

No. 08-1234

In the Supreme Court of the United States

OCTOBER TERM 2008

IONIA MANAGEMENT S.A.,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

**BRIEF FOR THE RESPONDENT
THE UNITED STATES OF AMERICA**

TEAM 24

Attorneys for the Respondent

THE UNITED STATES OF AMERICA

QUESTIONS PRESENTED

- I. Whether the district court's jury instructions were proper when they applied the definition of vicarious corporate criminal liability authorized by the Supreme Court in precedent and by Congress in federal statutory law.

- II. Whether the district court's jury instructions that a corporation can be vicariously liable for the criminal acts of its agents were consistent with the general principles of criminal law, and whether this Court should revisit the longstanding precedent of New York Central & Hudson River Railroad Co. v. United States which established the rule for vicarious corporate criminal liability.

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
RELEVANT STATUTORY PROVISIONS.....	1
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT.....	6
I. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY THAT A CORPORATION COULD BE HELD VICARIOUSLY LIABLE FOR THE ACTS OF ITS EMPLOYEES WHEN IT APPLIED THE DEFINITION OF CORPORATE CRIMINAL LIABILITY AUTHORIZED BY THE SUPREME COURT AND FEDERAL STATUTORY LAW.....	6
A. The District Court’s Jury Instructions Properly Applied The Definition of Vicarious Corporate Liability For The Criminal Acts Of Employees Authorized By Supreme Court Precedent.....	7
1. The Supreme Court Adopted the Principle of Vicarious Corporate Liability From Civil Law And Applied It To Criminal Law.....	7
2. In Accordance With Supreme Court Precedent, The District Court Properly Instructed The Jury That Ionia Could Only Be Liable For The Crimes Of Its Employees When Acting Within The Scope Of Employment Although The Acts May Be Unauthorized, Illegal, Or Against Company Policy.....	8
B. The District Court Properly Instructed The Jury That Ionia Could be Vicariously Liable For The Crimes Of Its Employees Pursuant To Advancing The Congressional Purpose Of The APPS.....	12
II. THE DISTRICT COURT’S INSTRUCTIONS WERE CONSISTENT WITH THE REQUIRED ELEMENTS OF MENS REA AND ACTUS REUS NECESSARY TO IMPOSE PUNISHMENT ON A CORPORATION, AND THE PRINCIPLE OF STARE DECISIS ARE FORCEFULLY AGAINST REVISITING <u>NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO. V. UNITED STATES</u>.....	15
A. The District Court’s Jury Instructions On Corporate Criminal Liability Were Consistent With The General Principles Of Criminal Law Because A Corporation Can Be Attributed With The Criminal Intent And Criminal Acts Of Its Agents.....	15

1. The District Court’s Jury Instructions Provided That A Mens Rea Could Be Imputed To A Corporation For The Culpable Mental State Of An Agent While Acting With Intent To Benefit The Corporation	16
2. The District Court’s Jury Instructions Provided That An Actus Reus Can Be Imputed To A Corporation For The Criminal Acts Of Its Agents While Acting Within The Scope Of Their Delegated Authority	18
3. Vicarious Corporate Criminal Liability Under The Doctrine Of Respondeat Superior Advances Criminal Law’s Goal Of Deterrence And Effectively Punishes Corporate Misconduct	20
B. This Court Should Not Revisit Its Longstanding Decision In <u>New York Central & Hudson River Rail Road Co. v. United States</u> Because Its Holding Established The Rule Of Vicarious Corporate Criminal Liability Which Is Consistently Applied And Promotes Vigorous Enforcement Of The Law.....	20
CONCLUSION.....	24

