation of corporate liability. Corporate Criminal Liability, 1483. This is contrary to the holding of New York Central, where the criminal employee was not just any employee; he could set shipping rates for the whole corporation and make deals with other companies. 212 U.S. at 494. Thus, it is inconsistent with the rationale of New York Central for lower courts to impute liability when the employee had no actual authority in the corporation and is vastly removed from the “brain” of the entity.

Another example is the district court's reliance on circuit cases to assert that vicarious criminal liability can be imposed even if the acts of the offending employee did not transfer any actual benefit to the employer. See J.C.B. Super Markets, Inc. v. U.S., 530 F.2d 1119, 1122 (2d Cir. 1976); See U.S. v. Cincotta, 689 F.2d 238, 241 (1st Cir. 1982). This extension of precedent diminishes the required showing of a corporate benefit emphasized in New York Central. 212 U.S. at 495. There, it was the fact that the corporation actually received a benefit from the criminal act that compelled the court to impose vicarious liability, in order to effectively enforce the statute. Id. Such mistaken extensions of precedent have resulted in corporations being held criminally liable through overbroad and harsh applications of *respondeat superior*. Corporations Cry Uncle, at 62-63. Furthermore, the significance of sufficient judicial consideration of congressional intent and the ramifications of broadly imposed liability have been subdued in the wake of an anti-corporate fever in the twentieth century. Corporate Criminal Liability, at 1487.

Moreover, the misapplication of this Court's precedent violates the vital concept of stare decisis and the binding precedent of higher courts. In Cascade Natural Gas Corp. v. El Paso Natural Gas, this Court reasserted the binding nature of its decisions stating, "no one, except this Court, has authority to alter or modify our mandate." 368 U.S. 129, 136 (1967). It is a basic principle of judicial interpretation that lower courts are bound by the precedent of higher courts. Johnson v. DeSoto County Bd. of Comm'rs, 72 F.3d 1556, 1559 (11th Cir. 1996). In failing to properly apply the holding and reasoning of New York Central, lower courts have manipulated the mandate of this Court regarding how and when to impose vicarious corporate liability for the criminal acts of employees. Thus, these mistaken interpretations are unauthorized as they infringe upon the mandatory and binding authority of this Court's precedent.

In the present case, the law relied upon by the district court to support its instruction on corporate liability against Ionia exemplifies the persistent application of these misguided principles. See U.S. v. Ionia Mgmt. S.A., 526 F. Supp. 2d. 319, 323-24 (D. Conn. 2007). The only Supreme Court case cited by the district court to support its instruction is New York Central, which it uses merely to state that a corporation “may” be held liable for the crimes of an agent. Id. at 323. Subsequently, the district court gives no recognition to the importance of congressional instruction present in that case and goes on to apply its holding in the overbroad manner typical of lower courts. Id. The authorities relied upon by the district court to craft its instruction not only misuse precedent by applying criminal liability to corporations by default without explicit legislative acquiescence, but several go even further to broaden the basis for which liability may be found under New York Central. Id. As such, the district court’s instruction is unauthorized under a proper reading of Supreme Court precedent.

Finally, even if the district court’s instruction ignoring the need for legislative acquiescence was considered a proper application of New York Central, an imposition of criminal liability against Ionia would still be erroneous. Under an accurate reading of the requirements for liability under New York Central, the crew aboard the Kriton, directly responsible for the violation, have insufficient authority and influence in Ionia for their actions to impute liability to the corporation. Ionia Mgmt., 526 F. Supp. 2d at 325. Unlike the agent in New York Central, who had authority to act for the “brain” of the corporation by binding it in shipping rates with other companies, the only authority delegated to the engineers here related to the operation of a ship’s engine room, which has no relation to the actual decision makers of Ionia. 212 U.S. at 494; See id. at 322. Thus, imposing liability for their actions would undermine the reasoning in New York Central which partly based such an imposition on the authority and

influence of the employee's relationship to the corporation. 212 U.S. at 494. Also, imposing liability to Ionia is improper under New York Central as there has been no proof of an actual benefit to Ionia. Id. at 326. Unlike New York Central, where an actual benefit was required and in fact resulted from the employee's illegal rebates, the crew's failure here to properly use the pollution prevention machinery provides no proven benefit to Ionia. 212 U.S. at 495. Thus, where only speculations of corporate benefits exist it is inconsistent with the reasoning of New York Central to impose vicarious liability.

