

In The
Supreme Court of the United States

OCTOBER TERM, 2008

Ionia Management S.A., et al.,

Petitioner,

v.

United States of America,

Respondent.

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

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the district court's instruction on corporate criminal liability was authorized by Supreme Court precedent and federal statutory law.
2. Whether the district court's instruction on corporate criminal liability was consistent with general principles of criminal law, and should this Court revisit its holding in New York Central & Hudson River Railroad v. United States, 212 U.S. 481 (1909).

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CORPORATE STATEMENT

Ionia Management, S.A. (“Ionia”) is a closely held Liberian corporation headquartered in Greece. It has no parent company and no public company owns any of its stock.

OPINIONS AND ORDER

The opinion of the Court of Appeals for the Second Circuit is reproduced at Ionia Management S.A. v. United States, 999 F.3d 999 (2nd Cir. 2008). It adopts the decision of the U.S. District Court for the District of Connecticut, 526 F. Supp. 2d 319 (D. Conn. 2007).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves questions relating to the Fifth Amendment’s Grand Jury Guarantee clause. U.S. Const. amend. V. This case also presents issues pertaining to the current application of the rule announced in New York Central & Hudson R.R. v. United States which permits Congress to apply agency principles in holding corporations criminally liable for the actions of their agents. 212 U.S. 481, 494 (1909) (hereinafter NYCHRR).

STATEMENT OF THE CASE

I. FACTUAL HISTORY

Petitioner, Ionia, is a Liberian corporation, headquartered in Greece, that owns the M/T Kriton, a shipping vessel. The M/T Kriton is fully equipped with oily water separators and various other oil pollution prevention equipment. United States v. Ionia Management, S.A., 526 F. Supp. 2d. 319, 325 (D. Conn. 2007).

At the time that the events giving rise to these charges occurred, Ionia had in place a rigid compliance policy aimed at preventing the improper discharge of oily waste and bilge water. Id.

at 322. Employees of Ionia, and, specifically, the M/T Kriton crew, were extensively trained on this policy and promised Ionia that they would each abide by it. Id. Despite their wide training on this policy and their promises to abide by it, certain crewmembers of the M/T Kriton hooked up a bypass hose while out to sea. Id. at 325. This hose allowed these crewmembers to circumvent use of the oil pollution prevention equipment and pump the oily waste directly into the ocean. Id. To cover up the fact that they had done this from Ionia and other authorities, the Chief Engineer then entered false entries into their record books, indicating that the oil pollution prevention equipment was functioning properly and being utilized by the crew. Id. at 325-36. These record books were provided to the United States Coast Guard when the M/T Kriton docked in New Haven Harbor. Id. at 326.

Ionia's strict compliance program was required as a condition of probation that was granted to Ionia in 2004 for a violation of 18 U.S.C. § 1001. Id. at 327. The terms of the probation required, among other things, that Ionia permit an outside auditing firm to regularly inspect Ionia vessels, designate a corporate compliance manager, internally review corporate safety measures, develop internal training programs and comply with maritime laws. Id.

During its charge to the jury, the district court provided both general and specific instructions relating to the issue of vicarious corporate criminal liability (See infra note 1). The instructions specific to agency principles for liability were founded on the standards set forth in NYCHRR, 212 U.S. 481 (1909).

II. PROCEDURAL HISTORY

At the conclusion of the jury trial in the United States District Court for the District of Connecticut, Defendant was found guilty on thirteen counts of the Act to Prevent Pollution from Ships (A.P.P.S.) under 33 U.S.C. § 1908(a); three counts of falsifying records under 18 U.S.C. § 1519; one count of obstructing justice under 18 U.S.C. § 1505 and one count of conspiring to

commit the offenses under 18 U.S.C. § 371. Ionia, 526 F. Supp. 2d at 321. Ionia subsequently appealed its conviction to the United States Court of Appeals for the Second Circuit, alleging that the jury instructions improperly instructed the jury on the standards they could use to find Ionia vicariously criminally liable for the actions of inferior crewmembers on board the M/T Kriton and that the standards do not comport with general principles of criminal law. On appeal, the Second Circuit adopted *in toto* the decision of the lower court. Petitioner then appealed the decision of the Second Circuit to this Court, and certiorari was granted.

