

No. 08-1234

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In The  
**Supreme Court of the United States**

October Term 2008

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

v.

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

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

—————◆—————  
**BRIEF FOR RESPONDENT**

—————◆—————  
Team 22

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**ORAL ARGUMENT REQUESTED**

## QUESTIONS PRESENTED

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

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*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962) ..... 16

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*McBoyle v. United States*, 283 U.S. 25 (1931) ..... 10

*New York Cent. & Hudson R. R. Co. v. United States*, 212 U.S. 481 (1909) ..... passim

*United States v. A & P Trucking*, 358 U.S. 121 (U.S. 1958) ..... 17

*United States v. Booker*, 543 U.S. 220 (2005) ..... 20

*United States v. Miller*, 471 U.S. 130 (1985) ..... 6

*United States v. Olano*, 507 U.S. 725 (1993) ..... 1

**FEDERAL CASES**

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*Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503 (7th Cir. Ill. 1997) ..... 18

*United States v. Abrogar*, 459 F.3d 430, 431-32 (3rd Cir. 2006) ..... 1

*United States v. Basic Const. Co.*, 711 F.2d 570 (4th Cir. 1983) ..... 5

*United States v. Cincotta*, 689 F.2d 238 (1st Cir. 1982)..... 17

<i>United States v. Hartley</i> , 678 F.2d 961 (11th Cir. 1982).....	18
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33 C.F.R. § 151.25 (2007) .....	7, 8, 9, 11
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33 C.F.R. § 151.25(j) (2007) .....	2
------------------------------------	---

**OTHER AUTHORITIES**

Ann Foerschler, Comment, <i>Corporate Criminal Intent: Toward A Better Understanding of Corporate Misconduct</i> , 78 Cal. L. Rev. 1287 (1990).....	5
Brent Fisse, <i>Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions</i> , 56 S. Cal. L. Rev. 1141 (1983).....	14, 21
Corporate Eye, <i>What is Intangible Brand Value</i> , <a href="http://www.corporate-eye.com/2009/01/what-is-intangible-brand-value/">http://www.corporate-eye.com/2009/01/what-is-intangible-brand-value/</a> (Jan. 16, 2009).....	14
Dan M. Kahan & Martha C. Nussbaum, <i>Two Conceptions of Emotion in Criminal Law</i> , 96 Colum. L. Rev. 269 (1996).....	15
DOJ Mem., Deputy Attorney General, Bringing Charges Against Corporations, Signed June 16, 1999 .....	16, 20
Eliezer Lederman, <i>Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle</i> , 76 J. Crim. L. & Criminology 285 (1985).....	18
Erich H. Witte & James H. Davis, <i>Understanding Group Behavior: Consensual Action by Small Groups, Vol. 1</i> , 129 - 131 (1996).....	7
<i>Gimbel v. Signal Cos.</i> , 316 A.2d 599 (Del. Ch. 1974) .....	6
International Maritime Organization, MARPOL Consolidated Edition 71-72 (2006).....	1, 8
John Kenneth Galbraith, <i>The New Industrial State</i> , 164-66 (Sean Wilentz ed., Princeton University Press 2007) (1967) .....	15, 16
Kjell Skognes & Øistein Johansen, <i>Statmap: A 3-Dimensional Model For Oil Spill Risk Assessment</i> 1364 ScienceDirect 8152, 2.3 (2003) .....	9
Model Penal Code § 2.07(1)(c) (Proposed Official Draft 1962) .....	19

Model Penal Code § 2.07(5) (Proposed Official Draft 1962).....	19
Nina Totenberg, <i>Supreme Court Weighs Exxon Valdez Damages</i> , National Public Radio, Feb. 27, 2008 <a href="http://www.npr.org/templates/story/story.php?storyId=48308288">http://www.npr.org/templates/story/story.php?storyId=48308288</a> .....	13
Pamela H. Bucy, <i>Corporate Ethos: A Standard for Imposing Corporate Criminal Liability</i> , 75 Minn. L. Rev. 1095, 1102-05 (1991).....	18, 19
Susan J. Hoffman, Comment, <i>Corporate Criminal Liability for Intracorporate Conspiracy</i> , 72 Ky. L.J. 225 (1984).....	18
Time, <i>The 50 Worst Cars of All Time</i> , <a href="http://www.time.com/time/specials/2007/article/0,28804,1658545_1658498_1657866,00.html">http://www.time.com/time/specials/2007/article/0,28804,1658545_1658498_1657866,00.html</a> (last visited Feb. 12, 2009) .....	15
USMilitary.com, Coast Guard Damage Controlman, <a href="http://www.usmilitary.com/3069/coast-guard-damage-controlman/">http://www.usmilitary.com/3069/coast-guard-damage-controlman/</a> (last visited Feb. 16, 2009) .....	11

## **OPINIONS BELOW**

On September 6, 2007, a jury in the U.S. District Court for the District of Connecticut convicted Ionia Management S.A. (“Ionia”) of eighteen counts including: falsifying records in a federal investigation (18 U.S.C. § 1519), conspiracy (18 U.S.C. § 371); obstruction of justice (18 U.S.C. § 1505); and thirteen counts under the Act to Prevent Pollution from Ships (“APPS”) (33 U.S.C. § 1901, *et seq.*). *United States v. Ionia Management S.A.*, 526 F. Supp. 2d 319, 321 (D. Conn. 2007). On appeal, the Second Circuit Court of Appeals upheld the opinion of the court. *United States v. Ionia Management S.A.*, 999 F.3d 999 (2d Cir. 2008).

