

No. 08-1234

In The

Supreme Court of the United States

October Term 2008

IONIA MANAGEMENT, S.A.,

Petitioner

v.

UNITED STATES,

Respondent

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

Brief for Petitioner

Team 11
Counsel for Petitioner

QUESTIONS PRESENTED

- 1. Was the district court's instruction on corporate criminal liability consistent with Supreme Court precedent and federal statutory law when it prevented the jury from effectively evaluating the principles of agency and vicarious liability?**
- 2. Is the imposition of corporate criminal liability consistent with general principles of criminal law when it does not further the tenets of criminal punishment and renders the notion of moral blameworthiness irrelevant?**

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of Title 1 of the United States Code provides, in relevant part:

* * *

the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

STATEMENT OF THE CASE

The petitioner in this case, Ionia Management S.A., is a ship management company headquartered in Piraeus, Greece. *U.S. v. Ionia Mgmt., S.A.*, 526 F. Supp. 2d 319, 321 (D. Conn. 2007). Ionia manages, but does not own, various maritime vessels, including the M/T Kriton (“Kriton”), which sails under the flag of the Bahamas. During the course of its management of the Kriton, Ionia maintained a strict policy as to the proper methods for the discharge of bilge water and oil waste from the ship to promote compliance with federal environmental laws. Ionia instructed all of its employees to comply with this policy. *Id.* at 322. However, several crewmembers aboard the Kriton secretly and wrongfully disconnected the hose which was designed to properly dispose of the waste and installed a hose that dumped the waste water directly into the sea. *Id.* at 325. The oil record books did not reflect this change, indicating that the crew was properly disposing of the waste. *Id.* at 325-26.

Ionia was subsequently prosecuted for (1) the violation of the Act to Prevent Pollution from Ships and associated regulations, (2) falsifying records in connection with a federal investigation in violation of 18 U.S.C. § 1519, (3) obstruction of justice in violation of 18 U.S.C. § 1505, and (4) conspiring to commit these offenses in violation of 18 U.S.C. § 371. *Id.* at 321. At trial, the district court instructed the jury in attributing criminal liability to Ionia using the following language:

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. at 324. Ionia was convicted on eighteen counts and sentenced to a fine of \$4.9 million, penalty assessments of \$7,200, and placed on probation for four years. After trial, Ionia moved for a judgment of acquittal and, in the alternative, for a new trial, but all post-judgment relief was denied. *Id.* at 321. On appeal, the Second Circuit affirmed and adopted the district court opinion. *Ionia Mgmt., S.A. v. U.S.*, 999 F.3d 999 (2d. Cir. 2008).

SUMMARY OF THE ARGUMENT

The district court's instruction on corporate criminal liability compelled the jury to apply broad *respondeat superior* principles in analyzing Ionia's liability, despite the fact that the statutes with which Ionia was charged are silent concerning how vicarious liability should be attributed. Because this Court has not addressed how courts should apply criminal vicarious liability to corporations in the absence of congressional guidance, this Court may consider how courts have analyzed vicarious liability in other, analogous circumstances.

This Court has extensively analyzed vicarious liability in the context of civil punitive damages. This analysis is applicable to criminal law because courts have indicated that punitive damages, like criminal liability, are intended to punish, rather than to redress a harm. For civil punitive damages, this Court has limited the broad common-law doctrine of *respondeat superior* and has held that only "managerial" employees may trigger vicarious liability for corporations. Additionally, a company may present evidence of efforts to prevent misconduct as a defense.

Similarly, this Court has imposed comparable limitations in Title VII sexual harassment cases, restricting liability to acts of supervisors. Again, courts have allowed evidence of a company's policies to deter offending conduct as an affirmative defense. In this case, the jury instruction was devoid of any meaningful analysis of the employee's authority, and it was completely silent as to corporations' policies against misconduct. This application of broad *respondeat superior* principles is at odds with the abovementioned analysis. This seems unjust, considering that the standards for liability this Court has applied in the civil context are narrower than the district court instruction on criminal liability. Because the jury instruction precluded the

jury from effectively evaluating Ionia's liability in light of this Court's analysis in analogous contexts, the conviction if Ionia was erroneous and should be reversed.

