
Docket No. 08-1234

In the
Supreme Court of the United States

OCTOBER TERM, 2008

IONIA MANAGEMENT S.A.,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR RESPONDENT

TEAM 13

Counsel for the Respondent

ISSUES PRESENTED

1. Whether the District Court's jury instructions were properly authorized by Supreme Court precedent and federal statutory law when those bodies of law have explicitly allowed the criminal prosecution of corporations for over 100 years.
2. Whether the District Court's jury instructions on corporate criminal liability were valid when they were based on the general principles of criminal law and this Court's holding in *New York Central & Hudson River RR v. United States*.

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STATEMENT OF THE CASE

Bilge water discharge is highly regulated in the shipping industry. Large ships produce massive amounts of waste oil that collect and mix with the bilge water. *U.S. v. Ionia Management S.A.*, 536 F.Supp.2d 319 (D.Conn. 2007). This oily waste poses significant environmental hazards if it is dumped directly into the ocean. In order to address this issue, two international conventions (“MARPOL”) were held with the ambition “to achieve the complete elimination of international pollution of the marine environment by oil and other harmful substances.” *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships* (Feb. 17, 1978) 1340 U.N.T.S. 61, 128. *See also 1973 International Convention for the Prevention of Pollution from Ships* (Nov. 2, 1973) 1340 U.N.T.S. 184. These conventions resulted in two international environmental treaties to which the United States is a party. Ionia knowingly violated these treaties on numerous occasions.

These international treaties provide that a vessel may only discharge oily waste *en route* if the discharged material is processed through a specified oil filtration system. MARPOL, 1340 U.N.T.S. at 67. Additionally, the ships must keep a record of all oil transfer operations in an oil record book (“ORB”). MARPOL, 1340 U.N.T.S. at 211-12. These treaties are not self-executing. *Id.* at 63. Therefore, Congress enacted the Act to Prevent Pollution on Ships (“APPS”), 33 U.S.C.A. §§ 1901-1912, which authorizes the Coast Guard to “prescribe any necessary or desired regulations to carry out the provisions of...MARPOL. 33 U.S.C.A. § 1903(c)(1). APPS also provides that “[e]ach oil tanker of 150 gross tons and above ...shall maintain an [ORB].” 33 C.F.R. § 151.25(a). This provision applies to ships registered in the United States irrespective of their location, and it applies to foreign-flagged ships only “while in the navigable waters of the United States, or while at a port or terminal under the jurisdiction of

the United States.” 33 C.F.R. § 151.09(1)(1)-(5). Negligent violations, knowing violations, and false statements, under APPS, are considered criminal acts and are punishable as either a Class A misdemeanor or a Class D felony. 33 U.S.C.A. § 1901(d)(1)-(3). Ionia was charged with 13 violations under APPS, as well as one count of conspiracy, three counts of falsifying records in a federal investigation, and one count of obstruction of justice. *U.S. v. Ionia Management S.A.*, 2007 WL 4998563 (D.Conn. 2007).

The charges against Ionia are derived from the actions aboard the *M/T Kriton* (“*Kriton*”), a 600-foot, 28,898 gross ton, oceangoing oil-tanker that Ionia manages, but does not own. *Ionia*, 2007 WL 4998563. The *Kriton* is registered in the Bahamas, while Ionia is incorporated in Liberia and headquartered in Greece. *Id.* From January 2006 to April 2007, the *Kriton* delivered oil and petroleum products to various ports on the east coast of the United States. *Id.* While making its deliveries, the crew of the *Kriton* routinely discharged oil, oil sludge, oil residues, oily mixtures, bilge slops, and bilge water into the ocean through a hose that was designed to bypass the ship’s Oily Water Separator, a mandatory piece of equipment. *Id.* These illegal discharges were performed under the specific direction and participation of the Chief Engineers and Second Engineer -- Edgardo Mercurio. *Id.*

In an effort to deceive authoritative entities such as the US Coast Guard, the crew went to great lengths to maintain the appearance of compliance with MARPOL. *Id.* They refilled the waste oil tanks with sea water to reflect the volumes that were written in the ORB. *Id.* They flushed the bypass hose with sea water. *Id.* They blew steam through the overboard discharge valve to clean any residual oil that might be noticed upon inspection. *Id.* They hid the bypass hose from the Coast Guard, during their routine inspections. *Id.* They made false entries in the

ORB to conceal these illegal discharges. *Id.* These actions represent a complete and utter disregard for two international treaties and the laws of the United States.