SUMMARY OF ARGUMENT

The Court of Appeals for the Second Circuit incorrectly affirmed the decision of the District Court for the District of Connecticut. The court improperly concluded that the jury was not instructed using the wrong agency principles for vicarious criminal corporate liability, or that the instructions constructively amended the indictment against petitioner **(Point I.)**. The court also erred in approving the district court's use of the standard of agency defined in NYCHRR because it does not conform to general principles of criminal law **(Point II.)**

The district court committed a plain error because it instructed the jury using principles of agency that were not consistent with the imposition of punitive damages on a corporation. First, the standards of *respondeat superior* espoused in NYCHRR are limited to statutes, like the Elkins Act, where Congress has expressly instructed that such principles should be applied **(Point I.A.1)**. In the absence of express instruction from Congress, the district court should have formed its instructions using recent decisions of this Court that dictate when a corporation can be held punitively liable for the actions of its agents **(Point I.A.2)**. The district court's instruction that the jury may consider the corporation's efforts to prevent unlawful acts in determining the

employee's "intent to benefit" or "authority" does not adequately emphasize the corporation's actions **(Point I.A.3)**.

The district court's jury instruction also constructively amended the indictment with regard to the A.P.P.S. charges against petitioner **(Point I.B)**. The prosecutor had the opportunity to add specific authorization as an alternate theory of liability in the indictment, but for whatever reason he did not **(Point I.B.1)**. It was plain error to allow this instruction with regard to the A.P.P.S. charges because it potentially removed from the jury's consideration whether the employee intended to benefit the corporation with his actions **(Point I.B.2)**. Because the specific authorization instruction was a constructive amendment and plain error, the jury's verdict on the A.P.P.S. charges should be vacated **(Point I.B.3)**.

Finally, this Court should revisit its holding under NYCHRR **(Point II.B)**. The district court's jury instructions were based on the NYCHRR standard, which are inconsistent with the general principles of criminal law. **(Point II.A)**. Not only were they inconsistent with the end goals of criminal law, the jury instructions made it easier to hold a corporation liable for punitive damages under criminal law than under civil laws. **(Point II.A.1-2)**. Because the goals of criminal law are undermined by this standard **(Point II.B.1)**, this Court should revisit its holding and implement a standard of liability similar to that found under Title VII cases **(Point II.B.2)**.

ARGUMENT

I. THE DISTRICT COURT COMMITTED PLAIN ERROR BY INSTRUCTING THE JURY ON THE WRONG AGENCY PRINCIPLES FOR VICARIOUS CRIMINAL CORPORATE LIABILITY AND BY CONSTRUCTIVELY AMENDING THE INDICTMENT.

Although petitioner did not object to the jury instructions during trial, this Court can review the lower court's actions if they constitute plain error under Fed. R. Crim. P. 52(b). "Before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.'" Johnson v. United States, 520 U.S. 461, 466-67 (1997). If all three conditions are met, a reviewing court may exercise its discretion to notice a forfeited error, but only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Johnson, 520 U.S. at 467. Petitioner respectfully urges that the district court committed plain error in its instructions in two distinct ways. First, the district court instructed the jury on the wrong agency principles for vicarious criminal corporate liability. Second, the instructions created a constructive amendment because they included a theory of liability not charged in the indictment with regard to the A.P.P.S. charges.¹

¹ The relevant part of the district court's instructions are as follows:

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.

...

[to convict Ionia of violating the Act to Prevent Pollution from Ships, 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 its agents, knowingly, meaning intentionally or voluntarily, failed to fully and accurately maintain an Oil Record Book in which the required disposal and discharge operations were recorded.

...

A. The jury instructions on vicarious corporate criminal liability did not provide the appropriate standard for imposing punitive damages on Ionia.

This Court has never considered how vicarious corporate criminal liability should be applied when a statute does not include express instructions on the application of agency principles. For nearly a century, lower courts have incorrectly assumed that the standard espoused in NYCHRR should control in the absence of legislative instruction regarding the application of agency principles to corporations in criminal statutes. Recent decisions by this Court in cases analogous to the instant matter reject the NYCHRR formulation with regard to the imposition of punitive damages on corporations through agency principles.