Additionally, even if this Court finds that the jury instructions were proper, it should consider the propriety of holding corporations criminally liable for acts of their employees in the context of general principles of criminal law. The justifications for punishing criminals are not promoted by corporate criminal liability. First, while deterring future misconduct is generally a persuasive reason to punish lawbreakers, prosecuting corporations who have already implemented compliance programs will not likely convince other companies to more closely monitor their employees. In fact, it sends the message that even diligent companies will not escape prosecution. Secondly, when corporations are convicted, innocent stockholders, employees, and consumers are wrongfully punished for the acts of individual employees. From a retributive perspective, the punishment of countless individuals who have not acted in a morally culpable manner is improper.

Furthermore, the imposition of corporate criminal liability runs afoul of the longstanding *mens rea* requirement. Society is loathe to punish those who did not intend to commit a criminal act. Because corporations are a legal fiction, they do not possess a brain with which to form criminal intent. However, some courts have been satisfied to attribute the *mens rea* of even the lowest and self-serving employees to the company in order to find corporations criminally liable. This is problematic, especially in cases such as this one, where the company made efforts to implement compliance methods to prevent wrongdoing. Corporations who have implemented compliance programs should not be stigmatized with a criminal conviction upon such an insubstantial showing of intent. Therefore, even if this Court finds the jury instructions

consistent with its own precedent and federal statutory law, it should still reverse the lower court's opinion because the current corporate criminal liability jurisprudence runs afoul of the objectives of criminal liability.

ARGUMENT

I. The district court’s instruction on corporate criminal liability was not authorized by this Court’s precedent or federal statutory law.

A. This Court has narrowly construed vicarious liability for employers in the context of civil punitive damages, and this analysis is applicable in assessing the district court’s instruction on corporate criminal liability.

In *New York Central & Hudson River Railroad*, this Court explicitly outlined and affirmed the constitutionality of the theory of corporate criminal liability. *New York Cent. Hudson River R.R. v. U.S.*, 212 U.S. 481, 493-96 (1909). At issue in *New York Central* was a federal statute that permitted corporations to be held criminally liable for acts committed by their employees. *Id.* at 491-92. The Court recognized that most common law commentary rejected the notion of corporate criminal liability. *Id.* at 495-96. However, it upheld Congress’s application of the broad civil principles of *respondeat superior* to the criminal context with little justification as to the propriety of such a significant departure from settled ideology. *Id.* (rejecting the “old and exploded doctrine” that corporations were incapable of committing crimes and holding that there was “no valid objection in law” to holding corporations criminally liable).

The Court explained the civil rule of *respondeat superior*, by which a corporation may be held responsible for the tortious conduct of its agents done within the scope their employment and for the benefit of the corporation. *Id.* at 493. It then upheld Congress’s transposition of these principles into the criminal context. *Id.* However, the Court made clear that liability may only be imposed where the agent is acting within his power of authority. *Id.* at 493-94. Though *New York Central* is often cited for the proposition that courts *must* apply broad *respondeat*

superior principles in corporate criminal liability cases, the actual holding was limited to upholding Congress's power to do so and imposed no requirement that vicarious liability be broadly analyzed in the criminal law context. *Id.* at 496.

