

No. 08-1234

IN THE
Supreme Court of the United States

IONIA MANAGEMENT S.A.,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT

TEAM 20

QUESTIONS PRESENTED

- I. Were the jury instructions authorized by Supreme Court precedent and federal statutory law when they charged that a corporation may be held criminally liable for the acts of its agents who failed to accurately maintain an Oil Record Book while acting within the scope of their employment and with an intent to benefit the corporation?
- II. Whether jury instructions serve the goals of the criminal justice system when they instruct the jury that a corporation may be held criminally liable for the acts of its culpable agents?
- III. Whether this Court should give credence to the doctrine of stare decisis and uphold over one hundred years of caselaw regarding corporate criminal liability given that the rule remains practical in regard to modern corporations?

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FEDERAL REGULATION INVOLVED

33 C.F.R. § 151.25(a):

Each oil tanker of 150 gross tons and above, ship of 400 gross tons and above other than an oil tanker, and manned fixed or floating drilling rig or other platform shall maintain an Oil Record Book Part I (Machinery Space Operations). An oil tanker of 150 gross tons and above or a non oil tanker that carries 200 cubic meters or more of oil in bulk, shall also maintain an Oil Record Book Part II (Cargo/Ballast Operations).

STATEMENT OF THE CASE

Ionia Management was found guilty of violating several federal statutes and associated regulations in September 2007. *United States v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 321 (D. Conn. 2007). Ionia was indicted in four separate districts on numerous charges which were consolidated into eighteen separate counts: thirteen counts of violating the Act to Prevent Pollution from Ships (APPS), 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. *Id.* at 321-22.

A Criminal History

Repeat offender Ionia Management is a foreign corporation that operates a fleet of commercial vessels including the ship involved in this case, the M/T Kriton. *Id.* at 327. In October 2004, Ionia was sentenced to three years of probation for making false statements to the United States Coast Guard. *Id.* at 327-28. As part of this probation, the court for the Eastern District of New York required Ionia to implement an environmental compliance program to ensure that Ionia vessels would no longer “pose a threat of injury to life, property, or the marine environment.” *Id.* at 327. The conditions of this program included designating a corporate compliance manager, establishing internal training programs, and accurately maintaining a “Compliance Checklist for the Proper Care and Disposal of Oily Waste.” *Id.* In order to complete the checklist, Ionia was required to certify that all pollution prevention equipment, including the Oily Water Separator, was being properly operated and that the Oil Record Book (ORB) was truthfully and accurately maintained. *Id.*

The Offense at Issue

In compliance with federal law, Ionia's ships are required to operate pollution prevention equipment while at sea. *Id.* at 325-26. Despite corporate policies and training programs to educate crewmembers on the proper use of this equipment, the Chief Engineer aboard the Kriton, Efstratios Tsigonakis, directly instructed the Second Engineer, Edgardo Mercurio, not to use the Oily Water Separator. *Id.* Tsigonakis ordered Mercurio and other crewmembers to dump the contaminated waste overboard into the ocean. *Id.* at 325. Subsequently, Mercurio spoke with another chief engineer, Petros Renieris, about this direction and was again ordered not to use the equipment. *Id.* These engineers, who were responsible for maintaining the ORB, then falsified the required entries, deceptively noting that the oil pollution prevention equipment was being used and was operating properly. *Id.* at 325-26. These actions saved "Ionia the time and expense of properly maintaining and using the oil pollution prevention equipment" and allowed the Kriton to dock at U.S. ports despite non-compliance. *Id.* at 325.

In March 2006, the Kriton arrived at port in New York. *Id.* at 328. Per Ionia's probation requirements, the U.S. Coast Guard performed a scheduled inspection of the ship. *Id.* at 327-28. The Coast Guard discovered that Ionia had falsified the Compliance Program Checklist in two ways. *Id.* at 328. First, Ionia represented that its crewmembers had been maintaining an ORB in which all entries were accurate and truthful. *Id.* Second, Ionia falsely represented that oil contaminated waste had been incinerated or discharged through the required pollution prevention equipment, when in fact the contaminated waste had been pumped directly into the ocean via the ship's bypass hose. *Id.* Similar events occurred at three other U.S. ports, forming the basis for the criminal charges brought against Ionia. *Id.* at 321.

The Jury Instructions

At trial, the district court instructed the jury on the law regarding corporate criminal liability and the elements necessary to convict under APPS. *Id.* at 324-25. The court instructed,

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

Id. at 324.

The court instructed the jury that the “acts attributable to Ionia were acts or omissions of its agents performed ‘within the scope of their employment.’” *Id.* at 325. Elaborating on actions that fall within “scope of employment” the court instructed,

An act or omission that was specifically authorized by the corporation would be within the scope of the agent’s employment. Even if the act or omission was not specifically authorized, it may still be within the scope of an agent’s employment if (1) the agent acted for the benefit of the corporation and (2) the agent was acting within his authority.

