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 Petitioner

Team 15
Counsel for the Petitioner

QUESTIONS PRESENTED

1. Whether the district court's jury instruction on corporate criminal liability was authorized by either Supreme Court precedent or federal statutory law.

2. Whether the district court's jury instruction on corporate criminal liability was consistent with general principles of criminal law and if the Court should revisit it's holding in *New York Central & Hudson River Railroad v. United States.*

TABLE OF CONTENTS

QUESTIONS PRESENTED.......... i

TABLE OF CONTENTS.......... ii

TABLE OF AUTHORITIES.......... iii

OPINION BELOW.......... 1

STANDARD OF REVIEW.......... 1

STATEMENT OF THE CASE.......... 2

SUMMARY OF THE ARGUMENT.......... 3

ARGUMENT.......... 4

I. THE DISTRICT COURT'S JURY INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS NOT AUTHORIZED BY EITHER SUPREME COURT PRECEDENT OR FEDERAL STATUTORY LAW.......... 4

A. The district court's jury instruction on corporate criminal liability is not authorized by Supreme Court precedent in *N.Y. Cent. & Hudson River R.R. Co. v. United States*.......... 5

B. Supreme Court precedent has consistently rejected the use of *respondeat superior* in similar cases.......... 7

C. The district court's jury instruction on corporate criminal liability was not authorized by federal statutory law.......... 9

II. THE DISTRICT COURT'S JURY INSTRUCTION ON CORPORATE CRIMINAL LIABILITY IS INCONSISTENT WITH THE GENERAL PRINCIPLES OF CRIMINAL LAW.......... 11

A. Corporate criminal liability is inconsistent with the traditional justifications of criminal punishment.......... 12

B. Criminally liability imputed from another party regardless of the defendant's actions or mental state is inconsistent with general principals of criminal law.......... 16

C. The Court should revisit the holding in *N.Y. Cent. & Hudson River R.R. Co.* to clearly delineate the standard for corporate criminal liability.......... 20

CONCLUSION.......... 22

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Arthur Anderson, LLP v. United States, 544 U.S. 696 (2005)........ 10
Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) 7, 8, 22
Faragher v. City of Boca Raton, 524 U.S. 775 (1998)........ 4, 7, 8
Hicks v. United States, 150 U.S. 442 (1893) 18
Kolstead v. Am. Dental Ass'n, 527 U.S. 526 (1999)........ 4, 8
N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909) 4, 5, 9, 21
Pa. State Police v. Suders, 542 U.S. 129 (2004) 7
United States v. Dotterweich, 320 U.S. 277 (1943)........ 19

OTHER FEDERAL CASES

Fort v. White, 530 F.2d 1113 (2d Cir. 1976) 8
J.C.B. Super Markets, Inc. v. United States, 530 F.2d 1119 (2d Cir. 1976)........ 4
United States v. Bank of New Eng., 821 F.2d 844 (1st Cir. 1987)........ 6
United States v. Beusch, 596 F.2d 871 (9th Cir. 1979)........ 6
United States v. Cincotta, 689 F.2d 238 (1st Cir. 1982)........ 5
United States v. Coleman Commercial Carrier, Inc. 2002 U.S. Dist. LEXIS 23155 (S.D.N.Y. Dec. 2, 2002) 6
United States v. Cullen, 499 F.3d 157 (2d Cir. 2007)........ 1
United States v. Demauro, 581 F.2d 50 (2d Cir. 1978) 4, 5
United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir. 1946)........ 6
United States v. Ionia Mgmt., 526 F. Supp. 2d 319 (D. Conn. 2007). .... passim
United States v. Koppers Co., 652 F.2d 290 (2d Cir. 1981) 4, 5, 6
United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991) 4
United States v. Park, 421 U.S. 658 (1975)........ 17, 18, 19, 20
United States v. Schlei, 122 F.3d 944 (11th Cir. 1997) 12
United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) 10, 11, 22
United States v. Twentieth Century Fox Film Corp., 882 F.2d 656 (2d Cir.)........ 4

STATE CASES

Commonwealth v. Koczwara, 155 A.2d 825 (Pa. 1959)........ 19

STATUTES

18 U.S.C. § 1519 (2000) 2
18 U.S.C. § 371 (2000) 2
33 U.S.C. § 1908 (2000) 2
Commodities Exchange Act, 7 U.S.C. § 2(a)(1)(B) (2000) 10
MODEL PENAL CODE § 2.07 (1962)........ 21
The Elkins Act, 32 STAT. 847 (1903) 9
United States Grain Standards Act, 7 U.S.C. § 87d (2000)........ 10

OTHER AUTHORITIES

Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319 (2007) 10, 12, 14, 16

Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism, and Accountability*, 11 SYDNEY L. REV. 468 (1988) 14

Brief for the Association of Corporate Counsel, et al. as Amici Curiae Supporting Petitioner, *Ionia Mgmt. v. United States* (2003) (No. 07-5801-CR) 22

C.L. Ten, *Crime, Guilty, and Punishment: A Philosophical Introduction* (Oxford University Press 1987) 13, 14, 15

