

Case No. 08-1234

In the

SUPREME COURT OF THE UNITED STATES

October Term 2008

IONIA MANAGEMENT S.A.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for Respondent

QUESTIONS PRESENTED

1. A corporation can be held criminally liable for the illegal conduct of its agents when that liability is limited to acts of corporate agents acting within the scope of employment. Here, the district court instructed the jury that a corporation can only 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. Was the district court's instruction on corporate criminal liability authorized by federal statutory law and Supreme Court precedent when it limited liability to acts of agents within the scope of employment?

2. Corporate criminal liability punishes corporations for the acts of their agents. Here, the district court relied on the longstanding *New York Central* holding and general principles of criminal law when instructing the jury on corporate criminal liability. Should the Court revisit *New York Central v. United States* despite years of case law that demonstrates the holding's flexibility and endurance? Further, should the district court's jury instruction be overturned when it was based upon venerable principles of criminal law?

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STATEMENT OF THE CASE

Ionia Management was found guilty of polluting the marine environment and violating international treaties. Ionia Management dumped oily wastewater into the sea from an oil tanker vessel it owned and operated. Ionia was found guilty of making false records in an attempt to cover up the intentional dumping, obstructing the ensuing investigation into the illegal dumping, and conspiring to commit these crimes.

Ionia Management is an international ship management company that is incorporated in Liberia and headquartered in Piraeus Greece. *U.S. v. Ionia Mgmt. S.A.*, 2007 U.S. Dist. LEXIS 58016 (D. Conn. Aug. 8, 2007). Ionia owns and operates an oil tanker vessel named the M/T Kriton. *U.S. v. Ionia Mgmt. S.A.*, 498 F. Supp. 2d 477, 480 (D. Conn. 2007). Ionia had previously gotten in trouble for violating the law and was sentenced to a three-year term of probation in the Eastern District of New York for making false statements to the U.S. Coast Guard in violation of 18 USC §1001. *U.S. v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 327 (D. Conn. 2007). In addition to the standard conditions of probation, the court specifically required Ionia Management to adhere to the terms of a compliance program to ensure that all Ionia Management vessels would not pose a threat of injury to life, property, or the marine environment. *Id.*

The M/T Kriton's electrician alerted authorities that Ionia was continuing to engage in illegal oily water discharges in violation of the specific terms of probation. *Ionia*, 2007 U.S. Dist. LEXIS 58016 at 3. Consequently, the Ionia oil tanker was boarded and investigated by the United States Coast Guard when it arrived in New Haven on March 20, 2007. *Id.* at 4.

Ionia's agents acted under direct orders from their superiors. *Ionia*, 526 F. Supp. 2d at 325. The M/T Kriton's engine department was headed by a Chief Engineer, assisted by a Second Assistant Engineer, Third Assistant Engineer, Fourth Assistant Engineer, Cadet Engineer, Fitter, and Electrician. *Ionia*, 2007 U.S. Dist. LEXIS 58016 at 28. All of whom were assisted by unlicensed engine department crewmembers known as 'oilers' and 'wipers'. *Id.* Each agent was both following instructions and carrying out the type of work for which he was employed: the chief engineers had the authority to manage the engine room and to maintain the oil record books; the engine room crew had authority to operate the pollution prevention equipment as well as the pumps and valves used to connect the bypass hose. *Ionia*, 526 F. Supp. 2d at 325-26.

The Chief Engineers aboard the M/T Kriton recorded entries falsely indicating that the pollution prevention equipment was functioning normally and was being utilized, despite official policies in place prohibiting oily water discharges by the crew. *Ionia*, 526 F. Supp. 2d at 325. Second Engineer Edgardo Mercurio testified that Chief Engineer Efstratios Tsigonakis specifically instructed him to not use the oily water separator. *Id.* Instead, the Chief Engineer told Mercurio to pump the oily waste directly overboard without utilizing any of the available and required oil pollution prevention equipment. *Id.* Chief Engineer Tsignoakis and Second Engineer Mercurio then directed the engine room crew to connect the bypass hose and dispose of the oily wastewater directly into the ocean. *Id.*

On October 27, 2004, Ionia Management was sentenced to a three-year term of probation in the Eastern District of New York for making false statements to the U.S. Coast Guard in violation of 18 USC §1001. *Ionia*, 526 F. Supp. 2d at 327. On September

6, 2007, Ionia Management was convicted on eighteen counts: thirteen counts of violating the Act to Prevent Pollution from Ships (APPS) and associated regulations, three counts of falsifying records in connection with a federal investigation in violation of 18 USC § 159, one count of obstructing justice in violation of 18 USC § 1505, and one count of conspiring to commit these offenses in violation of 18 USC § 371. *Ionia*, 526 F. Supp. 2d at 321. The District Court fined Ionia \$4.9 million for dumping oily wastewater, falsifying records, obstructing a federal investigation, and conspiring to commit these offenses. *U.S. v. Ionia Mgmt. S.A.*, 2008 U.S. Dist. LEXIS 23803, 4 (D. Conn. Jan. 28, 2008).

