

No. 08-8888

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In The  
Supreme Court of the United States

October Term, 2008

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**IONIA MANAGEMENT S.A.,**  
*Petitioner,*

v.

**THE UNITED STATES OF AMERICA,**  
*Respondent.*

—◆—  
On Petition for a Writ of Certiorari  
to the United States Court of Appeals, Second Circuit

—◆—  
**BRIEF FOR PETITIONER**

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Team 17

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**ORAL ARGUMENT REQUESTED**

## Questions Presented

Petition for writ of certiorari to the Court of Appeals for the Second Circuit was granted and limited to the following questions:

1. Was the district court's instruction on corporate criminal liability authorized by Supreme Court precedent and federal statutory law?
2. Was the district court's instruction on corporate criminal liability consistent with general principles of criminal law and should the Court revisit its holding in *New York Central & Hudson River Railroad v. United States*?"

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The opinion of the United States Court of Appeals for the Second Circuit is published at 999 F.3d 999 (2008). The opinion affirmed and adopted the opinion of the district court, which is published at 526 F. Supp. 2d 319 (D. Conn. 2007).

## **STANDARD OF REVIEW**

Questions of federal law are reviewed de novo. *Schiro v. Farley*, 510 U.S. 222, 228 (1994) (noting that matters of federal law require de novo review).

## **STATUTES INVOLVED**

Relevant statutes are reprinted in the appendix to this brief. App., *Infra*, 21-22.

## **STATEMENT OF THE FACTS AND OF THE CASE**

Ionia Management S.A. (“Ionia”) is a ship management company headquartered in Greece that operated the tanker vessel M/T Kriton. *U.S. v. Ionia Management S.A.*, 498 F.Supp.2d 477, 480 (D. Conn. 2007). While at sea, the engineers of the Kriton allegedly dumped waste into the ocean using a bypass hose instead of using oil filtering equipment. *Id.* The engineers purportedly did not record the dumping or use of the bypass hose in the Oil Record Book (“ORB”). *Id.*

Ionia's was first charged, along with defendant employees, with falsification of and failure to maintain an ORB. *Id.* at 480. The second charge was a violation of the Act to Prevent Pollution from Ships (“APPS”) by misrepresenting to the U.S. Coast Guard the contents of the ORB pursuant to 33 U.S.C. § 1908(a). *Id.* The third charge against Ionia was for impeding a federal investigation pursuant to 18 U.S.C. § 1519. *Id.* The fourth and fifth charges were for obstruction of justice pursuant to 18 U.S.C. § 1505. *Id.* at 481.

During trial, four members of Kriton's crew testified “that Ionia had a strict policy against the improper discharge of oily waste and bilge water, and they were each trained and promised to abide by this policy.” *U.S. v. Ionia Management S.A.*, 526 F.Supp.2d 319, 322 (D. Conn. 2007).

Ionia requested jury instructions that indicated that an actual benefit needed to be conferred upon Ionia as a requisite for vicarious liability. The trial court denied the jury instruction and instead told the jury:

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. *Ionia Management*, 526 F.Supp.2d at 325.

Ionia also requested that the trial court instruct the jury that Ionia should be relieved of vicarious liability if the prosecution does not prove that Ionia did not have policies in place that prohibited dumping of waste using a bypass hose. The trial court denied that instruction and instead instructed the jury:

If you find that the agent was acting within the scope of his employment, the fact that the agent's act was illegal, contrary to his employer's instructions, or against the corporation's policies will not necessarily relieve the corporation of responsibility for the agent's act. You may consider whether the agent disobeyed instructions or violated company policy in determining whether the agent intended to benefit the corporation, and/or was acting within his authority. *Id.*

The trial court also issued the following instruction:

So when we refer to the term “agents” in this case, it’s the entire crew of the engine room during the entire period of time that’s relevant to the indictments in this case. So it’s all the chief engineers, all the second engineers, third engineers, fourth engineers. And the rest of the engine room crew were the unlicensed members of the crew, that is, the oilers, the wipers, the fitters and the cadets. All of those gentlemen are agents of the defendant, and all of their actions can bind the defendant in this case and make the defendant criminally liable based upon their actions. *Id.*

Ionia was convicted of conspiracy, violations of the Act to Prevent Pollution from Ships 33 U.S.C. §1908(a), and obstruction of justice 18 U.S.C. §§1519 and 1505. *Ionia Management*, 498 F.Supp.2d at 481.