## **STANDARD OF REVIEW**

When a party claims a jury instruction was ambiguous and thereby subject to an erroneous interpretation, the proper inquiry is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of relevant evidence. *Boyde v. California*, 494 U.S. 370, 380 (1990). Further, when a jury instruction is not objected to at trial, the Court reviews for plain error. *United States v. Olano*, 507 U.S. 725, 732 (1993). Before correcting, there must be plain error affecting substantial rights “seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 732.

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

Annex I of the International Convention for the Prevention of Pollution from Ships (“MARPOL”), an international environmental convention, applies to ninety-nine percent of the world’s gross shipping tonnage. *United States v. Abrogar*, 459 F.3d 430, 431-32 (3rd Cir. 2006). Annex I requires vessels to record oil discharges in an Oil Record Book (“ORB”). *See* International Maritime Organization (“IMO”), MARPOL Consolidated Edition 71-72 (2006) (Regulation 17). Under the Act to Prevent Pollution from Ships (“APPS”) (33 U.S.C. § 1901 *et*

*seq.*), the United States Coast Guard (“Coast Guard”) requires that the ORB be available for inspection and maintained by the ship’s master. 33 C.F.R. §§ 151.25(i)-(j). Under the APPS, any person who knowingly violates MARPOL commits a felony. 33 U.S.C. § 1908(a).

The APPS is enforced in accordance with 33 U.S.C. § 1912, which requires its actions to comply with international law. The United Nations Convention on the Law of the Sea (“UNCLOS”), signed by the President yet not ratified by the Senate defines the rights of nations in their oceanic use. As such, UNCLOS applies only so far as it codifies international law of “impressive maturity and universality.” *Lauritzen v. Larsen*, 345 U.S. 571, 582 (1953).

The destruction, alteration, or falsification of records to impede or obstruct a federal investigation in federal investigations is a punishable crime under 18 U.S.C. § 1519.

The Eighth Amendment’s Excessive Fines Clause provides neither “excessive fines [be] imposed, nor cruel and unusual punishments inflicted.”

### **STATEMENT OF THE CASE**

On September 6, 2007, a jury in the District Court of Connecticut convicted Ionia, owner of the oil tanker *M/T Kriton* (“*Kriton*”), on eighteen criminal charges. The charges asserted that Ionia employees, all members of the *Kriton’s* crew, directed or participated in illegal oil discharges and falsifying ORBs. Brief for the United States at 9, *United States v. Ionia Mgmt. S.A.*, No. 07-5801-CR (2d Cir. Aug. 15, 2008) (Hereinafter “Gov’t Br.”). Evidence demonstrated the crew discharged oil under a strict chain of command. (Gov’t Br. at 9.) Crew members testified that superior officers ordered them to improperly dispose of oil, while Chief Engineers falsely maintained ORBs. (Gov’t Br. at 10-13.) Although Ionia provided pollution compliance programs, the crew members follow managerial orders to pollute. (Gov’t Br. at 15.)

In addition to crew testimony, evidence of dumping included evidence from Dutch officials who tracked an 11.7 kilometer oil discharge from the *Kriton*. (Gov't Br. at 13.) Further, for over fifteen months the *Kriton* illegally discharged around 1,000 tons of oily waste and falsely reported ORBs without disciplinary action by Ionia. (Gov't Br. at 18-19.)

The jury was not advised of Ionia's 2004 conviction in federal court for falsifying ORBs and discharging oil. (Gov't Br. at 4.) Ionia's 2004 sentence included probation and a requirement that Ionia to complete a compliance program for the disposal of oil. Two counts of falsifying records stemmed from violation of this program. (*Ionia*, 526 F. Supp. 2d at 327.)

On December 17, 2007, the court imposed a \$4.9 million fine and ordered Ionia serve four years probation with conditions requiring installation of monitoring equipment on its ships. (Gov't Br. at 5.) To find Ionia liable, the court, without objection from Ionia, instructed the jury in accordance with established corporate criminal liability law.

On post-trial motion, Ionia claimed the verdict should be set aside because the jury instructions (1) failed to apply principles of agency, (2) allowed a conviction without a finding that employees acted with intent to benefit Ionia, and (3) did not properly take into account the existence of corporate policies. (*Ionia*, 526 F. Supp. 2d at 322-23.) The court however, concluded the jury instructions' propriety and denied Ionia its motion. (*Id.* at 327.) The Second Circuit Court of Appeals upheld the district court's opinion. (*Ionia*, 999 F.3d at 999.)

### **SUMMARY OF THE ARGUMENT**

The government seeks to uphold the findings of the District Court of Connecticut. First, the court properly instructed to find liability for acts of Ionia agents. Case law demonstrates no requirement that agent acts only be those of managerial employees. The district judge did not err

in instructing that acts are within the scope of Ionia's agent if the acts were authorized by leaving out a requirement that the jury find the acts specifically benefited Ionia.

