

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

BRIEF FOR THE UNITED STATES

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Counsel for the Respondent

QUESTIONS PRESENTED

I. A federal district court issued a jury instruction providing that a corporation can be held criminally culpable for the acts of its employees undertaken within the employee's authority and with intent to benefit the corporation. Is this jury instruction authorized by this Court's precedent and federal statutory law?

II. Is this jury instruction consistent with general principles of criminal law?

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BRIEF FOR RESPONDENT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent, the United States of America, respectfully submits this brief in support of its request that this Court affirm the decision of the Court of Appeals Second Circuit.

STATUTORY AND REGULATORY PROVISIONS

The statutory and regulatory provisions relevant to the case before this Court:

1 U.S.C. § 1 (1947) states, in relevant part: [i]n determining the meaning of any Act of Congress, unless the context indicates otherwise--the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

18 U.S.C. §1001 (a)(1)-(3) (2008) states, in relevant part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, or imprisoned no more than five years.

18 U.S.C. §1519 (2009) identifies guidelines to punish the destruction, alteration, or falsification of records in Federal investigations and bankruptcy and states that:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

33 U.S.C. §1901(a)(10) (2008), provides definitions governing the Act to Prevent Pollution from Ships (“APPS”), and states, in relevant part:

(a)(10) “person” means an individual, firm, public or private corporation, partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body;

33 U.S.C. §1908(a) (2008) outlines penalties for violations to APPS and states, in relevant part:

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

42 U.S.C. §1981(a) (2008) covers equality under the law and outlines, in relevant part:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

33 C.F.R. § 151.09 (a)(5) (2008) details applicability of Coast Guard authority and states,

in relevant part:

(a) Except as provided in paragraph (b) of this section, §§ 151.09 through 151.25 apply to each ship that—

(5) Is operated under the authority of a country other than the United States 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. § 151.25 (h)&(j) (2007) outlines the standards for maintaining oil record books states,

in relevant part:

(h) Each operation . . . shall be signed by the person or persons in charge of the operations concerned and each completed page shall be signed by the master or other person having charge of the ship.

(j) The master or other person having charge of a ship required to keep an Oil Record Book shall be responsible for the maintenance of such record[.]”

STATEMENT OF THE CASE

Defendant-appellant Ionia Management S.A. was convicted by jury trial on September 6, 2007. *United States v. Ionia Management S.A.*, 526 F.Supp.2d 319, 321 (D.Conn. 2007). A jury found defendant guilty on 18 counts, *inter alia*, 13 counts violating 33 U.S.C. §1908 (a), the Act to Prevent Pollution from Ships (“APPS”) and related regulations, and three counts violating 18 U.S.C. §1519 for falsifying records connected to a federal investigation. *Id.* at 321. The charges stemmed from four separate indictments originating in the District of Connecticut, Southern District of Florida, Eastern District of New York, and the District Court of the Virgin Islands. *Id.* at 321-22. The four indictments were combined with the District of Connecticut’s action, where the trial took place. *Id.* at 322. The result of this consolidated trial is now the subject of this appeal to the Supreme Court of the United States.

Prior to these indictments, Defendant Ionia was on a three-year term of probation for violations of 18 U.S.C. §1001. *Id.* at 327. 18 U.S.C §1001 criminalizes making false statements or entries in documents presented to the United States government. *See* 18 U.S.C. §1001 (2008). As part of this probation, defendant was required to participate in a compliance program as part of special conditions to its sentence. *Id.* The compliance program established that defendant must certify the accuracy of its oil record books (“ORBs”) to the Coast Guard. *Id.* Parts of the current charges and subsequent convictions resulted after inspections during this probation period found Ionia falsified its records. *Id.* The indictments stated, *inter alia*, that from about Jan. 2006 through March 2007, Ionia, through its employees, violated APPS and MARPOL protocols by discharging oil-contaminated waste overboard from Ionia’s commercial tanker, the *M/T Kriton* and falsifying its ORBs to hide the discharge violations. *See United States v. Ionia Management*

S.A., 2007 WL 4998560 (D. Conn). The falsified ORBs were presented to Coast Guard officials during *M/T Kriton*'s multiple stops at U.S. and Virgin Island ports. *See id.*