**B. The Statutes Under Which Ionia Management is Charged Provide No Indication of Congressional Intent to Impose Corporate Criminal Liability through *Respondeat Superior* Principles.**

The district court's instruction was also unauthorized by Federal statutory law, as the statutes in question contain no language indicating a Congressional intent to impose vicarious liability on a corporation for the act of an employee. In formulating its instruction, the district court ignored the example of New York Central, and imposed corporate criminal liability regardless of congressional intent. 212 U.S. at 495-96. The statute at issue in New York Central, the Elkins act, clearly indicated congress' intent to impose liability by specifically stating that the act of any employee would be considered the act of the principle. See Pub. L. No. 57-103, ch. 708 (1903). In the statutes here, no such language exists to permit an imposition of corporate liability. See 33 U.S.C. § 1908(a); 18 U.S.C. § 371; 18 U.S.C. § 1519; 18 U.S.C. § 1505.

Generally, when used in federal statutes, Congress has determined that the words "person" and "whoever," can be construed to include corporations. See 1 U.S.C. § 1 (2000). Congress has been less clear, however, regarding how and when corporations can be held vicariously liable for the crimes of their employees. Further, when a statute uses words like "intent," "knowingly," or "willfully," it is accepted that the statute requires some finding of fault

in order to secure a conviction. LaFave, supra § 13.4(b). Thus, in order to hold an employer liable for the acts of an employee under such a statute, the employer must have acted willingly or knowingly to be liable for such acts. See Vachon v. New Hampshire, 414 U.S. 478, 479 (1974) (holding that an employer could not be liable for the unlawful acts of an employee where the employer neither condoned nor had knowledge of the act). Applying that reasoning to the context of corporate liability, it is improper to presume that the legislature intended the fault of an employee to suffice for a conviction of the employer where the statute in question requires showing of mental fault or intent for violation, unless there is clear direction otherwise. LaFave, supra, § 13.4(b).

In the present case, distinct from the unambiguous provisions found in the Elkins Act, none of the statutes in the present case, particularly the APPS, contain any language to expressly indicate congressional direction regarding the imposition of vicarious corporate liability. See 33 U.S.C. § 1908(a); 18 U.S.C. § 371; 18 U.S.C. § 1519; 18 U.S.C. § 1505. Instead, the language in these statutes concerning who can actually be held in violation of each law dictates that a “person” who acts “knowingly” or with “intent” commits violations. See id. The APPS goes further, stating that corporations are included in the definition of the term “person.” 33 U.S.C. § 1901(a) (1) (2000). Thus, the language included as to who can violate the statutes, and under what circumstances such a violation arises, merely imply that a corporation “can” violate the laws in question, if the corporation itself is shown to have “knowingly” done so. This does not, however, dictate that a corporation can be held criminally liable through *respondeat superior* for the unlawful act of an employee. Without any further instruction, it is not clear that the legislature intended to impose such liability. This is especially true where, as in the present case, no knowledge or fault on the part of the corporation has been proven. U.S. v. Ionia Mgmt, 526 F.

Supp.2d at 325-26. In fact, Ionia had specific policies against the illegal actions in question and was not even aware of the conduct of the Kriton's crew. Id. at 322. Thus, not only did they lack knowledge of or fault for the acts in question, Ionia had taken affirmative steps to prevent violations of the APPS from occurring.

**II. THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY, WHICH CREATED AN IRREBUTTABLE PRESUMPTION OF CORPORATE GUILT, DISREGARDED DEEPLY ROOTED PRINCIPLES OF CRIMINAL LAW SUCH AS INTENT, FAULT, DETERRENCE, AND RETRIBUTION.**

The District Court's instruction on corporate criminal liability was inconsistent with general principles of criminal law because it imposed liability without Congressional direction for the illegal acts of low-level, rouge employees without requiring the government to prove that the corporation, distinct from its employee, possessed fault or intent. The very essence of vicarious liability, imposing liability without fault, is a departure from general principles of criminal law. H. Lowell Brown, Vicarious Criminal Liability of Corporations for the Acts of their Employees and Agents, 41 Loy. L. Rev. 279, 283-84 (1995). [hereinafter Vicarious Criminal Liability.] Corporate criminal liability is unique in that a corporate entity, being only a "person" by design of legal fiction, can neither act nor think for itself and thus is limited by the acts and mental states of employees. New York Central, 212 U.S. at 492. As a result, the government must not only prove that the employees responsible for the illegal acts possessed the requisite intent, they must also prove that the corporate entity possessed the requisite intent. LaFave, supra, § 13.4(b). Under circuit precedent, however, there are virtually no limitations to this rule; the illegal act of any level of employee can create liability for the corporation even if no one of authority condoned the act. Standard Oil Co. of Tex., 307 F.2d at 127. This expansive imposition of corporate liability allowed under current law, which disregards intent and fault, deeply betrays the purpose and integrity of criminal system.