In addition, the court properly instructed as to the meaning of "maintaining" an ORB by instructing that the ORB be accurate in United States waters. This construction is supported by (1) the purpose of the statute enforcing MARPOL, (2) the language of 33 C.F.R. § 151.25, and (3) the application of the statute to a maritime setting.

Next, the court's jury instructions adhere to general principles of criminal law because they apply respondeat superior liability, which is the accepted basis for corporate criminal liability. Since *New York Central*, courts apply respondeat superior to promote criminal law principles, which are to punish, deter and condemn criminal offenders of all shapes and sizes.

Finally, the Court's ruling in *New York Central* should not be revisited. *New York Central* established Congress' power to codify corporate criminal liability, laid the foundation for today's corporate criminal law, and is the accepted doctrine by a majority of courts.

## **ARGUMENT**

The government intends to demonstrate that the court's jury instructions are supported by case law and statutory law, and are consistent with criminal law principles. Additionally, the government will show that the Court should not revisit its holding in *New York Central*.

### **I. THE JURY INSTRUCTIONS OF THE DISTRICT COURT WERE AUTHORIZED BY SUPREME COURT PRECEDENT.**

Plain error that substantially affects substantial rights of the defendant must be shown when appealing a jury instruction not objected to at trial. See *United States v. Olano*, 507 U.S. 725, 732 (1993). Ionia did not argue at trial that the court's instruction prejudiced its defense (Gov't Br. at 50) and accordingly, plain error must be shown.

A. The District Court Did Not Plainly Err when Instructing the Jury that an Agent Acting within the Scope of His Employment is Sufficient to Subject Ionia to Criminal Liability and it Need Not be the Acts of an Ionia Manager.

Since 1909 this Court has established that a corporation may be liable for the acts of its agents which act in the scope of their employment. *New York Cent. & Hudson R. R. Co. v. United States*, 212 U.S. 481, 494-495 (1909). The district court instructed the jury to convict for acts of agents acting within the scope of their employment. (Jury Instructions [Doc. # 164] at 19.) This instruction is in line with the longstanding precedent established by this Court.

B. The District Court Did Not Plainly Err by Instructing the Jury to Find Ionia Liable for an Act Specifically Authorized by Ionia Because when an Act is Authorized, Intent to Benefit is Not Necessary and it is Not an Unconstitutional Amendment to the Indictment to Drop this Charge from the Jury Instructions.

The indictment charged Ionia vicariously for the acts of its agents done for the benefit of Ionia. (Trial Pleadings [Doc. #1] at 20.) However, the district court instructed the jury to convict for the acts of Ionia's agents done within the scope of employment. The court defined this as acts "specifically authorized" by Ionia. (Jury Instructions [Doc. # 164] at 19.) This instruction had the effect of allowing the jury to convict Ionia without expressly finding that the agent acted with intent to benefit Ionia.

The intent to benefit is a test established by the lower courts to provide a needed distinction only when a corporation does not authorize an action, because even if the act is not authorized, the corporation may still be liable if the agent acted with the intent to benefit the corporation. *United States v. Basic Const. Co.*, 711 F.2d 570 (4th Cir. 1983).

The intent to benefit test distinguishes between an unauthorized act which may be vicariously imputed to the corporation and an act which is simply one of a rogue employee. *See Ann Foerschler, Comment, Corporate Criminal Intent: Toward A Better Understanding of Corporate Misconduct*, 78 Cal. L. Rev. 1287, 1297 (1990). The district judge appropriately

made this distinction by instructing the jury that they must decide whether the actions were for the benefit of Ionia “or were they just something that happened by a lazy second engineer to benefit himself to make his own life a little easier so he can go sit back, put his smelly feet up on the table.” (Gov’t Br. at 50.)

When an act is specifically authorized this distinction is not necessary and represents mere surplusage. The Court holds that that it does not constitute an unconstitutional amendment to an indictment to drop those allegations which are unnecessary to an offense that is clearly contained within it. *United States v. Miller*, 471 U.S. 130, 134 (1985). By allowing the jury to convict based on an authorized act the district court did not unconstitutionally constructively amend the indictment.

C. The District Court Did Not Plainly Err by Instructing the Jury to Find Ionia Liable for an Act Specifically Authorized by Ionia Because when an Act is Authorized an Intent to Benefit is Inherent, so the Jury Must Have Found an Intent To Benefit Ionia if they Found the Agent’s Act was Authorized by Ionia.

The time honored common law concept embodied in the business judgment rule creates a legal presumption that the directors of a corporation act for the benefit of the corporation. *Gimbel v. Signal Cos.*, 316 A.2d 599, 608 (Del. Ch. 1974). This presumption must be extended to authorized decisions of a corporate decision making body. Because a decision making body vets decisions, it is even more likely that acts authorized by the body will be done for the benefit of the corporation.

Personal motivations of individual directors are checked by others in the decision making body. This check makes the presumption even stronger that corporate benefit, not personal benefit, motivates acts specifically authorized by a corporation. Moreover, corporate decision making bodies are made up of the same directors who are entitled to this presumption and these corporate decision making bodies would not be poorer than an individual director subject to his

own personal motivations. See Erich H. Witte & James H. Davis, *Understanding Group Behavior: Consensual Action by Small Groups, Vol. 1*, 129 - 131 (1996). As a result, if the jury found that the act was specifically authorized by Ionia, the jury would be finding that the act was made to benefit Ionia.