### **SUMMARY OF ARGUMENT**

The district court's jury instructions on corporate criminal liability were not authorized by federal statute or Supreme Court precedent. Ionia was charged with violations of the Act to Prevent Pollution from Ships and Title 18 of the United States Code. While both statutes authorize corporate criminal liability, neither statute articulates *how* such liability is supposed to attach to the corporation.

The Supreme Court has not directly dealt with the issue of corporate criminal liability since *New York Central & Hudson River Railroad* in 1909. *New York Central* must be construed narrowly because it dealt specifically with the constitutionality of the Elkins Act of 1903. The Elkins Act expressly articulated how corporate criminal liability could attach to a corporation, but only for the limited purpose of the statute. Therefore *New York Central* is not precedent for the jury instructions in this case, and we must look to analogous cases regarding corporate civil liability. Opinions on a variety of Title VII and punitive damages cases have been issued by the Supreme Court and indicate that the Court would not permit the district court's jury instructions.

The very concept of corporate criminal liability is fundamentally flawed. The modern practice of imposing vicarious criminal liability upon corporations for the acts of their employees, as created in *New York Central*, is inconsistent with the fundamental principles of criminal law. Corporate vicarious criminal liability denies both corporations and their shareholders due process of law. The traditional principles of criminal law are not well suited to the regulation of corporations, which as abstract legal entities, cannot possess the moral

blameworthiness criminal law seeks to punish and reform. Corporate criminal liability was created out of a pragmatic policy determination without regard for the protections afforded defendants at criminal law. The *New York Central* court, in attempting to ensure that corporate wrongs did not go unpunished, unfortunately created a scheme of liability that often unfairly punishes innocent corporations and shareholders for the crimes of guilty actors who are allowed to escape responsibility for their unauthorized and detrimental actions.

Adoption of the managerial *mens rea* requirement for the imposition of corporate vicarious criminal liability will alleviate much of the inequity that results in the modern application of corporate vicarious criminal liability. Where public policy dictates that a corporate entity must be held accountable for the criminal acts of its agents, justice demands that the criminal acts attributed to the corporation actually be a product of the corporation's own policies or the conduct of its policy makers.

## **ARGUMENT**

### **I. NEITHER FEDERAL STATUTE NOR THE SUPREME COURT HAVE ESTABLISHED PRECEDENT TO SUPPORT THE DISTRICT COURT'S JURY INSTRUCTIONS**

#### **A. Congress Has Not Authorized A Method Of Applying Corporate Criminal Liability In The Federal Statutes Ionia Was Charged With Violating.**

Ionia was charged with violating the Act to Prevent Pollution from Ships (“APPS”) and associated regulations, 33 U.S.C. § 1908(a), falsifying records in connection with a federal investigation in violation of 18 U.S.C. § 1519, one count of obstructing justice in violation of 18 U.S.C. § 1505, and conspiring to commit these offenses in violation of 18 U.S.C. § 371. While each federal statute grants the authority to hold a corporation criminally and civilly liable, none offer any guidance as to how such liability can be established.

Beginning with APPS, Congress considers a “person” to include a “public or private

corporation”, therefore a corporation was expressly intended to be subject to the requirements of the act. 33 U.S.C. § 1901(a)(10). However, APPS is void of any indication of how to attach liability to a corporation.

The three other charging statutes fall under Title 18 of the United States Code, the Federal Criminal Code. Unless otherwise indicated in a federal statute, “the word 'person' include[s] corporations.” (1 U.S.C. § 1 (2000)). Thus, while none of the Title 18 statutes charged against Ionia expressly provide for criminal liability of a corporation, there is authorization for corporate criminal liability. However, as with APPS, there is no statement providing for how corporate criminal liability may attach.

In the past, other federal statutes have expressly indicated that traditional *respondeat superior* liability should apply. The Elkins Act, the federal statute in *New York Central and Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909), states, “[I]n construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person.” Elkins Act, 32 Stat. 847 (1903). The absence of equivalent language in the federal statutes at issue means that Congress did not authorize a method for attaching liability to a corporation. Therefore, we must look to Supreme Court precedent to determine what principles of law to apply.

