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**IN THE SUPREME COURT OF THE UNITED STATES**

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**DOCKET NUMBER 08-1234**

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**IONIA MANAGEMENT S.A.,**

*Petitioner*

v.

**UNITED STATES OF AMERICA,**

*Respondent*

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

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**BRIEF FOR PETITIONER**

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**Team #19**

## QUESTIONS PRESENTED

- I. WAS THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY AUTHORIZED BY SUPREME COURT PRECEDENT AND FEDERAL STATUTORY LAW?
  
- II. 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 CO. v. UNITED STATES*?

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 999 F.3d 999 (2d Cir. 2008). The Second Circuit summarily affirmed the decision of the United States District Court of Connecticut, reported at 526 F. Supp. 2d 319 (D. Conn. 2007).

## JURISDICTION

A formal statement of Jurisdiction has been waived in accordance with the 2009 Herbert Wechsler National Criminal Law Moot Court Competition Rules and Instructions.

## CONSTITUTIONAL PROVISIONS AND STATUTES

The texts of the following authorities, relevant to the determination of the present case, are set forth in the appendix: 18 U.S.C. § 371 (2009); 18 U.S.C. § 1505 (2009); 18 U.S.C. § 1519 (2009); 33 U.S.C. § 1908(a) (2009).

## STATEMENT OF THE CASE

Ionia Management S.A. (“Ionia”) is a ship management company incorporated in Liberia and headquartered in Piraeus, Greece and at all relevant times Ionia managed the tanker vessel M/T Kriton which is registered in the Bahamas. Indictment, *United States v. Ionia Mgmt. S.A.*, No. 07CR00134 (D. Conn. June 7, 2007). Ionia was charged with a total of eighteen counts under four separate indictments that were consolidated for trial in Connecticut. *United States v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 321-22 (D. Conn. 2007). The indictment stemmed from the actions of Second Engineer Edgardo Mercurio, a crewmember onboard the M/T Kriton, who instructed fellow crewmembers to bypass the oily water separator which resulted in false entries in the oil record book. *Id.* at 325. These actions were not authorized and were in direct contradiction to Ionia’s compliance program. *Id.* at 327.

On September 6, 2007 a jury convicted Ionia on all eighteen counts. *Id.* at 321. This guilty verdict was a result of the district court's instruction on corporate criminal liability which directed that Ionia could be held criminally liable for the acts of its employees if they were acting within the scope of employment and with the intent to benefit the corporation. *Id.* at 324-25. The district court instructed the jury that the fact that the agent's act was against the corporation's compliance program would not immunize the corporation from liability, but evidence of such a program can be used in determining whether the agent was acting within his authority or with the intent to benefit his employer. *Id.* Ionia filed a Motion for a Judgment of Acquittal, or in the Alternative, a New Trial. *Id.* at 322. The district court denied Ionia's motion and the Second Circuit Court of Appeals summarily affirmed. *United States v. Ionia Mgmt. S.A.*, 999 F.3d 999 (2d Cir. 2008). On December 12th, 2008, the petition for writ of certiorari was granted by the Supreme Court.

#### SUMMARY OF THE ARGUMENT

The district court committed plain error by upholding the instruction on corporate liability. The district court, in supporting its broad respondeat superior instruction, cited to Second Circuit cases which erroneously relied on *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909). *New York Central* merely stands for the proposition that Congress has the power to impute liability onto corporations, but did not state that liability must be assigned in every criminal case. *New York Cent.*, 212 U.S. at 496. Unlike other federal statutory laws, the violations at issue in this case do not contain respondeat superior in the language of the statute. 18 U.S.C. § 371 (2009); 18 U.S.C. § 1505 (2009); 18 U.S.C. § 1519 (2009); 33 U.S.C. § 1908(a) (2009).

The Supreme Court has narrowed the scope of respondeat superior in similar civil cases. In the context of punitive damages, corporations are only held liable for the actions of managerial employees. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). In Title VII sexual harassment cases, the Supreme Court has authorized an affirmative defense which would protect a corporation from liability where they can prove they had a sexual harassment policy in place and the plaintiff/employee did not utilize the corrective measures. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). It is inconsistent for the Court to hold that corporate defendants should be given the opportunity to present an affirmative defense in civil liability claims but not in criminal liability cases. As the law currently stands, it is easier to hold a corporation criminally liable for the acts of its agents than it is to impute civil liability on a corporate defendant, and this is a result our justice system should not condone.