David Jones, *Crime and Criminal Responsibility* (Nelson Hall 1978) 11

Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Anderson Prosecution*, 43 AM. CRIM. L. REV. 107 (2006) 10

Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23 (1997) 15, 16

Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. CRIM. L. REV. 1343 (2007) 16

Immanuel Kant, *The Metaphysical Elements of Justice* (1797) 14

Joel Feinberg, *Harm to Others* (Oxford University 1984) 13

John C. Walsh, Jr., *"No Soul to Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981) 22

Kathleen F. Brickey, *Rethinking Corporate Liability under the Model Penal Code*, 19 RUTGERS L.J. 593 (1988) 21

Lowell H. Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279 (1995) 16

P. Brett, *An Inquiry into Criminal Guilt* (London 1963) 14

Patrick Devlin, *The Enforcement of Morals* (Oxford University Press 1965) 13

RESTATEMENT (SECOND) OF TORTS §909 (1979). 8

Roland Hefendehl, *Corporate Criminal Liability: Model Penal Code Section 2.07*, 4 BUFF. CRIM. L. REV. 283 (2000) 21

V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U.L. REV. 355 (1999) 12

William Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647 (1994) 12

Wayne R. LaFave, *Criminal Law* (4th ed. 2003) .... passim

OPINION BELOW

The decision of the District Court of Connecticut in *United States v. Ionia Management* is reported at 526 F. Supp. 2d 319 (D. Conn. 2007).

STANDARD OF REVIEW

The standard of review for challenging the meaning of statutes and the accuracy of jury instructions is *de novo*. *United States v. Cullen*, 499 F.3d 157, 162 (2d Cir. 2007).

STATEMENT OF THE CASE

This court is being asked to reverse a judgment by the United States Court of Appeals for the Second Circuit which affirmed the district court's jury instructions on corporate criminal liability. *United States v. Ionia Mgmt.*, 526 F. Supp. 2d 319 (D. Conn. 2007). The first issue on appeal is whether or not the jury instructions were authorized by Supreme Court precedent and federal statutory law. The second issue is determining if the jury instructions were consistent with general principles of criminal law.

Ionia is a ship management company operating several tanker vessels, including the *Kriton*. *Id.* at 325. Ionia Management was charged with criminal violations as a result of the claimed conduct aboard this ship. *Id.* at 321. The trial court instructed the jury that Ionia could be liable if an employee failed to properly operate the Oily Water Separator, Oil Content Monitor or maintain an accurate Oil Record Book. *Id.* at 323. The only requirement was that the alleged conduct be within the scope of the employee's authority and done with at least a partial intent to benefit the corporation. *Id.*

Procedural History

Ionia was found guilty by a jury for the following: thirteen counts of violating the Act to Prevent Pollution from Ships, 33 U.S.C. § 1908 (2000); three counts of falsifying records in connection with a federal investigation, 18 U.S.C. § 1519 (2000); one count of obstructing justice, 18 U.S.C. § 1519 (2000); and one count of conspiring to commit these offenses in violation of 18 U.S.C. § 371 (2000). *Id.* at 321. Ionia appealed to the Court of Appeals for the Second Circuit which affirmed the trial court's decision in favor of the Government. The United States Supreme Court has granted certiorari regarding the district court's jury's instruction on corporate criminal vicarious liability.

SUMMARY OF THE ARGUMENT

Supreme Court precedent in *N.Y. Cent. & Hudson River R.R. Co.* did not authorize the jury instructions given in *United States v. Ionia Management S.A.* The district court incorrectly expanded the Court's affirming of the constitutional validity of a statute to allow a general rule of corporate criminal liability under the doctrine of *respondeat superior*. Any instruction on vicarious liability at least should be limited to the conduct of managerial agents. The reason for this requirement is that manager's have a substantial amount of corporate authority in contrast with the average employee. This approach is also consistent with the Court's application of *respondeat superior* in both punitive damages and Title VII cases. In addition, the district court's jury instructions were not authorized by federal statutory law. Congress has explicitly chosen particular statutes in which to impose vicarious liability. None of the statutes charged against *Ionia* contained this instruction. Limiting corporate criminal liability is also essential to protecting the criminal justice system. The mere threat of indictment is so dangerous that many corporations have been coerced into agreeing to disproportionate settlement agreements.

Corporate vicarious liability is inconsistent with general principles of criminal law. Holding a corporation liable does not promote either of the fundamental justifications for punishment. Punishment is not retributive because it punishes an entire corporation, including many innocent agents, while failing to specifically punish the guilty party. It does not satisfy utilitarian goals since the individual wrongdoers are not deterred when the corporation is punished. The inconsistencies in corporate criminal law can be removed by applying the standard of the Model Penal Code. The Model Penal Code provides for categories of offenses based on the type of employee, type of act and legislative intent. It also provides an affirmative defense in situations where a corporation can demonstrate effective corporate compliance policies.

ARGUMENT

I. THE DISTRICT COURT'S JURY INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS NOT AUTHORIZED BY EITHER SUPREME COURT PRECEDENT OR FEDERAL STATUTORY LAW.

