

No. 08-1234

In The Supreme Court
of the United States

OCTOBER TERM 2008

IONIA MANAGEMENT S.A.,

PETITIONER

v.

UNITED STATES OF AMERICA,

RESPONDENT

BRIEF FOR THE PETITIONER

TEAM 2

QUESTIONS PRESENTED

- I. Neither this Court's precedent nor federal law support applying traditional civil liability theories, such as *respondeat superior*, in a vicarious corporate criminal liability context without express statutory authorization. Here, the district court instructed jurors that Ionia could be held criminally liable for the crew's actions onboard the *Kriton*, despite their intentional violation of well-known corporate policies and without express authorization in any of the four relevant statutes. Was the district court's instruction on corporate criminal liability authorized by this Court's precedent and federal statutory law?

- II. General principles of criminal law call for deterrence and retribution. Here, the district court, citing New York Central and its progeny, instructed the jury using a broad *respondeat superior* approach to vicarious criminal liability. This instruction authorized Ionia's criminal conviction even if a mere low-level employee acted contrary to express company instructions and policies, primarily for his own benefit, and with no actual benefit to Ionia. Was the district court's instruction on vicarious criminal liability consistent with general principles of criminal law and should the Court revisit its holding in New York Central?

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STATEMENT OF THE CASE

Vessel operators, like Ionia Management, S.A., make their living on the high seas and recognize their obligations to act responsibly in protecting our oceanic environment. In shipping goods to the world, Ionia enforces strict company policies prohibiting improper oily discharges from any of its vessels and trains its employees to abide by those policies. United States v. Ionia Mgmt., 526 F. Supp. 2d 319, 322 (D. Conn. 2007). Ionia empowered its employees with the means to comply, but as its vessel *Kriton* transited the high seas, far from the reach of corporate management, crew members chose to shortcut Ionia's pollution prevention system.

In the Act to Prevent Pollution from Ships (APPS), Congress mandated that vessels operating in U.S. territorial waters use specialized equipment to process oily wastewater before discharging it at sea. 33 U.S.C. § 1908(a) (1996). The statute further requires that vessel operators maintain records of the equipment and all oily discharges. Id.

Ionia maintained oily-water separator equipment onboard the *Kriton*. Ionia Mgmt., 526 F. Supp. 2d at 325. Crew members testified that the company had "a strict policy" against bypassing the anti-pollution devices, in accordance with the probation terms imposed by an earlier action. Id. at 322, 328. Crew members also testified that Ionia trained them on how to use the equipment to avoid inappropriate oily discharges. Id. at 322. The crew members promised to abide by this policy. Id. While out at sea, however, the crew chose to violate the policy by using a hose to bypass the separator and then falsifying records. Id. at 325-26.

A District Court of Connecticut jury criminally convicted Ionia based on a vicarious liability theory for its employees violating APPS, obstructing justice, and falsifying records. Id. at 321. None of the relevant statutes contained provisions regarding vicarious criminal liability. 18 U.S.C. § 371 (1994); 18 U.S.C. § 1505 (2004); 18 U.S.C. § 1519 (2002); 33 U.S.C. § 1908(a)

(2008). Nonetheless, the district court judge instructed the jury by applying *respondeat superior* principles to vicarious criminal liability. Ionia Mgmt., 526 F. Supp. 2d at 324-25.

The district court sentenced Ionia to four years of probation with special stringent conditions for which Ionia will bear the costs. United States v. Ionia Mgmt., 2008 U.S. Dist. LEXIS 23803, 3 (2008). Additionally, the district court imposed a \$4.9 million dollar fine. Id. The Second Circuit upheld this conviction on appeal. Ionia now respectfully requests this Court to reverse the Second Circuit's ruling and vacate the convictions.

SUMMARY OF THE ARGUMENT

Responsible corporations that support effective compliance programs make good citizens and best serve the public's interests. The district court's blanket *respondeat superior* instruction discourages corporations who might otherwise invest in a strong ethical culture. Such a proactive, ethical culture reduces employee wrongdoing – criminal law's ultimate purpose.

First, this Court's precedent does not support applying civil liability theories, such as *respondeat superior*, in a vicarious corporate criminal liability context, without express statutory authorization. In the often cited New York Central opinion, this Court held it constitutional for Congress to apply vicarious criminal liability by statute, but mere authorization does not mandate blanket application, especially where statutory authority is missing. Moreover, this Court's recent precedent limits the application of *respondeat superior* in closely analogous civil liability cases. Second, the four relevant federal statutes do not authorize the district court's imputing criminal liability to the corporation. Alternatively, even if Ionia should be held criminally liable for the unauthorized activities of its shipboard employees, the district court erred when it instructed the jury using an overly broad application of *respondeat superior* principles.