On March 3, 2008, Ionia was ordered to immediately make its first of four installment payments of \$1.225 million. *U.S. v. Ionia Mgmt. S.A.*, 537 F. Supp. 2d 321, 323 (D. Conn. 2008). The remaining payments are due with interest on the first, second, and third annual anniversary of the date of sentencing. *Id.* In another proceeding on March 7, 2008, Ionia was again ordered to make the first payment and charged a 10-percent delinquency penalty because Ionia was more than thirty days delinquent since January sentencing. *U.S. v. Ionia Mgmt. S.A.*, 2008 U.S. Dist. LEXIS 17750, 7 (D. Conn. March 7, 2008). Ionia received a twenty-four hour extension on March 10, 2008, ordering that Ionia's first payment, plus accrued interest, plus penalty was due March 11, 2008. *Ionia*, 2008 U.S. Dist. LEXIS 17750 at 7.

SUMMARY OF THE ARGUMENT

Corporations are increasingly important actors in almost every aspect of society. While corporations should be allowed and encouraged to continue to profit, they should simultaneously be required to act responsibly. Corporations develop their own methods and culture that guide employee behavior. That culture is a web of attitudes and policies that may instill respect for the law or breed contempt and malfeasance. Corporations must be held accountable for the conduct they promote and facilitate. Corporations are encouraged to act responsibly when they are held accountable under criminal law. Only by prosecuting the corporation can society deter criminal behavior and insure systemic reform.

The jury instruction on corporate criminal liability was authorized by federal statutory law because it was consistent with both the plain meaning of the statute and the underlying statutory purpose. The plain meaning of the statute is that corporations can and will be held liable for criminal conduct. The jury instruction was consistent with the statutory purpose, to deter criminal conduct, because it encouraged corporations to take affirmative steps to prevent criminal conduct.

The district court's jury instruction on corporate criminal liability was authorized by Supreme Court precedent because it reasonably limited a corporation's criminal liability and encouraged corporations to prevent criminal conduct. This Court has recognized that Congress has the authority to impute corporate criminal liability when that liability is reasonably limited to conduct committed by corporate agents acting within the scope of their employment. Specifically, the instruction narrowed corporate criminal liability in three ways: 1) liability can only be imputed through actions of corporate

agents; 2) the illegal conduct must have occurred in the scope of the agent's employment; and 3) the illegal conduct must have been on behalf of or for the benefit of the corporation.

The *New York Central* holding should not be revisited because the criminal justice system has built-in protections that keep corporations from being unreasonably prosecuted. First, the mens rea requirement in criminal convictions provides a safeguard for corporations. Second, the *New York Central* holding gives courts the flexibility to decide criminal liability on a case-by-case basis. Juries, as the fact-finders of criminal courts, must continue to be given the power to decide, on a case-by-case basis, whether the facts merit holding a corporation vicariously liable.

The district court's instruction was consistent with general principles of criminal law because corporations should not be insulated from the consequences of wrongdoing merely because it was an employee acting. Corporations must take responsibility for their contribution, whether directly or indirectly, to the crime. Criminal penalties have far-reaching effects, effectively deterring corporations from encouraging or tolerating illegal behavior. With criminal convictions, corporations have more than just monetary losses at stake; there is also the possibility of damage to reputation and social status. The corporation is in the best position to influence the actions of its agents. This is best done by establishing a strong ethical culture and using preventative methods such as compliance and ethics training programs. However, compliance programs are but one small part of a greater remedial and preventative approach towards implementing a strong ethical culture.

ARGUMENT

- I. The district court’s instruction on corporate criminal liability was authorized by federal statutory law and Supreme Court precedent. The instruction was consistent with both the plain meaning of the statutes and consistent with the underlying statutory purpose. The instruction was authorized by Supreme Court precedent because it reasonably limited corporate criminal liability and encouraged corporate responsibility.**

Corporations are increasingly important actors in almost every aspect of society. While corporations should be allowed and encouraged to continue to profit, they should simultaneously be required to act responsibly. Corporations develop their own methods and culture that guide employee behavior. That culture is a web of attitudes and policies that may instill respect for the law or breed contempt and malfeasance. Corporations must be held accountable for the conduct they promote and facilitate. Corporations are encouraged to act responsibly when they are held accountable under criminal law. Only by prosecuting the corporation can society deter criminal behavior and insure systemic reform.