Ionia contests the jury instructions given by the District Court. *Ionia Management S.A.* 526 F.Supp.2d at 324. The court's jury charge instruction on vicarious criminal liability stated:

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

Id. The court also stated that to convict Ionia of violating APPS, the Government would have to prove:

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

Id. at 324-25. Further, the court detailed the scope of agency in a criminal context, and stated, in relevant part:

“that acts attributable to Ionia were acts or omissions of its agents performed “within the scope of their employment” with Ionia as I will now define that term. An act or omission that was specifically authorized by the corporation would be within the scope of the agent's employment. Even if the act or omission was not specifically authorized, it may still be within the scope of an agent's employment if (1) the agent acted for the benefit of the corporation and (2) the agent was acting within his authority. It is not necessary that the Government prove that the corporation was actually benefited, only that the agent intended it would be ... [and] 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.”

Id. at 325. The jury instructions given by the District Court are the subject of this appeal.

SUMMARY OF ARGUMENT

This Court, in *New York Central & Hudson River Railroad v. United States*, explained that a corporation can be found criminally culpable for the acts of its employees where that employee is acting within his authority and with intent to benefit the corporation. *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 493 (1909). The Court reasoned that this standard is appropriate based on secondary authority, public policy, and the contemporary civil liability standard. *Id.* at 494-95.

In subsequent cases, this Court continued to apply and flushed out the details of this standard. In *United States v. Union Supply Co.*, Justice Holmes implied that corporations can, via their employees, act in a willful manner. *United States v. Union Supply Co.*, 215 U.S. 50, 54-55 (1909). In *United States v. Dotterweich*, this Court reiterated the *New York Central* holding allowing for concurrent prosecutions of a corporation and individual employees. *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943). *Dotterweich* also explained that each prosecution is a separate action, and that an employee can be found culpable even where the corporation is also tried and found not guilty. *United States v. A&P Trucking* extended criminal culpability for employee actions to partnerships, and explained that robust culpability for the employees of businesses puts pressure on companies to ensure their employees comply with the law while under employment. *United States v. A&P Trucking Co.*, 358 U.S. 121, 126 (1958). All of these cases apply a standard for corporate criminal culpability that is consistent with both *New York Central* and the jury instructions in the present case. Consequently, the District Court's jury instruction is consistent with Court's precedent.

The jury instructions are also consistent with federal statutory law. Under the Act to Prevent Pollution to Ships ("APPS"), "persons" who willfully fail to maintain an Oil Record Book can be held criminally culpable. 33 U.S.C. §1908(a) (2008). APPS explicitly include corporations in the definition of persons. 33 U.S.C. §1901(a)(10) (2008). Consequently, corporations can be criminally convicted of violating acts. Additionally, the statutory scheme and purpose support criminal convictions for corporations.

General criminal law principles of deterrence and retribution also support a standard allowing for corporate criminal culpability for acts of an employee performed within the employee's authority and with intent to benefit the corporation. It is well established that ramifications from the acts of employees can flow to the employer. *New York Central*, 212 U.S. at 493. This flow helps deter corporate criminal conduct. Specifically, it provides incentive for corporations to adequately supervise their employees and motivate corporations to detect and deter criminal conduct stemming from employee actions. Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411, 428 (2007). Further, imputing liability is a means of telling corporations that they have a non-delegable duty to ensure their employee conduct corporate business in a lawful manner. *United States v. Armour & Co.*, 168 F.2d 342, 344 (3d Cir. 1948). Imposing corporate criminal liability also achieves retribution and is a means on imposing moral blame onto a corporate. In this respect, corporate criminal liability is the other side of the corporate moral praise coin; because society praises corporations that act for the benefit of society, criminal law should also be able to impose sanctions on corporations when they act to the detriment of society.