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

<u>Am. Soc’y of Mech. Eng’rs Inc. v. Hydrolevel Corp.</u> , 456 U.S. 556 (1982)	12, 13
<u>Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters</u> , 459 U.S. 519 (1983).....	13
<u>Burlington Indus., Inc. v. Ellerth</u> , 524 U.S. 742 (1998)	6, 9, 11, 12
<u>Dickerson v. United States</u> , 530 U.S. 428 (2000).....	22
<u>Dixon v. United States</u> , 548 U.S. 1 (2006)	16
<u>Exxon Shipping Co. v. Baker</u> , 128 S. Ct. 2605 (2008).....	21
<u>Faragher v. City of Boca Raton</u> , 524 U.S. 775 (1998)	9, 11, 12
<u>Kansas v. Hendricks</u> , 521 U.S. 346 (1997).....	20
<u>Lake Shore & M.S. R. Co. v. Prentice</u> , 147 U.S. 101 (1893).....	7
<u>Meritor Sav. Bank v. Vinson</u> , 477 U.S. 57 (1986)	6, 11
<u>Meyer v. Holley</u> , 537 U.S. 280 (2003)	6, 9, 12
<u>N. Y. Cent. & Hudson River R.R. Co. v. United States</u> , 212 U.S. 481 (1909)	<i>passim</i>
<u>Payne v. Tennessee</u> , 501 U.S. 808 (1991)	21, 22
<u>Planned Parenthood of Se. Pa. v. Casey</u> , 505 U.S. 833 (1992)	22
<u>Powell v. State of Tex.</u> , 392 U.S. 514 (1968).....	18
<u>Seminole Tribe of Fla. v. Florida</u> , 517 U.S. 44 (1996).....	21
<u>United States v. A & P Trucking Co.</u> , 358 U.S. 121 (1958).....	6, 8, 10
<u>United States v. Dotterweich</u> , 320 U.S. 277 (1943)	6, 10, 12, 13
<u>United States v. Gypsum Co.</u> , 438 U.S. 422 (1978)	16
<u>United States v. Ill. Cent. R.R. Co.</u> , 303 U.S. 239 (1938).....	8
<u>United States v. Int’l Bus. Machs. Corp.</u> , 517 U.S. 843 (1996)	22

UNITED STATES COURT OF APPEALS CASES

<u>Standard Oil Co. of Tex. v. United States</u> , 307 F.2d 120 (5th Cir. 1962)	16, 17, 19
<u>United States v. Automated Med. Labs., Inc.</u> , 770 F.2d 399 (4th Cir. 1985)	16, 19
<u>United States v. Bank of New Eng.</u> , 821 F.2d 844 (1st Cir. 1987).....	19
<u>United States v. Basic Constr. Co.</u> , 711 F.2d 570 (4th Cir. 1983).....	19
<u>United States v. Carter</u> , 311 F.2d 934 (6th Cir. 1963).....	18
<u>United States v. Cincotta</u> , 689 F.2d 238 (1st Cir. 1982)	17, 18
<u>United States v. Hilton Hotels Corp.</u> , 467 F.2d 1000 (9th Cir. 1972)	13, 18, 20
<u>United States v. Inv. Enters., Inc.</u> , 10 F.3d 263 (5th Cir. 1993)	19
<u>United States v. Koppers Co.</u> , 652 F.2d 290 (2nd Cir. 1981).....	19
<u>United States v. Potter</u> , 463 F.3d 9 (1st Cir. 2006)	17, 19
<u>United States v. Sun-Diamond Growers of Cal.</u> , 138 F.3d 961 (D.C. Cir. 1998)	16
<u>United States v. Twentieth Century Fox Film Corp.</u> , 882 F.2d 656 (2nd Cir. 1989).....	20

FEDERAL STATUTES

1 U.S.C. § 1 (2006)	14
15 U.S.C. § 1 (2006).....	13

18 U.S.C. § 1519 (2006)	1
33 U.S.C. § 1901(a)(10) (2006)	14
33 U.S.C. § 1908(a) (2006)	14
45 U.S.C. § 71 (2000)	8

SECONDARY SOURCES

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<u>Developments in the Law – Corporate Crime: Regulating Through Criminal Sanction</u> , 92 Harv. L. Rev. 1227 (1979)	20
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MISCELLANEOUS

H.R. Rep. 96-1224 (1980)	13, 14
Pub. L. No. 107-204 116 Stat. 745 (2002)	23
Memorandum from Larry D. Thompson, Deputy Att’y Gen., Principles of Federal Prosecution of Business Organizations (January 20, 2003) http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited Feb. 19, 2009)	23

OPINIONS BELOW

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

RELEVANT STATUTORY PROVISIONS

1. The Act to Prevent Pollution from Ships (“APPS”), 33 U.S.C. § 1908(a) (2006)

provides:

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

“A person who knowingly violates the MARPOL Protocol, Annex IV to the Antarctic Protocol, this chapter, or the regulation issued thereunder commits a class D felony. In the discretion of the Court, an amount equal to not more than 1/2 of such fine may be paid to the person giving information leading to conviction.”