Corporations are responsible for the conduct of their agents acting within the scope of their employment. *New York Cent. & H.R.R. Co. v. U.S.*, 212 U.S. 481 (1909). Corporations are responsible for the tortious acts of their agents acting within the scope of their employment even if done wantonly, recklessly, or against express orders. *Id.* at 493. Likewise, corporations are criminally liable for the illegal conduct of their agents acting within the scope of their employment. *U.S. v. A&P Trucking Co.*, 358 U.S. 121, 125-126 (1958); *New York Cent.*, 212 U.S. at 493. This Court explained that to give corporations immunity from criminal punishment would virtually take away the only effective means of controlling and preventing the illegal behavior. *New York Cent.*, 212 U.S. at 496.

The district court's instruction on corporate criminal liability was authorized by federal statutory law and Supreme Court precedent. The instruction on corporate criminal liability was authorized by federal statutory law because it was consistent with both the plain meaning of the statute and the underlying statutory purpose. The instruction on corporate criminal liability was authorized by Supreme Court precedent because it reasonably limited corporate liability to crimes committed by its agents acting within the scope of their employment and encouraged corporate responsibility.

A. The district court's instruction on corporate criminal liability was authorized by federal statutory law because it was consistent with the plain meaning of the words used and encouraged corporations to prevent criminal conduct.

Ionia was found guilty of dumping oily waste water at sea, creating false records to cover up the dumping, obstructing the ensuing investigation, and conspiring to commit these crimes. Ionia failed to exercise control over its agents to prevent this criminal conduct. Ionia should be held accountable for its failure to act responsibly.

Ionia was found guilty for violating four criminal statutes. First, Ionia was convicted on thirteen counts of violating the Act to Prevent Pollution from Ships (APPS) and associated regulations, 33 U.S.C. § 1908(a). *U.S. v Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 321 (D. Conn. 2007). Second, Ionia was convicted on three counts of falsifying records in connection with a federal investigation in violation of 18 U.S.C. § 1519. *Id.* Third, Ionia was convicted for obstructing justice in violation of 18 U.S.C. § 1505. *Id.* Lastly, Ionia was convicted for conspiring to commit these crimes in violation of 18 U.S.C. § 371. *Id.*

The jury instruction on corporate criminal liability was authorized by federal statutory law because it was consistent with both the plain meaning of the statutes and the

underlying statutory purposes. The plain meaning of the statutes is that corporations can and will be held liable for criminal conduct. The jury instruction was consistent with the statutory purpose, to deter criminal conduct, because it encouraged corporations to take affirmative steps to prevent criminal conduct.

First, the statutory language is to be enforced according to the plain meaning of its actual terms so as not to defeat its purpose. *Arkansas v. Farm Credit Services of Cent.*, 520 U.S. 821, 821 (1997); *Fed. Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349, 351 (1941). If a statute is ambiguous and its meaning in dispute, the actual words still provide the starting place for analysis. *Bunte*, 312 U.S. at 350.

Second, the analysis should look to the purpose and circumstances surrounding the statute's enactment. *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 489 (1951); *Bunte*, 312 U.S. at 351. The legislative purpose is typically expressed by the ordinary meaning of the words used. *Richards v. U.S.*, 369 U.S. 1, 9 (1962). Every reasonable presumption attaches to the proscription to require courts to make the statute effective in accord with the evident purpose. *U.S. v. Evans*, 333 U.S. 483, 486 (1948).

Here, the plain meaning of each statute, under which Ionia was charged and found guilty, is that a corporation will be held responsible and punished for criminal conduct. The words "person" and "whoever" in any federal statute are defined to include corporations unless the statute specifically indicates otherwise. 1 U.S.C. § 1 (2000). Under the APPS, it is a felony for any "person" to knowingly dump oily water at sea. 33 U.S.C. § 1908(a). Corporations are also targeted under the three additional criminal

statutes that Ionia violated because they use the words “whoever” and “person”. 18 U.S.C. § 371 (2000); 18 U.S.C. § 1519 (2000); 18 U.S.C. § 1505 (2000).

The drafters intentionally used the inclusive terms “whoever” and “person” so as to hold a corporation responsible for the illegal conduct of its agents. *A&P.*, 358 U.S. at 129. This Court explained that unless the context of any act of Congress indicates otherwise, the terms “person” and “whoever” include corporations. *Id.* at 123. If the drafters had wanted to exclude corporations from liability for criminal conduct, they would have used more narrow terms. Holding corporations responsible is consistent with the underlying public policy of encouraging the corporation to make its agents abide by the law. *Id.* at 126.

Second, the statutes seek to deter criminal conduct. If there was ambiguity as to the plain meaning of these statutes, both the purpose and circumstances surrounding their enactment indicate Congress intended corporations to be held responsible and punished for crimes by their agents. The APPS seeks to eliminate all intentional polluting of the marine environment. *See* 33 U.S.C. § 1908 (1980). Additionally, Ionia was charged and found guilty under statutes which seek to eliminate filing of false records, obstruction of investigations, and conspiracy. The collective purpose of these criminal statutes is to prevent harmful conduct. This purpose should not be frustrated by a statutory interpretation that allows corporations to freely violate the laws through their employees. *See U.S. v. Gilliland*, 312 U.S. 86, 93 (1941).