Id. The district court explained that “the Government need not prove that the agent was only concerned with benefitting the corporation. It is sufficient if one of the agent’s purposes was to benefit the corporation.” *Id.* Moreover, the court instructed that “[i]t is not necessary that the Government prove that the corporation was actually benefitted, only that the agent intended it would be.” *Id.* Further, the court charged,

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

Id.

With regard to APPS, the district court instructed that the Government must prove beyond a reasonable doubt that “Ionia, through its agents, knowingly, meaning intentionally or voluntarily, failed to fully and accurately maintain an Oil Record Book in which the required disposal and discharge operations were recorded.” *Id.*

Conviction Affirmed

At the end of a jury trial, Ionia was found guilty on all counts alleged in the consolidated indictment. *Id.* at 321. Ionia then appealed to the United States Court of Appeals for the Second Circuit. *Ionia Mgmt. S.A. v. United States*, 999 F.3d 999 (2nd Cir. 2008). In September 2008, the court of appeals affirmed and adopted the opinion of the court below. *Id.* Ionia petitioned for a writ of certiorari to this Court which was granted on December 12, 2008. Order Granting Pet. Cert. (Dec. 12, 2008).

SUMMARY OF THE ARGUMENT

Reflecting a long history of federal court precedent, the district court appropriately charged the jury on corporate criminal liability. The court correctly instructed that Ionia may be held liable for the acts of its crewmembers if the acts were committed within the crewmembers' scope of employment and performed with an intent to benefit the corporation, at least in part. In explaining that "scope of employment" includes acts that are either specifically authorized or within a crewmember's "apparent authority," the court correctly stated the applicable law. Further, it was appropriate for the court to charge that Ionia need not accrue any actual benefit for criminal liability to attach.

Second, the district court's instructions were consistent with the Act to Prevent Pollution from Ships, charging the jury that all ships within U.S. waters must accurately maintain an Oil Record Book. These instructions appropriately reflect caselaw on the interpretation of "shall maintain" and convey the intent of Congress in passing 33 U.S.C. § 1901.

Third, the instructions further the goals of criminal law in that they promote the deterrence of corporations from wrongdoing, provide the option of rehabilitation, and where appropriate, punish the culpable offender. Therefore, this Court should affirm the Court of Appeals' decision and uphold *New York Central*, giving credence to stare decisis and maintaining one hundred years of precedent.

ARGUMENT

In *New York Central & Hudson Railroad Company v. United States*, this Court abandoned the "old and exploded doctrine" of corporate criminal immunity, taking the long established principles of civil liability "only a step farther" to create corporate responsibility within the criminal justice system. 212 U.S. 481, 494-96 (1909). Throughout the one hundred years of rulings, trials, and litigation since this decision, courts have affirmed the basic tenants of this landmark case. *See*

United States v. Cincotta, 689 F.2d 238, 242 (1st Cir. 1982). In *New York Central*, this Court held that a corporation may be criminally liable for an agent's acts that are performed within the scope of the agent's employment and motivated by an intent to benefit the corporation. 212 U.S. at 493-94.

In charging a jury on corporate criminal liability, trial courts are given broad discretion because no pattern instructions exist. *Johnson v. Breeden*, 280 F.3d 1308, 1314 (11th Cir. 2002). Here, the district court's instructions served to adequately inform the jury of all elements necessary to find that Ionia was vicariously responsible for the criminal acts of its employees. The district court correctly instructed the jury that Ionia had a legal obligation to accurately maintain the Kriton's Oil Record Book (ORB) in compliance with APPS. Further, the court's instructions were consistent with the general principles of criminal jurisprudence. Because corporate criminal liability complies with the basic foundations of criminal law and the goals of our justice system, this Court should affirm its holding in *New York Central*.

Determination of the issues raised by this appeal will require examination into whether the jury instructions given at trial adequately informed the jury on each issue presented by the case and the applicable law. Because this is a question of law, a de novo standard of review is appropriate. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

I. THE DISTRICT COURT'S INSTRUCTIONS ADEQUATELY APPRISED THE JURY ON CORPORATE CRIMINAL LIABILITY AND IONIA'S LEGAL OBLIGATIONS UNDER FEDERAL STATUTORY LAW.

Reflecting the doctrine set forth in *New York Central*, the district court correctly instructed that a corporation may be held criminally liable for the acts of an agent which are performed within the agent's scope of employment and with an intent to benefit the corporation, at least in part. Further, the court appropriately instructed that a person, or in this case a corporation, must accurately maintain an ORB as required by federal regulations under 33 C.F.R. § 151.25.

Jury instructions serve to apprise the jury of the issues to be decided during deliberation and the applicable law. On appeal, the adequacy of a set of instructions is determined by looking to the instructions as a whole. *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). A single instruction to a jury cannot be judged in “artificial isolation, but instead must be viewed in the context of the overall charge.” *Id.* An appellate court should not reverse a trial court’s decision unless the challenged instructions misled the jury as to the correct legal standard or did not adequately inform the jury on the applicable law. *Hathaway v. Coughlin*, 99 F.3d 550, 552 (2nd Cir. 1996). If a court finds that a set of instructions failed these requirements, a defendant must also show that she was prejudiced by the instructions to obtain reversal. *Fort v. C.W. Keller Trucking Inc.*, 330 F.3d 1006 (7th Cir. 2003).