This Court has defined punitive damages as quasi-criminal because they “operate as

The second element that the Government must prove beyond a reasonable doubt is that Ionia, through its agents, was in charge of operating the oil pollution prevention and discharge equipment for the M/T Kriton. You have been instructed that Ionia, as a corporate entity, is legally responsible for the acts or omissions of its agents or employees under certain circumstances. You must find that the Government has proven beyond a reasonable doubt that acts attributable to Ionia were acts or omissions of its agents performed "within the scope of their employment" with Ionia as I will now define that term.

An act or omission that was specifically authorized by the corporation would be within the scope of the agent's employment. Even if the act or omission was not specifically authorized, it may still be within the scope of an agent's employment if (1) the agent acted for the benefit of the corporation and (2) the agent was acting within his authority. It is not necessary that the Government prove that the corporation was actually benefitted, only that the agent intended it would be.

If you find that the agent was acting within the scope of his employment, the fact that the agent's act was illegal, contrary to his employer's instructions, or against the corporation's policies will not necessarily relieve the corporation of responsibility for the agent's act. You may consider whether the agent disobeyed instructions or violated company policy in determining whether the agent intended to benefit the corporation, and/or was acting within his authority.

In determining whether an agent was acting for the benefit of the corporation, you are instructed that the Government need not prove that the agent was only concerned with benefitting the corporation. It is sufficient if one of the agent's purposes was to benefit the corporation.

Ionia Management S.A. v. United States, 526 F. Supp. 2d 319, 324-325 (D. Conn. 2007).

‘private fines’ intended to punish the defendant and to deter future wrongdoing.” Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432 (2001). It has recognized two standards to determine when a corporation may be held vicariously liable - and forced to pay punitive damages - for the actions of its agents. The more lenient agency standard, which was based on explicit language in the Elkins Act, appeared in NYCHRR.²

This Court clarified the second agency standard in Lake Shore & Michigan Southern R.R. Co v. Prentice. 147 U.S. 101 (1887) (relying on The Amiable Nancy, 16 U.S. 546 (1818)). In that case, this Court received no explicit instruction on the application of agency principles to a corporation that is held punitively liable for the acts of its employees. This Court wrote that, “[a] principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for . . . punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent.” 147 U.S. at 107.

The district court should have provided jury instructions consistent with Lake Shore and this Court’s more recent rulings on the imposition of punitive damages on corporations. It was plain error for the district court to instruct the jury with NYCHRR agency principles.

1. Principles of *respondeat superior* as applied in NYCHRR were specific to the Elkins Act, and are therefore inapplicable in this matter.

In NYCHRR, this Court ratified Congress’ constitutional authority to apply principles of *respondeat superior* to corporations in criminal law. Section 1 of the Elkins Act states,

[i]n 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 of the person.

Elkins Act, 32 Stat. 847 (1903) (as cited in NYCHRR, 212 U.S. at 491).

² Discussed more fully infra at **Point I.A.1**.

After deeming Congress' instruction on agency principles constitutional, the Court proceeded to clarify the specific standard by which "scope of employment" should be determined to comply with this legislative mandate:

Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him . . . may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

NYCHRR, 212 U.S. at 494.

While instructive on how to apply agency principles under the Elkins Act, this standard was intended as a clarification of *only* those agency principles. Although Congress may instruct courts to apply *respondeat superior*, it did not in the statutes that Ionia has been charged under. Nowhere do they indicate that "scope of employment" alone should determine Ionia's liability.³

In the absence of Congress' explicit instructions on the application of agency principles, courts should look to analogous precedents to assist in providing the appropriate agency standard to the jury.⁴ The relevant statutes impose punitive damages upon a corporation for the unlawful acts of its agents, so cases involving punitive damages should be followed.

2. Recent decisions by this Court regarding the imposition of punitive damages upon corporations have used similar requirements as in Lake Shore.

Although this Court has not yet decided what agency principles should define corporate liability in the criminal context in the absence of explicit instructions, it has mandated agency principles analogous to Lake Shore in the civil context. Even the Second Circuit has recognized that, civilly, a corporation must be involved in or ratify an agent's act to be punitively liable.

³ The district court instructed the jury it must find "that acts attributable to Ionia were acts or omissions of its agents performed 'within the scope of their employment.'" *See supra* note 1.

⁴ Although the Lake Shore and Title VII cases are civil in nature, it is evident from this Court's decision in NYCHRR that civil liability principles guided their decision as well.