Second, the district court's instruction is overly broad because it authorizes conviction for even the most responsible corporations. Criminal convictions can devastate corporations, along with their innocent stockholders, suppliers, employees, and communities. Mindful of these high stakes, the time is ripe for this Court to revisit its holding in New York Central. First, the district court's overly broad instruction is inconsistent with the general principles of criminal law. Second, the instruction creates an unnecessary and unjust imbalance in the criminal justice system. Third, narrowing vicarious criminal liability by requiring the government to prove the corporation failed to maintain an effective compliance program would better serve the principles of criminal law and the balance of justice.

Therefore, the district court erred by applying *respondeat superior* principles in an overly broad manner that is not supported by this Court's precedent or federal statutory law. Further, the instruction fails to serve the public's best interests. Accordingly, Ionia respectfully requests this Court reverse the Second Circuit's ruling affirming the district court's instruction and vacate the convictions.

ARGUMENT

The time is ripe for this Court to clarify its position on vicarious criminal liability, because the doctrine as applied by lower courts is inconsistent with this Court's recent precedent and statutory law. The standard of review for the district court's jury instruction is plain error. Johnson v. United States, 520 U.S. 461, 466-67 (1997). Accordingly, Ionia respectfully requests this Court overturn the Second Circuit's ruling affirming the instruction and vacate the convictions.

I. The District Court Erred Because Neither This Court’s Precedent Nor Federal Statutory Law Authorize Its Instruction Applying *Respondeat Superior* Principles To Vicarious Corporate Criminal Liability Under The Four Relevant Statutes.

In today’s environment, convicting a corporation for the unauthorized criminal actions of its employees carries severe consequences and may even jeopardize the continued existence of the corporate entity. Recently, the severity of the criminal conviction stigma was dramatically demonstrated in the Arthur Andersen case, where this Court overturned the conviction but the organization still succumbed to financial ruin. Arthur Andersen LLP v. United States, 544 U.S. 696 (2005). This Court’s recent holdings in analogous civil cases demonstrate sympathy for the tension created between responsible corporations struggling to meet their compliance obligations and the individual, self-motivated acts of employees.

Punitive damages held against corporations have been described by this Court as “quasi-criminal,” given the inevitable moral condemnation and similar objectives served by such damages and the criminal law. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001). Since these holdings limit vicarious liability in the civil context, it is currently easier for lower courts to impute criminal than civil liability to corporations, regardless of the corporation’s good-faith efforts. Thus, recent civil cases provide a close analogy that may assist in this Court’s consideration of the vicarious criminal liability rule.

Here, the district court erred when it instructed jurors to apply *respondeat superior* principles in a corporate criminal liability context. First, this Court’s precedent does not support applying civil liability theories, such as *respondeat superior*, in a vicarious corporate criminal liability context, without express statutory authorization. Second, the four relevant federal statutes do not authorize the district court’s imputing criminal liability to the corporation. Alternatively, even if *Ionia* should be held criminally liable for the unauthorized activities of its

shipboard employees, the district court erred when it instructed the jury using an overly broad application of *respondeat superior* principles.

- A. This Court's holding in *New York Central* does not support *respondeat superior* application to vicarious corporate criminal liability, where, as here, statutory authorization is missing. Further, this Court's recent precedent limits the application of *respondeat superior* principles in closely analogous cases.

Congress imposes extensive regulatory schemes on today's corporations. This Court, however, has yet to rule on how criminal liability for employee actions should be imputed to a corporation, where express statutory authorization is missing. In the often cited *New York Central* opinion, this Court held that Congress may apply vicarious criminal liability by statute, but mere authorization does not mandate blanket application, especially where statutory authority is missing. *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494 (1909). Moreover, this Court's more recent holdings limit *respondeat superior* application in analogous civil cases, concerning punitive damages and corporate liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq* (2000).

First, this Court's holding in *New York Central* does not support the application of *respondeat superior* principles to vicarious corporate criminal liability, where statutory authorization is missing. Reasoning that Congress may identify specific classes of crimes where the public's interests are best served by applying civil liability principles, the *New York Central* Court held that it is constitutional for federal statutes to specifically impute criminal liability to the corporation for an employee's actions. *Id.* In that case, under the Elkins Act, Congress identified common carrier price control infractions as such a class and included very specific language imputing an employee's criminal actions to the corporation. *Id.* Here, in stark contrast to the *New York Central* situation, none of the statutes under which Ionia was convicted impute

criminal liability to the corporation, including the regulatory scheme Congress created in the Act to Prevention Pollution from Ships (APPS). 33 U.S.C. § 1908(a).

Second, this Court's more recent rulings limit *respondeat superior* application in closely analogous civil actions. When considering punitive damages against the corporate defendant in Kolstad, this Court ruled that the corporation should not be held vicariously liable for employee acts that were contrary to the organization's policies and good-faith efforts to support compliance with Title VII. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544-45 (1999). This Court further reasoned that applying punitive damages to a well-intentioned corporation created "perverse incentives" against their supporting effective compliance programs, ultimately thwarting Congressional intent. Id. at 545.