**A. Holding a Corporation Vicariously Liable for the Criminal Acts of its Employees is Inconsistent With the Criminal Law Principles of Fault, Criminal Intent, and Trial by Jury.**

Actus facit reum nisi mens sit rea, the act does not make one guilty unless there be a criminal intent. LaFave, supra, § 13.4. This Latin phrase has been incorporated into Anglo-American criminal law whereby a criminal defendant must be exonerated unless the government proves, beyond a reasonable doubt, that the defendant possessed concurrent mens rea and actus reus. See id. The belief that an act is only a crime when injury is accompanied by intent is not a fleeting notion, but instead is universal and reinforces the societal belief in free will and duty to chose between right and wrong. Morrisette v. U.S., 342 U.S. 246, 250-51 (1952). Speaking for this Court, Justice Jackson analogized criminal conviction without intent to conviction of a child who replies, “But I didn’t mean to[.]” Id. (quoting Williams v. N.Y., 337 U.S. 241 (1949)). Thus, intent remains an indispensable element of any criminal conviction.

Congress, in enacting laws, is presumed to have legislated in a way that incorporates the general legal principles of criminal law, one such being intent. Morrisette, 342 U.S. at 263. Furthermore, while full effect is given to Congress’ intentions, this Court has on numerous occasions directed that criminal statutes be construed strictly. U.S. v. Morris, 39 U.S. 464, 475 (1840). Even if the statute is ambiguous, Justice Scalia reminds courts that the rule of lenity directs unclear statutes to be construed in favor of the defendant. U.S. v. Santos, 128 S. Ct. 2020, 2025 (2008) (plurality opinion). These protections ensure that those obligated to follow the law are put on adequate notice of its requirements and that the laws only reach those who Congress intended. Id. Both of these mandates are usually specific to criminal law, but this Court has applied the rule of lenity to civil violations where they have criminal applications. U.S. v. Thompson/Center Arms Co., 504 U.S. 505, 517-18 (1992) (plurality opinion) (applying the rule of lenity in a tax case).

Where Congress has not expressly provided intent to hold corporations criminally liable for the acts of its employees, the Model Penal Code, which limits the scope of such liability, may provide guidance. § 2.07 (1985). Under these provisions, corporations are only held liable when a high managerial agent participates in the illegal acts. Id. A high managerial agent participates when he or she “authorized, requested, commanded, performed, or recklessly tolerated” the employee’s illegal acts while acting in the scope of his employment. Id. Therefore, criminal acts of low-level employees should not be imputed to their employers absent congressional intent.

Nevertheless, in the absence of congressional intent, this Court does not consider the level of the employee within the corporation but instead imputes the intent of the employee to the corporation so long as the employee was acting within the scope of his or her employment. See New York Central, 212 U.S. at 494. This means that a corporation can be criminally liable for the illegal of any employee so long as they are job-related and the employee intends to benefit the corporation. Id. However, this interpretation has been broadened by lower courts which no longer require proof of benefit. See, e.g., Ionia Mgmt., 526 F. Supp. 2d at 323. Thus, the agent is found to have acted within the scope of his or her employment and to benefit the employer even when the employer has extensive policies against the employee’s criminal acts and the employee is acting for his own benefit. However, when Congress has not expressly provided that a corporation is to be vicariously liable for the acts of its employees, the corporation’s liability should be consistent with the deep-seeded principles of criminal law which require intent and fault and not relaxed versions of liability.

Furthermore, because of the low threshold for the imposition of corporate criminal liability under the current interpretation of New York Central, a corporation finding itself potentially liable is likely forego its right to trial and enter into a deferred prosecution agreement