The surrounding circumstances also indicate the statutes seek to hold corporations liable. When important public interests are at stake, such as elimination of intentional pollution of the marine environment, it is reasonably assumed that Congress intended to

impose criminal liability upon corporations for the “acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents” to requirements of the law. *U.S. v. Hilton Hotels Corp.*, 467 F.2d 1000, 1005 (9th Cir. 1972). Congress has repeatedly decided to impose corporate criminal liability which suggests a widespread belief on the part of legislators that imposing corporate criminal liability is necessary to effectively prevent harmful conduct. *Id.* at 1006.

Corporate criminal liability is necessary to prevent criminal conduct. The jury must be allowed to hold Ionia responsible for the criminal conduct of its agents because that is the only effective means to encourage the corporation to take reasonable steps to prevent the criminal conduct. *New York Cent.*, 212 U.S. at 496. The plain meaning of the statutes indicates that Ionia should be held liable for the criminal conduct of its agents. The underlying statutory purpose indicates corporations should be held liable to encourage them to deter criminal conduct. Accordingly, the jury instruction on corporate criminal liability was authorized by federal statutory law.

B. The district court’s instruction on corporate criminal liability was authorized by Supreme Court precedent because it reasonably limited corporate criminal liability and encouraged corporations to prevent criminal conduct.

The district court’s jury instruction on corporate criminal liability was authorized by Supreme Court precedent because it reasonably limited a corporation’s criminal liability and encouraged corporations to prevent criminal conduct. This Court has recognized that Congress has the authority to impute corporate criminal liability when that liability is reasonably limited to conduct committed by corporate agents acting within the scope of their employment. *See New York Cent.*, 212 U.S. at 495. Specifically, the

district court's jury instruction narrowed corporate criminal liability in three ways: 1) liability can only be imputed through actions of corporate agents; 2) the illegal conduct must have occurred in the scope of the agent's employment; and 3) the illegal conduct must have been on behalf of or for the benefit of the corporation.

First, the jury instruction on corporate criminal liability reasonably narrowed liability to only actions of corporate agents. The term agent has been defined to include all levels of the organizational hierarchy such as managers, directors, and employees. *U.S. v. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1946). Therefore, the term "agent" narrows corporate liability to only those crimes committed by persons over which the corporation has the ability to control. Holding corporations responsible for the acts of all employees is consistent with the statutory purpose to deter harmful conduct. *Id.* The corporation is encouraged to deter all of its agents from committing criminal activity. Further, the proscribed acts are more likely to be performed by employees rather than corporate chiefs so the corporations must be held liable for acts of all agents to effectively deter illegal conduct. *See id.*

In *A&P* the owner of commercial transport trucks was held criminally liable for violations of Interstate Commerce Commission regulations for the safe transport of explosives and dangerous materials. *A&P*, 358 U.S. at 121-122. The purpose of the statutes was to ensure compliance by motor carriers with safety requirements. *Id.* at 124. The business entity was not free from liability merely because the owners or stockholders did not personally participate in the infractions. *Id.* at 126. The business entity is pressured to ensure that its agents abide by the law when it is held responsible for the illegal acts of those agents. *Id.*

Here, Ionia failed to diligently control its employees and was therefore held criminally liable for their illegal conduct. Ionia is in a unique position to prevent its employees from committing illegal activity. Ionia must be held responsible for failure to exercise control over its employees. Ionia is not shielded from liability simply because the owners or stockholders did not personally participate in the illegal conduct. Holding Ionia responsible for its failure to effectively control its agents is crucial to encouraging corporations to take reasonable steps to deter criminal conduct.

Second, the instruction narrowed corporate criminal liability to only those actions committed within the scope of an agent's employment. Criminal liability may only be imposed on the corporation where the agent is acting within the scope of employment. *New York Cent.*, 212 U.S. 481; *U.S. v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982). An action is committed within the scope of employment when it: 1) is conduct of the kind the servant is employed to perform; 2) occurs substantially within the authorized time and space limits, and 3) the action is motivated, at least in part, by intent to benefit the corporation. *Faragher v. City of Boca Raton*, 524 U.S. 775, 793 (1998); *Cincotta*, 689 F.2d at 242.