Fort v. White, 530 F.2d 1113, 1116 (2d Cir. 1976). Allowing prosecutors to obtain punitive damages against a corporation where plaintiffs in a civil suit cannot is surely an odd result.⁵

Most notably, this Court has continuously rejected the application of *respondeat superior* for punitive damages in Title VII cases. In the companion cases of Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998), this Court refused to fully apply *respondeat superior*.⁶ Instead, vicarious liability was limited to the acts of supervisors, and corporations were given an affirmative defense if they had enacted reasonable policies to deter violations.

In Kolstad v. American Dental Association, 527 U.S. 526 (1999), this Court reiterated its deviation from strict application of *respondeat superior* when imposing punitive damages on a corporation. The Court wrote,

Holding employers liable for punitive damages when they engage in good faith efforts to comply . . . is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages -- that it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously."

Id. at 544.

Criminally, corporations are predominantly punished by the imposition of punitive damages. To use the NYCHRR standard in all corporate makes it easier for prosecutors to obtain punitive damages against a corporation than plaintiffs in a civil case. This inconsistent result illustrates that the district court was misguided when it applied agency principles founded

⁵ The 2nd Circuit distinguished Fort in a corporate criminal vicarious liability case, but its reasoning was a conclusory statement rather than instructive. J.C.B. Super Mkts. v. U.S., 530 F.2d 1119, 1122 (2d Cir. 1976) ("JCB had been authorized to participate in the Food Stamp Program which has the laudable aim of raising the nutritional levels of low income families. The abuse of that program by employees authorized to act by JCB suffices to inculcate the corporation.").

⁶ These cases are discussed more fully at **Point II.B.3.**

in Congress' instructions under the Elkins Act rather than longstanding principles that require corporate involvement in or ratification of its agents' wrongful acts.

3. The district court's instruction to the jury that it may consider Ionia's compliance program in determining "intent to benefit" and "authority" was not enough to overcome the error of using the wrong agency principles.

Lake Shore, its progeny, and subsequent Title VII cases allow a jury to exonerate a corporation from punitive liability if they find that the corporation did what was reasonably necessary to prevent its agents from committing the wrongful act. See, e.g., Burlington, 524 U.S. at 765; Faragher, 524 U.S. at 807. This does not bear upon under what circumstance an employee was "authorized" to act, but rather how corporations have tried to ensure that employees take the right action. Instructions on whether a corporation's actions limited the defendant's authority emphasizes the employee's action rather than the corporation's attempt to prevent it.⁷ The jury is told to balance preventative action with the employee's "intent to benefit," which focuses on the intent of the employee rather than the intent and actions of the corporation. Using the NYCHRR standard forces a corporation to defend its employee's actions, instead of its own, if it has any hope of avoiding liability.

In the absence of Congress' explicit instruction on how to impose punitive damages upon a corporation through vicarious criminal liability, the district court committed plain error by instructing the jury to follow *respondeat superior* rather than the agency principles relating to punitive damages in general, as set forth by this Court in Lake Shore and its progeny, and ratified most recently in the context of Title VII cases.

⁷ Authority is a broad term in the district court's jury instruction. It is best understood as any circumstance under which the employee has permission from the corporation to act. The action itself is not controlling, because the act can be illegal or against corporate policy and still be authorized within the district court's definition.

B. The district court constructively amended the indictment by instructing on specific authorization, where the indictment only charged implied authorization.

Petitioner respectfully submits that its Fifth Amendment Grand Jury Guarantee⁸ was violated because the indictment it was charged under only alleged a theory of implied authority with regard to the A.P.P.S. violation. The judge's instruction allowed for a conviction under A.P.P.S. through application of a specific authorization theory.⁹ "After an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." Stirone v. United States, 361 U.S. 212, 215-16 (1960) (citing Ex Parte Bain, 121 U.S. 1 [1887], for the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form).

1. The specific authorization instruction amended the indictment because it added a theory of criminal liability that was not charged by the grand jury.

If a court, through its instructions and the facts it permits in evidence, allows proof of an essential element of a crime on an alternative basis permitted by the statute but not charged in the indictment, *per se* reversal is required. Stirone, 361 U.S. 212, 215-19 (1960). Vicarious criminal liability is undoubtedly an essential element of all of the charges in the indictment, because the corporation cannot be held liable without the application of agency principles.