**B. The Supreme Court Did Not Authorize The Corporate Criminal Liability Instructions Given By The District Court.**

*New York Central* is the seminal case regarding corporate criminal liability. It authorized the constitutionality of the Elkins Act and held that Congress has the authority to hold corporations criminally liable for the acts of their agents. 212 U.S. at 496-497. As noted above,

the Elkins Act expressly defines how a corporation can be criminally liable for the acts of its agents. The Supreme Court has never dealt with the issue of how a corporation can be criminally liable when there is a statute that does not expressly provide the criteria. Thus, *New York Central* does not define how a corporation may be criminally liable and cannot be used as a justification for jury instructions. Since the federal statutes at issue are silent as to corporate criminal liability we must look to other Supreme Court precedent to see if there is precedent for the district court's ruling in this case.

Since *New York Central*, the Supreme Court has had little to say regarding corporate criminal liability. However, a variety of cases have been decided on the issue of punitive damages in corporate civil liability. The Court has considered punitive damages to be “quasi-criminal” since such damages are designed to punish the wrongdoer and deter future conduct, *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001). Further, “punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law,” *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2628 (2008) quoting *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989). Because the Supreme Court has not expressly determined what is necessary to hold a corporation criminally liable in the absence of pertinent statutory language, we must look to the Court's findings on punitive damages in the corporate civil liability context. Andrew Weissmann, *Why Punish? A New Approach To Corporate Criminal Liability*, 44 Am. Crim. L. Rev. 1319, 1330-1335 (2007).

Sexual harassment claims under Title VII of the Civil Rights Act of 1864 also provide analogous case law that indicates that the Supreme Court has limited the scope of corporate liability. Since punitive damages are awarded for Title VII claims, it is appropriate to compare

Title VII cases with corporate criminal law. Further, just as deterrence is one of the purposes of criminal law, Title VII is also designed primarily “not to provide redress but to avoid harm.”

*Kolstad v. American Dental Association*, 527 U.S. 526 (1999) quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). Therefore the goals of Title VII and criminal law are analogous and we can gain insight from these Title VII cases.

In *Faragher*, the city was held liable for sexual harassment under Title VII of the Civil Rights Act of 1964. A female lifeguard had been sexually harassed by a supervisor, and the issue before the Court was whether the employer, the city, could be vicariously liable and whether the employer is entitled to an affirmative defense. *Id.* at 780. The affirmative defense involved (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* at 778. The Court held that the employer could be vicariously liable, but was entitled to the affirmative defense. In reaching this decision, the Court relied on the Restatement (2d) of Agency. *Id.* at 802.

*Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), was the companion case to *Faragher* and shared the same holding. *Faragher*, 524 U.S. at 807. Burlington had enacted a policy regarding sexual discrimination and distributed the policy to its employees. *Burlington*, 524 U.S. at 749. A female salesperson had been sexually harassed by a supervisor. *Id.* at 748. The salesperson knew of the company policy, but failed to follow policy and report the harassment to her immediate supervisor. *Id.* Summary judgment was granted for Burlington. *Id.* at 749. While the Supreme Court reversed and remanded the case, it held that a corporation is entitled to an affirmative defense in Title VII cases if (a) the corporation has exercised reasonable

steps, or implemented policies designed to prevent the misconduct, and (b) the plaintiff failed to utilize those steps or policies. *Id.* at 761.

In *Kolstad, supra*, the Court held “in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's “good-faith efforts to comply with Title VII.” *Id.* at 545.

1. *The District Court's Jury Instruction Improperly Extended The Scope Of The Corporation's Liability To Low-Level Employees.*

Through *Kolstad*, the court limited the scope of corporate civil liability to managerial agents. The jury instruction given in the present case included all employees:

So when we refer to the term “agents” in this case, it’s the entire crew of the engine room during the entire period of time that’s relevant to the indictments in this case. So it’s all the chief engineers, all the second engineers, third engineers, fourth engineers. And the rest of the engine room crew were the unlicensed members of the crew, that is, the oilers, the wipers, the fitters and the cadets. All of those gentlemen are agents of the defendant, and all of their actions can bind the defendant in this case and make the defendant criminally liable based upon their actions. *Ionia Management*, 526 F.Supp.2d at 325.

Since even in punitive damages situations, the Court has been unwilling to extend corporate liability to low-level employees, the Court would unlikely extend the managerial requirement to criminal liability.