Affirming the conviction of a railroad company, this Court held in *New York Central* that criminal liability may be imputed to a corporation for the acts of its agents motivated by an intent to benefit the corporation. 281 U.S. at 494. Over one hundred years later, the rule established by this Court remains the law on corporate criminal liability. *See Cincotta*, 689 F.2d at 241-42; *see also United States v. Demauro*, 581 F.2d 50, 54 (2nd Cir. 1978). Subsequent cases decided by this Court and circuit courts across the country have not only followed this doctrine, but have also provided further guidance in applying *New York Central*, “keeping with the remedial and deterrent policies served by vicarious corporate liability.” H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 Loy. L. Rev. 279, 284 (1995).

A. The district court’s instructions correctly charged the jury on all elements of corporate criminal liability.

A corporation may be held criminally responsible for the acts of an agent committed within the agent’s scope of employment. *N.Y. Central*, 212 U.S. at 493-94. This means the agent was performing acts of the kind which she is authorized to perform and was motivated by an intent to benefit the corporation, at least in part. *Id.*; *Demauro*, 581 F.2d at 53; *see also United States v.*

Automated Medical Laboratories, 770 F.2d 399, 407 (4th Cir. 1985) (holding a corporation liable for employee actions motivated, in part, by an intent to benefit the corporation).

An agent is anyone who is authorized to act on a corporation's behalf. *N.Y. Central*, 212 U.S. at 494. There is no distinction made between officers and employees, or "between persons holding positions involving varying degrees of responsibility." *United States v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1946) (imputing acts of a lower level salesman to the defendant corporation). Not only are the acts of a corporation's senior management attributed to a corporation, but also the acts of mid-managers and "menial" employees. *See N.Y. Central*, 212 U.S. at 494 (holding that the actions of an assistant manager could be imputed to the railroad company); *see also Automated Med. Labs.*, 770 F.2d at 407-08 (holding the defendant corporation liable for the falsification of log books by regional managers). Therefore, what is most relevant is not the agent's level of employment, but instead whether the agent has the authority to act on the corporation's behalf. *See Egan v. United States*, 137 F.2d 369 (8th Cir. 1943).

This Court and the circuit courts below have held that in order for an agent's act to be "authorized," the act must be a part of an agent's actual or apparent authority, termed "scope of employment." *N.Y. Central*, 212 U.S. at 493-94; *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir. 1945) (holding that when an agent sold the corporation's whiskey, he was acting not as an individual, but within his authority as an employee of the corporation). If an agent's acts fall within her scope of employment, the acts may be imputed to the corporation for purposes of criminal prosecution. *N.Y. Central*, 212 U.S. at 493-94. In determining whether an act is "authorized," *New York Central* established that a corporation may be held responsible "for an act done while an authorized agent of the company is exercising the authority conferred upon him." *Id.* at 494. However, this Court made clear that specific authorization is not necessary. *Id.* An act that falls

within an agent's "apparent authority" is also sufficient. *Id.*; *United States v. Beusch*, 596 F.2d 871, 877-78 (9th Cir. 1979). Apparent authority encompasses not only the acts performed within an agent's "general line of work," but also "the authority which outsiders would normally assume the agent to have." *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972).

If an agent's acts are found to be within the agent's apparent authority, the acts must also be motivated by an intent to benefit the corporation. *N.Y. Central*, 212 U.S. at 492-93; *see Cincotta*, 689 F.2d at 241-42. However, this intent does not have to be the agent's sole purpose, but instead may be one of several motivating factors. *Automated Med. Labs.*, 770 F.2d at 407. Further, no actual benefit must be realized by the corporation. *Old Monastery Co.*, 147 F.2d at 908. Thus, if through her actions, an agent intends, at least in part, to benefit her employer, it is irrelevant whether she was successful in those acts. *Cincotta*, 689 F.2d at 241-42 (citing *Demauro*, 581 F.2d at 54).

Finally, specific programs or directives by a corporation do not automatically release a corporation from criminal liability. *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006) (holding that direct instruction from the corporation's president against the agent's actions did not release the corporation from criminal liability). If a corporation could immunize itself by claiming that the agent's acts were without authority merely because those actions were against corporate policy or were illegal, the corporation could then strategically shift criminal responsibility from itself to its agents. *See Continental Banking Co. v. United States*, 281 F.2d 137, 150 (6th Cir. 1960). Such corporate policies or the illegality of an agent's actions are instead only factors to be considered in determining whether an agent's actions are within her scope of employment. *Potter*, 463 F.3d at 26.