The only language in the indictments that gave petitioner notice of a specific authorization theory of liability was contained in a conspiracy count under the Connecticut

⁸ The Grand Jury Clause reads: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V.

⁹ The judge's instruction on specific agency was, "You must find that the Government has proven beyond a reasonable doubt that acts attributable to Ionia were acts or omissions of its agents performed "within the scope of their employment" with Ionia as I will now define that term. An act or omission that was specifically authorized by the corporation would be within the scope of the agent's employment." See supra note 1.

indictment.¹⁰ Petitioner respectfully submits that theories of liability under each offense should be treated separately. Agency principles that create a theory of liability under a conspiracy charge should not be applied to the A.P.P.S. charge. Prosecutors could have pursued that theory under the A.P.P.S. charge to the grand jury, and for whatever reason chose not to include it in the indictment. The district court should not be permitted to amend the indictment after trial through its instructions when the prosecution could not do so before the grand jury.

The Second Circuit addressed the addition of alternative theories of liability in United States v. Milstein, 401 F.3d 53 (2nd Cir. 2005). It concluded that the prosecution could have pursued twenty-one different theories of liability, but only included one. Because the evidence and jury instructions permitted a second theory to be considered by the jurors, a constructive amendment had occurred. Milstein, 401 F.3d at 65.

2. Although petitioner did not object to the instruction at trial, it was plain error that substantially affected the fairness of the trial.

Petitioner urges that it was deprived of its constitutional guarantee that a grand jury would determine the correct theories of liability. Since the prosecution had an opportunity to include this theory in the A.P.P.S. charge, but did not, to allow its inclusion in the jury instructions is nothing less than plain error. Not only did the constructive amendment surprise petitioner with essentially a new charge just prior to jury deliberations, but it also rendered the appropriate instruction on implied authorization nugatory.

3. Ionia's conviction under A.P.P.S. should be vacated because the district court's jury instruction amounted to a constructive amendment.

Because it was plain error to allow an alternative theory of liability under the A.P.P.S.

¹⁰ The relevant language read: “senior engineers in the engine department of the *Kriton* . . . routinely directed subordinate engine department crew members to pump [oily wastes] directly overboard . . . through a flexible, black rubber hose”

charges, petitioner requests that this Court vacate its conviction under A.P.P.S. because “the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment.” See, e.g., United States v. Salmonese, 352 F.3d 608, 620 (2nd Cir. 2005).

II. THIS COURT SHOULD REVISIT AND CLARIFY ITS HOLDING UNDER NYCHRR BECAUSE THE CURRENT INSTRUCTIONS ON CORPORATE CRIMINAL LIABILITY ARE INCONSISTENT WITH GENERAL PRINCIPLES OF CRIMINAL LAW.

A. The jury instructions given by the district court were inconsistent with general principles of criminal law.

The jury instructions in this case were inconsistent with the general principles of criminal law. They used tort law conceptualizations of *respondeat superior* and vicarious liability to impute intent to the corporation from any employee. The instructions permitted the jury to find Ionia criminally liable, where a civil jury could not have awarded punitive damages. Petitioner respectfully urges that this result is inconsistent with general principles of criminal law.

1. Criminal law and tort law have differing goals.

Criminal law and tort law seek different primary objectives. Tort law seeks to make a plaintiff whole following an injury. Tort damages, therefore, are meant to compensate harmed plaintiffs or to prevent future harms from occurring. Gerald E. Lynch, Crime and Custom in Corporate Society: The Role of Criminal Law in Policing Corporate Misconduct, 60 Law & Contemp. Prob. 23 (1997). In contrast, criminal law seeks to punish willful violators and deter future misconduct. Criminal sanctions, therefore, are meant to punish wrongful conduct and deter future violations of social norms. Id. In light of these divergent goals, different standards and rules have developed within criminal and civil law. Under our criminal justice system, it is expected that criminal law will be narrower and better defined than civil law. Lynch, supra.