Ionia was tried and convicted by jury in the United States District Court for the District of Connecticut under the theory of *respondeat superior*. *Id.* The jury was instructed that “it must find beyond a reasonable doubt that Ionia, through its agents, [were] in charge of operating the oil pollution prevention and discharge equipment for the *M/T Kriton* and that the acts or omissions performed by the agents were ‘within the scope of their employment.’” *Ionia*, 2007 WL 4998564. “Within the scope of employment” and its subsequent parts were defined by the court and presented to the jury as:

“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 benefited, 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 benefiting the corporation. It is sufficient if one of the agent's purposes was to benefit the corporation.”

Id. Ionia appealed the jury’s decision to the Second Circuit based on improper jury instructions. *Ionia*, 999 F.3d 999 (2d Cir. 2008). The Second Circuit subsequently affirmed the lower courts ruling. *Id.* This prompted Ionia to petition for writ of certiorari to the Court of Appeals for the Second Circuit, which was granted by this Court.

SUMMARY OF ARGUMENT

Petitioner is not before this Court due to a solitary act of indiscretion. Petitioner is here due to a multitude of knowing and intentional violations of international treaties and federal statutory law. Since there is no legally acceptable justification for these actions, Petitioner is attempting to call into question a legal theory that has been a fundamental principle of criminal law for 100 years.

Vicarious liability of corporations was indoctrinated into criminal law with this Court's 1909 holding in *New York Central & Hudson River RR v. United States*. In *New York Central*, the Court stated that a corporation will be criminally liable for actions that an employee has assumed to perform for the corporation and that when analyzing such actions it is not necessary to strictly construe the agent's scope of employment. From that point forward, this Court has continued to uphold this ruling and should do so here. The actions of Ionia's agents were performed within the scope of their employment and these actions unmistakably constitute a direct violation of federal statutory law.

In addition to this Court's jurisprudence, Congressional history is replete with statutes that rely on holding corporations criminally liable for the actions of their employees. Not only has Congress passed specific statutes that impute the actions of an employee to a corporation, such as the APPS statute, but it has also enacted a statute stating that the word "person" naturally includes corporations unless otherwise stated. Statutes, like the APPS statute, have been universally upheld within the circuit courts.

Corporate criminal liability is a firmly established, fundamental principle of criminal law. Every jurisdiction has recognized that the criminal prosecution of a corporation predicates liability upon conduct consisting of a culpable act or omission to act and it adequately serves the

goals of criminal punishment. The existence of these fundamental elements further support this Court's ruling in *New York Central*.

This Court should affirm the District Court's ruling and the ruling of the Second Circuit because (1) this Court and Congress have continually upheld and relied on corporate criminal liability; (2) corporate criminal liability is a firmly established, fundamental principle of criminal law; and (3) this Court appropriately integrated the doctrine of *respondeat superior* into criminal law with its ruling in *New York Central*.

ARGUMENT

I. THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY IS COMPREHENSIVELY SUPPORTED BY SUPREME COURT PRECEDENT AND FEDERAL STATUTORY LAW.

Supreme Court precedent and federal statutory law unequivocally support the criminal prosecution of corporations. Since the early 1900's, corporate defendants have contended that only natural persons are included when a criminal statute proscribed conduct by 'persons.' *U.S. v. Wise*, 370 U.S. 405, 408 (1962)(citing *U.S. v. Amedy*, 11 Wheat. 392). This Court, in its decision of *New York Central & H.R.R. Co. v. U.S.*, settled that issue when it held that a corporation may be liable for the acts of an employee within the scope of his employment. 212 U.S. 481 (1909). Since that time, the Supreme Court has continued to abide by that rule and Congress has continued to pass statutes that hold corporations criminally liable for the acts of its employees.

A. The District Court’s Jury Instructions Were Valid Because the Supreme Court Has Continually Authorized Criminal Prosecution of Corporations.

The past 100 years of Supreme Court precedent unmistakably support the fundamental principle that corporations can be held criminally liable for the acts of their employees. The law should have regard to the rights of all, and to those of corporations no less than to those of individuals; however, the Court cannot shut its eyes to the fact that the great majority of business transactions are conducted through corporations and to give them immunity from all punishment because of an outdated doctrine that corporations cannot commit a crime would virtually take away the only means of effectively controlling the subject-matter and correcting the abuses aimed at. *New York Central*, 212 U.S. at 495. That same rationale applies here. Ionia Management is afforded the same rights and protection under the law as an individual and, therefore, cannot be duly granted an exclusive right to violate the law because of its status as a corporation. The landmark ruling of *New York Central* established the foundation of corporate criminal liability, which this Court has historically relied upon and should continue to uphold today.