Here, the district court's instructions adequately apprised the jury of the applicable law concerning corporate criminal liability as established by this Court in *New York Central*. First, the district court correctly instructed the jury on the definition of "agent." *Ionia Mgmt.*, 526 F. Supp. 2d

at 324. The district court charged, “[a]s a legal entity, a corporation can only act vicariously through its agents; that is, through its directors, officers and employees or other persons *authorized* to act for it.” *Id.* (emphasis added). This instruction mirrors the substantive law on corporate criminal liability because it allows a jury to convict based upon the actions of an agent at any level of employment. *Id.* Further, the instruction makes clear that an agent is anyone *authorized* to act on behalf of a corporation. *Id.* It was unnecessary for the district court to include any distinction between an “officer” or “agent” because no distinction has ever been made by this Court. *See generally N.Y. Central*, 212 U.S. at 493-94. In *New York Central*, this Court repeatedly made note that simply the acts of “an authorized agent” could cause criminal liability to be imputed to the corporation. *See id.* Thus, what is most relevant in determining corporate criminal liability is whether the person at issue is *authorized* to act, a concept that was reflected by the district court’s instruction. *Ionia Mgmt.*, 526 F. Supp. 2d at 325.

Second, the district court adequately charged the jury on the general rule of corporate criminal liability, instructing that liability may be imputed to the defendant Ionia, if the acts of the Kriton’s crewmembers were within the “scope of [their] employment” and were performed “for the benefit of the corporation.” *Id.* Looking first to the charge on scope of employment, the district court made clear that scope of employment included actions “specifically authorized” by the corporation. *Id.* However, if the “acts or omissions” of an agent were not specifically authorized, an agent’s “scope of employment” could include those acts performed “for the benefit of the corporation” within the agent’s authority. *Id.* This language mirrors the dichotomy set forth in *New York Central* allowing corporate criminal liability to be imputed to the corporation for acts within an agent’s actual or “apparent authority.”

Reflecting the law established by this Court, the district court instructed that the agent need not act for the exclusive benefit of the corporation. *Id.* In its charge, the district court stated “the Government need not prove that the agent was *only* concerned with benefitting the corporation. It is sufficient if *one* of the agent’s purposes was to benefit the corporation.” *Id.* (emphasis added). Further, the district court correctly noted that no actual benefit to the corporation is necessary, but instead that simply an intent to benefit the employer is sufficient. *Id.* Thus, Ionia could not escape liability through simply showing that the cost of an illegal act would never confer a benefit.

Finally, the district court was correct in charging that if an agent’s actions are illegal or contrary to corporate policy that fact will not “necessarily relieve the corporation of responsibility for the agent’s acts.” *Id.* Because these are only factors to be used in determining scope of employment, it was proper for the court to instruct the jury that it may “consider whether the agent disobeyed instruction or violated company policy in determining whether the agent intended to benefit the corporation, and/or was acting within his authority.” *Id.*

Viewed in their entirety, the jury instructions on the elements of corporate criminal liability adequately reflect the substantive law as set forth by this Court in *New York Central* and the subsequent precedent established over the past one hundred years. The district court fulfilled its function of apprising the jury of the applicable law through the instructions given, thus allowing the jury to properly find Ionia guilty of the crimes charged against it.

B. The district court’s instructions correctly charged the jury that Ionia had a legal obligation to accurately maintain its Oil Record Book in order to comply with the Act to Prevent Pollution from Ships.

The Act to Prevent Pollution from Ships (APPS) is the combination of two environmental treaties to which the United States is a party: the 1973 International Convention for the Prevention of Pollution from Ships and the Protocol of 1978 Relating to the International Convention for the

Prevention of Pollution from Ships. 33 U.S.C. § 1901 (2008). These treaties are generally referred to as the MARPOL Protocol, and target the prevention of oil pollution at sea. *United States v. Jho*, 534 F.3d 398, 401 (5th Cir. 2008).

Under APPS, the United States Coast Guard has the authority to promulgate regulations to enforce the provisions of MARPOL. *See* 33 U.S.C. §1903(b)(1) (2008). The Coast Guard's regulations require that corporations operating ships over a certain tonnage "shall maintain" an Oil Record Book (ORB) that must be readily available for inspection. 33 C.F.R. §151.25(a). An ORB must include records for all transfers of oil, management and disposals of oily wastes generated on board a vessel, and disposals of oil residues. 33 C.F.R. §151.25(d),(e). Further, the Coast Guard maintains the authority to inspect ships at port in the United States for compliance with MARPOL, APPS and associated APPS regulations. 33 U.S.C. § 1904(c) (2008); 33 C.F.R. §151.25. During inspection, the Coast Guard must rely not only on the statements of a corporation's agents, but also on a ship's compliance documentation, including the ORB. *United States v. Abrogar*, 459 F.3d 430, 432 (3rd Cir. 2006) (affirming the conviction of a shipping corporation found guilty of the inaccurate maintenance of a vessel's ORB). The failure of a ship to comply with the ORB requirement can form a basis of action for the U.S. to refuse a ship's entry into port, to prohibit the ship from leaving port without remedial action, or where appropriate, to prosecute the violation. *Id.* (citing 33 U.S.C. § 1908 (2008)). Under federal law, a person or corporation who "knowingly violates the MARPOL Protocol...or the regulations issued thereunder commits a class D Felony." 33 U.S.C. § 1908.