Here, in today's complex and dangerous world of chemical pollution and scant resources, the public's interests are best served by encouraging corporations to train their employees on responsible environmental stewardship. Civil penalties available under regulatory schemes, such as APPS, provide a strong incentive for organizations to invest in effective compliance programs. Ionia trained the *Kriton's* crew on proper oily discharge handling procedures and provided appropriate equipment. Ionia Mgmt., 526 F. Supp. 2d at 322. The crew members chose to circumvent those procedures and admittedly engaged in improper discharges while on their own at sea. Ionia Mgmt., 526 F. Supp. 2d at 325-26. In Kolstad, this Court considered an analogous situation under Title VII and held that protecting corporations from punitive damages further incited them to "detect and deter" violations – the ultimate goals of the regulation. Kolstad, 527 U.S. at 545.

Other recent Title VII cases demonstrate this Court's sympathy for the inevitable rift between corporate policies and unauthorized employee actions. Faragher v. City of Boca Raton,

524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); see also Pa. State Police v. Suders, 542 U.S. 129 (2004) (reaffirming the Faragher/ Ellerth affirmative defense and expanding its applicability). In Faragher, this Court held that employers are entitled to an affirmative defense when they exercise reasonable care to avoid employee violations of the law. Faragher, 524 U.S. at 806-07.

Congress designed APPS to avoid environmental damage and ensure a healthy oceanic environment for the public's benefit and enjoyment. 33 U.S.C. § 1908(a). Both Title VII and APPS seek to influence the behavior of individual actors, in part, by incenting the organizations that employ them. Even in Faragher's civil context, this Court recognized that limiting vicarious liability provides an effective means of enlisting employer support against the targeted evil. Here, Ionia was convicted under more stigmatizing criminal statutes, despite its compliance program and training efforts designed to avoid the oily discharge pollution.

Thus, this Court's recent precedent limits the application of *respondeat superior* principles in closely analogous civil cases. Moreover, this Court's holding in New York Central does not support blanket application of *respondeat superior* principles to vicarious corporate criminal liability, where, as here, statutory authorization is missing.

- B. Federal statutory law does not support the district court's use of *respondeat superior* principles in its instruction. Here, Ionia was convicted under four separate statutes, none of which impute criminal liability to the corporation.

To ensure fairness, the criminal law is founded on principles of specificity and strict construction. This Court has ruled it constitutional for Congress to expressly assign criminal liability to a corporation for the acts of its employees. New York Central, 212 U.S. at 494. Here, Ionia was convicted using such *respondeat superior* principles, but none of the four relevant statutes even mentions imputing criminal liability to corporations. 18 U.S.C. § 371; 18 U.S.C. § 1505; 18 U.S.C. § 1519; 33 U.S.C. § 1908(a). First, Congress could have authorized

vicarious corporate criminal liability under the relevant statutes, and has done so in other situations. Second, the rules of statutory construction require ambiguous criminal law be interpreted in the defendant's favor. Thus, federal statutory law does not support the district court's application of vicarious corporate criminal liability in its instruction.

First, Congress could have authorized the application of *respondeat superior* principles in any of the four relevant statutes, but did not. In contrast, Congress has expressly authorized vicarious corporate criminal liability under other regulatory schemes. For example, the relevant statute in New York Central, the Elkins Act, set price controls for common carriers and contained specific language imputing liability to the carrier, "[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." New York Central, 212 U.S. at 491-92 (citing The Elkins Act, 32 Stat. at L. 847, chap. 708, U.S. Comp. Stat. Supp. 1907, p.880).

Here, Ionia was convicted under four separate statutes, using a blanket *respondeat superior* instruction. Ionia Mgmt., 526 F. Supp. 2d at 324. None of the four statutes, including the regulatory scheme enacted under APPS, authorized, or even addressed, vicarious corporate criminal liability. Congress' application of *respondeat superior* principles under the Elkins Act, and other such regulations, places corporations on reasonable notice that they will be held criminally liable for their employees' actions. Moreover, because corporations are on notice, they are incited to create effective compliance programs that minimize the risk of violations. Under APPS, Congress could have easily imputed criminal liability to corporations, but chose

not to do so. Thus, Ionia was not on notice that it would be held criminally liable for the unauthorized actions of individual employees, despite its good-faith efforts.

Second, as this Court recently reiterated, the venerable Rule of Lenity requires ambiguous criminal laws be interpreted in the defendant's favor. United States v. Santos, 128 S. Ct. 2020, 2025 (2008). Courts must not play the part of "mind-reader" regarding Congressional intent, and no citizen should be "held accountable for a statute whose commands are uncertain, or subjected to a punishment that is not clearly prescribed." Id. at 2026. Here, Ionia was held vicariously liable for its employees' actions under criminal statutes containing no such prescriptions. As this Court unequivocally stated, criminal lawmaking is best left to Congress. Id. Therefore, because Congress chose not to expressly authorize vicarious corporate criminal liability under the relevant statutes, and strict construction requires ambiguous criminal laws be interpreted in the defendant's favor, current federal law does not support the district court's instruction.