New York Central established the fundamental principle that corporations could be held criminally liable for the actions of their employees. In *New York Central*, the Court was to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him. *Id.* at 494. The agents, a general freight traffic manager and an assistant freight manager, were authorized to establish rates at which freight should be carried over the rail line of the New York Central & Hudson River Company. *Id.* Through this authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress (the Elkins Act), which required the filing and publishing of rates and punished departures from these published rates. *Id.* Sugar had a

published rate of 23 cents per 100 pounds. *Id.* at 490. However, the agents set the rate at 18 cents per 100 pounds for Edgar & Son as an incentive for Edgar & Son to use the rail system instead of resorting to water transportation. *Id.* In order to conceal this special rate, a rebate of five cents per 100 pounds was transferred from the railroad company by cashier's draft to the agent of the sugar company. *Id.* at 491. The Court ultimately held that the corporation was criminally liable for the acts of its employees as it borrowed the theory of respondeat superior from civil law to support its ruling. *Id.* at 494.

The District Court's jury instructions fall directly within the guidelines established by this Court. Corporations can *only* act through their employees; therefore, they are liable for their acts or omissions. *U.S. v. Illinois Cent. R. Co.*, 303 U.S. 239, 244 (1938). In order to determine which acts a corporation can be held liable, the Court does not restrict the scope of authority to "legal" acts alone.

"[A] corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act."

New York Central, 212 U.S. at 493-494 (citing *Washington Gaslight Co. v. Lansden*, 172 U.S. 534, 544 (1899)). This language mirrors the language of the jury instructions that the District Court issued, which stated that an agent will be acting within the scope of employment "even if the act or omission was not specifically authorized" as long as "(1) the agent acted for the benefit of the corporation and (2) the agent was acting within his authority." The matter at hand is indistinguishable from *New York Central*.

Just like the agents of the New York Central Railroad Company, Ionia's agents were "clothed with authority." With these powers, the agents are bound to respect the regulations

enacted by Congress. *New York Central*, 212 U.S. at 494. The APPS statute required the crew to keep an ORB and to properly use the mandated oily water separator. The *Kriton* crew clearly did not respect these regulations. But, what makes this case especially egregious is that the crew did not simply fail to follow these guidelines; the crew, including the Chief Engineers and Second Engineer Edgardo Mercurio, devised a system of fraud and deceit to cover up their direct and knowing violations of the APPS statute. These actions were clearly within their authority to manage the ship and the only plausible explanation for their outrageous acts of defiance is that they were done in order to increase the efficiency of their operation thereby benefiting the corporation. It is unfathomable that the crew would go through all of the trouble of designing a bypass system and implementing fraudulent procedures if it did not render some cognizable benefit to the operation of their ship. “To permit corporations to conceal the nefarious acts of their underlings by using the shield of corporate armor to deflect corporate responsibility would permit corporations to cause wide spread harm for which there would be inadequate redress. *Commonwealth v. Beneficial Fin. Co.*, 275 N.E.2d 33, 83-84 (Mass. 1971). The Supreme Court has traditionally not allowed corporations to use a shield of armor to protect themselves from the actions of their employees and they should not be allowed to deflect it today. Since the ruling of *New York Central*, the Court has continued to apply the doctrine of *respondeat superior* to all business entities.

The Court’s application of *respondeat superior* in a criminal context is such a fundamental principle that it has been applied unilaterally to all business entities. The business entity cannot be left free to break the law merely because its owners, stockholders, or partners do not personally participate in the infraction. *U.S. v. A & P Trucking Co.*, 538 U.S. 121, 126 (1958). The treasury of the business may not with impunity obtain fruits of violations which are