D. Ionia Waived Any Objection to the Omission in the Jury Instruction of a Requirement to Find Materiality by Failing to Include the Charge in Their Suggested Jury Instructions.

In two of the three charged offenses under 18 U.S.C. § 1519, the indictment charged: “material false statements” were made to the U.S. Coast Guard during an inspection. (Trial Pleadings [Doc. #1] at 18.) The district court omitted the “material” charge when instructing the jury. Materiality is not required under 18 U.S.C. § 1519. Further, even Ionia’s suggested instructions conspicuously omitted this element. (Ionia Proposed Jury Instructions, Document 94, 9 (2007 WL 4998581).) Consequently, Ionia has waived any review of this instruction. See Fed. R. Crim. P. 30(d).

**II. THE JURY INSTRUCTIONS OF THE DISTRICT COURT WERE AUTHORIZED BY FEDERAL STATUTORY LAW.**

Congress authorized the Coast Guard to create any “necessary or desired” regulations to implement MARPOL, 33 U.S.C. § 1903(c)(1). The Coast Guard responded by implementing 33 C.F.R. § 151.25, requiring foreign flagged vessels to “maintain” an ORB while in United States waters. The word “maintain” must be defined by: (1) the purpose of 33 C.F.R. § 151, to prevent pollution and assess MARPOL compliance (33 C.F.R. §§ 151.23, 25); (2) the language of 33 C.F.R. § 151.25; and (3) by the maritime setting.

Using this principle, the district court properly instructed the jury that the requirement to “maintain” the ORB means that Ionia was required to possess a correct ORB, of all discharges made by the *Kriton* even discharges made on the high seas. (Gov’t Br. at 23.)

A. “Maintaining” Should be Interpreted According to the Regulation’s Purpose of Preventing Pollution and Enforcing MARPOL.

The Coast Guard requires that a ship’s ORB be maintained and to be kept readily available for inspection, 33 C.F.R. § 151.25, so that the Coast Guard may determine compliance with MARPOL and detain ships which present an unreasonable environmental threat. 33 C.F.R. § 151.23. Coast Guard inspections are not a perfunctory action or an end in themselves. Only by interpreting “maintain” to mean an ongoing obligation to possess an accurate ORB is this purpose be upheld; any other construction would frustrate this purpose.

1. The Purpose to Assess Compliance with MARPOL Requires True Records.

“Maintaining” the ORB must be a requirement to present an accurate record of its entire discharge history because an accurate history is necessary to determine whether MARPOL has been complied with. As a party to MARPOL the United States must identify breaches and sound the alarm to alert the flag state of an offending vessel that there has been a violation. *See* IMO, MARPOL Consolidated Edition 71-72 (2006) (Regulation 17).

MARPOL regulates all discharges, whether in territorial waters or on the high seas. In order determine if the *Kriton* is in compliance, it is necessary that Ionia possess an accurate ORB of all discharges. A construction of “maintain” that would allow Ionia to enter United States waters with a falsified ORB would frustrate the purpose of assessing the *Kriton’s* compliance with MARPOL and alerting the flag state any breach.

2. The Purpose of Determining an Environmental Threat Requires Accurate ORB Records.

“Maintaining” the ORB is a requirement to present an accurate record of a ship’s entire discharge history because a full and accurate discharge history is necessary to determine the environmental threat created by the *Kriton*.

The Coast Guard is charged with determining the *Kriton's* threat to the environment as a whole. 33 C.F.R. § 151.23(b). This requires an accurate account of the amount of oily waste generated by the *Kriton* because threat levels are established by determining how much waste is produced. *See* Kjell Skognes & Øistein Johansen, Statmap: A 3-Dimensional Model for Oil Spill Risk Assessment 1364 ScienceDirect 8152, 2.3 (2003). If Ionia falsifies only some of its ORB records, an accurate determination of the amount of oily waste the vessel produces as a whole is distorted. A construction of “maintain” that would allow Ionia to present inaccurate records of discharges at sea would frustrate the Coast Guard in their duty to determine the *Kriton's* environmental threat.

B. “Maintaining” is Interpreted in Context of Language Used in 33 C.F.R. § 151.25.

Words are known by the company they keep; therefore 33 C.F.R. § 151.25 should be read as a whole for proper interpretation. *Jarecki v. G. D. Searle & Co.* 367 U.S. 303, 307 (1961). The district court properly instructed the jury that the meaning of the word “maintain” is an ongoing duty and not simply a duty to “keep” the ORB ready for inspection or a duty to properly “record” discharges. (*See* Gov’t Brief at 23.)

The Coast Guard articulated the requirement that the ORB be “kept” in such a place as to be readily available for inspections. 33 C.F.R. § 151.25(i) and that discharges shall be fully “recorded” in the ORB. 33 C.F.R. § 151.25(h). If the Coast Guard wanted to impart the meaning of “keep” or “recorded” onto the word “maintain” they would have done so by requiring the ORB be “maintained” in such a place as to be readily available for inspection, or by establishing a duty to properly “maintain” discharges.