C. Alternatively, even if Ionia should be held criminally liable under *respondeat superior* principles, here, the district court erred in its overly broad application of that doctrine.

This Court has significantly limited employer liability under *respondeat superior* principles in analogous civil contexts. The Amiable Nancy, 16 U.S. 546 (1818); Faragher, 524 U.S. at 775; Ellerth, 524 U.S. at 742. Despite the greater stigma of criminal conviction, here, the district court's overly broad instruction charged the jury to find Ionia guilty regardless of its good-faith efforts and special situation as a vessel operator. Ionia Mgmt., 526 F. Supp. 2d at 324.

First, traditionally, this Court has limited vessel operator liability for crew actions at sea. The Amiable Nancy, 16 U.S. at 558-59; Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2616 (2008) (preserving punitive damages protection for vessel operators, given divided Court's

narrow affirmation of the Ninth Circuit's award). Second, in more recent cases, this Court has narrowed employer vicarious liability to situations where employees acted in a managerial capacity. Faragher, 524 U.S. at 804. Further, this Court has recognized an employer's reasonable care efforts to promote employee compliance with the law as an important limiting factor. Id. Thus, the district court erred in its instruction by applying overly broad *respondeat superior* principles.

First, vessel operators are not liable for punitive damages related to crew actions at sea, given their limited control over shipboard activities. The Amiable Nancy, 16 U.S. at 558-59. Here, the *Kriton* crew's actions that led to Ionia's conviction occurred while at sea. Ionia Mgmt., 526 F. Supp. 2d at 325-26. In The Amiable Nancy, the Court reasoned the vessel operator was "innocent" regarding the crew's actions, "having neither directed it, nor countenanced it, nor participated in it in the slightest degree," and thus should not be held liable for punitive damages. Id. The criminal liability imputed to Ionia is closely analogous to such punitive damages, since both serve objectives of punishment and deterrence. Like the vessel operators in The Amiable Nancy, ultimately, Ionia corporate management had limited control over the *Kriton* crew's actions at sea. Therefore, the district court should have recognized the special situation of vessel operators and tempered its instruction regarding vicarious corporate criminal liability.

Second, in more recent civil cases regarding sexual harassment under Title VII, this Court has limited vicarious liability to those situations where employees act in a managerial capacity. Faragher, 524 U.S. at 807. This Court further provided an affirmative defense for employers who take reasonable care efforts to prevent and correct violations, and the alleged victim unreasonably fails to take advantage of preventive programs or otherwise limit harm. Id. In Faragher, the lifeguard crews worked in small groups at various beach locations, with little

contact from city management or policymakers. Id. at 808-09. There, the city could not avail itself of the defense since the city had an anti-discrimination policy in place but did not disseminate it to the lifeguards. Id.

Like the city in Faragher, Ionia had a corporate policy in place to ensure proper oily discharge disposal and support APPS compliance. Ionia Mgmt., 526 F. Supp. 2d at 322. Similar to the lifeguards, the *Kriton*'s crew was also necessarily isolated from corporate management and policymakers by their duties. Here, however, the employees acknowledged that they received both the policy and pertinent training. Ionia Mgmt., 526 F. Supp. 2d at 322. The *Kriton* crew intentionally violated the policy and then falsified records to show that Ionia's policies had been followed. Ionia Mgmt., 526 F. Supp. 2d at 325-26.

Despite this analogous situation, the district court's instruction authorized conviction regardless of the corporation's reasonable care efforts to promote compliance. Ionia Mgmt., 526 F. Supp. 2d at 324. Moreover, the district court failed to advise the jury that vicarious liability is limited to those situations where employees act in a corporate management capacity. Thus, even if Ionia should be held criminally liable under a *respondeat superior* theory, the district court erred when it failed to properly limit its instruction.

In conclusion, the corporate landscape in this country has grown increasingly complex since this Court's holding in New York Central, allowing Congress to apply vicarious corporate criminal liability by statute. In contrast to the common carriers of 1909, today's corporations wrestle with a wide variety of regulatory schemes and compliance obligations. The principles of fairness and legality demand that corporations be given reasonable notice when they will be held criminally liable for the unauthorized actions of their employees. Here, Congress could have imputed criminal liability to corporations under APPS, but did not. Thus, neither this Court's

precedent nor federal statutory law authorized the district court's instruction under the four relevant statutes.

II. This Court Should Revisit Its Holding In *New York Central* Because Lower Courts, Including The District Court Here, Have Mistakenly Applied An Overly Broad *Respondet Superior* Approach To Corporate Criminal Liability. The District Court's Instruction Is Inconsistent With General Principles Of Criminal Law And Strikes An Unjust And Unnecessary Imbalance In The Criminal Justice System.