Congress has, in general, determined that corporations are capable of committing crimes. *See* 1 U.S.C. § 1 (2006) (indicating that “persons” may include corporations). However, it generally has not specified how criminal liability is to be attributed to corporations. In this case, Ionia was charged with the violation of several federal statutes. *See* 33 U.S.C. § 1908(a) (2006); 18 U.S.C. § 1519 (2006); 18 U.S.C. § 1505 (2006); 18 U.S.C. § 371 (2006). None of the statutes at issue give any guidance to courts analyzing vicarious liability. The district court's instructions, however, apply broad *respondeat superior* principles, stating that, for a corporation to be found criminally liable for the actions of its agent, the agent must be acting (1) on behalf of the corporation, (2) for the benefit of the company, and (3) within the scope of his employment. *Ionia Mgmt.*, 526 F. Supp. 2d at 324. The instructions also indicate that the jury could find Ionia responsible for “the acts and omissions of its agents and employees under certain circumstances,” which are further explained as meaning those circumstances where the agent is acting “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.* at 324-25. This broad application of *respondeat superior* principles was certainly not mandated by Congress in the statutes at issue, and in the absence of Congressional guidance, this Court must look to its own precedent in analyzing the district court's instructions on corporate criminal liability.

One area in which this Court has thoroughly examined vicarious liability is in the context of civil punitive damages. This analysis is analogous to corporate criminal liability because this

Court has indicated that punitive damages are “quasi-criminal” in nature, in that they serve the purposes of retribution and deterrence, just as the criminal law does. *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); see *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997) (indicating that the primary purposes of the criminal law system are deterrence and retribution). Punitive damages, like criminal punishment, are not meant to compensate a loss or redress a harm, but to inflict punishment on wrongdoers to send the message that misconduct will not be tolerated, just as the criminal law does. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Considering that Congress has not instructed courts how to attribute vicarious liability to employers in this situation, this Court should punitive damages principles in determining whether the district court’s instructions were sufficient to enable the jury to assess Ionia’s liability.

In the context of punitive damages, this Court has expressly rejected the notion that every employee of a company acts as the company’s agent. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 527-28 (1999). In *Kolstad* the Court made clear that, for a company to be held vicariously liable for the actions of its employees the employee must serve in a “managerial” capacity. *Id.* at 544. The analysis made much of the common-law limitations upon the law of agency for punitive damages. *Id.* The Court also emphasized that holding employers liable for punitive damages based upon broad *respondeat superior* principles, like those delineated in *New York Central*, would “reduce the incentive for employers to implement” remedial methods to prevent similar acts. *Id.* It also held that even managerial agents may not trigger vicarious liability where employers had implemented policies to prevent the misconduct, reasoning, again, that to do otherwise would improperly penalize employers who had taken efforts to prevent misconduct. *Id.*

This Court most recently addressed the issue of punitive damages in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). In that case, the Supreme Court was asked to decide the issue of whether a shipmaster's actions could make the corporation employing said shipmaster liable for punitive damages based on the shipmaster's actions aboard the boat. *Id.* at 2611. In considering its decision, the Supreme Court cited ones of its earliest decisions regarding responsibility for the actions of individuals aboard ships, *The Amiable Nancy*. *Id.* at 2615 (citing *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818)). In that 1818 decision, the Court recognized the fact that ship owners could not indemnify themselves against the actions taken by individuals who, even though hired by the ship owners, were unsupervised while at sea. *The Amiable Nancy*, 16 U.S. (3 Wheat.) at 558-559. The Court, in 1818, was concerned with holding innocent parties liable for the criminal acts of others while aboard ships. *Id.* This, in effect, is the same concern held by the four Justices in *Exxon* who did not favor holding the parent company liable for the actions of the ship owners.

In *Exxon*, the Court did not reach a unanimous decision. *Exxon*, 128 S. Ct. at 2616. The majority noted that the principles of vicarious liability on land had developed such that a train conductor could make the railroad liable for his actions. *Id.* However, they noted Exxon's claim that vicarious liability in the maritime context has evolved differently. *Id.* The Court also looked to circuit decisions to see the trends there and noted that the circuits are split on the issue. *Id.* at 2615. Similarly, in the *Exxon* decision, the Justices were evenly split. Thus, in the absence of a majority, the Court affirmed the ninth circuit decision, holding the company liable for its employees' actions. *Id.* at 2616. However, the Court pointed out that there was no precedential value in its decision, because the Court was evenly split, and that it was affirming only because they did could not come to a unanimous decision. *Id.*