In *Faragher* the employer was held liable under Title VII for workplace harassment caused by a supervisor because the conduct occurred within the scope of employment. *Faragher*, 524 U.S. at 780. During the course of Faragher's five years working as an ocean lifeguard, she was repeatedly subjected to uninvited and offensive touching, lewd comments, and generally derogatory comments about women. *Id.* The primary purpose of Title VII is to prevent workplace harassment and discrimination by encouraging the creation and enactment of effective compliance policies. *Id.* The

employer was held liable but subject to an affirmative defense of the reasonableness of the actions of the employer and victim. *Id.* at 807.

Here, Ionia was held liable for illegal conduct of its agents because the conduct occurred within the scope of employment. Ionia was held responsible because it failed to diligently exercise control over its employees. The illegal conduct was within the scope of employment, in part, because Ionia failed to take reasonable efforts to prevent such criminal conduct. Evidence of reasonable efforts to prevent criminal conduct could have helped show the conduct was not within the scope, but Ionia failed to take reasonable efforts. Instead, Ionia tolerated the criminal conduct by not diligently enforcing a compliance program. Because Ionia tolerated the criminal conduct, the jury determined the agents were acting within the scope of employment.

Third, the instruction narrowed corporate criminal liability to only those actions committed on behalf of and for the benefit of the corporation. This requirement shields the corporation from criminal liability for actions of its agents which are “inimical to the interests of the corporation” or which may have been undertaken “solely to advance the interests of that agent.” *U.S. v. Automated Med. Labs.*, 770 F.2d 399, 407 (4th Cir. 1985). The agent’s illegal conduct must be motivated, at least in part, by an intent to benefit the corporation and, therefore, need not actually benefit the corporation. *Cincotta*, 689 F.2d at 242.

The agent is acting to benefit the corporation when the agent is performing acts which he is authorized to perform. *Faragher*, 524 U.S. 793; *Cincotta*, 689 F.2d at 242. Realistically, no corporation benefits when it is held responsible for the illegal conduct of its agents. *See J.C.B. Super Markets, Inc., v. U.S.*, 530 F.2d 1119, 1122 (2d Cir. 1976).

The benefit requirement should not be so narrowed as to allow corporations to freely violate the law through their agents simply because the corporations do not benefit when punished. Here, the jury concluded Ionia's agents were performing acts which they were authorized to perform when they dumped oily wastewater at sea, made false records, obstructed the ensuing investigation, and conspired to commit these crimes. *Ionia*, 526 F. Supp. 2d at 321.

A corporation may show that an agent's illegal conduct was not intended to benefit the corporation if the corporation has undertaken diligent efforts to prevent such illegal conduct. *U.S. v Beusch*, 596 F.2d 871, 878 (9th Cir. 1979). However, merely stating or publishing compliance policies without diligently enforcing them is not enough to place the acts of an employee who violates them outside the scope of his employment. *Id.* Here, the jury decided that despite company policies, Ionia's agents were acting on behalf of and for the benefit of Ionia when they violated the law, in part, because Ionia had failed to diligently enforce a compliance policy.

Also, the jury instruction also further limited Ionia's liability because the jurors were given discretion to factor in the failure of Ionia to take reasonable steps to prevent, detect, and correct the criminal conduct of its employees. The jury instruction said, "a corporation *may* only be held criminally liable if." *Ionia*, 526 F. Supp. 2d at 321. Black's Law Dictionary defines may as "to be permitted, to be a possibility, or can." *Black's Law Dictionary* 1000 (8th ed. 2004). In some situations may has also been defined as loosely synonymous with shall or must. *Id.* In the context of this jury instruction, the term *may* gave the jurors some discretion when they chose to convict Ionia for illegally dumping oil at sea, creating false records, and obstructing the

investigation. This interpretation is also consistent with one of the underlying values of our legal system: allowing jurors to decide the defendant's ultimate guilt.

Additionally, the district court's jury instruction on corporate criminal liability was authorized by Supreme Court precedent because it encouraged corporations to prevent criminal conduct. Corporations are encouraged to take steps to prevent criminal conduct so that they will not be held criminally liable. The jury instruction encouraged corporations to prevent criminal conduct in two ways.

First, the obvious and intended benefit to taking reasonable steps to prevent criminal conduct is that the criminal conduct simply does not occur. These statutes were enacted to eliminate criminal activity. The statutes seek to eliminate criminal activity by holding corporations criminally liable and thereby encouraging the corporation to take steps to prevent the criminal conduct. This is especially beneficial to a corporation because it cannot be held liable for criminal conduct that never occurs.

Second, the jury instruction encouraged corporations to act responsibly because evidence of diligent efforts to prevent the criminal conduct can be a strong defense to corporate criminal liability. The existence of a proven, effective compliance program can serve as a defense showing that the agent was not acting within the scope of employment. Accordingly, the corporation can be held criminally liable when it has not taken all reasonable steps to prevent the illegal conduct. *Faragher*, 524 U.S. at 807; *see Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544 (1999). A compliance program is effective when it prevents the conduct, detects violations, and promptly corrects the problems. *Faragher*, 524 U.S. at 806-807. While a corporation cannot prevent all criminal conduct, it must make take reasonable steps by diligently controlling its agents. Under the district court's

jury instruction, the corporation is encouraged to take reasonable steps because diligent efforts can provide evidence showing the agent was not acting within the scope.