ARGUMENT

PETITIONER'S CONVICTIONS SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT'S JURY INSTRUCTION ON CORPORATE CRIMINAL LIABILITY IS CONSISTENT WITH THIS COURT'S PRECEDENT, INCLUDING *NEW YORK CENTRAL & HUDSON RIVER RAILROAD V. UNITED STATES*, FEDERAL STATUTORY LAW, AND GENERAL PRINCIPLES OF CRIMINAL LAW

This Court's precedent, federal statutory law, and general principles of criminal law each support the imputation of criminal liability from an employee of a corporation to the corporation. This Court's precedent has created a standard whereby a corporation can be held criminally culpable when an employee commits a criminal act within the employee's authority and the criminal act was undertaken for the benefit of the corporation. *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 493 (1909). This standard has been upheld since its inception, and is consistent with the development of federal statutory law. It is also consistent with the general principles of criminal law as they have developed since the founding of our nation. *See id.* In the present case, the District Court issued a jury instruction virtually identical to the standard espoused in *New York Central*. *See United States v. Ionia Management S.A.*, 526 F.Supp.2d 319, 325. (Dist. Conn. 2007). Accordingly, this instruction is consistent with this Court's precedent. Further, the *New York Central* standard is consistent with federal statutory law and general principles of criminal law. Therefore, the conviction of Ionia rendered subsequent to this instruction should be affirmed.

I. THE DISTRICT COURT'S JURY INSTRUCTION IS CONSISTENT WITH BOTH PRECEDENT FROM THIS COURT AND FEDERAL STATUTORY LAW

A. This Court Holds That a Corporation Can Be Criminally Culpable for the Acts of Its Employees and the Principles Governing New York Central & Hudson River Railroad v. United States Remain Applicable.

i. The District Court's Jury Instruction is Consistent with This Court's Precedent on Imputing Criminal Liability onto a Corporation

The first case in which this Court considered the parameters in which a corporation can be held criminally culpable for the acts of employees was *New York Central & Hudson River Railroad Co. v. United States*. In that case, this Court considered the corporate criminal culpability of the New York Central & Hudson River Railroad for the illegal rebates paid by an employee. *New York Central*, 212 U.S. at 489. In short, the employee agreed to, upon receipt of the required shipping price of a load of sugar, rebate an amount (based on the price of the sugar) to Edgar & Son, the company shipping the sugar. *Id.* at 490. Such a rebate was a criminal violation of the Elkins Act. *Id.* at 491. This Act also provided that any violation by an officer, agent, or employee of a carrier will also be deemed a violation by the carrier. *Id.* at 491-92. Accordingly, a criminal prosecution was brought against an employee and the Railroad. The Railroad challenged the prosecution, arguing that the Constitution does not allow a criminal prosecution to be imputed onto a corporation.

Justice Day, writing for this Court, held that criminal liability can be imputed to a corporation. The Court first explained that "modern authority, universally, so far as we know" allows for criminal corporate culpability. *New York Central*, 212 U.S. at 492. The court then explained that:

"[s]ince a corporation acts by its officers and agents their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously."

Id. at 492-93 (quoting BISHOP, NEW CRIMINAL LAW, §417). The Court then found that "[t]here is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil." *Id.* at 493. Further, the Court pointed out that in England such culpability is imputed. *Id.* The Court reasoned that because corporations can be found liable in tort, they can also be found liable for criminal violations, even when the criminal action is undertaken by an agent or employee of the corporation. *Id.*

The Court then explained the standard for imposing corporate criminal liability:

"In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct."

Id. This standard is identical to the standard used by the District Court in the present case. Both require that to establish corporate criminal liability, an agent or employee of the corporation must act within the scope of his employment (i.e. within his employment authority) and with an intent to benefit the corporation. *Compare New York Central*, 212 U.S. at 493 *with Ionia Management*, 526 F.Supp.2d at 325. This Court held that giving the rebates was within the authority of the employee, and was done to benefit the corporation, and thus the corporation is criminally culpable for the employee's act. *New York Central*, 212 U.S. at 494-95.

The Court concluded that public policy requires that the act of an agent be imputed to the employer, finding that "[i]f it were not so, many offenses might go unpunished and acts be committed in violation of the law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy." *Id.* at 495. Also, the Court explained that a corporation that profits by the actions of its

employees and agents must also be held culpable for actions of those agents done within the scope of employment. *Id.*

Subsequent decisions from this and lower courts continue to apply the corporate criminal liability standard espoused in *New York Central*. In the first such case, decided the same year as *New York Central*, Justice Holmes, writing for the Court, held that a corporation was liable for the failure of an employee to maintain records. *United States v. Union Supply Co.*, 215 U.S. 50 (1909). Specifically, the statute required certain wholesale dealers to keep specific books, and then provided that "any person who willfully violates any of the provisions of this section shall, for each such offense, be fined..." *Id.* at 53. Justice Holmes reasoned that, based on earlier versions of the statute and other sections of the current statute, "[i]t is impossible to believe that corporations were intentionally excluded. They are as much within the mischief aimed at as private persons, and as capable of a 'wilful' [sic] beach of the law." *Id.* at 54-55. The Court then reversed the District Court's order quashing the indictment. *Id.* at 55. Even in this early case this Court rejected the argument that corporations are incapable of committing specific intent crimes.