Interpreting the language "shall maintain," circuit courts have held that ships navigating within U.S. waters are under an obligation to maintain an ORB, make proper entries in the ORB of all discharges, and keep the ORB available for inspection at all times. *Jho*, 534 F.3d at 402 (citing 33 C.F.R. § 151.25(a)). Circuit courts have reasoned that if the requirement to "maintain" an ORB only

included an obligation to record entries when discharges from the ship were made, and not to keep the book accurate, then the regulation promulgated by the Coast Guard would be “at odds with MARPOL and Congress’ clear intent under APPS to prevent pollution at sea.” *See id.* at 403, 410 (holding a shipping corporation criminally liable for the inaccurate maintenance of an ORB by ship crewmembers). If “maintain” merely meant to possess, a ship could then avoid application of the ORB requirements altogether simply by falsifying its record book information just before entry into a port or navigable water. *Id.* at 403 (noting that that if “maintain” meant possession, then federal regulation would allow polluters to avoid detection).

Here, the district court’s instructions are not only are consistent with 33 U.S.C. § 1908(a), criminalizing knowing violations of 33 C.F.R. § 151.25, but also reflect the intent of the U.S. Coast Guard in promulgating this federal regulation. The court correctly instructed the jury that to convict Ionia of violating APPS, the Government must prove that “Ionia through its agents knowingly . . . failed to fully and *accurately maintain* an Oil Record Book.” *Ionia*, 526 F. Supp. 2d at 325 (emphasis added). This instruction informed the jury that Ionia not only had a duty to maintain an ORB, but that the entries made into the ORB had to be truthful and accurate, mirroring modern caselaw on the interpretation of “shall maintain.” *See Jho*, 534 F.3d at 404. Further, the language used by the court conveys the intent of the Congress and the Coast Guard in implementing 33 C.F.R. § 151.25 to prevent oil pollution through the reliance on accurate ORB entries. Because the Coast Guard would be unable to detect APPS violations if a ship’s ORB was merely possessed, the instruction that Ionia was required to “accurately maintain” an ORB is consistent with the policy that truthful ORB entries will promote compliance with MARPOL and reduce oil pollution at sea.

Thus, it was correct for the district court to instruct the jury that an ORB must be “accurately maintained.” Consistent with federal law and public policy, the district court’s jury instructions

served to adequately apprise the jury of the applicable law regarding the Act to Prevent Pollution from Ships.

II. CORPORATE CRIMINAL LIABILITY IS CONSISTENT WITH THE GENERAL PRINCIPLES OF CRIMINAL LAW IN THAT IT SERVES TO DETER AND PUNISH CORPORATE WRONGDOING.

In compliance with Supreme Court precedent on corporate criminal liability, the district court instructed the jury that Ionia could be held criminally responsible for the acts of its agents if the agents were acting within the scope of their employment and for the benefit of the corporation. *United States v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 324-26 (D. Conn. 2007); see *New York Central & Hudson R.R. Co. v. United States*, 212 U.S. 481 (1909). The jury charge on corporate criminal liability is consistent with the general principles of criminal law in that it serves to efficiently deter and fairly punish corporations that violate the law.

The recognition of corporate criminal liability in *New York Central* was premised on the idea that maintaining the “old and exploded doctrine” that corporations were incapable of committing crimes would immunize the major players in interstate commerce and virtually eliminate the only means of preventing corporate misconduct. 212 U.S. at 496. This Court acknowledged a compelling interest in ensuring that corporations comply with the laws created in the interest of society. See *id* at 495. The public policy underlying this landmark decision is of even greater importance today given the overwhelming costs of corporate crime to the American public and the ever expanding role corporations play in modern society. Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 Colum. J.L. & Soc. Probs. 77, 78 (2006). Criminal law is an important part in the multi-faceted scheme to deter and punish corporate misconduct. *Id.*

The basic justifications for criminal punishment are deterrence, incapacitation, rehabilitation, and retribution. *United States v. Brown*, 381 U.S. 437, 458 (1965); *see also Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008). Looking specifically at the justifications for corporate criminal liability, deterrence predominates because it seeks to prevent corporations, as rational decision-makers, from engaging in criminal acts by providing penalties which reduce the incentive to commit crime. *Developments in the Law – Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1235 (1979). Retribution and rehabilitation also provide justification in viewing corporations as culpable moral actors. *Id.*; *see also Jennifer Moore, Corporate Culpability Under the Federal Sentencing Guidelines*, 34 Ariz. L. Rev. 743, 756 (1992). A combination of these theories is advanced in continuing corporate criminal liability. *See Harmelin v. Michigan*, 501 U.S. 957, 959 (1991).