Such reasoning, as applied to this case, indicates that the jury instruction was improper in excluding analysis of the employee's authority. The criminal actors in this case were individuals who merely worked aboard the boat Ionia managed. *Ionia Mgmt.*, 526 F. Supp. 2d at 325-26. They played no role in the management of the boat, and they made no decisions on behalf of the company. *Id.* Furthermore, the evidence indicates that Ionia had a strict policy against the improper discharge of oily waste and bilge water and that each employee was trained and made to promise to abide by this policy. *Id.* However, the jury instruction contained no language indicating that the authority of the criminal employees was even relevant to the jury's consideration. *Id.* at 324-25. To impose criminal liability upon Ionia, when there is no evidence that any person with managerial authority even knew that waste was being improperly discharged, is to send the message that companies needn't bother implementing compliance programs. This reasoning defies logic and produces unjust results.

Furthermore, much like in *Exxon*, the criminals aboard the ship were acting against the express policies of Ionia and without any direction from company management. *Id.* However, Ionia's argument becomes even stronger than Exxon's because, if the actions of the few criminals aboard the boat are erroneously attributed to Ionia it will suffer the stigma of a criminal conviction. If the *Exxon* Court was split evenly on the issue when only punitive damages were at risk, the addition of a criminal stigma in this case should certainly be enough to tip the scales in favor of Ionia. Therefore, the district court instructions, which gave no mention to a "managerial" analysis or to a consideration of a company's efforts to prevent misconduct, were erroneous and resulted in the wrongful conviction of Ionia.

B. The district court’s instruction on corporate criminal liability did not conform to this Court’s precedent and other federal case law analyzing vicarious liability.

One other area in which the court has examined vicarious liability of employers for the actions of their employees is in the context of Title VII claims for violations of the Civil Rights Act of 1964. Courts have found that the primary purpose of Title VII was to deter offending behavior, not to redress injury or harm. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (noting that the “primary objective” of Title VII was “a prophylactic one”). Additionally, Title VII was meant to encourage employers to adopt and implement antidiscrimination practices. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 544 (1999). This analysis is applicable in this case, as the criminal law is also not meant to make a victim whole, but to deter criminal conduct and encourage citizens to avoid criminal behavior.

Within the realm of Title VII, the Supreme Court has limited the traditional principles of *respondeat superior* in two civil sexual harassment cases: *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The rule created by the Supreme Court governing the issue of vicarious liability was adopted in both cases. *Ellerth*, at 745; *Faragher*, at 807. Just as in the case of punitive damages, the Court rejected the traditional rule that all actions by employees within the scope of their employment will trigger vicarious liability. *Faragher*, at 807. Instead, the Court used the common law principles of agency as a way of restricting liability and providing an affirmative defense to Title VII claims. For such claims, the

Court limits liability to the actions of supervisors and allows courts to take into account a company's preventative policies. *Id.*

Additionally, the Second Circuit has recognized that the criminal acts of all employees may not be attributed to the corporation. Instead, a court must analyze the nature of the employment to determine whether the employee possessed decision-making power. *See U.S. v. Demauro*, 581 F.2d 50, 54 (2d. Cir. 1978) (protecting a grand jury's right to investigate what a supervisory employee knew because it could not be assumed that a lower level employee's actions could trigger criminal liability for the employer). The Second Circuit has expressly held that an employer may not be found criminally liable for an employee's behavior unless the employee had managerial authority such that his actions may be fairly attributed to the company. *U.S. v. Koppers*, 652 F.2d 290, 298 (2d Cir. 1981) (upholding a jury instruction delineating these parameters).