Furthermore, the jury instruction is inconsistent with the general principles of criminal law for several reasons. First, they do not serve the two main principles of criminal law of deterrence and retribution. *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997). As Ionia had a compliance program in place, there is nothing to deter either specifically or generally. *United States v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 327 (D. Conn. 2007). The same rationale applies to the context of retribution as Ionia had taken all the reasonable steps possible to deter and detect the criminal conduct of its employees, and thus Ionia's culpability is essentially non-existent. In fact, the very foundations of the criminal legal system are called into question by the current state of corporate criminal liability. Given the inordinate amount of power the prosecutor wields in corporate criminal liability cases, the law as it currently stands has deprived corporate defendants of any chance of a viable defense while allowing the prosecution to ride rough-shot

over the proceedings. For all the foregoing reasons, this Court should reverse the holding of the district court.

## ARGUMENT

### I. THE COURT SHOULD REVERSE THE DENIAL OF PETITIONER’S MOTION TO SET ASIDE THE GUILTY VERDICT BECAUSE THE JURY INSTRUCTION ON CORPORATE CRIMINAL LIABILITY IS NOT AUTHORIZED BY SUPREME COURT PRECEDENT OR FEDERAL STATUTORY LAW.

The standard of review to be used by the Court is plain error because no objection was made by Ionia at the trial court level regarding the jury instruction. *Johnson v. United States*, 520 U.S. 461, 466-67 (1997). The appellate court can recognize and correct the error not mentioned at trial if there is an “(1) error, (2) that is plain, and (3) affects substantial rights.” *Id.* at 467. Further, if these three elements are met, the court in its discretion can recognize the error if it “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.*

#### A. The Jury Instruction Given By The District Court On Corporate Criminal Liability Is Not Supported By Supreme Court Precedent.

1. The instruction to the jury on corporate criminal liability is based on a misapplication of the Supreme Court case *New York Central & Hudson River Railroad Co. v. United States*.

In denying Ionia’s motion to set aside the guilty verdict based on an improper jury instruction on corporate criminal liability, the district court relied on prior case law holding that a corporation is liable for unlawful acts committed by its employees while acting in the scope of their employment. *United States v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 323-24 (D. Conn. 2007). The district court erred when denying the motion because the case law the court relied upon misapplied a Supreme Court decision on corporate criminal liability. The current standard for corporate criminal liability is one which has developed from a misapplication of the Supreme

Court case of *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909).

In *New York Central*, the Supreme Court upheld the Elkins Act which imputed criminal liability to corporations in its statutory language. *Id.* The Elkins Act prohibited individual and corporate carriers, through the acts of their agents, from giving rebates to shippers. *Id.* The language in the statute makes any act by an agent “acting for or employed by such corporation” to be an act of the corporation. *Id.* at 491. The statute further provided that if an agent was “acting within the scope of his employment” this would be considered to be an act of the corporation as well. *Id.* at 491-92.

New York Central’s traffic manager and assistant traffic manager were accused of giving rebates. *Id.* at 489. The Court ruled that Congress has the power to hold corporations liable for the acts of its agents who commit a violation of interstate commerce. *Id.* at 496. The Court did not lay down as a mandatory requirement that principles of respondeat superior must be strictly applied to every criminal case involving acts of an agent of a corporation. *Id.* *New York Central* only shed light on corporate criminal liability in the context where there was express language of respondeat superior in the statute being violated such as the Elkins Act. *Id.*

In following *New York Central*, the circuit courts have applied civil tort liability of respondeat superior onto corporations in a criminal setting, and have instructed the jury according to said principles even when the statute charged does not include respondeat superior language. *See United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972) (holding corporation criminally liable under the Sherman Act); *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962) (charging the corporation with a violation of the Hot Oil Act); *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir. 1945) (holding a

corporation can be held responsible for acts of its agents committing conspiracy). Under the theory of respondeat superior, a corporation is guilty of a criminal act if one of its employees violates a statute within the course of employment and with the intent that the act will be beneficial to the employer. *See Hilton Hotels Corp.*, 467 F.2d at 1006-07.

In the Second Circuit, the courts in following respondeat superior have allowed criminal liability to be imposed onto corporations when the alleged wrongdoing was committed by a menial, low-level employee acting in the scope of employment. *United States v. George F. Fish, Inc.*, 154 F.2d 798 (2d Cir. 1946) (concluding an act of a salesman can be attributable to the corporate principal). To the contrary, two cases have instructed the jury that the corporation is criminally liable when the act is from a managerial agent. *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 659 (2d Cir. 1989); *United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir. 1981). Corporate criminal liability was instructed even when the act was against the express directions of the corporation. *Twentieth Century Fox*, 882 F.2d at 660.