Because corporations may act only through their agents, corporate crime is always committed by an individual or a group of individuals. *See N.Y. Central*, 212 U.S. at 392-96; Moore, 34 Ariz. L. Rev. at 753. However, since individuals are hired as agents to further the corporation's goals, the behavior of an agent is determined by the structure, objectives, and policies of the corporation. Moore, 34 Ariz. L. Rev. at 753-54. Consequently, corporate crime is frequently caused by the corporation and done on its behalf. *Id.* at 753 (explaining that the goal is for the corporation "to take[] from the individual some of his decisional autonomy, and substitute[] for it an organizational decision-making process") (citing Herbert Simon, *Administrative Behavior* 8 (3rd ed. 1976)). Thus, an employee's behavior is not merely a product of personal choice. *Id.* Notions of fairness require that when an agent is acting within the scope of her employment in response to this process, the corporation should be held accountable whether the agent acts "virtuously or viciously." *N.Y. Central*, 212 U.S. at 493; Moore, 34 Ariz. L. Rev. at 753. In this way, when the corporate process

results in criminal violations, it is the corporation that is culpable and deserving of punishment. Moore, 34 Ariz. L. Rev. at 753.

Merely punishing the individual fails to adequately influence corporate behavior. *See N.Y. Central*, 212 U.S. at 495. First, it is the corporation, not the agent, which has the most to gain from illegal acts. John C. Coffee, *No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386, 390 (1981). In holding a partnership entity liable for violating criminal statutes, this Court aptly noted in *United States v. A & P Trucking Co.* that “the treasury of the business may not with impunity obtain the fruits of violations.” 358 U.S. 121, 126 (1958). Immunizing corporations would allow those who profit and thus, who have the greatest incentive to break the law, to go undeterred. *See N.Y. Central*, 212 U.S. at 495 (reasoning that statutes against price rebates could not be effectively enforced if only individuals were punished because corporations profitted most from this practice). By placing corporate assets at stake, pressure is brought on those who control the corporation to ensure that their agents abide by the law. *A & P Trucking Co.*, 358 U.S. at 126; V.S. Khanna, *Corporate Liability Standards: When Should a Corporation be Held Criminally Liable?*, 37 Am. Crim. L. Rev. 1239, 1245 (2000).

Second, imputing criminal fault to the corporation promotes change in corporate behavior because corporations are rational decision-makers, meaning specific deterrence is practical and effective. *Developments*, 92 Harv. L. Rev. at 1235. Corporations, by their nature, are in the business of carefully analyzing the costs and benefits of a particular course of action. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 445-46 (noting that corporate behavior which is likely to give rise to criminal anti-trust charges is undertaken after consideration of the desired goals, weighing the “costs, benefits, and risks”); *Developments*, 92 Harv. L. Rev. at 1235. Further, executives who make corporate policies are most sophisticated at determining their roles under the

law and understanding what practices are criminal. *See* Khanna, 37 Am. Crim. L. Rev. at 1245. By contrast, lower level employees may not be aware of the implications of their actions under federal law. *See id.* Imputing criminal liability to the corporation increases pressure on executives to take internal corrective actions such as educating employees, implementing stringent corporate compliance policies, providing responsible supervision, and dismissing employees suspected of illegal conduct. Coffee, 386 Mich. L. Rev. at 407-08. Further, the indictment of one corporation can have a strong effect on general deterrence, especially when there is pervasive wrongdoing throughout the industry. U.S. Sentencing Guidelines Manual § 9-28.000 (2008). Corporate criminal liability makes certain that corporations have a vested interest in ensuring that their agents do not break the law on their behalf. *Developments*, 92 Harv. L. Rev. at 1235.

However, deterrence is not the only goal of corporate criminal liability; retribution is also a valid justification. Moore, 34 Ariz. L. Rev. at 756. While some argue that retribution does not apply to corporations because they are legal entities, not suitable for moral blame and the accompanying stigma, modern corporations have an “identifiable persona.” Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 Harv. J.L. & Pub. Pol’y 833, 852 (2000). This means that they not only have a moral character, but can also suffer the consequences of their wrongdoing. *Id.* Thus, retribution is appropriate where the corporation, as an entity, is deemed culpable. *Id.* at 842.

Moreover, this Court has recognized that corporations may be afforded the same rights as individuals which supports the idea that corporations have a potentially culpable and identifiable persona. *See National First Bank of Boston v. Belotti*, 435 U.S. 765 (1978) (holding that the corporate identity of the speaker did not bar protections under the First Amendment); Moore, 34 Ariz. L. Rev. at 754. Further, corporations are often described with human characteristics such as welcoming, cold, greedy, and even resilient. *See* Friedman, 23 Harv. J.L. & Pub. Pol’y at 833. The

ability of observers to identify “good and bad corporations, law abiding corporations and recidivist,” and to describe “corporate character is evidence that it is not inappropriate to speak of corporate culpability.” Moore, 34 Ariz. L. Rev. at 755.