The Supreme Court affirmed the constitutional validity of a statute that explicitly imposed corporate criminal vicarious liability. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 491 (1909). Unfortunately, some courts have expanded this decision to impose a general rule of vicarious liability on corporations for any criminal statutory violations. *United States v. Paccione*, 949 F.2d 1183, 1200 (2d Cir. 1991); *United States v. Demauro*, 581 F.2d 50, 53 (2d Cir. 1978); *J.C.B. Super Markets, Inc. v. United States*, 530 F.2d 1119 (2d Cir. 1976). At minimum, the application of corporate criminal liability should be limited to employees with substantial corporate authority, namely managerial agents. *See, e.g., United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir.); *United States v. Koppers Co.*, 652 F.2d 290 (2d Cir. 1981). This approach would be consistent with the Supreme Court's use of *respondeat superior* in other analogous cases. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (holding *respondeat superior* should be limited to the acts of supervisorial employees); *Kolstead v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (holding employer is not vicariously liable for punitive damages when they have made a good-faith effort to comply with Title VII regulations).

Absent congressional authorization, courts have adopted a general rule that subjects a corporation to criminal liability for the acts of a single rogue employee. Where reputable corporations are effectively dissolved when held criminally liable, corporations are forced into unbalanced negotiation agreements regardless of corporate responsibility.

A. <u>The district court's jury instruction on corporate criminal liability is not authorized by Supreme Court precedent in *N.Y. Cent. & Hudson River R.R. Co. v. United States*.</u>

The Supreme Court's decision to uphold a statute that explicitly imposed corporate vicarious liability did not authorize its use as a general rule. *N.Y. Cent.*, 212 U.S. at 491. The Supreme Court only held that the corporate liability provision of the Elkins Act was valid under the Constitution. *Id.* at 491-92. Therefore, the corporation was found criminally liable under the specific language of the statute. *Id.* at 491. This ruling gave Congress, not courts, the discretion to apply *respondeat superior* in the context of corporate criminal law. *Id.* Yet from this decision intermediary courts have imposed an illusory mandate of corporate vicarious liability in every all criminal statutes. *Demauro*, 581 F.2d at 53. No Supreme Court precedent supports this approach to corporate criminal liability. *Id.*

In addition, many courts have diminished the benefit analysis by merely requiring the employee to have a partial intent to benefit the corporation. *United States v. Cincotta*, 689 F.2d 238, 242 (1st Cir. 1982). An actual benefit conferred to the employer is no longer necessary. *Id.* This partial intent requirement is both subjective and ambiguous in contrast with the clear benefit discussed in *N.Y. Central.* 212 U.S. at 493-495. In *N.Y. Central* the court found direct proof that the illegal rebates issued by the company's traffic manager conferred a direct benefit to the corporation. *Id.* at 495.

If a general rule of corporate criminal liability is imposed, it should be limited to the conduct of managerial agents. *Koppers*, 652 F.2d at 298. This approach is logical since managers directly represent the corporation through their conduct. *Id.* This would also be consistent with *N.Y. Central* which applied corporate vicarious liability to the illegal conduct of one of the company's traffic managers. 212 U.S. at 489. Some courts have adhered to this limited standard in corporate criminal liability cases. *E.g.*, *United States v. Bank of New Eng.*, 821 F.2d 844, 847

(1st Cir. 1987); *United States v. Beusch* 596 F.2d 871, 877 (9th Cir. 1979). Although other courts have permitted vicarious liability to apply through all employees, this is inconsistent with precedent and the general scope of agency law,. *United States v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1946). In *Fish* the court held that a single salesman's violation of a maximum price regulation could be imputed to the entire company. *Id.* at 800. This approach fails to distinguish among varying degrees of authority and subjects a corporation liability for even the lowest of employees. *Id.*

Recently, some courts have instructed the jury that corporate criminal vicarious liability requires the offending employee to be a high managerial agent. *United States v. Coleman Commercial Carrier, Inc.* 2002 U.S. Dist. LEXIS 23155, *3 (S.D.N.Y. Dec. 2, 2002). A "high managerial agent" is one who is considered to directly represent the policies of the corporation. *Koppers*, 652 F.2d at 298. Although *Koppers* rejected this position, they still insisted that a general managerial agent standard was necessary to establish criminal liability. *Id.* The commonality of these two decisions is their adherence to a minimum requirement that the offending employee be a managerial agent who more directly represents the corporation than an average worker. *Id.*

The district court has inappropriately applied Supreme Court precedent by instructing the jury on an unlimited rule of corporate criminal liability. *United States v. Ionia Mgmt.*, 526 F. Supp. 2d 319, 324 (D. Conn. 2007). By allowing corporate vicarious liability, the district court has tailored jury instructions to accord with their own judicial intent. *Id.* The four statutes that were charged against Ionia Management contained no explicit language that imputed employee conduct on the corporation. *Id.* at 321. Yet the district court applied *respondeat superior* so broadly that an employee's violation of any statute would be imputed to the corporation. *Id.* at

323. Not only has the district court ignored the context in which the *N.Y. Central* was decided, it has loosened its standards. In *N.Y. Central* the court supported their decision by showing the conduct was done for the benefit of the company and that a benefit was conferred. The present jury instructions only required "some" intent to benefit regardless of the employee's primary motivation. *Id.* This subjective standard renders Ionia defenseless against any claim.