Here, the district court instruction on corporate criminal liability did not incorporate any sort of limitation on vicarious liability for corporations as this Court has done in analogous situations. Instead, it indicated that the jury was to convict Ionia for any actions of any employee if that action was conducted within the scope of the employee's employment. *Ionia Mgmt.*, 526 F. Supp. 2d at 324. As previously indicated, the policy considerations of Title VII cases are analogous to criminal liability, but the stakes are even higher here than they are in the civil context; if the lower court opinion stands, Ionia will be stamped with the perpetual stigma of a criminal conviction. This should persuade the Court that to apply broad *respondeat superior* principles in contravention of the analysis of Title VII and punitive damages cases would be a gross miscarriage of justice. Because the district court instruction neglected a "managerial"

analysis and evidence that Ionia had taken steps to prevent the criminal behavior of its low level employees, the jury was unable to fully consider Ionia's culpability. As such, the jury instruction and, consequently, Ionia's conviction were erroneous, and this Court should reverse the decision of the lower court.

II. The district court's instruction on corporate criminal liability was inconsistent with general principles of criminal law.

In *New York Central*, the Supreme Court, in a significant departure from common law principles, upheld a federal statute which allowed for the criminal prosecution of companies based solely on the wrongful acts of their employees. 212 U.S. at 495-96. Though courts have applied *New York Central* in finding corporations criminally liable for almost one hundred years, the application of vicarious liability in the criminal context runs afoul of general principles of criminal law, including the theories of punishment and the concept of *mens rea*. Therefore, even if this Court finds that the district court instructions were proper under existing law, it should still reevaluate the propriety of subjecting corporations to criminal liability for acts of their employees.

A. The imposition of corporate criminal liability does not further the goals of criminal punishment.

Despite the widespread acceptance of the notion of criminal liability, the punishment of criminal defendants is "not merely the inevitable consequence of a person's voluntary action, but rather the union of the individual's conduct with the recognition by society that its rules have been violated." *U.S. v. Rausch*, 570 F. Supp. 2d 1295, 1303 (D. Colo. 2008). As a result of this societal condemnation, a criminal conviction invokes strong feelings from the public and brands

the criminal with a permanent stigma. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 872 (1997) (noting the “opprobrium and stigma” of a criminal conviction). Thus, if punishment is not simply an automatic consequence of a person’s actions, a society must justify the imposition of designating citizens as criminals. Over time, two theories for the justification of criminal punishment have emerged: utilitarianism and retributivism. *See U.S. v. Ortiz*, 502 F. Supp. 2d 712, 714 (N.D. Ohio 2007) (recognizing the theoretical purposes of sentencing listed in 18 U.S.C. § 3553(a)(2)).

A utilitarian approaches punishment with a forward-looking perspective, reasoning that society punishes criminals if it will result in a net benefit to society; criminals are punished to deter others from committing future violations. *See U.S. v. Cole*, No. 5:08-cr-00327, 2008 WL 5204441, at *6 (N.D. Ohio Dec. 11, 2008) (stating that the utilitarian approach inherent in the general deterrence justification for punishment poses a difficult analysis). In contrast, a retributivist look backwards at the defendant’s conduct and believes that society should punish criminals because the defendant is morally culpable and deserves to be punished. *Id.* at *5. These theories of punishment are not mutually exclusive, and courts consider both when tailoring the appropriate sentence for a crime. *See id.* at *4-6 (detailing the purposes of criminal sentencing and discussing each in turn). In the context of corporations, neither aim is furthered by imposing criminal liability upon companies for the acts of their employees.

Deterring others from engaging in similar conduct is a persuasive reason to punish defendants in a society that has an interest in ensuring that actions it considers reprehensible are curtailed. In the context of corporations, however, the argument does not translate well. Because a corporation is a legal fiction and cannot itself be deterred, punishment should actually

aim to deter the individual employees from engaging in criminal conduct. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve*, 109 Harv. L. Rev. 1477, 1494-95 (1996).