The district court erred in finding the instruction was proper that Ionia should be found guilty if its agent, while acting within the scope of employment and with the intent to benefit the principal, violated the statutes charged. The basis for this instruction is ill-founded because the Supreme Court has not held that corporate criminal liability shall be imposed in all criminal cases against corporations. The Court in *New York Central* held that the Elkins Act, which contained vicarious liability principles, was constitutional because Congress has the power to impute liability onto corporations in violation of an interstate commerce statute. *New York Cent.*, 212 U.S. at 496.

The statutes that Ionia was convicted of did not contain language in the statute similar to the language in the Elkins Act that would impute liability onto Ionia when one of its agents

violated the statute while acting within the scope of employment. 18 U.S.C. § 371 (2009); 18 U.S.C. § 1505 (2009); 18 U.S.C. § 1519 (2009); 33 U.S.C. § 1908(a) (2009). The circuit court cases relied upon by the district court are based on a misapplication of *New York Central*. The Supreme Court did not authorize a broad application of respondeat superior on corporations in violation of criminal statutes without express language otherwise. Furthermore, the jury instruction imputed liability onto the corporation for an act of any of its agents regardless of their rank. *Ionia*, 526 F. Supp. 2d at 324-25. Two Second Circuit cases instructed the jury that the corporation would be vicariously liable for the acts of its managerial agents. *Koppers Co.*, 652 F.2d at 298; *Twentieth Century Fox*, 882 F.2d at 659. The instruction given by the district court differed from other Second Circuit cases because it allowed liability for acts of a low-level employee.

2. The jury instruction used at trial runs contrary to the current trend of respondeat superior in similar Supreme Court cases in civil law.

The Supreme Court has taken a stance on corporate liability in the civil context that is different than the current standard used for liability in the criminal realm. The jury instruction used against *Ionia* is inconsistent with the standard of respondeat superior in analogous civil cases. There are two main differences of the standard in criminal law and the standard in civil law for corporate liability. The first difference is that in civil cases liability is limited by allowing an affirmative defense. The second difference is that the standard is limited by only imputing liability for the actions of managerial employees. Two areas of civil law are demonstrative of these limitations: Title VII sexual harassment and punitive damages. The scope of respondeat superior has been narrowed in civil liability, and this should carry over onto the standard in corporate criminal liability because criminal law incorporated respondeat superior based on civil tort law. Also, criminal law parallels the goals of punitive damages in civil law.

In *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999), the court discussed the limitations that common law agency principles have on punitive damages in Title VII sexual harassment actions against corporate defendants. The court held that granting punitive damages in a case where the employer/corporation implemented sexual harassment policies and in good faith enforced those policies runs against the goals Title VII was set to achieve. *Id.* at 544. By punishing those corporations, even when an anti-discrimination policy is set in place, the common law agency “scope of employment” principle has the effect of discouraging corporations from implementing policies as it will have no effect on the outcome of a sexual harassment lawsuit. *Id.* at 545. Instead of following strict vicarious liability, the court held that in an action for punitive damages corporations should not be found liable for decisions of their managerial employees when a “good faith” attempt to abide by Title VII was made. *Id.*

According to common law principles of agency, vicarious liability is limited in respect to punitive damages. Restatement (Second) of Agency, § 217C (1958). A principal can only be liable for punitive damages for agents acting within the scope of employment if the agent is “employed in a managerial capacity.” *Id.* In comparison, acts of low-level agents can only impute liability for punitive damages if the act or acts were expressly authorized, if the agent was unqualified and the principal was irresponsible in hiring him/her, or if the managerial agent ratified the act. *Id.*

The civil law cases dealing with punitive damages are comparative to cases of criminal liability because punitive damages have been described to be “quasi-criminal.” *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991). The purpose of punitive damages is similar to criminal law because they both strive to discourage and penalize. *Id.* In *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2621 (2008), the Supreme Court in discussing punitive damages stated, “the

consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.”

The Supreme Court also discussed corporate vicarious liability in two other Title VII sexual harassment cases, and incorporated an affirmative defense in order to stay in line with the goals of the statute with regards to encouraging corporations to implement sexual harassment policies. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The court stated that corporations need to prove two elements for an affirmative defense when sexual harassment by a supervisory employee has been alleged. *Faragher*, 524 U.S. at 807. The two elements to be proven are: “(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.*

This type of defense fits with the main goal of Title VII which seeks to influence conduct because the statute is in place to prevent harm. *Faragher*, 524 U.S. at 806 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)). The Supreme Court affirmed the use of this defense in *Pa. State Police v. Suders*, 542 U.S. 129 (2004).