*Inclusio unius est exclusio alterius*; the inclusion of “kept” and of “recorded” is the exclusion of “maintain.” Since the Coast Guard chose to use the words “kept” and “recorded”

instead of “maintain,” it must be inferred that the word “maintain” does not communicate the underlying obligation as clearly as the word “kept” or “recorded.”

One implication is that Ionia might breach their obligation to “maintain” the ORB in United States territorial waters regardless of whether they “kept” the ORB ready for inspection. A second implication is that Ionia might be held liable under United States jurisdiction for breaching their obligation to “maintain” the ORB even when Ionia is not subject to United States jurisdiction for failure to “record” discharges on the high seas.

Ionia should be held liable for maintaining inaccurate records while in United States territorial waters regardless of whether Ionia kept the ORB or whether the failure to record discharges happened on the high seas.

C. “Maintaining” is a Maritime Term of Art that is Interpreted as a Constant Duty.

It is necessary for the agency to choose words which will be understood by those the regulation governs. If chosen carelessly or inappropriately the regulation may be unenforceable. The agency must therefore draft regulations “in language that the common world will understand.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

The *Kriton* is a mechanical monster requiring constant maintenance on machinery ranging from engines and pumps, to electrical and environmental systems. The term maintenance in this setting can only mean good repair because any other meaning would be dangerous. A sailor who fails to maintain his vessel may be lost, stranded, or worse. In this setting maintenance is a constant duty.

The Coast Guard operates in the same setting and places the same emphasis on proper maintenance. The Coast Guard purposefully chose the word “maintain” to signify good repair, and an ongoing obligation. This is a word that every seaman would understand. *See* USMilitary.com, Coast Guard Damage Controlman, <http://www.usmilitary.com/3069/coast->

guard-damage-controlman/ (last visited Feb. 16, 2009). If the ORB is left in error as it enters United States territorial waters the ORB is not in good repair and is not properly maintained as this word is defined in the maritime environment.

D. The Rule of Lenity Does Not Apply.

The word “maintain” is defined by the purpose of preventing pollution and assessing MARPOL compliance. 33 C.F.R. §§ 151.23, 25. The word “maintain” is further defined by the language of 33 C.F.R. § 151.25. The word “maintain” is still further defined by the maritime setting. Since “maintain” is so thoroughly defined, the “grievous ambiguity” precondition required by the rule of lenity is conspicuously absent and therefore should not apply. *Huddleston v. United States*, 415 U.S. 814, 831 (1974).

**III. THE COURT’S JURY INSTRUCTIONS ON CORPORATE CRIMINAL LIABILITY ARE CONSISTENT WITH PRINCIPLES OF CRIMINAL LAW TO DETER, PUNISH AND CONDEMN CORPORATE CRIMINAL ACTS THROUGH THE DOCTRINE OF RESPONDEAT SUPERIOR.**

The district court’s jury instructions are consistent with general principles of criminal law because they provide the evidentiary basis on which corporate criminal liability may be found and a means to punish, deter and condemn criminal offenders. The instructions articulate a field of criminal law called corporate criminal law, which is based on the doctrine of strict vicarious liability, also known as respondeat superior. By applying the doctrine of respondeat superior to hold Ionia criminally culpable, the instructions are consistent with the principals of criminal law.

A. Under *New York Central*, the Jury Instructions Conform to General Principles of Criminal Law by Applying Respondeat Superior to Find Ionia’s Liability.

The jury instructions are consistent with criminal law principles because the instructions apply the doctrine of respondeat superior to find Ionia criminally liable for its employees acts. Respondeat superior imputes the acts and intent of corporate agents onto the principal corporation. *New York Central*, 212 U.S. at 494-95. *New York Central* established, and its

progeny affirmed, the application of respondeat superior as a valid means to assert the criminal law. Its steady application by the judiciary and legislature demonstrates that corporate criminal liability, premised on respondeat superior, is consistent with principles of criminal law.

1. *New York Central* First Applied Respondeat Superior to Criminal Law.

The Court first asserted respondeat superior as the foundation of corporate criminal liability in *New York Central* where it affirmed Congressional authority to extend civil law respondeat superior to criminal law. The Court carried the doctrine "only a step farther...in the interest of public policy" to "control" the conduct of an agent by "imputing his act to his employer and imposing penalties upon the corporation for which he is acting." *New York Cent.*, 212 U.S. at 494. *New York Central* incorporated respondeat superior into criminal law by finding that like a corporeal person, the conduct of an incorporeal legal entity has consequences, and so the law should set similar criminal limits on its behavior.

2. Judicial and Legislative Development of Respondeat Superior Criminal Liability Refined the Doctrine to Its Present Day Practice.