committed knowingly by agents of the entity in the scope of their employment. *Id.* Here, the Court addressed the issue of whether a partnership could be held criminally liable under the same theories that had been traditionally applied to corporations. *Id.* at 124. In *A & P Trucking*, the appellees were charged, as entities, with statutory violations which made it criminal to knowingly violate the Interstate Commerce Commission regulations for the safe transportation in interstate commerce of explosive and other dangerous articles. *Id.* at 121-122. The District Court dismissed the case on the ground that a partnership entity could not be guilty of violating the statutes involved. *Id.* at 122. The government appealed and this Court held that the constitutionality of imposing criminal statutory liability against corporations had been established in *New York Central & Hudson River R.R. Co. v. U.S.* and no reason was suggested as to why Congress has not equal power to charge the partnership assets with liability and to personify the company so far as to collect a fine by a proceeding against it by the company name. *Id.* at 126. The Court went on to state that by holding the business entity liable for the actions of its employees under the theory of *respondeat superior* it puts pressure on those who own the entity to see to it that their agents abide by the law. *Id.* This principle is no less true today than it was 50 years ago when this Court issued its ruling.

The District Court's jury instructions fall directly within the framework of Supreme Court jurisprudence and should therefore be affirmed.

B. The District Court’s Jury Instructions Were Proper Because Federal Statutory Law Specifically Provides That Corporations Will Be Held Criminally Liable for the Acts of Employees.

The District Court’s jury instructions were proper because federal statutory law specifically provides that corporations will be held criminally liable for the acts of employees. As a matter of legal development, it has taken time to establish criminal liability for a corporation itself and not merely for its agents. *U.S. v. Dotterweich*, 320 U.S. 277, 281 (1943). Therefore, Congress has addressed this issue broadly by including “corporations” within the statutory definition of a “person.” 1 U.S.C.A. § 1. It has also addressed this issue by specifically including the necessary language in particular statutes. *See* 33 U.S.C.A. § 1901(a)(10). Congress has utilized both of these methods to explicitly include the appropriate language to ensure that corporations can be held criminally liable for the acts of its employees.

Congress has consistently provided that corporations will be held criminally liable for the actions of its employees. Historically, Congress needed to use elaborate phrases to fasten criminal liability on corporations. *Dotterweich*, 320 U.S. at 281. The history of the federal food and drug legislation is a good illustration of such elaborate phrasing. *Id.* Section 12 of the Food and Drugs Act of 1906 provided that

‘the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission or failure of such corporation, company, society, or association as well as that of the person.’

Id. at 281-282. By 1938, legal understanding and practice had rendered such statement of the obvious superfluous. *Id.* at 282. In the interest of brevity and good draftsmanship, Congress passed a statute that stated when a person is determining the meaning of any Act of Congress the word “person” includes corporations unless the context indicates otherwise. *See* 1 U.S.C.A. § 1.

In the matter at hand, Congress did not indicate otherwise when it passed APPS. To the contrary, Congress specifically defines “person” within the language of APPS to mean “an individual, firm, public or private corporation, partnership, association . . .” 33 U.S.C.A. § 1901(a)(10). Under APPS, Congress clearly anticipated and intended for corporations to be held liable for violations.

Furthermore, Congress has designated a particular sentencing structure for corporations. 18 U.S.C.A. § 3571(c) provides a sentencing guideline for organizations that have been found guilty of a criminal offense. This statute specifically designates sentencing guidelines for individuals and organizations separately. 18 U.S.C.A. § 3571. Congressional Acts such as these exemplify the fundamental principle that corporations can be held criminally liable for the acts of their employees.

Corporate criminal liability is not an infantile concept that has yet to develop within the legal world; it is a principle that is firmly indoctrinated in both Supreme Court jurisprudence and the statutory framework. The jury instructions issued by the District Court fall well within the guidelines provided by the rulings of this Court and the statutes enacted by Congress. Therefore, the Second Circuit’s ruling should be affirmed.

II. THE DISTRICT COURT'S JURY INSTRUCTIONS WERE PROPER BECAUSE CORPORATE CRIMINAL LIABILITY IS A FIRMLY ESTABLISHED AND FUNDAMENTAL PRINCIPLE OF CRIMINAL LAW.

Corporate criminal liability is a firmly established and fundamental principle of criminal law. The same law that creates the corporation may create the crime, and to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not...bear discussion. *U.S. v. MacAndrews & Forbes Co.*, 149 F. 823, 836 (C.C.S.D.N.Y. 1906). Corporate criminal liability has been adopted in every circuit, as well as by this Court. The application of corporate criminal liability within every jurisdiction in the United States has been guided by the recognized principles of criminal law. These principles of criminal law predicate liability upon conduct consisting of a culpable act or omission to act. These principles also require the goals of punishment to be adequately served. Corporate criminal liability does not deviate from these fundamental principles and exists squarely within the realm of criminal law.