Society imposes criminal punishment primarily to deter and punish intentional, wrongful conduct. This Court has held Congress may constitutionally authorize vicarious corporate criminal liability by statute, but lower courts, including the district court here, have mistakenly applied an overly broad application of the rule by default. *New York Central*, 212 U.S. at 481. Now, a corporation can be convicted based on the action of a single, low-level rogue employee—despite the corporation's total lack of intentional wrongful conduct.

Indeed, a corporation can be convicted when the corporation expressly forbids the criminal action, takes measures to prevent the action, and even where the rogue employee acts primarily for personal gain. See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972); see also *Dollars S.S. Co. v. United States*, 101 F.2d 638, 638-39 (9th Cir. 1939). As the Second Circuit has declared, “[a] compliance program, however extensive, does not immunize the corporation from liability.” *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989).

Thus, rather than intend wrongful conduct, the corporation can intend, and actually do, everything right, yet still face criminal conviction. A criminal conviction, or simply an indictment, can devastate even the largest, most long-standing corporations, along with their innocent stockholders, suppliers, employees, and communities. See Howard E. O’Leary, Jr., *Corporate Criminal Liability: Sensible Jurisprudence or Kafkaesque Absurdity?*, 22 *Crim. Just.* 24, 24, 29 (2008).

Mindful of these high stakes, this Court should revisit its holding in New York Central because lower courts' *respondeat superior* application of vicarious criminal liability is overly broad. First, the application is inconsistent with the general principles of criminal law. Second, the application creates an unnecessary and unjust imbalance in the criminal justice system. Third, narrowing vicarious criminal liability by requiring the government to prove the corporation failed to maintain an effective compliance program would better serve the principles of criminal law and the balance of justice.

- A. The district court gave an overly broad jury instruction that violates general principles of criminal law. The instruction authorizes punishment for corporations that are not blameworthy and disincentivizes effective corporate compliance programs.

Historically, intent has played a vital role in criminal law. The intent requirement distinguishes criminal law from civil law. Additionally, the intent requirement reserves punishment for the morally blameworthy and for actions that can be deterred, i.e. intentional acts. These distinctions are important because criminal convictions carry the stigma of societal condemnation. Here, the overly broad *respondeat superior* application flies in the face of these basic criminal law principles. First, vicarious liability now applies more readily in the criminal context than in similar civil contexts, thus blurring the lines between civil and criminal law beyond reason. Second, the overly broad *respondeat superior* application punishes corporations that are not blameworthy and fails to promote prevention and deterrence.

First, vicarious criminal liability must be narrowed to bring the doctrine in line with this Court's recent decisions on vicarious liability in civil contexts. By default, lower courts, including the district court here, apply an overly broad *respondeat superior* approach to vicarious criminal liability borrowed from civil law, even when not authorized by statute. See United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir. 1946); see also Ionia Mgmt., 526 F. Supp. 2d at 323-26. However, this Court has limited the scope of vicarious liability in two civil

contexts: punitive damages and hostile work environment claims under Title VII. Kolstad, 527 U.S. at 545-46; Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807.

In Kolstad, this Court rejected the overly broad *respondeat superior* rule for punitive damages under Title VII and held that “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 (quoting Kolstad v. Am. Dental Ass’n, 139 F.3d 958, 974 (D.C. Cir. 1998)(Tatel, J., dissenting)). Further, the “principles of agency law place a significant limitation, and in many foreseeable cases a complete bar, on employer liability for punitive damages.” Id. at 547 (Rehnquist, W., concurring); see also Faragher, 524 U.S. at 806-07 (applying similar reasoning to hold employers are allowed an affirmative defense in Title VII cases for civil damages).

This Court reasoned that the primary purposes of punitive damages are punishment and deterrence. See id. at 541-45. However, punishment is unjust when “award[ing] punitive damages against one who himself is personally innocent and therefore liable only vicariously.” See id. at 544 (quoting Restatement (Second) of Torts § 909 cmt. b (1979)). Moreover, employers that have effective compliance programs are innocent because they could not have reasonably deterred the employee’s wrongdoing. See id.

Additionally, punishing employers despite their good-faith efforts reduces their incentive to institute internal compliance programs, since employers may choose to forego costly programs, which cannot shield them from liability. See id. at 544-45. These effective compliance programs, however, reduce employee misconduct. See id. Thus, such an incentive is “perverse” when the end goal is deterrence. See id. Therefore, adding an effective

compliance component furthers the basic principles of criminal law by only punishing employers that are blameworthy, while also promoting prevention and deterrence. See id.

Unlike the Title VII cases, the default application used by the district court here authorizes conviction even if the corporation has an effective compliance program, no matter how extensive, and the employee acts contrary to express corporate policies. See Ionia Mgmt., 526 F. Supp. 2d at 324-25. Therefore, convicting corporations under criminal vicarious liability is easier than holding them liable in similar civil contexts. This significant difference cannot be justified. The justice system, largely through constitutional means, includes additional safeguards against criminal convictions that are not available in civil cases. See e.g., U.S. Const. amend. IV, V, VI, VIII. Furthermore, criminal law and punitive damages have common goals of punishment and deterrence.