which takes courts out of the equation as well as the customary protections of the criminal law. Joan McPhee, Stop the Business-Busters Corporate Liability for Criminal Misconduct Reaches Much Too Far, Legal Times, April 21, 2008, at 58 [hereinafter Stop the Business Busters.] Moreover, these agreements often upset the delicate balance of the adversarial system. Gerard E. Lynch, The Role of Criminal Law in Policing Corporate Misconduct, 60 Law & Contemp. Probs 23, 54-58 (Summer 1997) [hereinafter The Role of Criminal Law.] Deferred prosecution agreements are entered into before a corporation is indicted because indictment is often seen as fatal. See id. Under the agreement, a corporation is required to admit to violating the law and cooperate with the government; in return the government tolls the statute of limitations and may decline to indict the corporation so long as it complies with all of its requests. Scott A. Resnik and Keir N. Dougall, The Rise of Deferred Prosecution Agreements While Such Pacts Can Keep a Company Alive, They Come at a Cost, N.Y.L.J. December 18, 2006, 9, col. 1. If the corporation does not comply, conviction is certain. Id. These agreements place the corporation at the mercy of the prosecutor who serves as judge, jury and executioner. Stop the Business-Busters, at 58. These agreements are inconsistent with the criminal law principles that guilt be proven by the government in a public trial, overseen by a judge, and determined by a jury. Id.

Here, the district court's instruction was inconsistent with general principles of criminal law because they allowed Ionia to be convicted for the acts of its employees without requiring the government to prove that Ionia either intended to violate the law or was at fault for the law's violation. Ionia Mgmt, 526 F. Supp. 2d at 323-27. The employees who violated the statutes at issue were not officers, senior management, or persons responsible for making company policy. Id. at 327. In fact, the Kriton's crew was far from the "brain" of the corporation and was literally out to sea. Id. Moreover, Ionia even maintained a compliance program which included

establishing internal training programs and keeping a log of its waste disposal. Id. Crew members testified that they were aware of this policy. Id. at 323. Ionia had already bought and installed all necessary equipment to ensure that the crew of the Kriton had everything necessary to comply with the law. See Id. at 326.

Furthermore, Ionia did not receive a benefit contrary to the district court's assertion which was completely speculative. Id. at 326. For example, the district court alludes to the fact that Ionia benefited financially but there was no evidence that the employer's decision to dispose of waste illegally was more cost effective or enhanced the ship's or the crew's performance. Id. Even if Ionia received these incidental benefits as a result of the employees' conduct, there is no evidence that the employees acted with the intent to benefit Ionia. Id. The employees may have violated the law because they were lazy, disgruntled, or for any personal benefit. The suggestion that the employees were acting for the benefit of Ionia, namely, that violating the law would save Ionia time and money, has simply not been proven. Id. at 326. Because Ionia had done everything in its power to ensure that its employees complied with the statute and did not violate the law, it did not receive a benefit as a result of the employees actions and the employees did not intend to bestow a benefit. Id. Holding Ionia liable for their employees' crimes would be inconsistent with the principles of fault and intent.

The illegal actions of the Kriton's crew were not the intentions of Ionia's corporate management, nor were they done to benefit the corporation. Rather, they were rogue acts of individual employees. The effective programs and policies in place by Ionia are more reflective of its intent than the rogue acts of employees aboard a ship in the middle of the ocean. The employees aboard the ship possessed the intent and are at fault. Thus, to allow them to testify as

government witnesses instead of answering for their crimes, and convicting Ionia without a neither intent nor fault, would be against general principles of criminal law.

**B. Holding Ionia Criminally Liable for the Acts of their Employees Furthers neither Deterrence nor Retribution.**

Holding Ionia criminally liable for the illegal acts of its employees, without knowledge or acquiescence on the part of Ionia, frustrates the principles of deterrence and retribution.

Deterrence is often cited as the primary justification for corporate criminal liability. Rethinking Criminal Corporate Liability, at 412. Deterrence can be either specific or general. Id. Specific

deterrence focuses on preventing a particular defendant from engaging in the same conduct, while general deterrence seeks to deter others, not just this defendant, from engaging in the illegal conduct. Id. General deterrence is particularly effective in white-collar crimes. Id. at 428.

The theory is that convicting the corporation decreases its net worth giving the shareholders, who are the true owners, an incentive to discourage employees from engaging in illegal acts.

Corporate Criminal Liability, at 1494-95. However, it has not been shown that conviction is more deterrent than self-policing by the corporation. Id. at 1495. In fact, allowing corporations to report the illegal acts of its employees without instant liability would likely encourage corporations to report such illegal acts to the proper authorities.

Retribution is also a consideration in the implementation of corporate criminal liability, encompassing the principle of *lex talionis* or an eye for an eye. William Laufer, Corporate Intentionality, Desert, and Variants of Vicarious Liability, 37 Am. Crim. L. Rev. 1286, 1292 (2000). [hereinafter Corporate Intentionality.] Retribution seeks to punish those who break the law. Id. In contrast to civil law, which often places liability on the person who is best able to absorb the loss, criminal law adopts the position that it is wrong to convict a defendant who is not blameworthy. See id. The idea of punishment links criminal law to morality. LaFave, supra,

§ 1.2 (f). The reason criminal law is different from civil law in this regard is because criminal law reflects the values of society and adequately defines what is socially tolerable. Id.