A. Corporate Criminal Liability is Recognized in Every Jurisdiction.

Circuit courts unanimously recognize and apply corporate criminal liability. It is beyond doubt that a corporation may be held criminally liable. *Steere Tank Lines, Inc. v. U.S.*, 330 F.2d 719, 721 (5th Cir. 1963). *See U.S. v. Potter*, 463 F.3d 9 (1st Cir. 2006); *U.S. v. Paccione*, 949 F.2d 1183 (2d 1991); *U.S. v. Sain*, 141 F.3d 463 (3d 1998); *U.S. v. Singh*, 518 F.3d 236 (4th Cir. 2008); *U.S. v. Bi-Co Pavers, Inc.*, 741 F.2d 730 (5th 1984); *U.S. v. Carter*, 311 F.2d 934 (6th Cir. 1963); *Tippecanoe Beverages, Inc. v. S.A. El Aguila Brewing Co.*, 833 F.2d 633 (7th Cir. 1987); *U.S. v. Jorgensen*, 144 F.3d 550 (8th Cir. 1998); *U.S. v. Beusch*, 596 F.2d 871 (9th Cir. 1979); *U.S. v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975); *U.S. v. Gold*, 743 F.2d 800 (11th Cir. 1984). The existence of corporate criminal liability in every jurisdiction overwhelmingly

indicates that the doctrine of *respondeat superior* has successfully been integrated into the realm of criminal liability.

B. Criminal Prosecution of Corporations Predicates Liability Upon Conduct Consisting of a Culpable Act or Omission to Act.

Corporate criminal liability maintains the basic elements of criminal law. Criminal law generally requires criminal conduct consisting of a culpable act or omission to act. Kathleen F. Brickey, *Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, Their Officers and Agents*, vol. 1, 89 (2d ed., Clark Boardman Callaghan 1992). Early court rulings immunized corporations from liability for crimes requiring intent because they felt that corporations were mere legal entities. *Id.* at 129. However, the courts have since resolved this issue by noting the striking similarity between the analytical framework used to impute criminal acts on people and that needed to impute criminal intent to corporations. *Id.* See *U.S. v. MacAndrews & Forbes Co.*, 149 F. 823, 836 (S.D.N.Y. 1906)(holding that there is no more logical difficulty with imputing an evil mind to the corporation than with imputing a contractual obligation to the corporation). See also *C.I.T. Corp. v. U.S.*, 150 F.2d 85, 90 (9th Cir.1945)(stating that the principle [established in *New York Central*] has been accepted in the circuits as controlling in corporate crimes in which intent is an essential factor).

Corporations can *only* act through their employees; therefore, they are liable for their acts or omissions. *U.S. v. Illinois Cent. R. Co.*, 303 U.S. 239, 244 (1938). To the extent that their acts and intent could be said to represent corporate policy, employee's criminal acts could become acts for which the corporation would be criminally responsible. Brickey, *Corporate Criminal Liability* at 90. This general rule is supplemented by the caveat that the employees must act "within the scope of their employment." *Id.* This term of art signifies little more than

that the employee's crime must be committed in connection with his performance of some job-related activity. *Id.*

Scope of employment includes all levels of employees within a corporation's hierarchy. The greater the degree of control an executive exercises over corporate matters, the clearer the rationale for holding the corporation bound by his acts. *Id.* at 91. *See U.S. v. Park*, 421 U.S. 658 (1975)(upholding the conviction of the corporation and the president of the corporation for violations under the Federal Food, Drug and Cosmetic Act); *U.S. v. Empire Packing Company*, 174 F.2d 16 (7th Cir. 1949)(upholding the conviction of a corporation and its president); *Mininsohn v. U.S.*, 101 F.2d 477 (3d Cir. 1939)(upholding the conviction of a corporation and one officer for conspiracy to defraud the government by selling short weight bags of cement). As the courts analyze the actions of employees that fall lower on the corporate totem pole, they have maintained the same rationale that an employee's actions can be imputed to the corporation.