Culpability has been defined as “the degree to which [an offender] may justly be held to blame for the consequences or risks of his act[s].” *Id.* at 746 (quoting Andrew von Hirsch, *Doing Justice* 80 (1976)). Through the principles of *respondeant superior*, the action and accompanying mental state of an employee is imputed to the corporation when an agent commits a crime while acting within the scope of her employment and for the benefit of the corporation. *N.Y. Central*, 212 U.S. at 492-94. The employee’s mens rea is justly attributed to the corporation because the corporation has chosen to delegate its authority to her and employed her to act on its behalf. *Id.* at 492-93; Moore, 34 Ariz. L. Rev. at 758. Further, corporations have a distinct character often called corporate culture which “endures over time and transcends the character of the corporation’s members.” Moore, 34 Ariz. L. Rev. at 755. It is this culture which controls corporate policy. *See id.* at 754-55. Thus, it is very likely that corporations who repeatedly break the law “have developed a corporate atmosphere favorable to unethical and illegal behavior and that executives and other employees of these corporations have been socialized to violate the law.” *Id.* at 754.

Third, because corporations can have a good or bad character, they may also be rehabilitated. *Id.* at 756. Rehabilitation is one of the more desirable goals of criminal law because it seeks to reform offenders, making them productive members of society. *Id.* The Sentencing Commission has explicitly endorsed the goal of rehabilitating corporate offenders; the availability of corporate probation makes this a viable option. *Id.* at 757; *see* Guidelines § 9-28.000. Deferred Prosecution Agreements (DPAs) also allow the corporation to voluntarily change its behavior through increased

transparency, internal controls, and other like methods to create a culture of compliance. Meeks, 40 Colum. J.L. & Soc. Probs. at 97.

Corporate criminal liability is appropriate in modern society because it is not a harsh, per se rule. *See generally* William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 Am. Crim. L. Rev. 1285, 1302-05 (2000). Prosecutors have discretion in deciding whether to charge a corporation for the criminal acts of its agents, looking to the degree of corporate culpability. *Id.*; Guidelines, § 9-28.100, introductory cmt. b. Acknowledging the great benefits of criminal prosecution in changing corporate culture, the Sentencing Guidelines explain that prosecutors should always consider the following factors:

(1) the nature and seriousness of the offense, including the risk of harm to the public...; (2) the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management; (3) the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it; (4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents; (5) the existence and effectiveness of the corporation's pre-existing compliance program; (6) the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers...; (7) collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable...; (8) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance and; (9) the adequacy of remedies such as civil or regulatory enforcement actions.

Guidelines § 9-28.100, introductory cmt., § 9-28. 300. In deciding whether to indict a corporation, prosecutors will consider these factors, promoting the indictment of culpable entities as well as preventing innocent corporations from being charged. *See generally* Guidelines § 9-28.100-900.

Finally, criminal prosecution has many advantages not available in civil law. Meeks, 40 Colum. J.L. & Soc. Probs. at 78. Criminal sanctions serve a different purpose, making them more effective where they are warranted. Friedman, 23 Harv. J.L. & Pub. Pol'y at 854. Civil liability does

not capture guilt and morality, but rather only discusses fault. *Id.* By contrast, criminal punishment expresses to the corporation and society that a certain behavior is morally repugnant and will not be tolerated. *Id.* at 843. Being labeled as criminal or guilty carries a stigma which can arouse strong public reaction thereby serving as a powerful deterrent. Coffee, 79 Mich. L. Rev. at 424-25.

Looking to the case at issue, the instructions given by the district court comport with the general principles of criminal law in that they advance the justifications for criminal punishment. When viewed as a whole, the court's instructions stated that for the jury to hold Ionia guilty for the crimes of its agents, it had to find that an agent of Ionia committed the requisite offense charged. *Ionia*, 526 F. Supp. 2d at 324-25. Further, the jury had to find that this agent was acting within the scope of his employment with an intent to benefit Ionia. *Id.* at 325. The court also instructed that a corporation's agents are "its directors, officers and employees or other persons authorized to act for it." *Id.* at 324. This captures the notion that a corporation should be held accountable for those that act on its behalf. First, the instruction allowed the jury to convict Ionia for the crimes of anyone authorized to act on behalf of Ionia, no matter his position within the company. *Id.* at 324-25. Given that corporations are strategic decision-makers, immunizing a corporation for the acts of non-managerial employees would allow Ionia to strategically shift the burden of criminal liability to lower level employees. *Developments*, 92 Harv. L. Rev. at 1235.

Further, a corporation chooses to delegate responsibility to its agents and entrusts them to act on its behalf. Khanna, 37 Am. Crim. L. Rev. at 1296. As the Court of Appeals for the Ninth Circuit pointed out in *C.I.T. Corporation v. United States*, it is the "function delegated to the corporate officer or agent which determines his power to engage the corporation in a criminal transaction." 150 F.2d 85, 89 (9th Cir. 1945). Accordingly, the instruction appropriately informed the jury that agents are individuals *authorized to act* for the corporation no matter their level of employment. *Ionia*, 526

F. Supp. 2d at 324. The district court also instructed the jury that liability may be imputed to the corporation only if the actions of the Kriton’s crewmembers were conducted within the “scope of [their] employment” and performed “for the benefit of the corporation.” *Id.* at 325. Specifically requiring that the agent be acting for the benefit of the corporation, prevents the corporation from being held liable for employees who were acting within their authority, but purely for personal gain.