Thus, this Court has stated that punitive damages are “quasi-criminal.” Cooper Indus., 532 U.S. at 432. Additionally, both criminal liability and punitive damages have historically required a similar level of *mens rea*. Indeed, this Court has described the required *mens rea* for punitive damages as a “criminal indifference to civil obligations.” Smith v. Wade, 461 U.S. 30, 62 (1983)(quoting Phila., Wilm. & Balt. R.R. v. Quigley, 62 U.S. 202, 212 (1858)). Here, vicarious criminal liability has no *mens rea* requirement, while the civil does. Therefore, the current differences blur the line between civil and criminal law beyond reason.

Narrowing vicarious criminal liability would not only provide necessary demarcation between federal civil and criminal law, it would also provide much needed guidance to state courts. While 37 jurisdictions (including territories and commonwealths) currently apply a narrower, or at least the same, approach to criminal law than to punitive damages, the remaining minority of jurisdictions inexplicably applies a broader approach in criminal cases. Christopher

R. Green, Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law, 87 Neb. L. Rev. 197, 222 (2008).

Therefore, the doctrine should be narrowed to avoid making it easier to convict corporations under vicarious criminal liability than it is to hold them liable in similar civil contexts. Accordingly, the district court's overly broad *respondeat superior* application violates general principles of criminal law.

Second, the overly broad *respondeat superior* application violates basic principles of criminal law by punishing corporations that are not blameworthy and by failing to promote prevention and deterrence. As noted above, criminal law should receive narrower treatment than civil law, and at least the same treatment as punitive damages. Therefore, the same rationale regarding vicarious liability this Court applied in the civil Title VII cases applies here in the criminal context.

Thus, corporations that make good-faith compliance efforts are not blameworthy because they could not have reasonably prevented or deterred the employee's wrongdoing, and lack criminal intent. Moreover, when the corporation could not have reasonably done anything differently to deter the wrongful conduct, no corporate action is deterred or incited by punishing them. Further, the overly broad *respondeat superior* application actually disincentivizes effective compliance programs that deter employee wrongdoing by punishing corporations even when they do the right thing. Therefore, the overly broad application fails to promote prevention and deterrence—the criminal law's ultimate purpose.

These conclusions are not only supported by this Court's rationale in the Title VII cases, but also by industry data, the Federal Sentencing Guidelines, and the Department of Justice Memos on prosecuting corporations. According to the Ethics Resource Center's National

Business Ethics Survey (NBES),¹ effective compliance and ethics programs “dramatically decrease[s] misconduct, increase[s] the likelihood of reporting, and reduce[s] retaliation against employees who report.” Ethics Resource Center, National Business Ethics Survey: An Inside View of Private Sector Ethics 10 (2007). Despite the availability and effectiveness of these programs, however, only 25 percent of companies have a well-implemented ethics and compliance program. Id. at 5, 26.

These numbers partly result from the legal system’s single-minded focus on punishing lack of compliance, and its failure to incent effective compliance programs. See id. at 27. Simply punishing lack of compliance, regardless of the corporation’s good-faith compliance efforts, creates a don’t-get-caught-culture, but does not get to the root of the problem by incenting an overall ethical culture that effectively reduces misconduct. See id. at 26-27. Thus, laws “should encourage the building of an ethical culture that extends beyond a single-minded focus on compliance.” Id. at 27. The overly broad *respondeat superior* application fails to do so, and therefore does not serve the public’s best interests.

The United States Sentencing Guidelines also recognize the importance of compliance programs in assessing criminal liability by providing for a more lenient sentence if a corporation has an effective compliance program. U.S. Sentencing Guidelines, § C2.5(f)(2008). By the time of sentencing, however, the damage is already done. The corporation is convicted even though they lacked criminal intent, violating general principles of criminal law. See Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Criminal Liability, 75 Minn. L. Rev. 1095, 1160

¹ The Ethics Resource Center (ERC) was founded in 1922 and describes itself as “America’s oldest nonprofit organization devoted to the advancement of high ethical standards and practices in public and private institutions.” The National Business Ethics Survey “has become the national benchmark on organizational ethics . . . and the country’s most rigorous measurement in trends in workplace ethic and compliance.” Ethics Resource Center, National Business Ethics Survey: An Inside View of Private Sector Ethics I, III (2007).

(1991). Additionally, indictment and improper criminal conviction can destroy a corporation, regardless of the sentence. Thus, the Sentencing Guidelines wisely incorporate principles that should be required for conviction, rather than used to simply reduce the sentence.

Moreover, the Department of Justice memos recognize the important role of corporate compliance in assessing criminal liability. See Memorandum from Paul McNulty, Deputy Atty. Gen., to Heads of Dep't, U.S. Dep't of Justice, 12-15 (Dec. 12, 2006). Before deciding to indict, prosecutors must consider "whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees." Id. at 14. This policy acknowledges that effective compliance programs directly relate to a corporation's blameworthiness and its criminal intent, if any.