The instruction given to the jury is inconsistent with the current trend of vicarious liability in analogous civil cases. The district court failed to provide a defense for having a good faith policy in place that served to deter employees from committing unlawful conduct. *Ionia*, 526 F. Supp. 2d at 325. Instead, the court only instructed the jury that they could consider the policy against the conduct in determining whether the employee was acting with the intent to benefit the employer. *Id.* The jury was instructed that the policy or express instructions against the unlawful conduct would not immunize the corporation from responsibility. *Id.*

The jury instruction runs contrary to the current standard in the civil corporate liability world. The Supreme Court has put limits on vicarious corporate liability in cases of Title VII sexual harassment and cases of punitive damages. *Kolstad*, 527 U.S. at 545; *Faragher*, 524 U.S. at 807. When punitive damages are involved, the employer/corporation is only liable for agents acting within the “scope of employment” if the agent is employed in a managerial capacity. *Kolstad*, 527 U.S. at 543. Punitive damages have a similar goal with criminal law which is in place to punish and deter unlawful conduct. *Pac. Mut. Life*, 499 U.S. at 19. Therefore, the jury instruction should have stated that Ionia would only be liable for acts of managerial agents while acting in the scope of employment. If in civil punitive damages cases the liability has been limited for corporations, then the liability should be limited in the criminal context because the theory of respondeat superior was borrowed from civil tort law.

Also, the corporate criminal liability instruction lacked any type of defense for a corporation who expressly instructed against the unlawful act or a company who had a policy implemented to prevent such acts. This instruction is inconsistent with *Ellerth* and *Faragher* which held that a defense was appropriate in Title VII sexual harassment cases because it was effective in meeting the goals that Title VII set to achieve. *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 807. Mainly, the defense encouraged companies to set-up and implement a policy against sexual harassment. *Faragher*, 524 U.S. at 807.

A similar defense in corporate criminal liability would also work to achieve the goals of criminal statutes because it would encourage corporations to put in place policies that would deter employees from committing these crimes. It does not seem rational that a corporation in a civil case would have this type of defense but would not have it in a criminal setting. The severity of punishment in criminal cases is much higher than in civil cases. Such a defense in

corporate criminal liability would reward those corporations that took measures to prevent this type of behavior because they would not be subject to criminal fines if it was proven that they did all they could to deter this behavior.

Ionia had a stringent policy in place which advised employees against disposing of the oily waste by improper discharge. *Ionia*, 526 F. Supp. 2d at 322. There was also testimony at trial that Ionia properly trained their employees according to this policy as well as required them to promise they would follow the policy. *Id.* Ionia should not be held responsible for a rogue employee who chose not to follow the express guidelines offered by his employer. The trial court only instructed the jury that the policy could be considered in determining if the employee was acting with the intent to benefit his employer. *Ionia*, 526 F. Supp. 2d at 325. The court did not provide a jury instruction with a defense for corporations who actively tried to deter its employees from committing crimes. *Id.* This instruction runs contrary to the standard in civil corporate liability. The instruction used at the trial court level constitutes plain error in light of the current trend of respondeat superior in civil Supreme Court cases.

**B. The Jury Instruction Given By The District Court On Corporate Criminal Liability Is Not Supported By Federal Statutory Law.**

Federal statutory law does not authorize the instruction on corporate criminal liability that was given to the jury. The statutes Ionia was convicted of do not state that the acts of an agent while acting within the scope of employment will be considered the acts of the corporation. This is not to say that corporations cannot be held responsible in violating criminal statutes. Congress has determined that the word “person” in any statute also includes corporations thus making them capable of being charged with a crime. 1 U.S.C. § 1 (2009). However, within the meaning of the statutes charged there is no language that Congress authorized the instruction of corporate criminal liability that was given to the jury by the trial court. § 371; § 1505; § 1519; § 1908(a).