Thus, a defendant who exceeds society's morals and commits a crime is, in the eyes of society, deserving of punishment. However, a blameless defendant does not deserve society's denunciation. Id. Although this policy is only persuasive, the Pennsylvania Supreme Court found the imposition of vicarious liability to be at odds with the aims of criminal law: "partly to reform, partly to prevent the continuation of the anti-social activity, and partly to deter others," where the defendant "has personally lived up to the social standards of the criminal law and has not menaced or injured anyone..." Commonwealth v. Koczwara, 155 A.2d 825, 828 (Pa. 1959) (holding that imprisonment of the employer based on an employee's violation of a strict liability law to be beyond the bounds of corporate criminal liability but allowing the imposition of fines).

Moreover, Gerald Lynch, former Chief of the Criminal Division of the Office of the United States Attorney, who specialized in white collar crime, warns against undermining the "moral nature" of the criminal law by punishing those who are not blameworthy or able to control the circumstances. The Role of the Criminal Law, at 48. He further warns that the continued labeling of offenses as criminal, where the defendant is not morally blameworthy, will eventually decrease the criminal law's ability to fulfill its role in the justice system. Id. In essence, Lynch finds corporate criminal liability to be inappropriate unless the corporation is itself morally blameworthy; otherwise, it should only be punished where it is clear to the public that the corporation has acted immorally. Id. at 49. Where the corporation has programs and policies against the illegal behavior at issue, the imposition of punishment is even more questionable. Rethinking Criminal Corporate Liability, at 429.

Even in the civil context, this Court has taken steps to limit vicarious liability to corporations in recognition of the sensitive nature of imposing liability upon a faultless defendant. Comparing corporate criminal liability in civil cases and criminal cases is warranted because the basis for corporate liability stems from the tort theory of *respondeat superior* and some civil sanctions parallel the goals of criminal law in deterring and punishing unacceptable behavior. Thompson/Center Arms Co., 504 U.S. at 518. In recent opinions this Court has limited the scope of vicarious liability as it relates to punitive damages and Title VII sexual harassment cases. See, e.g., Kolstad v. American Dental Association, 527 U.S. 526 (1999) (holding that an employer is not liable for punitive damages for the illegal acts of its managers when the employer has made a good faith effort to comply with the law). As a result of these decisions civil law has been narrowed while criminal law has remained uncharacteristically broad.

Furthermore, this Court has allowed the corporate defendant an affirmative defense where it exercised due diligence to prevent and deter criminal behavior by having effective policies in place. See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775 (1998). For instance, in Faragher, due diligence relieved a municipal employer of liability in a Title VII case where he exercised reasonable care to prevent harassment by managerial employees and that the harassed employee did not avail herself of the policy's protection. Id. This reasoning has yet to be applied to criminal cases. Although this Court has noted the similarity between some civil sanctions and criminal sanctions, the scope vicarious liability has been narrowed in civil law but remains overbroad in criminal law. See Thompson/Center Arms Co., 504 U.S. at 518.

In the instant case, conviction of Ionia would be in direct conflict with principles of criminal law that discourage conviction when the defendant cannot be deterred and is not deserving of punishment. Neither specific nor general deterrence will be advanced by convicting

Ionia for the acts of its employees. Ionia Mgmt, 526 F. Supp. 2d at 322, 325. As to specific deterrence, Ionia is not blameworthy and has attempted to proactively prevent the illegal occurrences. Id. Ionia had “a strict policy against the improper discharge of oily waste and bilge water, and [the employees] were each trained and promised to abide by this policy.” Id. As a result, there is no behavior to deter. Similarly, general deterrence is ineffective because instead of encouraging corporations from engaging in prevention techniques similar to Ionia’s, it makes it more likely that corporations will either spend that time and money elsewhere or cover up violations out of fear that liability will be imposed regardless of their best efforts. See id.

Moreover, Ionia was not aware of the crew’s illegal actions and did not authorize or condone them. In addition, there is no evidence that anyone employed by Ionia, besides the engineers and engine room crewmembers aboard the Kriton, was aware of the crew’s illegal behavior. See id. at 325-26. Short of placing executives or corporate overseers, on every inch of every ship on every sea, Ionia cannot prevent its employees from exercising their free will. Id. at 322. Thus, it is inconsistent with the criminal law principle of retribution to impose a criminal conviction where one is not deserved. See Corporate Intentionality, at 1292. Conviction would also erode the distinction between criminal and civil law, thus undermining the moral implications that come with criminal law. The Role of Criminal Law, at 48.