Since *New York Central*, courts and Congress further developed and formulated the general rule of corporate criminal liability. Today, a corporation may be held liable for the acts of its employees if the individual: (1) acted within the scope and nature of his employment; (2) acted, at least in part, to benefit the corporation; and (3) the act and intent can be imputed to the corporation. *In re Hellenic, Inc.*, 252 F.3d 391, 395 (5th Cir. 2001). In addition, corporate criminal liability may be applied to most statutes including "person" or "whoever," which are defined to include corporations. 1 U.S.C. § 1. Finally, Congress holds corporations criminally liable via respondeat superior in various legislative acts such as the Commodities Exchange Act (7 U.S.C. § 2(a)(1)(B) (2000)). Whether formulated in court or by statute, the application of respondeat superior is the accepted means in jurisprudence to impose corporate criminal liability.

### 3. Through Respondeat Superior the Instructions Reflect Criminal Law.

The jury instructions are consistent with principles of criminal law because they reflect respondeat superior corporate liability. To find Ionia liable, the instructions required the jury to find that Ionia's employees: acted within the scope and nature of their employment (Jury Instructions [Doc. # 164] at 19.); acted, at least in part, to benefit the company; and acts and intent could be imputed to Ionia. (*Id.* 19-20.) The instructions properly explained respondeat superior corporate liability, and in turn, the principles of criminal law. Through respondeat superior, Ionia was found liable because the *Kriton's* crew acted within their authority and with intent to benefit Ionia when they illegally discharged oil and falsified disposal records.

#### B. The Jury Instructions Seek to Deter, Punish, and Condemn Criminal Acts.

The instructions reflect respondeat superior corporate criminal liability, which advocate the principles of criminal law: deter, punish, and condemn criminal acts. Corporate attributes of intent, action, and voluntariness, like those of an individual, support criminal sanctions. Through stigmatization, condemnation, monetary and nonmonetary penalties, corporate criminal liability punishes, deters, and condemns criminal acts.

#### 1. The Stigma of Criminal Conviction Promotes Principles of Criminal Law.

A corporation's criminal conviction attaches an effective stigma of criminality that serves to deter, punish, and condemn. Because corporations are viewed by society as capable of committing unwanted or morally offensive acts, they are held to blame for the acts of their employees. When the Exxon Valdez spilled eleven million gallons of oil into Prince William Sound, the public condemned Exxon. Nina Totenberg, *Supreme Court Weighs Exxon Valdez Damages*, National Public Radio, Feb. 27, 2008, <http://www.npr.org/templates/story/story.php?storyId=48308288>. When people blame corporations, they are not merely channeling

aggression against a symbolic thing; they are condemning the fact that people within the organization collectively failed to avoid the offense to which corporate blame attaches. Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. Cal. L. Rev. 1141, 1149 (1983) (Hereinafter cited "*Reconstructing*"). The stigma attached to criminal convictions punishes through adverse publicity. This often results in negative economic consequences as corporations use their brand names to secure investments, promote credibility, and increase sales. Corporate Eye, *What is Intangible Brand Value*, <http://www.corporate-eye.com/2009/01/what-is-intangible-brand-value/> (Jan. 16, 2009). Corporations deter stigmatization by improving processes or learning from peer mistakes and avoiding the harm. *Reconstructing*, at 1154. The stigma of criminal punishment is an effective means to punish, deter, and condemn corporate crime.

## 2. Criminal, Not Civil, Liability Reflect Principles of Criminal Law.

Without criminal liability, corporations would escape moral conviction for wrongdoing, and the retributive significance of criminal liability to the community would be lost. Under a strict civil liability regime, there would be no moral condemnation equivalent to a criminal conviction. For example, a corporation found civilly liable might be deemed negligent or reckless, but no statement, in the form of a conviction, would adequately address the significance of the harm. In the end, the civil financial liability imposed would come to be viewed, by both the corporation and the community, merely as a cost of doing business.

The pressure to decriminalize corporate offenses is seen as "the economic and political power of the corporate sector [being] effectively marshaled" to discourage the provision of criminal penalties. *Reconstructing*, at 1144. Civil liability allows a company to purchase an exemption from moral condemnation, which diminishes the significance of the harm. Further,

the vindication of the valuations of persons and goods would vary not with the conduct alleged but, rather, with the offender's identity. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 351 (1996).

3. A Criminal Conviction is a Significant Financial Impact on Corporations.

Corporate criminal liability serves as a strong means to punish and deter through monetary motivations. Unlike criminal penalties, corporations often respond to civil damage awards as a predictable expense to be weighed against other costs. For instance, while developing the Pinto, Ford calculated the cost of safety, in the form of reinforcing the car's rear end, at \$121 million, versus potential victim claims estimated at \$50 million. Time, *The 50 Worst Cars of All Time*, [http://www.time.com/time/specials/2007/article/0,28804,1658545\\_1658498\\_1657866,00.html](http://www.time.com/time/specials/2007/article/0,28804,1658545_1658498_1657866,00.html) (last visited Feb. 12, 2009). Criminal liability, unlike civil liability, is a valid means to impose monetary sanctions that cannot be budgeted in a business plan. Criminal financial penalties are often derived from the United States Sentencing Guidelines ("Sentencing Guidelines"), and, in keeping with the Constitution's Eighth Amendment prohibition of cruel and unusual punishment, criminal fines avoid the "quasi criminal" nature of civil punitive damages. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991). Corporate criminal liability's monetary sanctions, effectively serve to punish, deter, and condemn corporate criminal acts.