Recognizing lower court decisions, however, the government in the same breath reserves the right to exercise its fullest discretion to indict regardless of a corporation's effective compliance program. See id. at 13. Thus, the government knows compliance programs are important in assessing criminal liability, but the government also knows they can fully ignore them.

Therefore, the overly broad *respondeat superior* application violates basic principles of criminal law by punishing corporations that are not blameworthy and by failing to promote prevention and deterrence. Accordingly, the district court's overly broad jury instruction violates the general principles of criminal law.

- B. The district court's instruction on vicarious criminal liability is overly broad because it strikes an unjust and unnecessary imbalance in the criminal justice system. The overly broad instruction grants prosecutors vast negotiating leverage, allowing them to coerce corporations into signing questionable deferred-prosecution agreements.

This nation has a system of virtually unchecked, vast prosecutorial discretion. As Chief Justice Burger (then Circuit Judge) stated, "Few subjects are less adapted to judicial review than

the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings.” Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967). Because of this vast discretion, the criminal law must provide a necessary check to avoid arbitrary and unjust exercises of this discretion to indict corporations. The overly broad *respondeat superior* rule applied by the district court fails to do so.

First, prosecutors and corporations both understand indictments are easily obtained due to the liberal application of vicarious criminal liability, thus increasing prosecutors’ already vast discretion. Additionally, indictments can be extremely detrimental to corporations, regardless of their guilt. Second, this overwhelming leverage allows prosecutors to coerce corporations into entering questionable deferred-prosecution agreements, with little to no oversight. Third, such vast discretion is unjust and unnecessary and should appropriately be in the hands of judges and juries.

First, the Department of Justice explicitly recognizes its vast authority to indict, and reserves maximum discretion to do so. The Department’s painstaking explanation of lower-court case law shows the Department further recognizes the source of its vast authority flows from the liberal vicarious liability rule—not from its role as prosecutor. See McNulty Memorandum at 13. Thus, any narrowing of the application will limit the Department’s vast discretion to indict. Preet Bharara, Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants, 44 Am. Crim. L. Rev 53, 80-81 (2007)(noting the broad rule, Bharara, former U.S. attorney and now lead counsel for a Senate judicial subcommittee, argues that a narrower corporate liability rule is the most effective way to achieve appropriate levels of prosecutorial discretion).

Understandably, corporations are fully aware the overly broad application leaves them in an extremely weak negotiating position when trying to avoid indictment. A corporation's position is further weakened because an indictment, let alone a conviction, can destroy it. Market impacts can slash stock value to a fraction of its former value simply upon public disclosure of criminal investigation. See Pamela H. Bucy, Why Punish? Trends in Corporate Criminal Prosecutions, 44 Am. Crim. L. Rev. 1287, 1288-89 (2007). Moreover, indictments can have immediate consequences including unavailability of loans and revocation of licenses and permits. Id.; Paul J. Desio, Ethics and Compliance Programs May Get Their Day in Court, Ethics Resource Center, Dec. 30, 2008. In the end, uncertainty prevails, causing employees and customers leave. Bucy, supra, at 1288-89.

Thus, fighting an easily obtained indictment can be corporate suicide. Companies simply have to consider the demise of the accounting giant, Arthur Andersen. At one point the firm supported over 25,000 employees in the United States, but recently had around 200. Jonathan Glater, Enron Trial Stirs Memory of Andersen, N.Y. Times, Feb. 21, 2006, at C1. This Court overturned Andersen's conviction in 2005, but unfortunately the damage was already done. Arthur Andersen, 544 U.S. at 708.

Second, prosecutors' overwhelming leverage allows them to coerce corporations into entering questionable deferred-prosecution agreements with little to no judicial oversight. Because of their leverage, prosecutors successfully employ a cooperate-or-else strategy. Prosecutors have coerced corporations to waive attorney-client privilege, stop paying for employee attorney fees, threaten employees with termination for refusing to give statements to the government, force a CEO to relinquish his position, and even endow a one-million-dollar professorship at the prosecutor's alma mater. United States v. Stein, 435 F. Supp. 2d 330

(S.D.N.Y. 2006); United States v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006); Bharara, supra, at 88-102; Jeff Horowitz, Almost Criminal: Will the Obama Administration Shy Away From Indicting Lawbreaking Companies?, Slate, Jan. 26, 2009.

Third, prosecutors' vast discretion is unjust and unnecessary and should appropriately be in the hands of judges and juries. The current system requires prosecutors to make important judgments regarding a corporation's intent when deciding whether or not to indict. Prosecutors do so by deciding whether a corporation had a compliance program "adequately designed for maximum effectiveness." McNulty Memorandum at 14. This decision should not be left to the prosecutor for several important reasons.