The jury instruction on corporate criminal liability was authorized by Supreme Court precedent because it reasonably limited a corporation's criminal liability to crimes committed by its agents acting within the scope of employment and because it encouraged corporations to prevent criminal conduct. Therefore, the district court's jury instruction on corporate criminal liability was authorized by both federal statutory law and Supreme Court precedent.

II. The *New York Central* holding should not be revisited because it gives courts the flexibility to decide corporate criminal liability on a case-by-case basis, as necessary, to fit the specific facts of a case. The district court's jury instruction on corporate criminal liability was consistent with the general principles of criminal law.

Corporations are economic and social giants, and as such, they have great responsibility to protect society's health and safety. Corporations commit crimes only through the wrongdoing of corporate agents. Further, truly random crimes are almost nonexistent: there is nearly always a reason for the behavior. Merely slapping a corporation on the wrist with civil penalties is not enough to encourage the corporation to deter dangerous criminal behavior. Corporate compliance programs are a paltry step towards effecting a greater corporate cultural change. Corporate responsibility has been, and will continue to be, best enforced by holding corporations criminally liable.

Congress may constitutionally impose criminal liability upon a business entity for acts or omissions of its agents within the scope of their employment. *U.S. v. A & P Trucking Co.*, 358 U.S. 121 (1958); *New York Cent. & Hudson R.R. Co. v. U.S.*, 212 U.S. 481 (1909). Such liability may attach without proof that the conduct was within the

agent's actual authority, and even though it may have been contrary to express instructions. *U.S. v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-5 (3d Cir. 1970). *See also New York Cent.*, 212 U.S. at 493; *Standard Oil Co. v. U.S.*, 307 F.2d 120, 127-28 (5th Cir. 1962); *Egan v. U.S.*, 137 F.2d 369 (8th Cir. 1943).

The *New York Central* holding should not be revisited because it gives courts the flexibility to decide corporate liability on a case-by-case basis, as necessary, to fit the specific facts of a case. The district court's jury instruction was consistent with general principles of criminal law, which support the continued vitality of corporate criminal liability.

- A. This Court's holding in *New York Central* laid a flexible framework for determining corporate criminal liability because it allows juries to determine, on a case-by-case basis, if the facts warrant an indictment.

The rationale behind the *New York Central* holding has continued to be relevant and persuasive since this Court decided the case in 1909: the public still needs protecting from corporations; it is still unfair to hold individuals liable while allowing corporations to shield themselves; and encouraging corporations to deter criminal action is still a pervasive goal of the criminal justice system. *See generally New York Cent.*, 212 U.S. at 493. Overturning the *New York Central* holding would effectively undo 100 years of case law focused on bringing fairness and justice to the American public. Corporations must be held accountable for the illegal actions of agents acting within the scope of their employment. The *New York Central* holding should not be revisited because: 1) the criminal justice system has built-in protections that keep corporations from being unreasonably prosecuted; and 2) the *New York Central* holding give courts the flexibility as necessary, to decide criminal liability on a case-by-case basis.

First, the criminal justice system has built in protections to keep corporations from being unfairly convicted. The mens rea requirement in criminal convictions provides a safeguard for corporations. The holding in *New York Central* gives juries the flexible framework under which they may do their job. Before a corporation may be held vicariously liable, the jury must find that the corporate agent had the requisite level of mens rea. If the individual acted solely for their own benefit, their intent cannot be imputed to the corporation. *U.S. v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (“The test to determine whether an agent is acting within the scope of employment is whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated, at least in part, by an intent to benefit the corporation.”). However, if the agent acted with the intent to benefit the corporation in some way, the corporation can be held vicariously liable. *U.S. v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985). The mens rea element provides a safeguard to protect corporations from being prosecuted for actions that do not relate to the scope of the agent’s employment.

Second, the *New York Central* holding is adaptable to the specific facts of each case. Courts have used *New York Central* to hold corporations liable despite company directives and policies against the criminal behavior. *Potter*, 463 F.3d at 25-26 (“A corporation cannot “avoid liability by adopting abstract rules” that forbid its agents from engaging in illegal acts; “even a specific directive to an agent or employee or honest efforts to police such rules do not **automatically** free the company for the wrongful acts of agents.”); *Hilton*, 467 F.2d at 1006 (affirming antitrust liability, even though the agent's actions were contrary to corporate policy and directly against express instructions from his superiors)

Still, other courts have found situations where vicarious liability may not be appropriate for a corporation. In 1998 this Court restricted liability in Title VII cases to the acts of supervisors. This created an affirmative defense for the employer if the victim employee could have avoided the harm by her own efforts, and the employer had taken reasonable care. *Burlington Indus. v. Ellerth*, 525 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Under the flexible holding of *New York Central*, courts are able to determine the appropriateness of corporate criminal liability in each individual case.