Criminal law operates on the basic presumption that individuals are capable of free choice and can choose whether to break the law. Charles J. Walsh & Alissa Pyrich, Corporate Compliance Programs as a Defense to Criminal Liability: Can A Corporation Save Its Soul, 47 Rutgers L. Rev. 605 (1995). Criminal law developed as a way to punish the “vicious will” of those who actively chose to do wrong when given the choice. Id. Intent to commit a wrong must be found prior to the imposition of criminal liability. Tort law has no such requirement.

2. The jury instructions allowed Ionia to be found criminally liable when punitive damages would not have been allowed under civil law principles.

Tort law comes closest to criminal law in the area of punitive damages. This Court has determined that punitive damages are quasi-criminal in nature, because punitive damages, like criminal law, are aimed at punishing past wrongful conduct and deterring future such conduct. Cooper Industries, Inc., 532 U.S. at 432. The current standard under which conduct of an employee may be imputed to the corporation in determining punitive liability is *lower* in the criminal law context than in the civil law context.

Under civil law, punitive or exemplary damages are reserved for cases where the defendant’s conduct was egregious, often because of their mental state at the time they acted. See Kolstad, 527 U.S. at 538. In Kolstad, this Court was concerned with the proper standard for imputing liability from the acts of an employee to the employer under Title VII. This Court specifically rejected the imposition of punitive damages in cases where an employer had undertaken a good faith effort at compliance. Id. at 544. Citing Restatement (Second) of Torts, this Court decided that “it is ‘improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.’” Id. This Court has further noted that punitive damages should be reserved for cases where an employer “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.” Hazen

Paper Co. v. Biggins, 507 U.S. 604, 607 (1993). Recently, in Exxon Shipping Co. v. Baker, this Court reiterated the prevailing rule in American jurisprudence. 2008 U.S. LEXIS 5263 (2008). This rule limits the application of punitive damages to cases where a defendant's conduct was "outrageous, ... owing to gross negligence, willful, wanton, and reckless indifference for the rights of others, or behavior even more deplorable." Id. at 38-39 (citing Day v. Woodworth, 54 U.S. 363 (1852)).

Thus, civilly, liability for punitive damages is reserved for cases where the employer had actual knowledge that an employee was engaged in wrongful conduct, where the employer exhibited reckless disregard for whether its employees were acting inappropriately, or otherwise engaged in outrageous or deplorable behavior. Currently, the standard for imposing criminal liability on a corporation for acts of its employees is far lower. Criminal liability can be imputed to a corporation from any employee even where the corporation has implemented compliance programs and is unaware of the wrongful conduct of that employee. This stands contrary to one of the bedrock principles of our criminal law system, that an individual not be held criminally liable for something that he did not choose to do.

B. This court should revisit its holding in NYCHRR.

Corporate criminal liability, with its unjust and arbitrary application of agency principles borrowed from tort law, has developed far beyond the scope of this Court's holding in NYCHRR. The current application of corporate criminal liability does little to achieve the deterrent goals of criminal law. Corporations are essentially strictly liable for actions of any low-level employee, irrespective of any corporate compliance program in existence. The very low bar that prosecutors have to reach to hold corporations criminally liable for acts of their employees strips corporations of their ability to defend themselves, in violation of due process.

Petitioner respectfully urges this Court to revisit its holding in NYCHRR and limit the scope of corporate criminal liability in a way that prevents the unfair, unjust, and arbitrary application of criminal sanctions against corporations for actions of employees that are out of their control. It is urged that this Court adopt an approach similar to that used in Title VII cases. Burlington, 524 U.S. 742; Faragher, 524 U.S. 775. This approach allows corporations an affirmative defense of demonstrating a comprehensive compliance program or corporate policy.

1. The primary goal of criminal law is deterrence and the current application of corporate criminal liability undermines this and other goals of criminal law.

Above all else, criminal law seeks to punish wrongful conduct and deter similar future conduct. Criminal law is the vehicle used to “deter those who victimize society through egregious and dangerous acts.” Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Responsibility, 75 Minn. L. Rev. 1095, 1096 (1991). With this goal in mind, criminal liability generally requires proof of the requisite *mens rea* before it can attach; criminal law has traditionally been reserved for intentional violations of the law. Id. at 1097. Generally speaking, absent proof of an “evil mind” or other sort of egregious behavior, no criminal liability should attach for an individual’s actions.