Courts have upheld corporate convictions for the acts of middle and low level supervisory personnel such as sales, depot and production managers, and general foreman. *See, e.g., U.S. v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970)(sales); *Continental Banking Co. v. U.S.*, 281 F.2d 137 (6th Cir. 1960)(depot manager); *U.S. v. Steiner Plastics Mfg. Co.*, 231 F.2d 149 (2d Cir. 1956)(production manager); *U.S. v. Milton Marks Corp.*, 240 F.2d 838 (3d Cir. 1957)(general foreman). Corporations have also been held accountable for the criminal acts of low level employees including salesmen, clerical workers, truck drivers, and manual laborers. *See, e.g., U.S. v. George F. Fish, Inc.*, 154 F.2d 798 (2d Cir. 1946)(salesmen); *Riss & Co. v. U.S.*, 262 F.2d 245 (8th Cir. 1958)(terminal log clerk); *U.S. v. Harry I. Young & Sons, Inc.*, 464 F.2d 1295 (10th Cir. 1972)(truck driver); *U.S. v. Illinois Cent. R.R.*, 303 U.S. 239 (1938)(employee whose duty was unloading cattle from a boxcar). In the

matter at hand, this Court is concerned with the actions of the chief engineer and the crew of the *Kriton*. The respective rank of these employees does not affect this Court's analysis of liability.

The corporate rank of Ionia's agents is irrelevant to this Court's analysis of corporate criminal liability because the purpose of APPS was to comply with an international treaty and significantly reduce ship pollution. Statutory law where the requisite purpose is the protection of the public at large is clearly designed to enlarge and stiffen the penal net and not to narrow and loosen it. *Dotterweich*, 320 U.S. at 282. In *Dotterweich*, the Court dealt with an Act that sought to set up effective provisions against abuses of consumer welfare growing out of inadequacies in the Food and Drugs Act of June 30, 1906. *Id.* The defendant claimed that he should be exonerated because the Act of 1938 freed all individuals, except when proprietors, from culpability. *Id.* However, the goal of the act, which the Court focused on, was to strengthen and extend the law's protection of the consumer. *Id.* The matter at hand is resoundingly similar to the Court's rationale in *Dotterweich* because APPS was enacted to protect the public at large from the pollution of ships.

APPS was enacted in response to MARPOL, an international treaty to reduce oceanic pollution. The purpose of APPS was to make *any* knowing violation of MARPOL a criminal act. 33 U.S.C.A. § 1908(a). Therefore, the actions of any agent that causes a knowing violation should be directly imputed to the corporations. The chief engineer and the crew of the *Kriton* knowingly disabled the oil water separator and designed a bypass system that would dump oil sludge directly into the ocean. They also falsified the ORB entries. "Oil upon the waters is as harmful if its presence be due to inattention as if due to design." *Hegglund v. U.S.*, 100 F.2d 68, (5th Cir. 1938). These actions unmistakably constitute a knowing violation of the law and the only adequate response is criminal punishment.

Additionally, the illegal actions described by APPS will invariably be performed by the subordinate employees of Ionia Management. Therefore, no distinctions should be made in this Court's analysis between persons holding positions with varying degrees of responsibility especially when the provisions of a federal statute will be carried out by the subordinates rather than the corporate managers. *U.S. v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d 1946). The *George F. Fish* Court dealt with the issue of whether the guilt of its salesman could be attributed to the corporation. *Id.* The Second Circuit held that a subordinate salesman's actions could be imputed on the corporation because the federal statute that made his actions criminal were designed specifically for those employees that would be directly involved with the sales. *Id.*

Similarly, APPS was designed to restrict the dumping of oil sludge, which is an act that subordinate employees would perform. Clearly corporate managers could not violate APPS while they were sitting in their office thousands of miles away. The only people that could possibly violate APPS are those that are perform the day-to-day tasks aboard an oceangoing vessel. Congress certainly recognized this issue and properly drafted this statute to include corporations under the umbrella of liability. Ionia Management should, therefore, be held liable for the actions of its employees regardless of their rank because the purpose of APPS was to protect the public at large by reducing ship pollution.

C. Corporate Criminal Liability Adequately Serves the Goals of Criminal Punishment.

Upholding the criminal conviction of Ionia Management not only maintains the basic elements of criminal law, but it also adequately serves the goal of deterrence. When the purpose of a federal statute is deterrence, denying the possibility of corporate responsibility for the acts of minor employees will immunize the offender who really benefits, and will open wide the door for evasion. *George F. Fish*, 154 F.2d at 801. The primary goal of APPS was to prevent illegal oil discharge by large shipping vessels. In light of this goal, Congress was cognizant of the fact that corporations would not be dissuaded from illegally dumping oil if the maximum fines they faced were civil fines. Therefore, Congress relied on vicarious liability and criminal law to serve as an adequate deterrent.