The role played by juries is a fundamental cornerstone of the criminal justice system. Juries, as the fact-finders of criminal courts, must continue to be given the freedom to decide, on a case-by-case basis, whether the facts merit holding a corporation vicariously liable. Accordingly, the *New York Central* holding should not be revisited.

- B. The district court’s jury instruction on corporate criminal liability was consistent with the enduring principles of criminal law because it sought to hold corporations responsible for the illegal actions of their employees. Further, the instruction seeks to deter corporations from encouraging or allowing illegal acts, and to seek remedial measures to correct and prevent future illegal behavior.

Failure to hold a corporation responsible for the illegal acts of an employee, especially where the corporation benefits from such acts, would be fundamentally unfair. Here, the district court’s jury instruction correctly stated that a corporation cannot act on its own, but “can only act vicariously through its agents; that is, ... employees or other persons authorized to act for it.” *Ionia*, 526 F. Supp. 2d at 324. The district court’s instruction was consistent with general principles of criminal law because: 1) corporations should not be insulated from the consequences of wrongdoing merely because it was an employee acting and not an owner or shareholder; 2) criminal penalties

have far-reaching effects, effectively deterring corporations from encouraging or tolerating illegal behavior; and 3) the threat of criminal penalties influences corporations to take remedial and preventative measures to change the overall corporate ethics culture.

First, justice must be brought against those corporations benefiting from the illegal actions of their employees. *A & P*, 358 U.S. at 126. Identification of individual wrongdoers is often difficult, and measuring how much responsibility an individual should bear is nearly impossible. *Hilton*, 467 F.2d at 1006. Here, the alternatives to the district court's instruction allowing corporations to be held criminally liable are either to assign liability to the guilty lower-level agent, or not assign fault at all. The former would result in an unfair outcome, because while the individual made the choice to take the illegal action, the corporate officials almost certainly either specifically authorized the illegal behavior, or at least knew about it and did nothing to stop it. *Hilton*, 467 F.2d at 1006. The second alternative would result in the crime going completely unpunished. Richard S. Gruner, Corporate Criminal Liability and Prevention §2.03(5) (Law Journal Press 8th ed. 2008) (2004). The *New York Central* holding established vicarious corporate liability to prevent either unfair alternative. *New York Central*, 212 U.S. at 307. Corporate "conviction and punishment... is... both appropriate and effective." *Hilton*, 467 F.2d at 1006. Thus, corporations must take responsibility for their direct or indirect contribution to the illegal actions.

The corporate culture often encourages employees to commit crimes. Corporate policies often promote a culture that puts pressure on individuals to meet deadlines, cut costs, and do their job faster and more efficiently. Charles J. Walsh & Alissa Pyrich, Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation

Save its Soul?, 47 Rut. L. Rev. 605, 636 (1995). The high pressure can lead to the ultimate wrongdoing of the agent. *Hilton*, 467 F.2d at 1006 (stating that “violations of the Sherman Act are a likely consequence of the pressure to maximize profits that is commonly imposed by corporate owners upon managing agents and, in turn, upon lesser employees.) Here, the district court correctly stated that corporations should be held liable for “those actions done on behalf of and for the benefit of the corporation, and directly related to the performance of the duties the employee has to perform.” *Ionia*, 526 F. Supp. 2d at 324. Corporations must take responsibility for their contribution, whether directly or indirectly, to the crime.

Corporations are capable of doing far greater harm than an individual, acting in a personal capacity, and thus, should be held to a higher standard of responsibility. The great amount of wealth and power wielded by corporations comes with the duty to closely supervise employees and ensure the safety and wellbeing of the general public. *A & P*, 358 U.S. at 126 (“Thus pressure is brought on those who own the entity to see to it that their agents abide by the law.”). When corporations are not held liable, it gives the appearance of preferential treatment. Gruner, *supra* at §2.03(5). Corporate liability sends a zero tolerance message to the both individual actors as well as the corporate world.

Second, corporations are more likely than individuals to be deterred by criminal liability because they have more to lose. The district court’s jury instruction allowing corporate liability for the acts of its agents is consistent with general criminal deterrence principles because vicarious liability encourages the corporation to prevent illegal behavior before it starts. Civil penalties do not have the stigma that attaches to a criminally charged corporation, and are thus, ineffective deterrence mechanisms in

comparison. The federal law identifies offender reform and the specific deterrence of offenders as primary goals of criminal sentences for convicted corporations. 18 U.S.C. §3553(a) (2009). With criminal conviction, corporations have more than just monetary losses at stake; there is also the possibility of damage to reputation and social status. 47 Rut. L. Rev. at 629.