The district court has also failed to limit corporate vicarious liability to the conduct of managerial agents. Unlike *N.Y. Central*, criminal liability could attach to Ionia from the misconduct of any employee. *Ionia Mgmt.*, 526 F. Supp. 2d at 325. This inconsistent application of *respondeat superior* should be removed from the district court's jury instructions. There is a substantive difference between an Ionia manager's representation of the corporation and that of a common worker aboard one of their many ships. *Id.* at 322. As discussed in *Kopper*, a manager of a corporation has such duties that his position alone represents the corporation. The same is not true of an engineer whose duty is to pump waste from a boat.

B. Supreme Court precedent has consistently rejected the use of *respondeat superior* in similar cases.

Limiting the broad application of *respondeat superior* in criminal law would be consistent with this Court's approach in analogous cases. Both Title VII claims and criminal law are enforced for the purposes of deterrence and punishment. *Pa. State Police v. Suders*, 542 U.S. 129, 145 (2004). In two recent Title VII cases the Court has limited *respondeat superior* to the acts of supervisors. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). It is already evident that a supervisor possesses a special authority that regular employees do not have. *Faragher*, 524 U.S. at 801. Furthermore, a corporation can exercise reasonable control over supervisors since they are not as infinite in

number as other employees. *Id.* Employers have a greater opportunity to train these employees effectively and ethically. *Id.* at 803. The Court limited *respondeat superior* to supervisorial employees because they are a "distinct class of agent." *Ellerth*, 524 U.S. at 762.

This Court's second limitation on *respondeat superior* was effectuated by providing corporations with an affirmative defense against vicarious liability. *Faragher*, 524 U.S. at 805. The two-part defense first requires that the employer exercise reasonable care in avoiding harassment. *Id.* The second part requires the company to prove that the employee failed to take reasonable care in preventing the harm, despite employer safeguards. *Id.* Employer safeguards may be demonstrated by an effective corporate policy or complaint procedure. *Ellerth*, 524 U.S. at 765. This affirmative defense was afforded to corporations even where the statute explicitly subjected them to liability. *Faragher*, 524 U.S. at 786.

The Supreme Court's managerial agent standard for *respondeat superior* is further demonstrated through application in punitive damages cases. *Kolstead*, 527 U.S. at 536.[1] The Court in *Kolstead* determined that punitive damages could not be awarded unless the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.* at 537. *Respondeat superior* does not serve its purpose when an employee's conduct is unknown to and independent from the employer. *See Fort v. White*, 530 F.2d 1113, 1117 (2d Cir. 1976). The purposes of deterrence and punishment are mutual to punitive damages and criminal liability such that they require similar treatment. *Kolstead*, 527 U.S. at 542.

The application of *respondeat superior* in Title VII cases should be applied to the criminal statutes that where congress does not explicitly provide for vicarious criminal liability. Instead, the district court erroneously applied principles of *respondeat superior* broader than the

Supreme Court has even allowed in civil cases. *Id.* at 323. In addition, the district court should have structured its jury instructions to provide Ionia with a clear affirmative defense. The instructions in *Ionia* allowed the jury to hold the corporation liable even if the employee's action was contrary to an effective corporate compliance policy. *Id.* at 324. Without this protection, corporations have no incentive to actively pursue any method of corporate compliance.

C. **The district court's jury instruction on corporate criminal liability was not authorized by federal statutory law.**

Federal criminal statutory law must explicitly intend for vicarious liability to be applied to corporations.[2] Vicarious liability has previously been drafted in statutes where Congress deemed it necessary. *N.Y. Cent.*, 212 U.S. at 620. Congress specifically enacted the Elkins Act to prevent corporations from benefiting through the authorization of illegal rebates. *Id.* The Act explicitly stated that for the purpose of regulating price rebates, "a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation…" The Elkins Act, 32 STAT. 847 (1903). The language of this statute shows the conscious inclusion of *respondeat superior* by Congress. *Id.* at 495. The deliberate structure of this statute is evidence that Congress does not presuppose vicarious liability in all criminal statutes. *Id.*

In contrast with the Elkins Act, none of the four federal statutes charged against Ionia contained provisions imposing vicarious criminal liability. *Id.* at 321. Nonetheless, the district court read vicarious liability into the statutes in the absence of express congressional authorization. *Id.* at 323. Since other federal statutes have explicitly required vicarious liability,

[1] This limitation on *respondeat superior* is analogous to its basic understanding in tort laws. RESTATEMENT (SECOND) OF TORTS §909 (1979).
[2] Congress has adopted several statutes that have explicitly included corporate vicarious liability. *See, e.g.*, Commodities Exchange Act, 7 U.S.C. § 2(a)(1)(B) (2000); United States Grain Standards Act, 7 U.S.C. § 87d (2000).

failure to explicitly prohibit *respondeat superior* in statutes is not indicative of legislative acquiescence. There is a complete absence of statutory authority for the courts to apply such broad application of *respondeat superior* against Ionia. Where there is no statutory basis for applying *respondeat superior* the court is changing rather than interpreting the statute.