2. 18 U.S.C. § 1519 (2006) provides:

Destruction, alteration, or falsification of records in Federal investigations and bankruptcy-

“Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.”

STATEMENT OF THE CASE

Ionia Management S.A. (“Ionia”) is a ship management company that operates large oil tankers. (R. at 319.) Whenever one of Ionia’s ships arrived at a seaport in the United States, Ionia was required to certify and disclose an accurate Oil Record Book (“ORB”) to the U.S. Coast Guard (R. at 327.) An ORB records the use of a ship’s Oily Water Separator (“Separator”). (R. at 327.) The Separator is an anti-pollution device that removes oil waste from water that is used for various purposes aboard an oil tanker. (R. at 327.) Not using the Separator and allowing direct

discharge of oily waste into the ocean could cause damage to the marine environment. (R. at 327.)

Ionia managed the M/T Kriton (“Kriton”), an oil tanker that conducted business at seaports along the eastern coast of the U.S. (R. at 322.) The Kriton’s chief engineers managed the engine room crew and maintained the Kriton’s ORB’s. (R. at 326.) The engine room crew operated the Separator, including the pumps and valves used to connect a bypass hose that pumped oily waste into the Separator. (R. at 326.) The Kriton’s chief engineer specifically instructed the second engineer and the engine room crew not to use the separator. (R. at 325.) Instead of connecting the bypass hose to the Separator, the chief engineer and second engineer ordered the engine room crew to pump the oily waste through the bypass hose directly into the ocean. (R. at 325.) Additionally, a subsequent chief engineer who came aboard the Kriton gave identical instructions to the engine room crew not to use the separator and to pump oily waste directly into the ocean. (R. at 325.) Both chief engineers allegedly recorded false entries in the Kriton’s ORB indicating that the engine room crew used the pollution prevention equipment and that it functioned normally. (R. at 325-26.)

These allegedly falsified ORB’s were presented to the U.S. Coast Guard when the Kriton arrived in New Haven Harbor, Connecticut. (R. at 326.) Additionally, Ionia was alleged to have falsified illegal discharges of oily waste from January 19, 2006 to January 23, 2006, and again from March 2, 2006 to March 7, 2006. (R. at 327-28.) These ORB’s allegedly failed to account for all of the discharges and disposals of oily waste from the Kriton. (R. at 328.) After discovering the allegedly falsified ORB’s, the government brought four separate indictments against Ionia for the illegal discharge of oil waste along the eastern coast of the United States. (R. at 322.) The indictments were brought in the District Court of the Virgin Islands, the

Southern District of Florida, the Eastern District of New York, and the District of Connecticut. (R. at 323.) All four indictments were consolidated for trial in the District of Connecticut in 2007. (R. at 323.) The indictments included thirteen counts of violating 33 U.S.C. § 1908, the Act to Prevent Pollution from Ships (“APPS”). (R. at 320.) Additionally, the indictments included three counts for violating 18 U.S.C. § 1519, which prohibits any intentional act to fabricate records in the obstruction of a government investigation. (R. at 329.)

At trial, the Government and Ionia debated the proper definition of corporate criminal liability. (R. at 323.) However, the district court instructed the jury that it could find Ionia criminally liable for the acts of its employees under vicarious corporate criminal liability. (R. at 324.) The district court explained to the jury that the application of agency principles in the criminal context meant that Ionia was “legally responsible for the acts or omissions of its agents or employees under certain circumstances.” (R. at 325.) The district court instructed the jury that a corporation could “only act vicariously through its agents; that is, through its directors, officers, and employees or other persons authorized to act for it.” (R. at 324.) The district court then issued a general instruction on the definition of corporate criminal liability, stating that “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.” (R. at 324.)