The Court also analyzed criminal corporate liability in *United States v. Dotterweich*. In *Dotterweich*, the Court considered the culpability of a corporation that shipped misbranded and adulterated pharmaceuticals. *United States v. Dotterweich*, 320 U.S. 277, 278 (1943). Dotterweich and his employer, Buffalo Pharmacal Co., were indicted for violating 21 U.S.C. §331, that made it criminal for "any person" to introduce into interstate commerce any drug "that is adulterated or misbranded." *Id.* at 278 (quoting 21 U.S.C. §331). At trial, the jury found the corporation not guilty, but found its employee, Dotterweich, guilty of violating §331. *Dotterweich*, 320 U.S. at 278. Dotterweich appealed, arguing that he is not a "person" within the meaning of the statute. *Id.* at 279. The Court disagreed. It held that, based on other sections of

the statute, employees as well as corporations are "persons" within the meaning of the statute. *Id.* at 280-81. The Court also explained that, based on *New York Central*, the only way that corporations can act is via its employees, so absent some statutory exception, individuals can be held culpable in any instance in which corporations can also be culpable. Put another way, because "from the point of view of action the individuals are the corporation," there must be some explicit statutory clause in order for a corporation to be potentially culpable but an employee immune. *Id.* at 281. Because such a clause is not in this statute, Dotterweich falls within the statute because his corporation, Buffalo Pharmacal Co., also is covered under the statute. *Id.* at 285. This strengthens the *New York Central* standard because it reaffirms that employee and corporation liability go hand in hand, and, where a statute implies that both employee and corporate culpability attaches, the Court will not immunize either and both are required to separately defend themselves.

This Court reaffirmed the constitutionality of pursuing criminal violations against corporations in *United States v. A&P Trucking Co.* Here, this Court held that partners could be charged both separately and as a partnership for violations of federal laws criminalizing the unsafe interstate transportation of explosives. *United States v. A&P Trucking Co.*, 358 U.S. 121, 122 (1958). The Court first explained that *New York Central* established the constitutionality of criminally charging corporations, and noted that partnerships can also be criminally charged. *Id.* at 126. The Court reasoned that a business "may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment." *Id.* Also, providing for such liability puts pressure on corporations and partnerships to ensure that their agents obey the law. *Id.* The Court also explained that the statutes the business were charged with specifically provide that partnerships may be charged. *Id.* Also, 1 U.S.C. § 1, which

provides rules of construction for the entire United States Code, states that "in determining the meaning of any Act of Congress, unless the context provides otherwise...the words 'person' and 'whoever' include corporations...partnerships...as well as individuals;..." *Id.* at 123 (quoting 1 U.S.C. § 1 (1947)). 1 U.S.C. § 1 is still in force today. The Court also held that because one statute the partnership was charged under requires that a violation be done "knowingly," and the other statute charged under requires the violation be done and "knowingly and willfully," the partnership (and corporation) is found culpable for knowing and willful violations via respondeat superior, whereby the employee/agent is found guilty of the specific intent, and that intent is then imputed onto the partnership/corporation. *A&P Trucking Co.*, 358 U.S. at 125. The Court concluded by holding that in this case the partnership can violate the statutes charged under here, apart from the partner's personal liability. *Id.* at 126.