First, assessing a corporation's effective compliance program is a quasi-intent assessment, which should be left to impartial judges and juries, not to prosecutors trained to get convictions. Second, because an indictment alone can destroy a corporation, the intent assessment should come at the trial phase. Third, corporations would have better guidance on what is "effective compliance" if courts were allowed to develop factors and standards through judicial case law. Bharara, supra, at 111-12. Finally, in addition to the increased role of judges and juries, the availability of regulatory schemes, civil penalties, and individual criminal prosecutions further reduces the necessity for vast prosecutorial discretion to indict corporations.

Therefore, the overly broad *respondeat superior* application creates an unjust and unnecessary imbalance in the criminal justice system because prosecutors have too much discretion that should appropriately be in the hands of judges and juries. Accordingly, this Court should narrow the scope of vicarious criminal liability to balance the scales of justice.

- C. Forcing the government to prove the corporation failed to maintain an effective compliance program would better serve the principles of criminal law and the balance of justice. This modified *respondeat superior* rule promotes general principles of criminal law. Additionally, judges and juries can effectively apply the modified rule.

Modifying New York Central's mistakenly and broadly applied, 100-year-old vicarious criminal liability rule best serves the public's interests. To do so, this Court could simply hold that employees do not act within the scope of their employment, nor with intent to benefit, when they act contrary to an effective compliance program. This modified rule would still authorize punishment for deceitful corporations like Enron, WorldCom, and Tyco, where fraud was pervasive. Andrew Weissmann & David Newman, Rethinking Criminal Corporate Liability, 82 Ind. L.J. 411, 415-416 (2007). At the same time, the modified rule would grant relief to well-intentioned corporations that are undermined by rogue employees. Further, not only would corporations get relief, so too would innocent stockholder and employees.

Because this modified rule applies in criminal cases and proving ineffective compliance is a quasi-intent assessment, the government should bear the burden of proof. In the alternative, corporations should at least be allowed to prove an effective compliance program as an affirmative defense. By modifying the rule, this Court would further the general principles of criminal law and strike an appropriate balance in the criminal justice system. First, the modified rule promotes general principles of criminal law because the rule authorizes punishment only for blameworthy corporations and incents effective compliance programs. Second, the modified rule allows corporations to control their destiny, rather than leave them hostage to rogue employees and prosecutors. Third, judges and juries can effectively administer the modified rule because guidelines and benchmarks are already available.

First, a modified rule authorizes punishment for blameworthy corporations and incents effective compliance programs. Kolstad, 527 U.S. at 545. Instead of wasting money defending against indictment and prosecution for the inevitable actions of rogue employees, corporations can spend that money building an effective corporate compliance program, which the rule rewards. Moreover, industry data show that effective compliance programs increase employee morale, investor confidence, and industry competitiveness. See Ethics Resource Center, supra, at 2, 19, 25. Of course, effective programs also dramatically decrease employee wrongdoing, thus satisfying the criminal rule's ultimate purpose. Id. at 10.

Second, the modified rule would allow corporations to control their own destiny, rather than leave them hostage to rogue employees and prosecutors. The modified rule makes corporations accountable for their own actions. Corporations that fail to maintain effective compliance programs risk criminal prosecution, while those that do maintain effective programs can be certain that their futures are secure. This added security allows corporations to focus resources and energy on building businesses, not on negotiating questionable deferred-prosecution agreements. This fostering of corporate responsibility and efficient allocation of resources best serves the public's interests.

Third, judges and juries can effectively administer the modified rule because guidelines and benchmarks are already available. The United States Sentencing Guidelines give excellent guidance by laying out seven elements for an effective compliance program. U.S. Sentencing Guidelines, § 8B2.1. Additionally, studies prove that the elements of an effective compliance program can be measured and benchmarks are already in place. Ethics Resource Center, supra, at 27. Further, the "effective" portion of the rule is very similar to a reasonableness determination, which judges and juries are commonly asked to make.

Thus, the modified rule promotes the general principles of criminal law and the balance of justice far greater than the overly broad *respondeat superior* rule applied by the district court. Accordingly, this Court should narrow the scope of the rule so that employees do not act within the scope of their employment, nor with intent to benefit, when they act contrary to an effective compliance program.

In conclusion, the district court applied an overly broad vicarious criminal liability rule. First, the district court's overly broad instruction punishes corporations that could not have reasonably prevented their employees' wrongful action, and thus are not blameworthy. Additionally, the overly broad instruction disincentivizes effective corporate compliance programs that successfully decrease employee wrongdoing. Second, the overly broad instruction unnecessarily and unjustly gives prosecutors too much discretion in determining a corporation's fate. This determination should be left to impartial judges and juries. Finally, the modified rule promotes the general principles of criminal law and the balance of justice far greater than the broad *respondeat superior* rule.

CONCLUSION

The district court erred in its instruction by applying *respondeat superior* principles in an overly broad manner. Accordingly, Ionia respectfully requests this Court reverse the Second Circuit's ruling affirming the district court's instruction and vacate the convictions.