Congress has made clear that respondeat superior principles will be used in some regulatory statutes. This is evident by the language in such statutes. In the Packers and Stockyards Act, a provision in the statute provides that an act of any person employed by a packer or dealer that is “within the scope of his employment” will also be considered to be an act of that packer or dealer. 7 U.S.C. § 223 (2009). The Commodities Exchange Act also contains a similar provision imputing liability onto the principal/corporation for the acts of its agent/employee. 7 U.S.C. § 2(a)(1)(B) (2008). There are a host of other regulatory acts that have respondeat superior in their statutes and also impose criminal penalties for a violation of the act. *See also* United States Cotton Standards Act, 7 U.S.C. § 63 (2009); Egg Products Inspection Act, 21 U.S.C. 1041(d) (2009); Animal Health Protection Act, 7 U.S.C. § 8313(c) (2009); United States Cotton Futures Act, 7 U.S.C. § 15b(i) (2009).

The Elkins Act, which was found constitutional in *New York Central*, also contains language of respondeat superior. The distinction between the Elkins Act and the four statutes in violation in the case at hand is the statutory language. The Elkins Act explicitly states that acts or omissions of an agent, acting in the scope of employment, are to be considered acts or omissions of the carrier as well. *New York Cent.*, 212 U.S. at 491. The acts Ionia was convicted of do not contain such language, so there is no direction from Congress of how the jury should be instructed regarding vicarious liability. The courts have set the standard of broad respondeat superior, and such a broad instruction imposing liability has not been authorized by Congress.

The district court’s jury instruction on corporate criminal liability constitutes plain error as it affects Ionia’s rights substantially. Federal statutory law does not authorize the instruction on corporate criminal liability because respondeat superior language is absent from the statutes charged. Additionally, Supreme Court precedent does not support the instruction because the

Court has not stated vicarious liability is to be used in every criminal case against a corporation. The standard set in similar civil Supreme Court cases has narrowed the scope of vicarious liability and this standard should be followed in criminal law as well. The Court should reverse the district court's denial of Ionia's motion to set aside the guilty verdict and remand the case to the district court for a new trial.

II. THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS ERRONEOUS AS IT IS INCONSISTENT WITH GENERAL PRINCIPLES OF CRIMINAL LAW WHICH STEMS FROM A MISAPPLICATION OF THIS COURT'S HOLDING IN *NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO. v. UNITED STATES*.

In this case Ionia is challenging the district court's jury instruction on corporate criminal liability, but as this instruction was not objected to below the applicable standard of review is plain error. *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); FED. R. CRIM. P. 52(b). The Supreme Court has outlined a three part test that must be satisfied in order to prove plain error: (1) error, (2) that is plain, and (3) that affects substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). If these elements are satisfied an appellate court may exercise its discretion to correct the error if it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732.

A. The District Court's Instruction On Corporate Criminal Liability Is Inconsistent With General Principles of Criminal Law.

On September 6, 2007, a jury found Ionia guilty on eighteen counts:

thirteen counts of violating the Act to Prevent Pollution from Ships ('APPS') and associated regulations, 33 U.S.C. § 1908(a); three counts of 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 one count of conspiring to commit these offenses in violation of 18 U.S.C. § 371.

*United States v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 321 (D. Conn. 2007). The basis of these counts stemmed from the actions of Second Engineer Edgardo Mercurio, one of the crewmembers on board the M/T Kriton, who directed other crewmembers to bypass the oily water separator which resulted in false entries being recorded in the ship's oil record books. *Ionia*, 526 F. Supp. 2d at 325-26. Mercurio's actions were in direct contradiction to Ionia's policies, as evidenced by the compliance program Ionia had instituted in 2004, as well as against U.S. federal law. *Id.* at 327. Despite this fact, Ionia was convicted on the theory of vicarious criminal liability which was charged to the jury as follows: "[a] corporation may be held criminally liable for the acts of its agent done on behalf of and for the benefit of the corporation, and directly related to the performance of the duties the employee has authority to perform." *Id.* at 324. In other words, a corporation can be held criminally liable if an employee was (1) acting within the scope of employment and (2) with the intent to benefit the employer. Given this low threshold for the imputation of criminal liability, coupled with the fact that even if a corporation has an effective compliance program in place to prevent such behavior by employees it will be found guilty of the conduct, is inconsistent with the general principles of criminal law.