A&P Trucking is applicable to the present case. Here, Ionia Management was charged with 13 counts of knowingly violating the Act to Prevent Pollution from Ships ("APPS"). *Ionia Management*, 526 F.Supp.2d at 321. The District Court's jury instruction stated that Ionia is culpable of a knowing violation through the acts of its agents. *Id.* at 324-35. Accordingly, the jury instruction based the specific intent of Ionia on the knowing acts of its employees. This is entirely consistent with *A&P Trucking*. In both cases, the specific intent of the employee is imputed to the business entity. Consequently, *A&P Trucking* supports the District Court's jury instruction on corporate criminal liability. After *A&P Trucking Co.*, this Court denied certiorari to cases in which corporations sought to challenge criminal convictions obtained via the *New York Central* standard.¹

¹ See, e.g., *United States v. Bank of England*, 821 F.2d 844 (1st Cir. 1987), *cert. denied*, 484 U.S. 943 (1987); *United States v. Gold*, 743 F.2d 800 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985); *United States v. Cincotta*, 689 F.2d 238 (1st Cir. 1982), *cert. denied*, 459 U.S. 991 (1982); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir. 1978), *cert. denied*, 437 U.S. 903 (1978).

Each of these cases has applied principles of corporate criminal culpability consistent with *New York Central*. Nearly all lower federal courts, including the District Court and Second Circuit in the present case, apply the same legal standard (specifically requiring intent to benefit and an action within the scope of the employment).² Accordingly, there is no doubt that the District Court's jury instruction is consistent with this Court's decision in *New York Central* and subsequent Court precedent.

One potential counterargument is that *New York Central* requires that, in order for a corporation to be culpable, there be an explicit statutory clause imputing corporate criminal liability from the employee to the employer. While it is true that the statute at issue in the *New York Central* did have such a clause, this Court did not base its holding on that clause. Rather this Court explained that modern authority, public policy, and civil liability principles allow for criminal culpability to be imputed from an employee to an employing corporation. *New York Central*, 212 U.S. at 493-94. Accordingly, *New York Central* stands for the proposition that, with or without a statutory clause, corporate criminal liability can be imputed onto a corporation.

Another potential counterargument is that more recent decisions have narrowed the scope of corporate criminal liability and liability only attaches if the “agent” was in a managerial or high managerial position. *See, e.g., United States v. Koppers Inc.*, 652 F.2d 290, 298 (2d Cir. 1981). However, this is an overstatement. *Koppers* held that when the agent acts within his authority and with intent to benefit the employer, then the agent is deemed to act within the scope of employment. *See Koppers*, 652 F. 2d at 298. Although the Second Circuit mentions that the Model Penal Code standard requires the agent be a managerial agent, the Court sidesteps this argument without directly addressing it. Further, even where that argument has been

² *See, e.g., In re Hellenic, Inc.*, 252 F.3d 391, 395 (5th Cir. 2001); *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983); *United States v. 7326 Highway 45 N.*, 965 F.2d 311, 316 (7th Cir. 1992); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970).

addressed, those decisions are not binding on this Court and are inconsistent with *New York Central* and subsequent decisions of this Court. All of those decisions do not distinguish between managerial and non-managerial employees. Consequently, the *New York Central* standard is appropriate, and the defendant's counterarguments cannot stand.

ii. The District Court's Jury Instruction is Consistent with This Court's Precedent on Corporate Due Process

In *New York Central*, this Court rejected an argument that criminal liability cannot be imputed onto a corporation because to do so would be to deprive shareholders of an opportunity to be heard in violation of due process. *New York Central*, 212 U.S. at 492. The Court reasoned that to render corporations immune would be to prevent any criminal punishment, and thereby take away the only means of controlling corporate conduct. *Id.* at 495-96.

There is no doubt that corporations are entitled to due process of law. *See Sinking-Fund Cases*, 99 U.S. 700, 718 (1878). Accordingly, when criminally indicted, corporations must be given a chance to be heard. Indeed they must be given an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). Here, Ionia was given the full right to a trial by jury. Further, Ionia was able to defend the specific charges against by either seeking to show that the acts of the employees were outside the scope of employment or that they were not done with intent to benefit Ionia. Because Ionia was given the full range of criminal procedure protections, and because they were able to defend the imputation of corporate criminal liability by showing the action was outside the scope of employment or lacked an intent to benefit, Ionia was heard at a meaningful time and in a meaningful manner. Thus due process was satisfied.