Criminal liability serves as a compelling incentive for corporations to follow the law. Normally, the most direct way to deter certain actions is to hold the individual liable. V.S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 Am. Crim. L. Rev. 1239, 1243 (2000). However, agents do not have sufficient assets to pay for the total social costs of the wrongdoing. *Id.* Therefore, corporate liability improves deterrence when agents are judgment proof because it places corporate assets at risk and thereby forces the corporation to internalize the total social cost of wrongdoing. *Id.* at 1244-1245. This was one of the primary goals of the recently enacted Sarbanes-Oxley Act (“SOX”).

SOX set new punishment benchmarks for corporate criminal liability. In response to the spectacular corporate crime scandals that unraveled in 2001 and 2002, SOX was enacted. Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 Buff. Crim. L. Rev. 1, 22 (2004). The statute employs a multi-pronged approach to the prevention and punishment of white collar criminality by imposing new offenses, stiffer penalties and more transparency into

corporate practices. *Id.* One of the firm rationales for this statute is that if the laws expose the individual agent to the risk of punishment without also punishing the corporate entity there would be little incentive for corporate management to take an active role in formulating procedures to insure that the affairs of the enterprise are conducted lawfully. Brickey, *Corporate Criminal Liability*, at 10. In fact, some commentators believe that crimes committed by organizations may cause more damage to society than crimes committed by individuals. Diana E. Murphy, *The Federal Sentencing Guidelines For Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 699 (2002). SOX, therefore, required an immediate revision of the U.S. Sentencing Guidelines to ensure that punishment proved to be a measure of deterrence and corresponded to the committed wrong. Roland Hefendehl, *Enron, Worldcom, and the Consequences: Business Criminal Law Between Doctrinal Requirements and the Hopes of Crime Policy*, 8 Buff. Crim. L. Rev. 51, 62 (2004).

In light of SOX and the facts of modern corporate life, people have been prompted to argue that requiring employee supervision to be sufficient to prevent violations by the law is impracticable within the context of the large business corporation. Brickey, *Corporate Criminal Liability* at 103. However, the blunt judicial response to that suggestion has been that “the checking and elimination of...obviously illegal practices is not shown to be any more difficult than other details of a nation-wide industry.” *Id.* (citing *U.S. v. Armour & Co.*, 168 F.2d 342, 343 (3d Cir. 1948)). Specifically related to the matter at hand is the fact that Ionia Management competes in the international shipping industry. Ionia was indicted in four separate jurisdictions for violations stemming from activities aboard the *Kriton*. Each of these instances were separate acts of defiance for the laws of an international treaty and the laws of the United States. It seems

a far cry from reality that Ionia could operate on an international market, yet could not maintain the proper protocol for the operations aboard its ships.

Holding Ionia liable for the actions of its employees adequately serves the goals of punishment that are innate to the principles of criminal law. Perhaps upon paying the appropriate criminal fines, Ionia will re-evaluate its corporate structure and will invoke policies and procedures that fall in line with international law and the laws of the United States.

This Court should affirm the Second Circuit's ruling because corporate criminal liability is a fundamental principle of criminal law and the District Court's jury instructions did not deviate from these standards.

III. THE COURT SHOULD NOT REVISIT *NEW YORK CENTRAL & HUDSON RIVER RR V. U.S.* BECAUSE THE HOLDING APPROPRIATELY INTEGRATED THE DOCTRINE OF *RESPONDEAT SUPERIOR* INTO CRIMINAL LAW.

This Court should not revisit *New York Central* because it appropriately integrated the doctrine of *respondeat superior* into criminal law. The doctrine of respondeat superior appropriately applies to criminal law because a corporation can only act through its employees. *U.S. v. Illinois Cent. R. Co.*, 303 U.S. 239, 244 (1938). This Court, as well as every circuit court, has continued to recognize corporate criminal liability as an integral part of criminal law. Not only is it good, well-established law, but a complete abolition of corporate criminal liability is out of the question because concepts of corporate criminal liability are found in numerous enactments created at different times and for different reasons over the course of several decades. Hefendehl, 4 Buff. Crim. L. Rev. at 292. As a result, the consequences of a contrary ruling by this Court would be almost impossible to predict. *Id.* *New York Central* is legally sound case law and this Court should uphold this century old ruling.