2. *The District Court Incorrectly Instructed The Jury That Ionia's Policies Against Illegal Dumping Would Not Relieve Ionia Of Vicarious Liability.*

Further, Ionia enacted policies prohibiting dumping waste, which represents an effort to prevent such activity. Under the Title VII cases, the Court has been reluctant to award punitive damages when a corporation has sexual harassment policies in place that the employee failed to follow. The purpose of the statute is to prevent sexual harassment. Company policies are the best way to prevent such misconduct. The Court is reluctant to impose liability because if a

corporation will be held vicariously liable regardless of the implementation of policies against the misconduct, then the corporation has no incentive to implement the policies. Without the policies, then the misconduct cannot be deterred and the statute will have no effect.

Here, the same principle applies since criminal law is designed to deter as well as punish. Four witnesses for Ionia testified that the corporation had enacted a policy prohibiting dumping waste except through use of a filtering system, and that each of those four employees had promised to follow that policy. The Title VII cases are analogous precedent that such a procedure is desired and ought to entitle Ionia to an affirmative defense. The district court denied Ionia's jury instruction charging the jury to find the prosecutor has proven that Ionia *did not* have policies in place. While the Title VII cases do not authorize adding an additional element to proving *respondeat superior*, they do provide that the corporate defendant is entitled to an affirmative defense.

The trial court instructed “the fact that the agent's act was illegal, contrary to his employer's instructions, or against the corporation's policies will not necessarily relieve the corporation of responsibility for the agent's act.” (*Ionia Management*, 526 F.Supp.2d at 325. (Emphasis added). This jury instruction is inconsistent with the precedent set by the Title VII cases because it does not acknowledge the existence of an affirmative defense.

3. *The District Court Incorrectly Instructed The Jury That An Agent Of Ionia Need Only Intend To Benefit Ionia Rather Than Confer An Actual Benefit.*

The district court held “an agent need not have conferred an actual benefit, however; it is sufficient that there was an intent, at least in part, to benefit the employer.” *Ionia Management*, 526 F.Supp.2d at 323. The district court denied Ionia's requested jury instruction that charged the jury with finding the criminal conduct of the agents constituted an actual benefit to Ionia. Admittedly, there is lower court precedent for the jury instruction that was given at trial. *United*

*States v. Cincotta*, 689 F.2d 238 (1st Cir.1982) , *United States v. DeMauro*, 581 F.2d 50 (2d Cir. 1978); *United States v. Beusch*, 596 F.2d 871 (9th Cir. 1979). However, the issue at hand rests upon the precipice of whether the Supreme Court has established precedent to warrant such an instruction. Since *New York Central* is the last case to truly deal with corporate criminal liability, and it is silent as to this issue, this Court has the opportunity to develop the standard for imputing criminal liability on a corporation. In the Title VII cases cited here, the Court has continued the use of the Restatement (2d) of Agency which only requires an intent to benefit, not an actual benefit. However, considering the higher standard that the criminal law places upon the prosecutor versus a plaintiff in a civil court, it is reasonable for this Court to require the prosecutor to prove that the corporation incurred an actual benefit, rather than merely the agent acted with an intent to benefit the corporation.

## **II. THE SCHEME OF CORPORATE CRIMINAL LIABILITY CREATED BY *NEW YORK CENTRAL* IS INCONSISTENT WITH THE FUNDAMENTAL PRINCIPLES OF CRIMINAL LAW AND DENIES CORPORATIONS AND THEIR SHAREHOLDERS DUE PROCESS OF LAW.**

The second issue on appeal requires an appraisal of the validity of the seminal case on corporate criminal liability, *New York Central and Hudson River Railroad v. United States*, 212 U.S. 481 (1909) and the entire scheme of corporate criminal liability that arose out of that case. *New York Central* has been long-standing precedent for one-hundred years, despite being fatally inconsistent with the fundamental principles of criminal law. *New York Central* should be reversed, or at least re-interpreted, in light of those principles.