B. The District Court’s Jury Instructions on Corporate Criminal Culpability are Consistent with Federal Statutory Law Because the Statute at Issue Specifically Provides For Criminal Corporate Culpability

Under APPS, Congress implemented two international treaties, to which the U.S. is a signatory, designed to regulate pollution and discharges by ships. *United States v. Jho*, 534 F.3d 398, 401 (5th Cir. 2008); The treaties, the 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 Relating to the International Convention for the Prevention of Polluting Ships, better known combined as “MARPOL,” aim to eliminate sea pollution of marine environments around the world. *See* 33 U.S.C. §1901 (2008); *See Jho*, 534 F.3d at 401; *see also United States v. Abrogar*, 459 F.3d 430, 431 (3rd Cir. 2006). In fact, “more than 95% of the world’s shipping tonnage is transported under the flags of signatories to these treaties.” *Abrogar*, 459 F.3d at 432.

The APPS not only prohibits violations to MARPOL but also provides criminal sanctions to violators. “[A] person who knowingly violates the MARPOL Protocol ... this chapter, or the regulations issued thereunder commits a Class D felony[,]” and is also subject to civil penalties whether the violator was aware of the violations or not. *Jho*, 534 F.3d at 401; *see* 33 U.S.C. §1908 (a) (2008). The Act further defines its meaning of “person” and states that a “person means an individual, firm, public or private corporation, partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.” 33 U.S.C. §1901 (a)(10) (2008).

APPS grants the U.S. Coast Guard authority to issue regulations and enforce MARPOL directives. *Jho*, 534 F.3d at 401. For example, the Coast Guard is authorized to board a ship once its in a U.S. port, and check for updated record keeping of the ships oil record books, interview crew members to ensure compliance with the APPS and MARPOL protocols, and detain a ship if

the Coast Guard officers deem the ship to be in potential violation. *Jho*, 534 F.3d at 402. Review of the oil record books [hereinafter “ORB”] is included in this delegation of authority. *See* 33 C.F.R. § 151.25 (2009). The regulation states, in relevant part, that:

[e]ach completed operation shall be signed by the person or persons in charge of the operations concerned and each completed page shall be signed by the master or other person having charge of the ship ... [and] [t]he master or other person having charge of a ship required to keep an Oil Record Book shall be responsible for the maintenance of such record[.]”

33 C.F.R. § 151.25 (h) & (j) (2009). Additionally,

“the oil record book must include records for (1) all transfers of oil; (2) management and disposal of oily wastes generated on board the vessel, including any discharges of dirty ballast or cleaning water from fuel oil tanks; and (3) the disposal of oily residues such as sludge, as well as discharges of bilge waste that has accumulated in machinery spaces.”

Abrogar, 459 F.3d at 432 (quoting MARPOL Annex I, Reg. 20(2)). However, the APPS does provide for two limitations. First, regulations of 33 C.F.R. §151.25 apply to foreign-flag ships only when the ship is in “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 (2009). Second, “[a]ny action taken under [Chapter 33] shall be taken in accordance with international law.” *Jho*, 534 F.3d at 402 (quoting 33 U.S.C. §1912 (2008)).

The Fifth and Third Circuits tackled this issue of federal regulations violations in both *Jho* and *Abrogar* where the defendants in each case were charged and convicted of failure to accurately maintain the ORBs in violation of the APPS. In *Jho*, the defendants included the ship’s chief engineer, Jho, and the ship’s owner, Overseas Shipholding Group (“OSG”). The ship transferred bulk petroleum from off-shore oil tankers to ports along the Gulf of Mexico. Jho, as chief engineer, was responsible for making entries into the ORB and keeping an accurate log of

any engine department issues including the disposal of oil in accordance with the APPS and MARPOL protocols. Defendants in that case argued that the U.S. did not have jurisdiction to prosecute any illegally dumping that happened outside of U.S. territorial waters. However, the Fifth Circuit disagreed. It stated that the offenses stemmed from Jho and OSG “failing to maintain the oil record book while in port.” *Jho*, 534 F.3d at 404. The court reasoned that “ignoring the duty to maintain puts the regulation at odds with MARPOL and Congress’ clear intent under the APPS to prevent pollution at sea according to MARPOL.” *Id.* It continued saying “a foreign-flagged vessel could avoid application of the record book requirements simply by falsifying all of its record book information just before entry into a port or navigable waters,” thus negating the effects of the regulations. *Id.* Therefore, the Fifth Circuit held that the defendants could stand trial in the U.S. for ORB offenses and the charges against both defendants were deemed in complete accordance with 33 U.S.C. § 1912. *Jho*, 534 F.3d at 409.