However, “[p]unishing the corporation for deterrence purposes is based on the false premise that a diligent principal can control the behavior of all of its agents.” Howard E. O’Leary, Jr., *Corporate Criminal Liability: Sensible Jurisprudence or Kafkaesque Absurdity*, 22 *Crim. Just.* 24, 27 (Winter 2008). Corporations can, of course, strive to monitor the actions of their employees, but no amount of monitoring can prevent actions by rogue employees who are intent upon hiding their conduct from their supervisors. Actions of individuals, done in secret and in furtherance of their own objectives, will not be deterred by the prosecution of the corporation. *See* Khanna, *What Purpose Does It Serve*, 109 Harv. L. Rev. at 1495 (indicating that monitoring is imperfect because it is “prohibitively costly” and difficult to observe secret acts of employees).

Furthermore, courts have made clear that even those corporations whose official policies prohibited the acts of their employees will not be shielded from liability. *See, e.g., U.S. v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1996); *U. S. v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972). Criminal convictions of those companies who have taken measures to prohibit illegal activities of their employees will not likely serve the purpose of deterrence. In fact, such convictions indicate that no matter how much a corporation does to curtail the illegal actions of its employees it may still be found liable. *See* Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 *Am. Crim. L. Rev.* 1319, 1327 (2007) (arguing that criminal convictions of corporations with effective compliance programs sends a message that “no good

deeds will go unpunished”).

Accordingly, the best method of deterring the criminal acts of employees is the prosecution of the individual employee, not of the corporation. As President Woodrow Wilson put it, “[e]very act of business is done at the command or upon the initiative of some ascertainable person or group of persons. These should be held individually responsible, and the punishment should fall upon them, not upon business organizations of which they make illegal use.” Woodrow Wilson, *The Lawyer and the Community*, 33rd Annual Meeting of the ABA, 35 Rpt. of the Amer. Bar Ass’n 427 (1910).

Additionally, corporate criminal liability does not effectively further the purpose of retribution, which entails punishing criminals because they have acted culpably. *See U.S. v. Hawkins*, 380 F. Supp. 2d 143, 148 (E.D.N.Y. 2005) (noting that retributivists contend that punishment is simply a criminal’s “just deserts”) (internal citations omitted); *U.S. v. Blarek*, 7 F. Supp. 2d 192, 201 (E.D.N.Y. 1998) (contrasting the retributive and utilitarian theories of punishment). Furthermore, restoring balance to the moral order of society is an intrinsic consideration for the purposes of retributivism: The criminal has taken something from the victim and society, and punishment seeks to right this wrong. Susan Tiefenbrun, *The Failure of International Laws of War and The Roles of Art and Story-Telling as a Self-Help Remedy for Restorative Justice*, 12 Tex. Wesleyan L. Rev. 91, 124 (2005).

However, moral concerns such as these are inapplicable to the corporate context because corporations are incapable of feeling emotions such as guilt or shame and, as such, are not motivated by such considerations. Additionally, “[p]unishing the corporation to exact retribution hits wide of the mark by inflicting harm on innocent consumers, employees, shareholders, and

consumers.” O’Leary, *Sensible Jurisprudence or Kafkaesque Absurdity*, 22 Crim. Just. at 28. Because a corporation is incapable of being imprisoned, criminal punishment takes the form of a fine. Shareholders, who are often innocent and uninvolved in the employee’s misdeeds, will likely be the first to absorb the cost of the fine. John Hasnas, *Managing the Risks of Legal Compliance: Conflicting Demands of Law and Ethics*, 39 Loy. U. Chi. L.J. 507, 510 (2006). Additionally, corporations forced to pay out a large fine will likely seek to employ cost-cutting methods. As a result, innocent employees will likely lose their jobs, if the entire company is not driven out of business. *Id.* Lastly, the consuming public will be adversely affected as a result of higher prices, increased to absorb the company’s loss, and a diminution in competition in the industry. O’Leary, *Sensible Jurisprudence or Kafkaesque Absurdity*, 22 Crim Just. at 28.