4. A Criminal Conviction is a Major Non-Financial Impact on Corporations.

Corporate criminal liability serves as a strong means to punish and deter through nonmonetary motivations. Corporations often act based on calculations of costs and benefits that reach beyond monetary gains. Nonfinancial considerations for managers include power and prestige, group identification, and achieving goals. John Kenneth Galbraith, *The New Industrial State*, 164-66 (Sean Wilentz ed., Princeton University Press 2007) (1967).

Courts, through nonmonetary penalties, can interfere with managerial autonomy by requiring corporations to remedy defective procedures or make organizational changes. According to economist John Kenneth Galbraith, in business “[n]othing is so iniquitous as government interference in the *internal* affairs of the corporation.” *Id.* at 96. Moreover, as the Court noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962), intervention in a firm’s internal affairs to deter certain behavior may bear the hallmarks of criminal punishment, rather than a civil mandate. *Id.* at 168-69. Nonmonetary punishment provides a legitimate means for the government to intervene in business. Finally, when a company is indicted for criminal conduct that is pervasive throughout an industry, peers will often take remedial steps, and thus “an indictment often provides a unique opportunity for deterrence on a massive scale.” DOJ Mem., Deputy Attorney General, Bringing Charges Against Corporations § I-B, Signed June 16, 1999 (Hereinafter “*Memo*”). Aggregating the effects of stigmatization, moral condemnation, and monetary and nonmonetary impacts to corporate decision making, the instructions on corporate criminal liability serve to promote the principles of criminal law.

**IV. THE SUPREME COURT SHOULD NOT REVISIT ITS HOLDING IN *NEW YORK CENTRAL* BECAUSE THE CASE REFLECTS THE DEVELOPMENT OF CORPORATE CRIMINAL LAW JURISPRUDENCE AND PROVIDES A FAIR BASIS IN LAW FOR CORPORATE CRIMINAL LIABILITY.**

The Court’s ruling in *New York Central* should be upheld for its noteworthy impact on the development of corporate criminal law. The Court saw “no valid objection in law, and every reason in public policy” why a corporation that profits from its transactions and acts through its agents, could not have the knowledge and purpose of its agents imputed onto it. *New York Cent.*, 212 U.S. at 496. Further, the Court held the law should have regard, “[t]o the rights of all, and to those of corporations no less than to those of individuals, . . . and to give [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a

crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.” *Id.* at 496-497. Although *New York Central* did not mandate respondeat superior liability, it provided the foundation for and growth of corporate criminal law.

Modern corporate criminal liability doctrine is longstanding and should continue to govern for several reasons. First, most courts reject alternative theories of liability. Second, developments in civil law vicarious liability are narrowly tailored and inapplicable to criminal law. Third, alternative formulations to respondeat superior liability are no more effective than today’s doctrine. Finally, current doctrine provides a fair approach to prosecuting corporate crime. For these reasons the Court should not revisit its holding in *New York Central*.

A. Today, Most Jurisdictions Apply *New York Central*’s Respondeat Superior Corporate Criminal Liability and Reject Alternative Liability Theories.

Respondeat superior corporate criminal liability has developed into a workable rule and is relied upon to hold corporations criminally accountable. Because most courts apply some form of respondeat superior liability, the Court need not revisit *New York Central*.

1. Respondeat Superior Liability is the Prevailing Rule.

Since *New York Central*, the Court and most jurisdictions, uphold the vicarious imputation of *mens rea* to a corporation. *See, e.g., United States v. A & P Trucking*, 358 U.S. 121 (1958); *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989); Jurisprudence demonstrates a principled application and acceptance of respondeat superior liability.

2. Alternative Theories of Corporate Criminal Liability are Neither Embraced by a Majority of Courts, Nor Require a Revisit of *New York Central*.

Alternate theories of corporate criminal liability, like complicity and conspiracy are generally not accepted. Many jurists agree that a company cannot be convicted for conspiracy

with itself or its agents. Despite the view of perpetrator and corporation as separate legal personalities, the corporation itself is incapable of thinking or acting; whereas a conspiracy is fulfilled when at least two minds meet and further the conspiracy. Susan J. Hoffman, Comment, *Corporate Criminal Liability for Intracorporate Conspiracy*, 72 Ky. L.J. 225, 231-38 (1984). Although *United States v. Consol. Coal*, 424 F. Supp. 577 (S.D. Ohio 1976), adopted conspiracy, it is a rarely used theory. *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982). Corporate criminal conspiracy amounts to punishing thoughts, which contrasts criminal law principles.

Application of corporate criminal complicity raises similar problems to those encountered with conspiracy. In the civil context, corporate complicity is a means to provide punitive damages when corporate officers order, participate in, or ratify outrageous conduct affirmed by the corporation. *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 513 (7th Cir. Ill. 1997) (citing Illinois' corporate complicity rule). In the criminal context, finding proof beyond a reasonable doubt of complicity between corporate officers and the corporation, presents difficult prosecutorial problems. Like conspiracy, the complicity theory is not applied in corporate criminal law because it contradicts the accepted imputation and perpetrator-corporation relationship theories of respondeat superior. Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. Crim. L. & Criminology 285, 81-87 (1985).