As currently applied, corporate criminal liability does little to achieve deterrence. Where *mens rea* is not required for criminal liability to attach, there is no way to delineate between acting right or wrong. Simply put, there can be little to no deterrent effect in instances where a corporation doesn’t know when an indictment may be filed against it, which is the exact situation that we find ourselves in today. See Id.

By blurring the lines between criminal and civil law, the impact of a criminal conviction is weakened and the power of criminal law is diminished. Id. at 1099-1100. Criminal law, through deterrence, seeks to achieve voluntary compliance with the law. However, to the extent

that laws are viewed as unjustly or arbitrarily enforced, voluntary compliance with the laws will ebb. Id. One prominent legal scholar noted the following:

The moral message of criminal conviction is that the defendant did something deeply wrong. This message is crucially compromised if the law permits the conviction of persons whose conduct was not deeply wrong, because they could not really have avoided the harmful result due to [...] lack of control over the circumstances.

Lynch, supra. If the law is to work in an efficient manner to deter violations, *punishment must be reserved for voluntary violations of the law*. Bucy, Corporate Ethos, supra at 1110.

Further, the current application of corporate criminal liability acts to undermine the goals of criminal law because it “allows the costs of wrongdoing to be passed on to persons who have not committed the wrongful acts, and who generally are not in positions to prevent others from committing them.” Walsh & Pyrich, supra at 643. Essentially, the costs of criminal penalties and defending against criminal prosecutions are passed onto stockholders, employees and consumers. Id. Ironically, in some instances, the corporate entity itself may actually escape suffering any tangible punishment by passing through all of its costs. Id.

- i. Under the current application of corporate criminal liability, the standard used to judge corporate liability is akin to strict liability.

The current standard for corporate criminal liability permits a corporation to be held liable for the actions of one rogue employee, even where the corporation adopts a comprehensive compliance program and takes all requisite steps to ensure that its employees obey its policies. Currently, a corporation can be held liable for the actions of *seemingly any low-level employee*, where that individual commits a crime that is in any way related to his employment. Bucy, Corporate Ethos, supra at 1102-03. This remains so even where the corporation has taken every possible step to prevent that rogue employee from violating a criminal statute while in the course of employment. Id. Thus, a corporation is helpless once it has been found that an employee

committed a wrongful act during the course of employment; the corporation is automatically criminally liable for that action.

By failing to consider corporate intent as an element of proving corporate criminal liability, the courts have transformed corporate criminal liability into something akin to strict liability. The *respondeat superior* standard used allows corporate criminal liability to focus solely on the individual employee's intent and automatically imputes that intent back to the corporation, regardless of the corporation's efforts to thwart such conduct. *Id.* at 1104. "Under this approach all corporations, honest or dishonest, good or bad, are convicted if the government can prove that even one maverick employee committed criminal conduct." *Id.* As a result, corporations are essentially subjected to absolute liability, absent any proof of corporate intent. Walsh & Pyrich, *supra* at 642.

- ii. Under the current application of corporate criminal liability, corporate defendants are denied the opportunity to defend themselves once indicted for a crime.

The current standard of corporate criminal liability puts prosecutors in a very powerful position. Once a corporation is indicted, the prosecution has pointed the "proverbial gun to [the] head" of the corporate entity. Preet Bharara, Corporations Cry Uncle And Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants, 44 Am. Crim. L. Rev. 53 (2007). Corporations, desperate to avoid the potentially "life ending" collateral consequences of a criminal conviction for an act committed by virtually any employee, are left with little choice other than to cave to the prosecutor's demands and work out a plea.

Potential collateral consequences facing a corporate defendant, if convicted, are numerous and substantial. This list includes the suspension or termination of eligibility to participate in certain governmental programs, such as bidding for defense projects, 48 C.F.R.

9.400-.409 (1991), or providing medical services through Medicare or Medicaid, 42 C.F.R. 1001.1-.953 (1991); termination of insurance, 12 U.S.C. 1818; and substantial adverse publicity or the denial of applications for expansions. See Pamela Bucy, Organizational Sentencing Guidelines: The Cart Before The Horse, 71 Wash. U. L. Q. 329, 352 (1993). Each of these potential consequences could sound the death knell for a corporation, notwithstanding that corporation's rigidly enforced compliance program.