Retribution only justifies the punishment of those who have acted in a criminally blameworthy manner. It does not validate the punishment of countless innocent individuals and entities who took no part in the wrongdoer’s actions. Penalizing the public in the name of safeguarding it from corporate misdeeds is illogical. *See New York Cent.*, 212 U.S. 481, 494 (1909) (arguing that corporate criminal liability is necessary to prevent corporate misdeeds which are against the interests of public policy from going unpunished). In cases involving municipalities, courts have held that governmental entities should not be found criminally liable for acts of their agents because to do so would punish innocent taxpayers. *See Vincent T. Garza Contracting Servs., Inc. v. Harlandale I.S.D. Pub. Facilities Corp.*, No. CIVASA03CA0759-XR, 2003 WL 23009259, at *3 (W.D. Tex. 2003) (holding that a governmental entity is incapable of forming the requisite *mens rea* to violate RICO, in part because “awarding punitive damages against the taxpayers of a municipal corporation whom RICO was designed to protect would be counterintuitive to the very purpose of the statute”).

This argument translates into the context of private corporations as well. If the purpose of imposing criminal punishment upon corporations is to protect and benefit society, it seems irrational to allow innocent consumers and employees to bear the brunt of illegal activities of criminal employees. Accordingly, the principles inherent in retributivism do not support the imposition of corporate criminal liability, and the most prudent course of action seems to be the prosecution of the employees themselves.

B. The imposition of corporate criminal liability renders the notion of moral blameworthiness irrelevant.

The notion of criminal intent, discovered in writings as early those of Plato, has been firmly entrenched in the American criminal justice system. *See U.S. v. Cordoba-Hincapie*, 825 F. Supp. 485, 490 (E.D.N.Y. 1993) (noting that Plato preferred to differentiate crimes based on levels of intent, rejecting the views of his contemporaries, who distinguished only between voluntary and involuntary crimes).

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to,"...

Morissette v. U.S., 342 U.S. 246, 250 (1952). As such, "the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

Dennis v. U. S., 341 U.S. 494, 500 (1951).

Accordingly, the common law rejected the notion that corporations were capable of committing crimes. *New York Central*, 212 U.S. at 492-93. The theory went that corporations were legal fictions with no "conscience... no soul to be damned, and no body to be kicked."

U.S. v. C.R. Bard, Inc., 848 F. Supp. 287, 290 (D. Mass. 1994) (noting that it is difficult to deal with a “legal abstraction” in seeking to address the defendant’s conscience and deter future misconduct). The requirement of a *mens rea* is also consistent with general principles of criminal law. A person who commits the social harm of an offense without a guilty mind is not dangerous, could not have been deterred, and is not in need of reform. Therefore, punishment would be counter-utilitarian. From a retributive point of view, a person who commits the social harm of an offense in a morally innocent manner does not deserve to be punished, as they did not choose to act unlawfully.

Contrary to such common law reasoning, the Court in *New York Central* decided that a corporation could be held criminally liable without addressing the difficulty in attributing criminal intent to an entity with no mind. *New York Central*, 212 U.S. at 493. It is true that Congress is permitted to impose strict liability on corporations in the realm of public welfare offenses, with no regard for the corporation’s intent. *See, e.g., Standard Oil Co. of Texas v. U.S.*, 307 F.2d 120, 125 (5th Cir. 1962). However, this argument is inapplicable in this context because the statute with which Ionia was charged *did* contain a *mens rea* term, requiring that the actor “knowingly” violate the statute. 33 U.S.C. § 1908(a). Secondly, public welfare offenses are often reserved for those offenses which carry light penalties and involve police regulations and are not appropriate where an indictment alone may mean death for a corporation. John C. Coffee, *Does Unlawful Mean Criminal?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991). Additionally, it has been argued that the public welfare doctrine should not be extended to “true crimes” at the risk of “sap[ping] the vitality of the criminal law.” *Id.*