### **A. Traditional Criminal Law Is Ill-Suited To Regulating Corporations.**

Criminal law generally grants the accused the presumption of innocence and requires that a jury be convinced beyond a reasonable doubt of his guilt. *In re Winship*, 397 U.S. 358, 362 (1970). The Constitution shields the accused from an unfair application of the law with the

requirements of substantive and procedural due process. The alleged criminal has a right to a jury trial, a right against self-incrimination, and a right to challenge witness against him, among other protections. U.S. Const. amend. IV, V, VI. These safeguards arose out of a recognition of the monumental consequences of a criminal conviction. In a criminal action the fundamental rights of life, liberty, property, and reputation are often all at stake. The severity of criminal sanctions requires that an accused criminal have heightened procedural protections.

The purposes of civil and criminal liability stand in stark contradiction with each other. The civil litigant seeks to be made whole in the form of damages or equitable relief against one who is *at fault* for his injury. In contrast, the criminal law lays *blame*. Fault and blame, as applied at law are two distinct concepts. Simply put, to be at fault, a person (or entity) need only commit an act that injures another. To be blameworthy at criminal law, a person generally must commit an illegal act, the *actus reus*, with the requisite criminal intent, or *mens rea*.

The purposes of criminal law are to punish and deter morally blameworthy conduct. Although the corporation may be recognized by the law as a “person” of sorts, it of course is not a real person, a human being. A person has a single mind and a single will. The acts of a person belong to that person alone. A corporation is an entity that is owned and operated by multiple individuals, each with his own mind, will, and actions. Since the corporation is not a human being, it is incapable of possessing the negative human characteristics that criminal law seeks to deter, punish, and reform. The traditional principles of criminal law are inapposite to governing corporate conduct.

**B. Corporate Criminal Liability Was Created In Response To A Pragmatic Policy Determination Without Regard For The Protections Afforded Defendants At Criminal Law.**

With the rise of corporations as a dominant force in modern society, jurists struggled with

how and whether to impose criminal sanctions upon an abstract legal entity that by its very nature could not possess the requisite moral blameworthiness the criminal law sought to condemn. To solve the problem, the *New York Central* court simply ignored the division of criminal and agency law. *Phile Qui Tam v. The Ship Anna*, 1 US 197, (1787) (“The law never punishes any man criminally but for his own act, yet it frequently punishes him in his pocket, for the act of another.”). Corporate criminal liability, as created in *New York Central*, appears to be the result of a pragmatic decision to subvert the requirement of criminal intent, or *mens rea*. In the place of *mens rea*, the doctrine of *respondeat superior* was imported from agency law to be shoe-horned into criminal jurisprudence. This legal sea-change reflected a policy consideration that corporations should not be able to shirk criminal responsibility due to the formalisms of traditional criminal law.

In *New York Central*, two employees of a railroad, the “traffic manager” and “assistant traffic manager” were accused of providing unlawful rebates to sugar manufacturers who agreed to ship their goods via the railroad. 212 U.S. at 489-491. Such rebates ran afoul of the Elkins Act, 32 Stat. 847 (1903) which provided that any act or omission by an agent of a corporation in violation of the statute that amounted to a crime would be imputed to the corporation. *Id.* at 492. The railroad challenged the constitutionality of the Elkins act on grounds that the act would deny the corporation the presumption of innocence and would deny the railroad’s shareholders notice and an opportunity to be heard in a matter affecting their property rights in the corporation *Id.* The *New York Central* court rejected these due process concerns and found the Elkins act constitutional, holding that a corporation could be held criminally liable of the acts of its agents *Id.* at 498. The court reasoned that since corporations are capable of action only through their agents, many crimes would go unpunished unless the actions of those agents were imputed to

their corporate principals via the agency law doctrine of *respondeat superior*. *Id.* at 494.

*New York Central* and its progeny formulated a new standard of culpability to be applied to corporations accused of criminal offenses. This standard embraces the agency law doctrine of *respondeat superior*, subjecting the corporate entity to liability for the crimes of its employees, or agents. To meet the requirement of a criminal *mens rea*, a corporation is now generally found to possess the sum of the knowledge of all of its employees. *United States v. Bank of New England*, 821 F.2d 844, 855 (1st Cir. 1987). If a single employee commits a crime with the requisite criminal intent his crime and his intent are imputed to his corporate employer. Of course, many corporate crimes, being in the nature of regulatory offenses, require no element of intent at all and rely solely upon agency principles for vicarious criminal liability. *Morissette v. United States*, 342 US 246, 257 (1952).