**III. THIS COURT SHOULD REVISIT ITS HOLDING IN NEW YORK CENTRAL & HUDSON RIVER RAILROAD V. U.S. BECAUSE IT SHOULD SEIZE THE OPPORTUNITY TO CORRECT ITS MISAPPLICATION BY LOWER COURTS AND TO IMPLEMENT A DUE DILIGENCE DEFENSE**

The lower courts’ interpretation of New York Central is overbroad and contrary to congressional intent. Corporate Criminal Liability, at 1483-84. While the imposition of corporate criminal liability is not per se erroneous, lower courts have failed to limit the application of New York Central in line with that case’s holding. See 212 U.S. at 490-91; See also Id. Because the

facts of the present case serve as an example of this unauthorized expansion of corporate criminal liability, this Court should seize the opportunity to reiterate the appropriate standards as they were handed down a century ago. 212 U.S. 489-91; See Ionia, 526 F. Supp. 2d at 327-28. An unequivocal directive to narrow the holding of New York Central would further allow corporations to feel confident in relying on the language of statutes and ensure proper notice is given. See 212 U.S. 481.

Additionally, proper application of New York Central would also decrease the frequency of deferred prosecution agreements and make them more effective when they are used. See generally, Id. As a result of relying on clear congressional intent to determine liability, corporations will be better equipped to employ legitimate defenses and thus less likely to waive their rights to trial. See Stop the Business-Busters, at 58. Moreover, this will force the government to prove its case when the statutory language is in its favor and emancipating them from the mercy of prosecutors. Id. Despite prosecutorial instructions from the Attorney General's office to the contrary, that office has no more ability to control individual prosecutors than the corporations can control low-level, rogue employees. See e.g Larry D. Thompson, Federal Prosecution of Business Organizations, [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). (last visit Feb. 19, 2008). Furthermore, the government will be able to spend more resources on corporations who do choose deferred prosecution agreements when the statutory language is not in its favor.

Beyond revisiting the holding in New York Central, this Court should also adopt a due diligence defense which would allow corporations an affirmative defense where they have proactively implemented policies and procedures to detect and deter the illegal conduct at issue; such a defense will further the principles of deterrence and retribution. Like the Title VII statute

at issue in Faragher, criminal statutes are often enacted to deter. 524 U.S. at 805-06. An adoption of a due diligence defense in criminal cases would further the same principles of deterrence it furthers in civil cases. See generally, Id. Since deterrent statutes are enacted to prevent harm from occurring in the first place, allowing corporations to assert an affirmative defense, showing they had effective policies and procedures in place when the illegal acts were committed, does not take away from the deterrent value of the statute. Rather, such recognition of self-regulation would increase the deterrence from criminal conduct. Allowing such an affirmative defense will encourage corporations to take action when an employee violates the law instead of tempting them to cover it up because of the fear of liability. Soon after the New York Central decision, several circuits adopted variations of the due diligence defense, however, it was rejected shortly thereafter. See, e.g., Holland Furnace Co. v. U.S., 158 F.2d 2, 5 (1946); U.S. v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972).

Adopting a due diligence defense will in effect deter proactive corporations from being untruthful and counter the “damned if you do, damned if you don’t” system currently in place that has been interpreted as being synonymous with strict liability. Vicarious Criminal Liability, at 308. The current overbroad and unwarranted interpretation of New York Central is not consistent with general principles of criminal law and is becoming less and less consistent with principles of civil law. This Court should revisit its holding in New York Central to explain its true meaning and to free those stuck in its grasp.

The instruction of the district court calling for a universal presumption of corporate criminal liability for the illegal acts of employees, regardless of Congressional direction or a showing of fault, is neither authorized by the authority of this Court nor federal statutory law. Furthermore, this unauthorized imposition of liability betrays and hinders the principles of

criminal law, specifically the policy to only punish those who actually possess the intent to commit unlawful conduct. By taking this opportunity to correct the overbroad application of corporate criminal liability over the past century, this Court can reinstate integrity and equality for all who stand before our system of justice.

### **CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court reverse the Judgment of the Second Circuit Court of Appeals and remand this case with orders for a proper jury instruction.

Respectfully submitted,

**Team 1, Attorneys for the Petitioner**