Additionally, the district court’s jury instructions elaborated on the specific elements of vicarious corporate criminal liability. (R. at 325.) The instructions stated it was “not necessary that the Government prove that the corporation was actually benefited, only that the agent intended it would be.” (R. at 325.) Furthermore, in order to find a corporation liable it would be sufficient “if one of the agent’s purposes was to benefit the corporation.” (R. at 325.) The district

court's instructions allowed the jury to consider whether a corporate "agent disobeyed instructions or violated company policy in determining whether the agent intended to benefit the corporation and/or was acting within his authority." (R. at 325.) However, 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." (R. at 325.) The district court instructed that "even if the act or omission was not specifically authorized, it may still be within the scope of an agent's employment." (R. at 325.)

Furthermore, the district court provided the specific instruction that Ionia may be convicted for violating the APPS if "Ionia, through its agents, knowingly, meaning intentionally or voluntarily, failed to fully and accurately maintain an [ORB] in which the required disposal and discharge operations were recorded." (R. at 325.) On September 6, 2007, the jury returned a guilty verdict, convicting Ionia on thirteen counts of violating the APPS and three counts of falsifying the ORB's. (R. at 321.) Ionia filed a motion of judgment of acquittal, or alternatively a new trial. (R. at 322.) Ionia argued that it was not subject to criminal liability because it allegedly received no benefit from the illegal discharges, did not authorize its agents to commit the criminal acts, and implemented a strict policy against the improper discharge of oily waste. (R. at 323.) The district court denied the motion, and Ionia appealed to the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed and adopted the decision of the district court. From that decision, Ionia now appeals to this Court.

SUMMARY OF THE ARGUMENT

I.

The Supreme Court and Congress authorized the district court's jury instructions. The instructions properly applied the definition of vicarious corporate criminal liability authorized by

Supreme Court precedent. This definition requires that corporations can be vicariously liable for the criminal acts of their employees done in the scope of employment with intent to benefit the corporation. This Court adopted this definition from civil law and applied it to criminal law. Furthermore, federal statutory law authorized the jury instructions because Congress intended to attach liability to a corporation when its employees violated certain criminal statutes that protect the public interest, including the APPS. Without vicarious corporate criminal liability for these statutes, Congress' efforts to protect the public welfare would be futile. This Court should find that the district court properly instructed the jury because both the Supreme Court and Congress authorized vicarious corporate criminal liability.

II.

The district court's jury instructions on vicarious corporate criminal liability are consistent with the general principles of criminal law. The instructions required that the indispensable elements of *mens rea* and *actus reus* are imputed to a corporation by the criminal acts of its agents. The instructions were consistent with the goals of criminal law because punishment is justified for a corporation that delegated authority to an agent who committed a crime. Furthermore, the principle of *stare decisis* is against revisiting this Court's landmark decision in New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481 (1909), which established that a corporation may be held criminally liable for the crimes of its agents under the doctrine of *respondeat superior*. No Congressional legislation has contravened this Court's central holding in New York Central, and vicarious corporate criminal liability has been consistently applied in federal courts and federal prosecutions. Because the district court's jury instructions were consistent with the general principles of criminal law, and this Court should not revisit its longstanding decision in New York Central.

ARGUMENT

I. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY THAT A CORPORATION COULD BE HELD VICARIOUSLY LIABLE FOR THE ACTS OF ITS EMPLOYEES WHEN IT APPLIED THE DEFINITION OF CORPORATE CRIMINAL LIABILITY AUTHORIZED BY THE SUPREME COURT AND FEDERAL STATUTORY LAW.

The district court properly defined corporate criminal liability when it rendered its instructions to the jury. The jury instructions applied the correct definition of vicarious corporate liability that the Supreme Court adopted from civil law and applied to criminal law. Accordingly, the jury instructions required liability to attach to an employer for an employee's crime done in the scope of employment although the act is unauthorized, illegal, or against company policy. Furthermore, federal statutory law authorized the jury instruction's application of vicarious corporate criminal liability, because failing to attach liability to corporations would undermine Congressional intent to protect the public welfare from the violation of certain statutes.