Explicit congressional intent is also necessary to protect corporations from an imbalanced prosecutorial system. Prosecution alone poses a dangerous threat to a corporation's existence. The danger is so great that corporations are faced with a system in which prosecutor's can coerce a favorable settlement by the mere threat of indictment. *See* Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1324 (2007). The power of the indictment alone to dissolve a corporation is so severe that even a successful appeal may be too late to save an innocent corporation. *E.g.*, *Arthur Anderson, LLP v. United States*, 544 U.S. 696 (2005).[3] For *Arthur Anderson*, the Supreme Court's decision to reverse the conveyance of jury instructions could not save the company from dissolving. *Id.* at 698. This unfortunate result is enough to illustrate prosecutor's unfair advantage in negotiations. In one instance the prosecution pressured an accounting firm into completely suspending attorney's fees provided to employees in an effort to obtain a favorable agreement. *United States v. Stein*, 435 F. Supp. 2d 330, 350 (S.D.N.Y. 2006). This prosecutorial power, although proscribed by the criminal justice system, has had a devastating impact on corporations. *Id.* at 359. The courts should heed to explicit legislative intent instead of permitting unlimited vicarious liability and an almost certain corporate death.

---

[3] *See also* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Anderson Prosecution*, 43 AM. CRIM. L. REV. 107 (2006) (discussing the indictment of Arthur Anderson as a misguided approach to criminal law).

II. THE DISTRICT COURT'S JURY INSTRUCTION ON CORPORATE CRIMINAL LIABILITY IS INCONSISTENT WITH THE GENERAL PRINCIPLES OF CRIMINAL LAW.

It is commonly stated that exceptions, a crime consists of at least two fundamental elements: an act (or omission) and a mental state.[4] Wayne R. LaFave, *Criminal Law* 239 (4th ed. 2003). This basic premise of criminal liability is reflected in the Latin maxim *"actus not facit reum nisi mens sit rea*," meaning: "An act does not make one guilty unless his mind is guilty." *Id.* Modern criminal liability generally requires four distinct elements: "(1) voluntary conduct that (2) violates a public law and (3) for which punishment may be imposed (4) in the name of a state." David Jones, *Crime and Criminal Responsibility* 3 (Nelson Hall 1978). While a mental state is not articulated as an independent element in the modern formula, the notion of a guilty mind is implicit because criminal liability cannot apply in the absence of a voluntary act. LaFave, *supra*, at 304.

The formulation of necessary elements in establishing criminal liability, under common law and the modern formulation, evolved through an effort to address human behavior. Consequently, determinations of what constitutes a sufficient act or mental state is much more difficult in the context of corporations – legal fictions consisting of multiple members. "The early common law view was that a corporation could not be guilty of a crime: it had no mind, and thus was incapable of the criminal intent then required for all crimes; it had no body, and thus could not be imprisoned." *Id.* at 701. Prior to 1900, in order to maintain a "proper distinction between the innocent and guilty," crimes committed under the color of corporate authority were charged to the individual acting in the business. William Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 648 (1994). "At the turn of the century, however,

state courts increasingly found corporations criminally liable for the actions and intentions of officers and agents." *Id.*

Although it is commonly accepted today that a corporate entity itself can be held criminally liable, they represent an anomaly in criminal jurisprudence, lacking both a body and mind in the conventional sense. LaFave, *supra*, at 701-02. A corporation can only act criminally through human agents. *United States v. Schlei*, 122 F.3d 944, 972 (11th Cir. 1997). In light of the inherent differences between individual actors and corporations (composed of individual actors), criminal liability cannot be established through the illegal act of an agent without contradicting the fundamental principles of criminal law. *See* V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U.L. REV. 355, 356 (1999). First, to hold a corporation criminally liable on the basis of the acts and mental state of a corporate agent is fundamentally inconsistent with traditional retributive and utilitarian justifications for criminal punishment. *Id.* Second, holding a corporation liable for the wrongful acts of an agent without considering the criminal act or mental state of the corporation, or the relationship between the two parties, is inconsistent with modern notions of criminal responsibility of others. *See* Weissmann, *supra*, at 1325.