In *Abrogar*, the defendant was chief engineer of a Panamanian-flagged ship, the Magellan. He was responsible for the ship’s engineers, engine room operations and maintenance of the ship’s ORB. After a Coast Guard inspection to determine MARPOL compliance discovered several violations conducted in non-U.S. waters, authorities found that Abrogar did not accurately record discharges in the ORB that was given to the Coast Guard. The Third Circuit stated that criminal liability existed for foreign vessels and personnel violating APPS or MARPOL. *Abrogar*, 459 F.3d at 435. Further, the court held that “the precise nature of Abrogar’s ‘offense of conviction’ under the Guidelines is most accurately described as ‘failure to maintain an accurate oil record book while in the navigable waters of the United States.’” *Id.* Abrogar pled guilty to the charges.

In the present case, defendants argue that they should not be held criminally liable for the acts of their employees and dispute the jury charges given. However, their argument is in direct contradiction to the statutes, federal regulation, international law, and relevant case law outlined above. APPS explicitly states that the term "person" includes corporations. 33 U.S.C. §1901(a)(10) (2008). Consequently an individual and a corporation, because they both fall within the definition of a "person", can be held criminally liable under APPS. 33 U.S.C. §1908(a) (2008). Therefore, based on the purpose and scope of APPS, a corporation can be held liable under APPS for the knowing violation of APPS by the corporation's employee, and Ionia is culpable for its employee's actions.

Ionia may also claim that the jury instructions should have stated that Ionia is not liable if the act took place outside of U.S. jurisdiction. The defendant asserts that the entries made in the ORBs took place outside of U.S. navigable waters and, therefore, they should not be criminally liable for any falsification - at least not in a U.S. court. However, that argument is also flawed. The criminal act was the presentation of the falsified books to the U.S. Coast Guard and not the act of dumping. Accordingly, falsifications made with the intent to impede an investigation violate 18 U.S.C. §1519. 18 U.S.C. §1519 (2009). Congress enacted 18 U.S.C. §1519 as part of the Sarbanes-Oxley Act of 2002 with the intent "to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct an investigation or matter within U.S. jurisdiction, or in anticipation of such a matter." *Ionia* 526 F.Supp.2d at 329 (citing 148 Cong. Rec. S7418-19 (daily ed. July 26, 2002) (statement of Sen. Leahy)). This is consistent with the holdings in both *Jho* and *Abrogar*, where the Fifth and Third Circuits found the criminal act was in the presenting of a purposefully erroneous ORBs to the U.S. Coast Guard. Therefore, because the falsified records were presented to the Coast Guard in a U.S. port, Ionia is

criminally responsible for these actions based on the Fifth and Third Circuit opinions, the APPS as well as statutory and regulatory provisions.

Lastly, petitioner may argue that the Court should look to Title VII in order to guide its decision for imputing liability of an employee to a corporation. Petitioner could argue that the statute under which Ionia was convicted is ambiguous and suggests that Title VII will resolve this ambiguity. However, this argument is flawed and apposite to the instant case. First, APPS provides specific criminal penalties for violating the MARPOL protocol. 33 U.S.C. §1908 (a) (2008). In contrast, Title VII is a civil statutory scheme aimed at resolving discrimination disputes and provides for capped compensatory and punitive damages . 42 U.S.C. §1981 (a) (2008).

Finally, the Court has stated “that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.” *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 764 (1998) (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)). Therefore, the standards of corporate criminal liability specifically identified and outlined in the statute should not be re-examined using civil standards. As the *Ellerth* Court noted, it is Congress’ duty to clarify a statute and not the Court’s. *Id.* Accordingly, Ionia’s potential arguments that the jury instructions regarding its criminal liability are not consistent with the relevant federal statutes and regulations are incorrect and the Court should affirm Ionia’s conviction.

II. THE DISTRICT COURT'S JURY INSTRUCTION IS CONSISTENT WITH GENERAL PRINCIPLES OF CRIMINAL LAW

Corporate criminal liability is based on the doctrine of *respondeat superior*, and was adopted from traditional agency principles in tort law. *Corporate Crime: Regulating Corporate*

Behavior Through Criminal Sanctions, 91 HARV. L. REV. 1227, 1247 (1979). The theory, as adopted, holds that

"a corporation, being merely a person in the law only, and not a real one, can act only through its employees for whom it should be held responsible. Thus, if criminal liability is to exist at all, then the corporation must be responsible for the actions of its employees through which it acts."

Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411, 412 (2007). This view, and subsequent application of *respondeat superior* to impute liability from an employee or agent to the corporation, is common in federal courts and many state courts. *Corporate Crime: Regulating Corporate Behavior*, 91 HARV. L. REV. at 1247. Accordingly, it is a well established criminal law theory that criminal activity undertaken by employees or agents of a corporation can lead to criminal culpability for that corporation.

The reasoning behind this theory is consistent with basic principles of criminal liability. As this Court has noted, deterrence is a legitimate goal of criminal law punishment. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991). This basic criminal law principle of deterrence is the primary rationale for culpability on corporations based on corporate criminal liability. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008). Further, "[i]mposing liability without independent fault deters fraud more than a less stringent rule." *Pacific Mutual Life Ins. Co.*, 499 U.S. at 14. Consequently, the current corporate criminal culpability standard will better deter than requiring a managerial, high managerial, or other stricter standard.

General deterrence measures have been quite successful in curbing corporate crime. Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411, 428 (2007). This is so because corporations, more than individuals, are able to determine what conduct it, based on precedent, must avoid. *Id.* Accordingly, using *respondeat superior* to generally deter corporate criminal conduct is an effective means of ensuring corporate

compliance. The deterrence incentive is especially strong in environmental regulation, where the goal is not necessarily to punish wrongdoers but rather to prevent wrongdoing in the first place.

Kenneth Manaster, *Early Thoughts on Prosecuting Polluters*, 2 ECOLOGY L.Q. 471, 474 (1972).

The current standard accomplishes general deterrence via methods that seek to get the corporation to police its self. One method is via the threat of prosecution. From the corporation's point of view, there is a great financial risk involved in opening the corporation to criminal indictment. Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411, 414 (2007). In addition to the costs of criminal defense, "the mere whiff of a criminal investigation can be devastating to the company and its stock prices." *Id.* at 441. Accordingly, corporations will find it more cost effective to pay closer attention to its employees than to risk criminal prosecution.

Separate from the financial incentive, imputing liability to the corporation is a means to telling corporations that they have a "non-delegable duty" to ensure their agents and employees conduct corporation business lawfully. *United States v. Armour & Co.*, 168 F.2d 342, 344 (3d Cir. 1948). In this respect, even corporations that do not fear the financial risks associated with corporate criminal liability will still seek to avoid it because they will seek to comply with the law. Both are effective measures of general deterrence.

Imposing criminal culpability and attendant punitive damages on corporations is also consistent with the general criminal law principle of retribution. *Exxon*, 128 S. Ct. at 2621. Under the retribution theory, imposing sanctions is justified because it is morally right to punish that wrongdoer. *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 91 HARV. L. REV. 1227, 1232 (1979). In the corporate criminal context, retribution is achieved via the imputation of the specific criminal intent of the employee onto the corporation. *Id.* at

1242. Accordingly, the corporation is morally blameworthy because the corporation's employee is morally blameworthy for undertaking an employment-related action. Because a corporation can only act via its employees and agents, if corporate moral blame is to be imposed in any circumstance, it must be done as a result of corporate employee action. *See United States v. Dotterweich*, 320 U.S. 277, 281 (1943). This is the flip side of the corporate benefit coin. Because a corporation will receive moral praise for the positive actions undertaken by its employees (e.g. donations to charity), it follows that the corporation must also be able to receive moral blame for the negative actions of its employees. Thus criminal punishment based on moral blame must also attach. Accordingly, because both the deterrence and retribution theories of criminal law support the standard for corporate criminal culpability contained in the District Court's jury instruction, that instruction is consistent with general principles of criminal law.

CONCLUSION

Based upon the foregoing arguments and authorities, the United States of America respectfully requests this Court to affirm Ionia's conviction and the decision of the Court of Appeals Second Circuit.

CERTIFICATE OF SERVICE

We hereby certify a true and correct copy of the foregoing brief for Respondent was sent by United States mail to all counsel of record on or before February 20, 2009.

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