In addition, the jury was allowed to consider factors relevant to Ionia’s culpability. The court instructed the jury that it could consider Ionia’s policies as well as whether the employee disobeyed instructions to the contrary in committing the requisite offense. *Id.* This instruction allowed the jury to determine whether Ionia was culpable and deserving of criminal punishment through the importation of guilt from its agents.

These instructions are consistent with the general principles of criminal jurisprudence. The serious implications resulting from a criminal conviction are counterbalanced with the elevated burden of proof in criminal trial and tempered with discretion and fairness. The Sentencing Guidelines require prosecutors to diligently consider the relevant factors in deciding whether to charge a corporation, thereby promoting justice and the rule of law. Therefore, the instructions on corporate criminal liability serve the goals of criminal law in deterring, rehabilitating and, where appropriate, punishing culpable corporations who have broken the law.

III. THE HOLDING IN *NEW YORK CENTRAL* SHOULD BE UPHELD BY THIS COURT BECAUSE IT CONTINUES TO STAND FOR THE PRACTICAL APPLICATION OF CRIMINAL LIABILITY TO CORPORATIONS FOR THE ACTS OF THEIR CULPABLE AGENTS.

The decision in *New York Central* should be upheld in that corporate criminal liability remains practical and justified as corporations continue to occupy a powerful and prominent role in society. Thus, this Court should affirm *New York Central*, giving credence to the importance of stare decisis.

Stare decisis has been termed “a cornerstone of [the American] legal system” and “of fundamental importance to the rule of law.” *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Whether stare decisis is followed is a question entirely within the discretion of the court. *Hertz v. Woodman*, 218 U.S. 205, 212 (1910). The decision of *Moragne v. State Marine Lines, Inc.* set forth three primary reasons for the rule of stare decisis: a desire for the law to furnish a clear guide for the conduct of individuals, the importance of furthering fair and expeditious adjudication, and the need to maintain public confidence in the judiciary. 398 U.S. 375, 403 (1970). Looking to these important principles, this Court has held that absent compelling justification, it will not depart from the doctrine of stare decisis. *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991). This Court has held that stare decisis imposes a severe burden on the party requesting that this Court disavow one of its precedents. *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980).

The decision to overrule a prior opinion is made by looking to a series of practical considerations. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). First, this Court looks to whether the rule has proven to be intolerable, defying workability. *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996). Second, this Court must determine “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.” *Patterson v. Mclean Credit Union*, 491 U.S. 164, 173-74 (1989). Third, this Court decides “whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting).

As illustration, in a series of cases dealing with racial segregation, this Court overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896), with its decision in *Brown v. Board of Education*, 347 U.S. 483

(1954). This Court has noted that the overruling of *Plessy* was “not only justified, but required” because the rationale for the prior decision was so fundamentally at odds with society’s view of the facts in 1954. *Planned Parenthood*, 505 U.S. at 863 (citing *Brown*, 347 U.S. at 494-95). No longer was the justification for *Plessy* applicable or accepted in modern society, thus mandating a departure from the doctrine of stare decisis. *Id.*

Here, the holding in *New York Central* in no way invokes any of the considerations looked to in overturning prior decisions. First, corporate criminal liability is not an intolerable rule defying practical workability. Instead, corporate criminal liability serves to prevent corporate criminal misconduct and creates an incentive for corporations to establish internal compliance programs. Second, the rule is not part of an old, abandoned doctrine, but is instead frequently used within the circuit courts and is continuously expanded upon by subsequent cases. *E.g. Cincotta*, 689 F.2d at 241-42; *e.g. Demauro*, 581 F.2d at 54. In fact, as stated by this Court, the holding in *New York Central* replaced the “old and exploded doctrine” of corporate criminal immunity. 212 U.S. at 496.

Third, unlike the *Plessy* decision, modern facts have not changed so much to have robbed corporate criminal liability of significant application or justification. The policy underlying the decision in *New York Central* still finds hold in modern society because today’s corporations are of increasing importance as they continue to grow in size and power. Thus, there is an even greater need to police corporate wrongdoing through the imposition of criminal punishment.

The overruling of *New York Central* would be inconsistent to the ideal of the rule of law and would not further the principles of stare decisis. Therefore, this Court should not revisit its holding, but should instead decisively reaffirm this landmark decision.

CONCLUSION

The jury instructions given by the district court are consistent with the substantive law regarding corporate criminal liability and federal statutory law under 33 U.S.C. § 1901. The instructions correctly informed the jury on all elements of corporate criminal liability and apprised the jury of Ionia's legal obligation to accurately maintain an ORB. Further, the instructions uphold the modern justifications for criminal punishment. For the foregoing reasons, this Court should affirm the court of appeals decision and Ionia's criminal conviction.

Respectfully,

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