The two main goals of criminal law are to deter and punish. *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997); Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1324 (2007). Deterrence encompasses two subcategories, specific and general. Weissmann, *supra* at 1325. Specific deterrence focuses on the individual wrongdoer and attempts to prevent future criminal conduct through the mechanism of incapacitation. *Id.* A corporation, as an artificial legal entity, cannot be incapacitated by imprisonment but can be subjected to several other forms of specific deterrence such as forced dissolution (which has been

conceived of as a type of corporate death penalty), being barred from engaging in certain activities (either permanently or temporarily), or being placed on monitored probation. *Id.*

On the other hand, general deterrence focuses on the impact punishment of an individual wrongdoer will have on society, particularly with respect to others who may engage in similar conduct. *Id.* Although this form of deterrence is thought to be especially appropriate in the context of corporate criminal conduct, as other corporations will take notice of such precedents, the value of general deterrence is not without its practical criticisms. *Id.* One major criticism is that over-criminalization of regulatory offenses “can devalue the deterrent impact of the criminal law generally.” Dick Thornburgh, *Symposium: Corporate Criminality: Legal, Ethical, and Managerial Implications*, 44 AM. CRIM. L. REV. 1279, 1282 (2007). This over-criminalization has in turn created a “culture of mistrust and paranoia” among employees and executives within a corporation, as well as hampering corporate innovation in general due to fear of potential criminal liability. *Id.* at 1283. For a corporation, such as Ionia, that has instituted compliance programs and policies “there is nothing to deter, generally or specifically,” as the corporation has instituted the measures that would be sought by the criminal justice system. Weissmann, *supra* at 1326.

The second goal of criminal law is punishment. *Id.* at 1324. This retributive function is served by punishing the wrongdoer for their criminal offense. *Id.* at 1325. In the context of an individual, criminality is determined after assessing the individual’s “intent, action, and voluntariness;” but these constructs do not apply analogously to a corporation. *Id.* at 1326. Therefore, if we are to hold a corporation criminally liable for the actions of its employees, “retribution requires us to first determine what it is that the corporation did or did not do that warrants criminal sanction.” *Id.* Given the fundamental difference between individuals and

corporations regarding the level of control that can be exerted over one's conduct, the doctrine of vicarious criminal liability needs to be reexamined.

As the body of law on vicarious liability currently stands, the law is in essence making corporations absolute insurers regarding the conduct of their employees, despite the fact that corporations "cannot control absolutely the people's conduct for which they can be criminally liable." *Id.* at 1327. In order to attempt to control employee conduct, corporations can institute compliance programs and policies but this still will not shield the corporation from the imposition of criminal liability, even where all "reasonable steps to deter and detect the criminal conduct of its employees" have been instituted. *Id.* at 1326. This does not further the retributive function of criminal law as the culpability of a corporation that has taken such preventative measures is non-existent. *Id.* In fact, the only culpable action of the corporation was "hiring someone who ultimately committed a crime." *Id.* at 1327. At most this action should trigger civil liability for negligence instead of criminal liability.

One of the criticisms lobbied at this aspect of vicarious criminal liability is that convicting corporations that have effective compliance programs and policies can have the "perverse effect" of deterring other corporations from implementing such enforcement mechanisms. Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994). Professor Arlen's economic analysis of strict criminal liability demonstrates that the cost of implementing enforcement mechanisms "reveals that increased corporate liability does not necessarily reduce corporate crime and, indeed, may result in increased crime." *Id.* at 836. This conclusion is reached by realizing that as a corporation incurs the costs of implementing compliance programs, this has a direct relationship to the number of crimes that will be detected, which will in turn increase the amount of exposure of the

corporation for criminal liability. *Id.* at 857. Based on this reasoning, vicarious criminal liability will produce inefficient results as it is to the corporation's detriment to institute enforcement mechanisms as compared to any gain. The goals of criminal law are contravened when our legal system penalizes such proactive, self-policing measures.

Finally, the broad application of corporate criminal liability calls into question the very foundations of our legal system in general, which is premised upon an adversarial system where a defendant is given the presumption of innocence. In the context of vicarious criminal liability, the prosecution wields an inordinate amount of power that is unrivaled in any other setting, and the source of this leverage is derived from the ever expanding "doctrine of criminal respondeat superior." Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 53 (2007).

Bharara's criticisms on the current state of corporate criminal liability are especially poignant given his position of Assistant United States Attorney for the Southern District of New York. Bharara addresses the "inherent vulnerability of corporations," (who he terms "eggshell defendants") as corporations are unlikely to survive indictment, let alone near certain conviction and sentencing. *Id.* at 73-74. Numerous commentators have opined that once a corporation has been indicted, it is essentially the sounding of a death knell for the company. Once indicted a corporation faces two choices: either accede to a prosecutorial agreement or go to trial, which would cost millions to defend and also expose the company to further investigation.

Thornburgh, *supra* at 1283.