*New York Central* should be reversed. Corporate criminal liability serves no purpose that is not accomplished more effectively and efficiently in the civil liability system. Public policy is best served by imposition of criminal liability upon the persons responsible for the criminal acts imputed to corporations, not innocent shareholders as under corporate vicarious liability. This is especially true in the case of *Ionia*, whose shareholders are being forced to unfairly suffer criminal consequences because of the acts of a few rogue employees.

### **C. Corporate Criminal Liability Denies Both Corporations And Shareholders Due Process Of Law.**

The application of corporate criminal law denies due process protections to both corporations and their shareholders. By imputing the criminal liability of its agents to the corporation, the corporation is denied the presumption of innocence and is in fact presumed to be guilty of criminal acts of its employees nominally done in the scope of their employment regardless of corporate policy contrary to the illegal and unauthorized acts of the employee.

A corporation does not have a right against self incrimination. Although this restriction was formulated before *New York Central* in *Hale v. Henkel*, 201 U.S. 43, 70 (1906) when corporations were still largely considered incapable of committing crimes, it is still good law. *Braswell v. U.S.*, 487 U.S. 99 (1988). Thus corporations are denied a major procedural safeguard that is afforded to human criminal defendants. This disparity highlights the uneven application of criminal law with regard to actual people and corporations. That uneven application of the criminal law to corporations of course stems from the fact that criminal law was developed with individual actors in mind, not corporate bodies.

The due process rights of innocent shareholders suffer most as a result of corporate criminal liability. As argued by the NYC & HRR Railroad in *New York Central*, the shareholders of a corporation on trial do not have a right to notice and an opportunity to be heard in an action with profound implications for their property rights in the accused corporation. 212 U.S. at 492. Innocent shareholders are subject to forfeiture of their property rights (in the form of their ownership stake in the sanctioned corporation) because of the wrongdoing of individuals over whom they exercise no control. This is of course no different from civil liability. *Roginsky v. Richardson-Merrill*, 378 F.2d 832, 841 (2d. Cir. 1967), *Kaufmann v. Societe Internationale*, 343 U.S. 156 (1952). So despite the promised enhanced protections of individual liberty and property at criminal law which are guaranteed in the Constitution, the shareholder of a corporation accused of crime is as exposed to criminal financial penalties as he is to civil damages due to the inequities of corporate criminal liability. This fact alone establishes both the unfairness of corporate criminal law and its redundancy.

Criminal law exists primarily to punish and deter morally blameworthy conduct. Because of the grave consequences of a criminal conviction, the criminal law affords the accused

many heightened procedural protections that are not available to the civil defendant. Since *New York Central*, corporations have been found to be answerable for the criminal actions of their employees but have been denied many of the protections of criminal law. This contradiction is the result of the inherent incompatibility of the traditional principles of criminal law and the policy determination of the *New York Central* court that corporations should be subject to criminal sanction. The answer to the problem of corporate wrongdoing is not found in the criminal law. Corporate vicarious criminal liability was created by adapting agency principles to the criminal law. Civil liability, imposed by applying those same agency law principles, is sufficient to deter corporations from the wrongdoing supposedly deterred and punished with criminal sanctions. By injecting agency principles into the criminal law, the *New York Central* court created a new, unnecessary, and unwieldy branch of law while simultaneously undermining the very constitutional protections the court is charged to defend.

### **III. ADOPTION OF THE MANAGERIAL *MENS REA* REQUIREMENT FOR THE IMPOSITION OF CORPORATE CRIMINAL LIABILITY WILL ALLEVIATE MUCH OF THE INEQUITY THAT RESULTS IN THE MODERN APPLICATION OF CORPORATE CRIMINAL LIABILITY.**

As an alternative to reversing *New York Central* and destroying the concept of corporate criminal liability outright, the requirement of a proper criminal *mens rea* should be restored. Adoption of the managerial *mens rea* standard set forth in the Model Penal Code, which imposes corporate criminal liability upon a corporation only upon proof that its managers were themselves morally blameworthy, will remove many of the inequities resulting from the application of the scheme of corporate criminal liability promulgated since *New York Central*. Under this standard, Ionia would be exonerated because the policies and procedures formulated by its managers were opposed to the illegal actions taken by its employees.