Petitioner has attempted to call into question the application of this doctrine based upon the evolution of the doctrine in civil law. Petitioner argues that in order to establish vicarious liability the prosecution should have to prove as a separate element in its case-in-chief that the corporation lacked effective policies and procedures to deter and detect criminal actions by its employees. Br. of Amici Curie, *U.S. v. Ionia Management S.A.*, 999 F.3d. 999 (2d Cir. 2009). This suggestion, however, is contrary to case law as the Second Circuit held, in *U.S. v. Twentieth Century Fox Film Corp.*, that a compliance program no matter how extensive will not immunize a corporation from liability when its employees, while acting within the scope of their employment, fail to comply with the law. 882 F.2d 655, 660 (2d Cir. 1989). Petitioner cites to this Court's case law as justification; however, those cases are civil cases and do not bear on the analysis of criminal cases.

The evolution of a doctrine within civil law is fundamentally different from the evolution of the same doctrine in criminal law. Criminal law is subjected to different procedure and a different burden of proof than civil law. *Addington v. TX*, 441 U.S. 418, 423-424 (1979). These differences will cause a doctrine such as *respondeat superior* to evolve into a unique legal principle, particular only to criminal law. Petitioner would like to convince this Court that a due diligence rationale should be applied to corporate criminal liability because the same rationale has been adopted in civil law. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). However, the Ninth Circuit appropriately addressed this due diligence argument as it relates to criminal law in *Coolidge v. U.S.*, 101 F.2d 638 (9th Cir. 1939).

Even when corporations take precautions to ensure that their agents follow the law, they can still be prosecuted for subsequent violations. At one time it was thought that statutory

liability was limited to those whose owners or masters had authorized to wrongful acts, but this has been overruled. *Coolidge*, 101 F.2d at 639. In *Coolidge*, the appellant was Dollar Steamship Company who was the owner of the steamship, “The President Coolidge.” *Id.* at 638. The Dollar Steamship Company had a strict policy against throwing refuse from the ship as there was a federal statute that made such a violation a misdemeanor. *Id.* While in port in Honolulu, a harbor patrol man, who was passing under the stern of the ship, was covered in a quantity of garbage dumped from the ship. *Id.* Appellants argued that they should not be held liable for the actions of its employees because they had taken precautions to ensure that the law would not be violated. *Id.* at 639. The Ninth Circuit disagreed and stated that “having committed his ship to the seas, an owner takes the risk of much which he cannot easily control. As between him and the injured party, it is thought desirable to throw the loss where prevention would have been at least possible.” *Id.* at 639 (*citing The Colombo*, 42 F.2d 211, 212 (2d Cir. 1930)). “Any other construction would change the statute from one of prohibition to that requiring merely due care.” *Id.* at 640.

Similarly, APPS is clearly one of prohibition and should not be reduced to a standard of due care. Ionia argues that the jury instructions were improper because “Ionia had a strict policy against the improper discharge of oily waste and bilge water.” *Ionia*, 526 F.Supp.2d at 322. Regardless of their policy, Ionia failed to prevent the commission of the forbidden act, an act that took place numerous times. Compliance programs are not a separate element for the prosecution to prove in its case-in-chief and have never been a separate element when handling a criminal case. APPS was enacted by Congress specifically to deter the illegal discharge of oil waste. If this Court rules contrary to the Second Circuit’s decision, it will effectively render this statute

and countless others useless because they will no longer serve the prohibitive function that is necessary in criminal law.

This Court's decision *New York Central* is still good law and this Court should reaffirm the ruling it made 100 years ago.

CONCLUSION

As the global community continues to focus its attention on environmental issues, Congress may find itself incapable of deterring corporations from violating statutes such as APPS if this Court reverses its holding in *New York Central*. Vicarious liability has become a fundamental and necessary principle of criminal law as it provides the judiciary with the appropriate means of addressing the actions of corporate juggernauts. This "tool" has been used for over 100 years and has been universally adopted by the circuit courts and this Court. Accordingly, this Court should affirm the ruling of the District Court and Second Circuit.

Respectfully Submitted,

Team 13
Counsel for the Respondent

CERTIFICATE OF SERVICE

Team Six (6) HEREBY CERTIFIES that on this 20th day of February, 2009, six (6) hard copies and one (1) copy burned on CDR of the foregoing Brief for Respondent was mailed to the Wechsler Competition Chair at the University of Buffalo School of Law.

Respectfully Submitted,

Team 13
Counsel for the Respondent