Given the hair-trigger of vicarious criminal liability, most corporations do not want to risk going to trial and therefore agree to either a deferred prosecutorial agreement or a non-prosecution agreement as dictated by the Department of Justice. As Thornburgh points out, even

these prosecutorial agreements are tainted by the incredible leverage a prosecutor wields over a corporation which can border on the extortionate and can lead to abuse. Thornburgh, *supra* at 1283-84. As examples of the type of abuse these agreements can foster, Thornburgh points to the Bristol-Myers Squibb agreement (where the company was forced to endow a chair at the prosecutor's alma mater) and the WorldCom agreement (where MCI, as the successor entity, had to add 1600 jobs to Oklahoma's work force). *Id.* at 1284. Surely, these types of agreements do not conform to the general principles of criminal law.

Aside from extortionate terms, Bharara points to a host of other effects the coercive power of the prosecutor can have on these agreements. Not least among these are the waivers the prosecution seeks in regards to attorney-client and work product privileges. Bharara, *supra* at 89. Corporations also "hold sway over third parties," (their employees) in a way that individual defendants do not. *Id.* at 98. These factors culminate in imposing an "unfair hardship" upon the corporation's employees who may stand as individual criminal defendants but have had substantial rights waived by the corporation, as well as conferring an "unfair advantage" on potential civil litigants who can take advantage of the waiver of certain rights to the prosecutor. *Id.* at 97-98.

Based on the foregoing discussion of the current state of vicarious criminal liability and the criticisms that have been lobbied against the doctrine, this strongly demonstrates that the district court's instruction on corporate criminal liability is inconsistent with the general principles of criminal law. This inconsistency in turn shows that the instruction constitute a plain error that substantially effected Ionia's rights to a defense, and as such, this Court should exercise its discretion to correct the error as it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732.

B. The Recent Supreme Court Decisions On Corporate Civil Liability Warrants  
Review Of The Holding In *New York Central & Hudson River Railroad Co. v. United States*.

It has been nearly one hundred years since the Supreme Court has had occasion to revisit its holding in *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909), which was a landmark case in which the Court held that corporations could be held criminally liable for the acts of its agents based on a provision in the Elkins Act. In the interim years since that decision the district courts have taken the concept of vicarious criminal liability and applied it to nearly every case possible. This application of the doctrine has led to the downfall of such corporate giants as Enron, WorldCom, and Arthur Andersen. Despite this incredibly broad application of vicarious liability in the criminal context, the Supreme Court has recently limited the doctrine in civil cases. Given this discrepancy, which has in effect made it easier to impute criminal liability to a corporation than civil liability, the Court should revisit its holding in the *New York Central* case.

In 1998, the Supreme Court handed down a pair of decisions involving claims of sexual harassment in violation of Title VII of the Civil Rights Act of 1964. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In both *Ellerth* and *Faragher*, the plaintiffs sought to have civil liability imputed to the corporation based on the sexual harassment of their supervisors. *Ellerth*, 524 U.S. at 746-47; *Faragher*, 524 U.S. at 780. In deciding these two cases, the Supreme Court made a marked turn in its jurisprudence on vicarious liability by holding that a corporation should be given an affirmative defense where two elements are met: “(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 preventative or corrective opportunities provided by

the employer or to avoid harm otherwise.” *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

Regarding the first element of the affirmative defense, the Court construed this to mean that the corporation has instituted some type of policy that prohibits these actions. *Faragher*, 524 U.S. at 807.

Both *Ellerth* and *Faragher* now stand for the proposition that in vicarious civil liability claims the employer is allowed an affirmative defense if it can prove the two elements by a preponderance of the evidence. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. However, in the context of vicarious criminal liability, based on the holding in *New York Central* and the century of case law that has followed in its footsteps, an employer has no such affirmative defense available. In essence, to convict a corporation on criminal liability a prosecutor only needs to prove that the agent was acting within the scope of employment and with the intent to benefit the employer. This discrepancy between criminal and civil vicarious liability now means that it is easier to impute criminal liability to a corporation than civil liability, which is a result the Court does not seem to countenance. *See Pa. State Police v. Suders*, 542 U.S. 129, 149 (2004) (holding that it would be anomalous to make a graver claim of hostile-environment constructive discharge easier to prove than the lesser claim of hostile work environment).

This new gap in the jurisprudence of the Court needs to be addressed and can be accomplished by revisiting and restricting the holding in *New York Central* and by allowing corporate defendants to present an affirmative defense based on the holdings in *Ellerth* and *Faragher*. In *New York Central*, the Court borrowed the doctrine of vicarious liability established in tort law to find that Congress had the power to include respondeat superior principles in a criminal statute, the Elkins Act. *New York Cent.*, 212 U.S. at 496. Although it has been established that Congress has the power to determine whether criminal conduct of

employees can be imputed to the corporation, the four statutes at issue in this appeal do not contain the same provision governing application of vicarious liability as in the Elkins Act. This absence of statutory authority must be reconciled with the recent precedents in *Ellerth* and *Faragher* as well as with the canons of construction in criminal law.