A. <u>Corporate criminal liability is inconsistent with the traditional justifications of criminal punishment.</u>

The district court's instruction on criminal liability is inconsistent with general justifications of criminal punishment. When a corporation is subject to criminal liability as an entity, acting through its agents, the traditional justifications for criminal sanctions ceases to

---

[4] Because the statutes at issue require some element of a mental state, strict liability offenses will

apply. Substantive criminal laws are created for the purpose of preventing harm to society. See LaFave, *supra*, at 8. They prescribe punishments for prohibited conduct specifically defined as "criminal." *Id.* Generally, criminal laws are accepted on the basis that "there are certain standards of behavior or moral principals which society requires to be observed; and the breach of them being an offence not merely against the person who is injured but against society as a whole." Patrick Devlin, *The Enforcement of Morals* 6 (Oxford University Press 1965). It follows that "state interference with a citizen's behavior tends to be morally justified when it is reasonably necessary . . . to prevent harm or the unreasonable risk of harm to parties other than the person interfered with." Joel Feinberg, *Harm to Others* 12 (Oxford University 1984). There are two types of philosophical theories of justification for punishment: the retributive theory and the utilitarian theory. C.L. Ten, *Crime, Guilty, and Punishment: A Philosophical Introduction* 3 (Oxford University Press 1987). Because these justifications are based on notions of human behavior, their goals and values are not furthered by uniform enforcement of criminal laws on corporations.

1. *Retributive Theory*

The retributive theory of justification does not apply to corporations because the wrongdoing of a single individual does not necessarily entail the wrongdoing of a corporation. The retributive theory maintains that when a person fails to act in accordance with what society deems acceptable they should be punished in a fashion proportionate to their wrongdoing. Ten, *supra*, at 5. Retributive theory needs no further justification of the right to punish beyond the fact that the offender has committed a wrong. P. Brett, *An Inquiry into Criminal Guilt* 51 (London 1963). Judicial punishment cannot be used to promote any prospective good to the

---

not be addressed.

perpetrator of a wrong or society as a whole - the punishment must be imposed on the individual for the sole reason that he has done wrong. Immanuel Kant, *The Metaphysical Elements of Justice* (1797). Such punishment for wrongdoing need only be based on the principle that every perpetrator is treated equally. *Id.* A person that commits a wrong has brought punishment upon themselves for violating a law that protected the rights of both the perpetrator and the victim alike. *Id.*

Corporations, as opposed to individuals, are composed of multiple agents. Under a retributive perspective, individuals in society should only be punished if they have committed an act that violates societal standards of permissible behavior. *See* Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism, and Accountability*, 11 SYDNEY L. REV. 468, 469 (1988). As a consequence, retributive theory does not justify punishments imposed on the corporation because every agent within the corporation is equally punished for the illegal conduct of a single actor. *See* Weissmann, *supra*, at 1325. Conversely, the wrongdoer does not receive any particularized punishment distinct from the treatment of his innocent counterparts. *See* Fisse, *supra*, at 473.

In the instant case, the jury instructions stated that the corporation should be found liable for the wrongful act of an agent where the act was (1) done on behalf of the corporation, (2) for the benefit of the corporation and (3) within their scope of authority. *Ionia Mgmt.*, 526 F. Supp. 2d at 324. All of the elements can be established without a connection to any other agent within the corporation. *Id.* The only act on behalf of the corporation or its innocent agents was the establishment of a relationship to the wrongdoer. This is unrelated to the actual illegal conduct of the Ionia employee and therefore unjustified under the retributive theory.

2. *Utilitarian theory*

Utilitarian theories justify punishment solely in terms of the prospective societal benefits produced by punishment. Ten, *supra*, at 7. These theoretical purposes can be broken down into three subgroups: (1) punishment to deter; (2) punishment to rehabilitate or reform; and (3) punishment to incapacitate. *Id.* at 7-8. First, criminal punishment can deter both wrongdoers and potential wrongdoers. *Id.* When wrongdoers violate a criminal law they are punished according to the offense. *Id.* As a consequence, he suffers the experience of the punishment and is aware of potential future punishment if he repeats the illegal conduct. *Id.* In addition, the wrongdoer's punishment discourages other actors in the community from engaging in the conduct that led to the wrongdoer's punishment. *Id.*; *see also* LaFave, *supra*, at 29 (punishment serves the prospective societal benefit of educating members of society as to the distinctions between good and bad conduct). Second, punishment reforms wrongdoers by changing their values as to what constitutes wrongful conduct. Ten, *supra*, at 7-8. In theory the individual will not repeat the conduct because he does not *want* to. *Id.* He realizes such conduct is wrongful and does not merely fear future punishment. *Id.* Finally, punishments can be designed to incapacitate the individual by literally preventing them from repeating the wrongful conduct. *Id.*

The justifications of the utilitarian theory are inapplicable to corporations because the innocent agents are not capable of preventing the wrongful conduct. *See* Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 45 (1997). Although the corporation is understood to act through its agents, the conduct of every employee is not necessarily subject to control by another. *See* Lowell H. Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 327 (1995). Specifically, a corporation should not be held liable for wrongful conduct

committed by a low-level employee where the conduct could not have been prevented by any other agent except the wrongdoer himself. *Id.* Due to a corporation's inability to control the conduct of all corporate agents, despite best efforts, vicarious liability cannot logically serve a utilitarian purpose. *See* Weissmann, *supra*, at 1330. Likewise, it would not improve other corporation's ability to prevent their own corporate agents from engaging in the same wrongful conduct.