The extremely low burden on the prosecution in proving the guilt of a corporation means that a conviction is exceedingly likely once an indictment has been filed. Prosecutors have long realized the extremely powerful position this places them in. Indeed, recent Department of Justice Guidelines that established when a corporation will be criminally liable for the acts of its employees considered the "degree of 'cooperation' extended by the corporation to the investigators, to be measured in part by a willingness to waive the attorney-client and work product privileges." Dick Thornburgh, Symposium: The Dangers Of Over-Criminalization And The Need For Real Reform: The Dilemma Of Artificial Entities And Artificial Crimes, 44 Am. Crim. L. Rev. 1279 (2007).

With the current low standard for establishing corporate criminal liability, the balance of power is heavily tilted towards prosecutors, who have occasionally abused that power.¹¹ The standard has essentially made corporations guilty once indicted, which is not something that our

¹¹ A recent case in the Southern District of New York drew attention to this critical problem facing our criminal justice system. In United States v. Stein (Stein I), 435 F. Supp. 2d 330 (S.D.N.Y. 2006) and United States v. Stein (Stein II), 440 F. Supp. 2d 315 (S.D.N.Y. 2006), Judge Kaplan found that the prosecutors had coerced accounting company KPMG into interfering with its employees' 6th Amendment and 5th Amendment rights. By threatening to prosecute, the government was essentially holding a gun to the head of KPMG, and was accordingly able to coerce KPMG into doing whatever was asked of it. For discussion of this case, see Preet Bharara, *Corporations Cry Uncle And Their Employees Cry Foul: Rethinking Prosecutorial Pressure On Corporate Defendants*, 44 Am. Crim. L. Rev. 53, 54 (2007).

criminal justice system can stand.

2. This Court should adopt an approach similar to that adopted in Burlington Industries and Faragher for Title VII cases.

Petitioner respectfully suggests that a more appropriate standard to be used to determine corporate criminal liability would be akin to the standard developed by this Court in Burlington, 524 U.S. 742, and Faragher, 524 U.S. 775, in Title VII cases. The test developed in these cases allows for an affirmative defense where a corporation can prove, by a preponderance of the evidence, that it exercised reasonable care to prevent harassing behavior and took steps to correct such behavior when it occurred. See Burlington at 765; Faragher at 807. Proof of an active corporate policy against the offensive conduct can thus be used as an affirmative defense to allow a corporation “off the hook,” where it would otherwise have been held civilly liable.

Support for such an affirmative defense to corporate criminal liability is abundant in legal scholarship. See e.g., Bucy, Corporate Ethos, supra; Ellen S. Podger, A New Corporate World Mandates a “Good Faith” Affirmative Defense, 44 Am. Crim. L. Rev. 1537 (2007); Walsh & Pyrich, supra; Brent Fisse, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions, 56 S. Cal. L. Rev. 1141 (1983). Legal scholars have noted the many benefits of permitting corporate defendants an affirmative defense to absolve them of criminal liability for the acts of a rogue employee. An affirmative defense protects corporate entities that are innocent of any wrongdoing from criminal sanctions. Podger, supra at 1543. An affirmative defense removes penal sanctions against corporations where the corporation has committed no wrongdoing. Walsh & Pyrich, supra at 677. It would also encourage corporations to police their employees, as they are in the best position to do so. Id. at 678. Perhaps most importantly, an affirmative defense would encourage corporations to develop rigorous and efficient compliance programs and achieve the deterrent effect, which is the main goal of criminal law. See generally

Bucy, supra.

Petitioner respectfully urges that allowing such an affirmative defense is necessary to reconcile corporate criminal liability with general criminal law principles. The criminal law does not penalize an individual where he has committed no wrongful act; likewise, a corporation should not be criminally liable where it has chosen to act lawfully and implements an effective compliance policy in furtherance of this decision. Walsh & Pyrich, supra at 677. The criminal law is also concerned with rehabilitation. Id. at 680. Allowing corporations an affirmative defense encourages corporations to act as responsible citizens and remedy internal problems that may cultivate criminal behavior. Id.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court

- a) Vacate petitioner's conviction under the A.P.P.S. charges because the district court committed a plain error in its jury instructions; and
- b) Declare the application of New York Central & Hudson R.R. to corporations charged with statutes that lack explicit legislative instruction relating to agency principles unconstitutional and against general principles of criminal liability.