**A. The Modern Application Of Corporate Criminal Liability As Created In New York Central Is Unfair To Both Corporations And Shareholders.**

Corporate criminal liability has a legitimate and even admirable goal of punishing the illegal acts of corporations and deterring criminal corporate conduct. However, a survey of the case law applying the standard of corporate criminal liability set forth in *New York Central* reveals deep flaws in the current scheme. Under current corporate criminal jurisprudence, corporations that take reasonable or even drastic steps to prevent criminal conduct by their employees are nevertheless held strictly liable when those crimes do occur. Guilty corporate agents have been allowed to pass their culpability onto their corporate principals and escape personal accountability. At criminal law, the corporation is simply too easy a target.

*United States v. Hilton Hotels*, 467 F.2d 1000 (9th Cir. 1972) for example, saw the Hilton Hotels corporation held criminally liable when a disobedient employee participated in an illegal boycott motivated by local, rather than corporate, concerns. The corporation's managers had *expressly prohibited* the employee from participating in the boycott. 467 F.2d at 1004. He disobeyed the order, thus breaking the law and subjecting his corporate employer to vicarious criminal liability for his crime. *Id.*

*The President Coolidge v. United States*, 101 F.2d 638 (9th Cir. 1939) both demonstrates the unfairness of the strictness with which corporate criminal liability has been applied since *New York Central* and is remarkably pertinent to Ionia's appeal. The "President Coolidge" was a steamboat. One of the ship's sailors was accused of having thrown garbage overboard which unfortunately landed upon the very officer charged with enforcing the regulations against such disposals. 101 F.2d at 638. The garbage had been thrown overboard despite signs placed throughout the ship forbidding doing so, locks being placed upon the ship's garbage chutes, and warnings from corporate management against throwing refuse overboard. *Id.* at 638-639.

Despite the efforts of the corporation to prevent the violation, it was held criminally accountable for the litter and was fined. *Id.* at 640. The court interpreted the applicable statute as not requiring the element of criminal intent on the part of the corporation and imputed the crime of the sailor to his corporate employer. Despite acknowledging the blamelessness of the corporate employer, the court nevertheless imposed the penalty of the crime upon the corporation *Id.*

This result is obviously unfair. The crime was committed by the sailor, not the corporation. If the purpose of criminal law is to punish the guilty actor, then the sailor should have been found and punished. The result in *The President Coolidge* undermines one of the fundamental rationales for imposing corporate liability in the first place, deterrence of corporate crime. The existence of the law against throwing refuse overboard clearly had the desired effect upon the corporate owners of the steamboat as all reasonable efforts to prevent throwing garbage overboard were taken. The corporation had done its part, and yet was punished. If Ionia's erroneous conviction is affirmed, the result here will be no different. There is no justifiable rationale for holding a corporation that has taken every reasonable step to prevent corporate crime accountable for acts contrary to corporate policy. Under that standard the guilty actor is allowed to avoid responsibility while the innocent corporation is punished despite complying with the law.

**B. The Model Penal Code Approach To Mens Rea Would Alleviate The Unfairness Of Federal Corporate Criminal Liability While Accomplishing Its Worthwhile Purposes.**

To avoid the problem of unfair imputation discussed above, section 2.07(c) of the Model Penal Code sets forth a simple and fair *mens rea* standard that should be adopted by the federal courts whenever the criminal act of a corporate agent is sought to be imputed to the corporate principal. That section requires that in order for a corporation to be found guilty of a crime

found in the criminal code (other than a strict liability or regulatory offense), the criminal offense committed must have been “authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.” Model Penal Code § 2.07(c). A “high managerial agent” is defined in the Code as an officer or agent of the corporation “having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.” Model Penal Code § 2.07(4)(c).

This standard recognizes that the will or intent of a corporation, if a corporation can be said to possess such faculties, is represented by the corporation’s stated and disseminated policy and the acts of its policy makers, rather than by every action of every corporate agent nominally falling within the scope of his employment.

This standard yields much more equitable results than the presumed guilt by imputation standard promulgated under *New York Central*. To broaden the current applicability of 2.07(c) to include regulatory offenses such as under which Ionia has been charged would remedy the harsh and unfair application of those statutes. An example of the application of this more rational standard is seen in the case of *Holland Furnace Co. v. United States*, 158 F.2d 2 (6th Cir. 1946).