Regardless of how menacing the prospect of any given punishment is, the fears of innocent corporate agents are irrelevant to their capacity to control wrongdoers. *Id.* In light of the inability to control all corporate agents, there is no reliable utilitarian correlation between the values of innocent corporate agents and the reprehensible behavior of wrongdoers. *See* Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. CRIM. L. REV. 1343, 1346 (2007). Consequently, there is no necessary reason to augment the values of any corporate agents other than the wrongdoer. *Id.* Finally, incapacitation of the corporation is not a viable solution because the wrongdoer can simply relocate to another corporation and resume the wrongful conduct.

In Ionia, the jury instruction was inconsistent with the fundamental principals of criminal punishment because they do not effectively punish or deter the wrongful conduct. Ionia employees can continue to violate federal statutes in ways which a corporation cannot prevent. The theories of justification for criminal law are simply not furthered by imposition of criminal liability on corporations. There is no justification in punishing Ionia, which has already has existing compliance policies, while allowing the offending individual to remain unpunished.

B. Criminally liability imputed from another party regardless of the defendant's actions or mental state is inconsistent with general principals of criminal law.

The jury instruction in Ionia is inconsistent with general principals of criminal law because there is neither a requirement to establish an act or mental state of the defendant nor an opportunity for the defendant to disassociate itself from the wrongdoing of the agent. Common law has recognized that multiple parties could jointly violate the law absent an agreement to commit a criminal act. LaFave, *supra*, at 664. In addition, courts have imposed criminal liability on employers vicariously for the acts of their employees. *See United States v. Park*, 421 U.S. 658 (1975). However, in no instance can criminal liability be imposed without reference to the accused.

Common law classified parties to a crime into four categories distinguished by the nature and timing of their involvement in felony crimes. They are "(1) principal in the first degree; (2) principal in the second degree; (3) accessory before the fact; and (4) accessory after the fact." *Id.* In every criminal act there had to be at least one principal in the first degree that committed the wrongful conduct and satisfied the necessary states of mind that violated the common law crime. *Id.* at 664-65. Other persons present at the commission of the crime were categorized as principals in the second degree if they offered aid, counsel, command, or encouragement to the principal in the first degree. *Id.* at 666. A person was an accessory if they offered aid, counsel, command, or encouragement to another party to commit a felony crime for which they themselves were not be physically or constructively present. *Id.* at 664, 666-67 (noting common law later recognized that the accessory after the fact was not a true participant to the crime and that modern statutes regard such an actor as merely obstructing justice).

Although modern jurisprudence does not distinguish between principals in the second degree and accessories before the fact, a person can be held criminally liable for the acts committed by another actor (referred to here as the "principal") under the theory of accomplice

liability. Id. Although the criminal act of the principal is imputed to the accomplice, it must first be established that the accomplice committed requisite acts and that he possessed the necessary mental state. *Id.* at 671. Generally accomplice liability requires that: (1) the accomplice assist or encourage the principal to commit a crime or fail to perform a legal duty to prevent such conduct; and that (2) such conduct was done with the intent to promote or facilitate the principal's crime. *Id.*; *see also Hicks v. United States*, 150 U.S. 442, 449 (1893) (holding that a judge must instruct the jury "that the acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting"; where there was no evidence of a prior agreement to commit a crime). Furthermore, an accomplice can avoid criminal liability in one of two ways: "(1) repudiate his prior aid; or (2) doing whatever is possible to countermand his prior aid or counsel and do so before the chain of events has become unstoppable." LaFave, *supra*, at 691.

Criminal liability can also be imposed vicariously for the wrongful conduct of employees, although common law limited such liability to nuisance and libel. *Id.* at 694-95. While vicarious liability is well established in civil law under the concept of *respondeat superior*, many courts have been reluctant to accept the notion that a person can be held criminally liable in the absence of an act, wrongful intent or even knowledge of the criminal conduct. *See e.g.*, *Park*, 421 U.S. 658 (1975); *Commonwealth v. Koczwara*, 155 A.2d 825 (Pa. 1959). One Pennsylvania Supreme Court justice noted his concern:

> The distinction between *respondeat superior* in tort law and its application to the criminal law is obvious. In tort law, the doctrine is employed for the purpose of settling the incidence of loss upon the party who can best bear such loss. But the criminal law is supported by totally different concepts. We impose penal treatment upon those who injure or menace social interests, partly in order to reform, partly to prevent the continuation of the anti-social activity and partly to deter others. If a defendant has personally lived up to the social standards of the

> criminal law and has not menaced or injured anyone, why impose penal treatment?

Koczwara, 155 A.2d at 827 n.1; *see also United States v. Dotterweich*, 320 U.S. 277 (1943) (Murphy, J., dissenting) ("It is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge"). In *United States v. Park*, the Supreme Court addressed the application of vicarious criminal liability to the president of a company who admitted to being "responsible for the entire operation of the company." 421 U.S. at 664. Evidence was introduced that the president had received a letter from the Food and Drug Administration concerning insanitary conditions at an Acme warehouse. *Id.* at 658. The Court noted that the Act related to the purity of food, a "public interest warranting imposition of the highest standard of care," and that the act imposed "not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur." *Id.* at 672. Although the act did not require an "awareness of wrongdoing" or "conscious fraud," the court upheld the statute on the basis that it was sufficiently individualized and provided the defendant with additional statutory protections. *Id.* at 673-74. First, the Act itself required the government to prove beyond a reasonable doubt that the defendant had the power to prevent or correct the prohibited condition. *Id.* at 673. The court explained through a concept of a "'responsible relationship' to, or a 'responsible share' in, a violation of the Act" that the statute had sufficiently imported a measure of "blameworthiness." *Id.* To satisfy this relationship, the government had to introduce evidence that "the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." *Id.* at 673-74. Second, the act provided for

an affirmative defense on behalf of the corporation if they could show that "the defendant was powerless to prevent or correct the violation." *Id.* at 673.