This Court applied vicarious corporate criminal liability to criminal law when it held that an employee "may be controlled, in the interest of public policy, by imputing his act to his employer." N.Y. Cent. & Hudson River R.R. Co., 212 U.S. at 494. An employer is liable when he acts within the scope of employment with intent to benefit the employer. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998). Acts that are unauthorized, illegal, or done without the knowledge of an employer, may still fall within the employee's scope of employment. United States v. A & P Trucking, 358 U.S. 121, 127 (1958); United States v. Dotterweich, 320 U.S. 277, 287 (1943). In addition, the mere existence of a grievance procedure and a policy against conduct, coupled with the failure to invoke that procedure, does not insulate a corporation from liability. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986). Furthermore, Congress intended courts to apply agency law principles to advance the congressional purpose of the statute. Meyer

v. Holley, 537 U.S. 280, 289 (2003). Because the district court applied the definition of corporate criminal liability authorized by the Supreme Court and Congress, this Court should find that the jury instructions were proper.

A. The District Court’s Jury Instructions Properly Applied The Definition Of Vicarious Corporate Liability For The Criminal Acts Of Employees Authorized By Supreme Court Precedent.

1. The Supreme Court Adopted The Principle Of Vicarious Corporate Liability From Civil Law And Applied It To Criminal Law.

When providing its jury instructions, the district court applied the definition of corporate criminal liability authorized by the Supreme Court. It is well-settled in tort actions that a corporation may be held responsible for damages caused by its agents acting within the scope of their employment. Lake Shore & M.S. R. Co. v. Prentice, 147 U.S. 101, 109 (1893). This Court applied the principle of civil tort liability to criminal law going “only a step farther in holding that the act of an agent . . . may be controlled, in the interest of public policy, by imputing his act to his employer.” N.Y. Cent. & Hudson River R.R. Co., 212 U.S. at 494. In New York Central, this Court held that a provision of the Elkins Act providing for vicarious corporate criminal liability was constitutional. Id. at 499. The Court reasoned that statutes like the Elkins Act could not be effectively enforced so long as only individuals could violate them. Id. at 495. Furthermore, the individuals were merely the instruments used by a corporation to carry out acts done for its benefit. Id.

This decision established new precedent by applying to criminal law the well-settled tort principle for vicarious corporate liability. This Court intended its ruling to extend beyond the limited scope of the Elkins Act. See Id. at 494. It reasoned that although corporations cannot commit some crimes, there is “a large class of offenses wherein the crime consists in purposely doing the things prohibited by statute.” Id. For these offenses, corporations may be charged with

the knowledge and purpose of their agents acting within the scope of authority conferred to them. Id. at 495-96. Otherwise, these offenses would go unpunished in many cases. Id.

Accordingly, this Court continued to apply vicarious corporate criminal liability for violations of a broad range of criminal statutes. See United States v. Ill. Cent. R.R. Co., 303 U.S. 239, 244 (1938). This Court held that a railroad company was liable for the violation of 45 U.S.C. § 71 (2000) (repealed by Pub.L. 103-272, § 7(b), July 5, 1994, 108 Stat. 1379), when its yardmaster confined cattle for an excessive amount of time. Ill. Cent. R.R. Co., 303 U.S. at 244; see also A & P Trucking Co., 358 U.S. at 126 (holding that a trucking company was liable for its employee's violation of the Motor Carrier Act even though its partners had no knowledge of the violation).

In this case, Supreme Court precedent authorized the jury instructions. The district court based the instructions upon the principles that this Court previously applied in civil and criminal cases involving vicarious corporate liability. The effect of New York Central and its progeny is that a corporation can be a defendant in criminal proceedings arising from its agents' acts. Applying this principle, the district court in this case instructed the jury that "Ionia as a corporate agent is legally responsible for the acts or omissions of its agents under certain circumstances." (R. at 325.) This instruction correctly applies the reasoning in New York Central because Ionia depended on its employees to promote the purpose of the corporation. (R. at 326.) It acted by and through its employees to carry out the functions of the Kriton. (R. at 326.) Therefore, allowing a corporation like Ionia to reap the benefits of its relationships with its employees while avoiding liability for the crimes committed within the scope of employment would run counter to Supreme Court precedent established by New York Central.