In *Holland*, an employee of a furnace company was charged with fraudulently selling a furnace in violation of a wartime ordinance requiring that only worn out or irreparable furnaces be replaced. *Id.* at 3. The trial record revealed that the Holland Furnace company scrupulously sought to obey the wartime limitations placed upon the sale of its equipment by sending out pamphlets advising its salesmen of the restrictions and admonishing its managers that every deal “must be as clean as a hound’s tooth.” *Id.* at 10-11. The key issue before the court was the validity of Holland’s conviction for the fraudulent sale of furnace replacing one that did not meet

the wartime threshold for replacement. The 6th Circuit reversed the corporation's conviction, while upholding the conviction of the salesman citing the rule that, a principle "...cannot be held criminally [liable] for the acts of his agent, contrary to his orders, and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent's employment, though he might be liable civilly." *Id.* at 8. The court reasoned that Holland Furnace's policy of adherence to the wartime restriction and its efforts to ensure that its employees obeyed that policy demonstrated the salesman's lack of authority to break the law on behalf of his employer. In essence, the court found that Holland Furnace lacked the necessary managerial *mens rea* to be held accountable for the unlawful acts of its salesman as demonstrated by its clearly expressed intent not to circumvent the restrictions as its employee had done.

As demonstrated by *Holland Furnace*, the managerial *mens rea* standard of liability set forth in the Model Penal Code alleviates much of the unfair results of the application of corporate criminal liability, yet still punishes corporations criminally when the policy of the corporation is itself unlawful or the corporation's policymakers violate the law with guilty knowledge. The *New York Central* court was concerned that without some form of corporate criminal liability many crimes would go unpunished. What has unfortunately resulted from the line of cases stemming from *New York Central* is that many innocent corporations, and by extension, their shareholders, have been forced to account for the unlawful and unauthorized acts of rogue employees. The purposes of criminal law are not accomplished by letting the guilty actor go free and transfer his culpability to another simply because of their agency relationship. But where the corporation is itself a guilty actor, as evidenced by its unlawful policies or the unlawful acts of its policy makers, or high managerial agents, it is reasonable to punish the corporation itself in that context.

Ionia Management, S.A. is not a guilty actor. Ionia's policies were opposed to the illegal dumping of waste into the ocean. There is no evidence that the corporation's managers sanctioned the illegal polluting. Under the managerial *mens rea* standard, Ionia should not be found guilty of the unauthorized acts of its employees. Responsibility should rest with the guilty actors, not their innocent and conscientious employer.

The Model Penal Code's managerial *mens rea* standard is a fair approach to resolving the *mens rea* problem currently found in the federal application of corporate vicarious criminal liability. Application of this standard ensures that only the truly "guilty" corporation is punished (if an abstract legal entity can be deemed to be guilty), allows corporate entities that actively comply with the law a defense against unwarranted prosecution, and removes the shield that disobedient employees have benefitted from for too long.

### CONCLUSION

The district court jury instructions on corporate criminal liability were neither authorized by the charging federal statutes, nor by Supreme Court precedent. Analogous precedent shows that the jury instructions were contrary to what the Supreme Court has decided under corporate civil law, thus this case deserves reversal on those grounds.

The entire scheme of corporate vicarious criminal liability demands to be reconsidered, starting with the fundamental case on the subject, *New York Central*. Corporate vicarious criminal liability should only be imposed when the managerial *mens rea* standard set forth in the Model Penal Code has been met by the corporation.

Respectfully Submitted,

Team 17 \_\_\_\_\_  
Counsel for Petitioner

## APPENDIX

### RELEVANT STATUTORY PROVISIONS

1. Section 1 of Title 1 of the United States Code reads, in pertinent part:
  - a. In 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;”
  
2. Section 371 of Title 18 of the United States Code reads, in pertinent part:
  - a. “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.  
  
If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.”
  
3. Section 1505 of Title 18 of the United States Code reads, in pertinent part:
  - a. “Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do

so; . . . Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.”

4. Section 1519 of Title 18 of the United States Code reads, in pertinent part:
  - a. “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.”
5. Section 1901(a)(10) of Title 33 of the United States Code reads, in pertinent part:
  - a. “(a) Unless the context indicates otherwise, as used in this chapter . . . (10) “person” means an individual, firm, public or private corporation, partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body;”
6. Section 1908(a) of Title 33 of the United States Code reads, in pertinent part:
  - a. “(a) 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. In the discretion of the Court, an amount equal to not more than 1/2 of such fine may be paid to the person giving information leading to conviction.”