Regarding the canons of construction, Justice Murphy's dissent in *United States v. Dotterweich*, 320 U.S. 277 (1943) is particularly illuminating. Justice Murphy stated that "[c]ongress alone has the power to define a crime and specify the offenders" and that it is not the job of the court to "supply any deficiencies in these respects." *Id.* at 287 (Murphy, J., dissenting). Justice Murphy also stated that "guilt is personal and that it ought not lightly be imputed" and "in the absence of clear statutory authorization 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." *Id.* at 286. It is also a general and long established principle that criminal statutes "must be strictly construed, and any ambiguity must be resolved in favor of lenity." *United States v. Enmons*, 410 U.S. 396, 411 (1973). These fundamental edicts counsel in favor of finding Ionia not criminally liable for the actions of the rogue employees onboard the M/T Kriton.

However, if this court does not find that these principles are dispositive of this case, the recent precedent established by the *Ellerth* and *Faragher* cases should be extended to the criminal liability context and afford corporate defendants the opportunity to present an affirmative defense if it had an effective compliance program or policy in place. Here, it has been established that Ionia had instituted a complex and robust compliance program in 2004, which was designed to prevent the conduct alleged in the indictment. *Ionia*, 526 F. Supp. 2d at 327. In fact, the compliance program specifically contained a provision for reporting any

instances of non-compliance. *Id.* Analogizing the two elements of an affirmative defense in civil liability cases to the case at bar, Ionia should have been afforded the opportunity to prove that it: (1) had a reasonable compliance program in place; and (2) that the employees unreasonably failed to take advantage of the preventative or corrective measures provided by the compliance program.

Limiting the application of vicarious criminal liability by providing corporate defendants with an affirmative defense based on compliance programs and policies will have several benefits. First, it will help to restore the fundamental distinction between civil and criminal claims by rectifying the discrepancy that has resulted from the holdings in *Ellerth* and *Faragher*, which has made it harder to prove vicarious civil liability than vicarious criminal liability. Second, it will give corporations a genuine incentive to implement these types of enforcement mechanisms, which will replace the current “perverse effects” that vicarious criminal liability has produced, in that corporations currently have a disincentive to institute these measures as they only increase liability exposure of the corporation. Public policy strongly countenances in favor of “meaningful and necessary self-regulation” at the corporate level to deter crime. Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, IND. L.J. 411, 440 (2007). Finally, the question of what constitutes an effective compliance program can be defined by reference to the Department of Justice’s memoranda, the numerous deferred prosecution agreements, and the Sentencing Guidelines governing corporations. *Id.* at 442.

In conclusion, the Court should revisit its holding in *New York Central* and limit the application of vicarious criminal liability by providing corporate defendants with the opportunity to present an affirmative defense based on established compliance programs. By not allowing Ionia this opportunity, the District Court’s instruction constituted a plain error that substantially

affected Ionia's rights. This Court should take the opportunity to exercise its discretion to correct the error as it substantially affects the fairness, integrity and public reputation of judicial proceedings due to the fact that recent precedent makes it easier to prove that vicarious criminal liability should be imputed to a corporation than civil liability.

#### CONCLUSION

The district court's instruction on corporate criminal liability constituted plain error as it was not authorized by Supreme Court precedent or federal statutory law. In addition, the instruction is inconsistent with the general principles of criminal law. The Supreme Court should revisit its holding in *New York Central & Hudson River Railroad Co. v. United States* and limit the broad application of corporate criminal liability that has resulted from a century of misapplication of the law in the lower courts. For all the foregoing reasons, Ionia respectfully requests this court to reverse the judgment below.

Respectfully Submitted,

Team #19 for Petitioner

## APPENDIX

### United States Code - 18 U.S.C. § 371 (2009)

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.

### United States Code - 18 U.S.C. § 1505 (2009)

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; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress--

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.

### United States Code - 18 U.S.C. § 1519 (2009)

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.

### United States Code - 33 U.S.C. § 1908(a) (2009)

#### (a) Criminal penalties; payment for information leading to conviction

A person who knowingly violates the MARPOL Protocol, Annex IV to the Antarctic Protocol, this chapter, or the regulations issued thereunder commits a class D felony. 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.