Convicted corporations may experience severe economic ramifications as a result of conviction. Thus, they are likely to take immediate remedial action to correct the wrongdoing. The corporation may be barred from participating in certain areas of business, especially bidding on government contracts as well as federally funded health care.¹ Given the far-reaching consequences of criminal conviction, a corporation is likely to implement policies and rules promoting an ethical corporate culture. Two elements that shape strong ethical culture include ethical leadership and supervisor reinforcement. Ethics Resource Ctr., *National Business Ethics Survey: An Inside View of Private Sector Ethics* (2007). The commitment to deter illegal behavior must start with those in the highest positions of the company. There would be no incentive to do so without the possibility of corporate criminal liability.

A convicted corporation may very well lose social as well as business contacts as a result of the criminal charges. “No corporation, large or small, can escape the ‘incalculable effect’ which a conviction may have on the public attitude toward the company.” *U.S. v. Security Nat’l Bank*, 546 F.2d 492, 495 (2d Cir. 1976). Due to widespread media attention given to white collar crime cases, consumers are affected in

¹ U.S. Dep’t of Justice, *Memorandum on Principles of Federal Prosecution of Business Organizations* (December 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

both their purchasing decisions and company preferences. Further, politicians and social organizations do not want to be associated with a convicted corporation for fear of damaging their reputation, or calling into question their own business practices. 47 Rut. L. Rev. at 629. Corporations can be made very insecure by prolonged periods of bad publicity. *United States v. Hosp. Monteflores, Inc.*, 575 F.2d 332 (1st Cir. 1978) Thus, the threat of criminal liability provides serious incentive for corporations to both train and police employees from the start.

Third, corporate criminal liability encourages the convicted corporation to take remedial and preventative measures to ensure future employee compliance. The district court's instruction on corporate criminal liability requires that the acts of the agents "be directly related to the performance of the duties the employee has the authority to perform." *Ionia*, 526 F. Supp. 2d at 324. The corporation is in the best position to influence the actions of its agents. This is done best by establishing a strong ethical culture, and using preventative methods such as compliance and ethics training programs.

Corporations that fail to implement strong corporate ethical standards have only themselves to blame for the wrongful acts of their employees. High-level corporate managers choose to hire their employees and thus, are responsible for training and monitoring their actions. A study showed that the strength of a company's formal ethics and compliance program had the greatest impact on encouraging employee reporting, *not* deterring the behavior from the start. Ethics Resource Ctr., *National Business Ethics Survey: An Inside View of Private Sector Ethics* (2007). In a study done in 2007, only nine percent of companies were found to have strong ethical cultures. *Id.* Criminal

liability encourages corporations to implement a greater corporate cultural change, rather than do simply have a compliance program.

Many lower courts allow evidence of compliance programs and corporate policies as mitigating factors. *U.S. v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but... the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."). Evidence of corporate policies or instructions can be used to show the employee was not acting within the scope of their employment, or to benefit the corporation when they committed the illegal act. However, the U.S. Department of Justice suggests that, "...the commission of such crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program."² Compliance programs are but one small part of a greater remedial and preventative approach towards implementing a strong ethical culture.

In the alternative, if compliance programs were allowed as an affirmative defense, it would allow corporations to ignore the origins of the problem, giving them an easy escape route, without being forced to take remedial measures. Compliance programs, by themselves, are not enough to ensure corporate responsibility. Further, most ethics and compliance programs are driven by legal and regulatory demands, and designed in reaction to past mistakes. Ethics Resource Ctr., *National Business Ethics Survey: An Inside View of Private Sector Ethics* (2007). As a result, they focus on teaching

² U.S. Dep't of Justice, *Memorandum on Principles of Federal Prosecution of Business Organizations* (December 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

employees what they must avoid doing, rather than addressing what ethical behavior should be from the start. Corporate criminal liability should not be so limited to allow a corporation to sidestep responsibility by claiming an ineffective compliance program as a defense.

The *New York Central* holding allows for flexible application of corporate criminal liability on a case-by-case basis, and should not be revisited. Juries, as the fact-finders of criminal courts, must continue to be given the freedom to decide whether the facts merit holding a corporation vicariously liable. Further, the district court's jury instruction was consistent with general principles of criminal law. Corporations must take responsibility for their contribution, whether directly or indirectly, to the crime. The threat of criminal liability provides serious incentive for corporations to both train and police employees from the start. However, corporate criminal liability should not be limited by allowing a corporation to sidestep responsibility by claiming an ineffective compliance program as a defense.

CONCLUSION

Accordingly, the People respectfully request that this court affirm the decision of the lower court.