The jury instruction in Ionia is inconsistent with the general principals of accomplice liability because there is no reference to the acts or mental state of the defendant, Ionia, distinct from the wrongdoing agent. First, the jury instructions in the instant case focused the jury exclusively on actions and mindset of the employee. *Ionia Mgmt.*, 526 F. Supp. 2d at 323. Although the instructions allowed the jury to consider whether the agent disobeyed corporate policy, the jury was instructed to only consider this factor in regard to whether the agent had the necessary state of mind when it committed the wrongful conduct. *Id.* at 324. There was no requirement to prove that Ionia encouraged, counseled or assisted the agent in violating the statute. Under accomplice liability the government would be required to demonstrate that the defendant encouraged the low-level employee to violate the law. Also, unlike *Park*, the jury was not required to consider the wrongdoer's level of authority or whether there was a responsible relation to the criminal conduct. *Id.* Second, the jury was not given an opportunity to review Ionia's policies and procedures to determine if they would negate criminal liability regardless of the agent's wrongful conduct. *Id.* Therefore, the standards that are applied to Ionia fall far short of the standards set in accomplice liability and lack the additional protections found in *Park*.

C. The Court should revisit the holding in *N.Y. Cent. & Hudson River R.R. Co.* to clearly delineate the standard for corporate criminal liability.

Although distinguishable, this Court should revisit the holding of *N.Y Cent. & Hudson River R.R. Co.* to determine its applicability to corporate criminal law. 212 U.S. 481 (1909). In light of present inconsistencies the Court should clarify when *respondeat superior* should be

applied to a corporation when Congress has not explicitly included them in the statute. The Model Penal Code provides an alternative and rather persuasive structure for corporate criminal liability. Violations by non-managerial agents, acting within the scope of their employment, should only be imputed to a corporation if it "plainly appears" that it was the intent of the legislature. MODEL PENAL CODE § 2.07 (1962). This is one of three possible situations in which a corporation can be held criminally liable under the Model Penal Code.[5]

Besides its tiered approach, the MPC also provides an affirmative defense for corporations. MODEL PENAL CODE § 2.07 (1962). The MPC states that for absolute liability crimes "it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent the commission." MODEL PENAL CODE § 2.07 (5) (1962). This "due diligence" defense would provide corporations with the motivation to employ effective corporate compliance policies. *Id.* On the other hand, the affirmative defense will encourage corporations to prevent illegal conduct while protecting them from the criminal acts of a rogue employee. *See Ellerth*, 524 U.S. at 765. Corporations employing the best practices will not be punished for wrongful conduct that could not be prevented while negligent corporations will not be spared.

[5] The second situation is a where the offense is the result of an omission to "discharge a specific duty of affirmative performance imposed on corporations by law." § 2.07 (1) (b). The third situation allows corporate liability for any offenses if they were "performed or recklessly tolerated by the board of directors or by a high managerial agent." § 2.07 (1) (c). The Model Penal Code provides a logical approach by distinguishing between types of crimes and types of employees. *See* Kathleen F. Brickey, *Rethinking Corporate Liability under the Model Penal Code*, 19 RUTGERS L.J. 593, 596 (1988); *See also* Roland Hefendehl, *Corporate Criminal Liability: Model Penal Code Section 2.07*, 4 BUFF. CRIM. L. REV. 283 (2000) (discussing the beneficial approach of the Model Penal Code in corporate criminal liability).

If the previous standard of criminal liability is upheld, the continued imbalance of power between the prosecutor and defendant will continue to exist. *E.g.*, *Stein*, 435 F. Supp. 2d 330. Criminal conduct will not be effectively punished or deterred and innocent corporations will remain subject to one-sided plea negotiations if they want to survive. The Model Penal Code approach is more beneficial for both corporations and the criminal justice system.[6] For the above reasons, the Model Penal Code approach would be more consistent with Supreme Court precedent, interpretation of federal statutes and the general principals of criminal law.

CONCLUSION

For the aforementioned reasons, this court should reverse the decision by the Court of Appeals for the Second Circuit.

Respectfully submitted,

Team 15

Attorneys for Petitioner

---

[6] Brief for the Association of Corporate Counsel, et al. as Amici Curiae Supporting Petitioner, *Ionia Mgmt. v. United States* (2003) (No. 07-5801-CR).This amicus brief gives several persuasive articles criticizing the present approach to corporate criminal liability. *See* John C. Walsh, Jr., *"No Soul to Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).