B. Alternative Formulations of Respondeat Superior are Inconsistent with Current Corporate Criminal Law and Do Not Require a Revisit of *New York Central*.

Corporate criminal liability does not require a heightened liability standard or affirmative defense to be consistent with the criminal law. There are two standards to determine corporate criminal liability: the generally accepted respondeat superior and the lesser applied Model Penal Code ("MPC"). Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095, 1102-05 (1991) (Hereinafter "*Corporate Ethos*").

The MPC requires that only “high managerial” employees may impute their conduct on the company and that corporate policies could be used as an affirmative defense. *See* Model Penal Code §§ 2.07(1)(c), 2.07(5) (Proposed Official Draft 1962). Although alternatives to respondeat superior exist, they are not widely accepted and are no more effective than today’s doctrine.

1. A Heightened Liability Standard is Not Required.

Rather than enticing corporations to educate and motivate all employees to follow the law, the MPC standard discourages high level employees from properly supervising low level employees. Corporate criminal liability can thus be evaded so long as high level managers remain ignorant of low level illegal activity. Additionally, the MPC standard is flawed in that large corporations can more easily evade liability because they have more management layers, making it difficult to define an appropriate high level. *Corporate Ethos*, at 1100-01. The MPC standard does not meet *New York Central’s* pronouncement or progeny, which imputes an agent’s act to her employer, regardless of the agent’s managerial rank.

2. An Affirmative Defense to Corporate Criminal Liability is Not Required.

Providing an affirmative defense to corporations charged with criminal liability offers no benefit over current corporate liability standards. The MPC and recent civil law rulings seem to support that company policies to prevent harm should provide an affirmative defense to corporate criminal liability. *See* Model Penal Code § 2.07(5) (Proposed Official Draft 1962); e.g. *Kolstad v American Dental Ass’n*, 527 U.S. 526 (1999). An affirmative defense however, provides no increased benefit as current doctrine already incorporates equivalent standards prior to indictment and before sentencing. While the Department of Justice (“DOJ”) considers compliance programs in deciding whether to indict, the Sentencing Guidelines consider such factors when devising punishment. *See* U.S. Sentencing Guidelines Manual ch. 8, introductory

cmt. (2008) (Hereinafter “*Manual*”); *Memo*, at § II. Given the current consideration of corporate preventative measures, an explicit affirmative defense for the same is not required.

C. *New York Central Promotes Fairness in Combating Corporate Criminal Acts.*

Respondeat superior corporate criminal liability serves to fairly punish corporations, not corporate associates, by careful consideration of relevant facts and circumstances.

1. Corporations Receive Fair Punishment Under Respondeat Superior.

The DOJ makes numerous considerations before indicting a corporation, while a court considers the Sentencing Guidelines before devising a punishment. The DOJ weighs the nature of the offense, the pervasiveness and history of wrongdoing, the corporation's timely disclosure of wrongdoing and willingness to cooperate, the existence and adequacy of compliance programs and remedial actions, collateral consequences, and non-criminal remedies. *Memo*, at § II.

Further, the Sentencing Guidelines advise a court to find a fair sentence. Congress enacted the guidelines to achieve greater uniformity in sentencing. *United States v. Booker*, 543 U.S. 220, 245-55 (2005). In applying the guidelines a court reviews a corporation’s culpability according to an organization’s involvement in or tolerance of criminal activity, prior history, violation of an order, obstruction of justice, existence of compliance and ethics programs, and, cooperation or acceptance of responsibility. *See Manual* at Ch. 8, introductory cmt.

The DOJ indictment policy and Sentencing Guidelines promote a fair system to weigh criminal indictment and sentencing. These culpability principles are the fruits of years of jurisprudence and law, founded on *New York Central*. Because the process for criminally charging and sentencing a corporation is fair, the Court should not revisit *New York Central*.

2. Corporate Associates are Not Unfairly Punished by Respondeat Superior.

Respondent superior criminal liability does not unfairly punish corporate associates, such as shareholders, personnel, or consumers. An associate's distress is akin to the affliction felt by a criminal convict's family, but not the convict himself. Associates are not themselves subject to the stigma of criminal punishment. Moreover, associates subscribe to a system where corporate profits and losses are distributed on the basis of investment, rather than praise or blame. *Reconstructing*, at 1175. The Court in *Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156 (1952), observed that a shareholder, "[b]y his contribution to capital and his participation in profits, . . . puts his investment at risk, according to the conduct of the corporation. He may have claims against management but those claims have nothing to do with corporate assets subject to the demands of creditors or governments." *Id.* at 166. Corporate punishment invariably, but not unfairly, results in some associate cost, irrespective of personal fault. Any punishment felt by an associate however, is an indirect by-product of the associate's voluntary relationship with the wrongdoing company. *Reconstructing*, at 1175. Corporate criminal liability serves to fairly punish illegal corporate acts, while avoiding any unjust punishment of corporate associates.

### CONCLUSION

The government respectfully requests the Court to affirm the judgment of the court of appeals. As such, the government requests the Court find the court's instructions authorized by Court precedent and law. Additionally, the government requests the Court find the instructions consistent with criminal law principles and not revisit its holding in *New York Central*.

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Respectfully Submitted,

TEAM 22  
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