However, courts generally do not even bother with a strict liability analysis, satisfied in attributing the knowledge of the individual employee to the corporation. Generally, the prosecution need only prove that a corporate agent or employee possessed the requisite intent to commit a crime to convict the company of said crime. *See Hilton*, 467 F.2d at 1004. This has come to mean that

[a] corporation is criminally liable even if the criminal conduct is undertaken without the knowledge of top management; the criminal activity was performed by a low level employee; the primary purpose was to benefit only the miscreant employee; there was no actual benefit to the corporation; the criminal acts were performed in direct violation of instructions from the company; there is a rigorous compliance program in place; no single individual had the requisite intent or knowledge sufficient to violate the law; it is never possible to identify the actual employee or agent responsible for the crime; or the offending employees are all acquitted of the same offense.

Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 Am. Crim. L. Rev. 53, 64-65 (2007). The injustice of this virtually unlimited corporate liability seems to run afoul of the longstanding requirement that criminals possess the requisite *mens rea* before being convicted of crimes.

Additionally, courts have attempted to make the prosecution's task of proving criminal intent even easier. Some jurisdictions have begun to impose criminal liability upon corporations for acts of their employees when the government can prove the existence of "collective knowledge" or "collective scienter." The landmark case detailing this doctrine came out of the First Circuit Court of Appeals, where the court upheld a jury instruction allowing the jury to convict a bank based upon the collective knowledge of several individual employees. *U.S. v. Bank of New England*, 821 F.2d 844, 855 (1st Cir. 1987). As one other court noted, the collective knowledge doctrine "would allow a plaintiff to prove scienter by piecing together scraps of 'innocent' knowledge held by various corporate officials, even if those officials never

had contact with each other or knew what others were doing.” *U.S. v. Westinghouse Savannah River Co.*, 352 F.3d 908, 918 (4th Cir. 2003). This Court has not spoken as to the propriety of the collective knowledge doctrine, and other courts have expressly rejected it. *See Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435-36 (9th Cir. 1995).

This Court has the authority and the opportunity to reevaluate the providence of imposing criminal liability upon corporations upon such a flimsy compilation of *mens rea*. Even attributing the *mens rea* of an individual to the corporation is inconsistent with general principles of criminal law. This is especially true in cases involving lower level employees and corporations who have attempted to implement effective compliance programs. In such cases, it seems illogical to attribute the unauthorized, even discouraged, actions of an employee with no authority to a corporation who took efforts to prevent those actions. The stigma associated with a criminal conviction is significant and should not be imposed lightly.

If the notion of the complete abolition of corporate criminal liability is a difficult pill for this Court to swallow, the Model Penal Code (“MPC”) offers an alternate approach. Section 2.07 proposes a narrowing of *New York Central’s* broad *respondeat superior* doctrine and indicates that a corporation may not be punished if “the defendant proves by a preponderance of the evidence that the high managerial agent having supervisory responsibility of the subject matter of the offense employed due diligence to prevent its commission.” Model Penal Code § 2.07(5). The MPC thus proposes two significant limitations upon corporate criminal liability: (1) that only agents with managerial authority may trigger criminal liability on behalf of the company and (2) diligent efforts by the company to implement effective compliance programs may serve as a defense to criminal liability. *See id.*

If implemented, these changes to the traditional approach to corporate criminal liability would ameliorate many of the problems associated with imposing criminal liability upon corporations for rogue acts of low-level employees. They will encourage companies to employ methods to prevent misconduct by its employees. Additionally, they will elucidate the *mens rea* confusion that plagues current jurisprudence by ensuring that only persons with control over the company's operations can trigger criminal liability.

PRAYER

Because the jury instructions in *Ionia Management* are not authorized by this Court's precedent or federal statutory law and do not further general principles of criminal law, Petitioner Ionia Management prays this Court reverse the lower court's adoption of the district court opinion and remand for further proceedings consistent with that opinion.

Respectfully Submitted,
Attorneys for Team 11