2. In Accordance With Supreme Court Precedent, The District Court Properly Instructed The Jury That Ionia Could Only Be Liable For The Crimes Of

**Its Employees When Acting Within The Scope Of Employment Although
The Acts May Be Unauthorized, Illegal, Or Against Company Policy.**

According to Supreme Court precedent, the district court properly instructed the jury that a corporation could be held liable for crimes committed by its employees acting within the scope of employment. Furthermore, this Court authorized the instructions that even illegal acts, unauthorized acts, or acts prohibited by company policy could fall within the scope of employment.

Traditional vicarious liability renders corporations responsible for the acts of their employees within the scope of employment. Meyer, 537 U.S. at 285. Employees act in the scope of employment when their purpose “however misguided, is wholly or in part to further” the employer’s business. Burlington Indus. Inc., 524 U.S. at 756. This Court found that corporations are not liable for their employees’ “frolics and detours” where their actions are motivated by individual desires and not to serve their employer. Faragher v. City of Boca Raton, 524 U.S. 775, 798 (1998).

Accordingly, the district court correctly instructed the jury that they must find that the Government proved “that acts attributable to Ionia were acts or omissions of its agents performed within the scope of their employment.” (R. at 325.) In accordance with the Burlington decision, in this case the instructions properly defined scope of employment to include acts intended to benefit the corporation. Furthermore, under this definition the district court properly instructed that “it [was] not necessary . . . that the corporation was actually benefited, only that the agent intended it would be” because a benefit is not required. (R. at 325.)

Ionia would not escape liability even if its employees’ acts were unauthorized, illegal, or unbeknownst to Ionia. Rather, it is only necessary that the employees acted under the scope of employment with the authority conferred to them by Ionia. Furthermore, liability may be

imposed upon a corporation for an employee's crimes because illegal acts of corporate employees may fall within the scope of employment. Dotterweich, 320 U.S. at 287. A Corporation is responsible for the act an employee "has assumed to perform for the corporation when employing the corporate powers actually authorized." N.Y. Cent. & Hudson River R.R. Co., 212 U.S. at 494. In such cases, "there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act." Id. Therefore, a partnership can violate a criminal statute without the participation and knowledge of the partners as individuals. A & P Trucking, 358 U.S. at 126.

In United States v. A & P Trucking, this Court found a partnership owning trucks guilty for "knowingly and willfully" violating federal certification requirements and motor carrier regulations. Id. The Court reasoned that the business entity cannot be left free to break the law merely because its owners, stockholders, or partners do not personally participate in the violation. Id. Furthermore, "the treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents . . . in the scope of their employment." Id. Therefore, a corporation can be held responsible for acts that its agent has assumed to perform for the corporation without an express instruction.

Similarly, the jury instructions in this case required that the jury consider Ionia vicariously liable even for unauthorized acts that it claims of which it had no knowledge. Applying the reasoning in A & P Trucking, it was not necessary for Ionia's board members, stockholders, or partners to personally know about the crimes its employees committed in the scope of employment. If the employees acted with intent to benefit Ionia, then Ionia cannot obtain the potential "fruits of violations" with impunity. Id. at 126. Thus, the district court

properly instructed that “even if the act or omission was not specifically authorized, it may still be within the scope of an agent’s employment.” (R. at 325.)

Furthermore, Ionia’s company policy forbidding the illegal oil dumping does not necessarily protect it from liability. (R. at 322.) The mere existence of a grievance procedure and a policy against discrimination does not insulate a corporation from liability. Meritor Sav. Bank, 477 U.S. at 72. Only in very limited circumstances has this Court allowed a company policy as an affirmative defense to liability when employees violated it. In a Title VII sexual harassment suit, when the alleged discrimination did not result in an adverse employment action this Court allowed an employer to raise an affirmative defense to vicarious liability. Faragher, 524 U.S. at 807.

This Court intended to limit this affirmative defense to sexual harassment situations where the employee did not suffer tangible employment actions such as hiring, firing, or failing to promote. Burlington Indus., Inc. 524 U.S. at 764 (distinguished between cases of sexual harassment where a supervisor makes an adverse employment action against an employee while exercising the authority granted by the employer, as opposed to a supervisor acting under personal interests and simply creating a hostile work environment for an employee). Similar to Faragher, the Court in Burlington allowed an employer to point to a company policy as an affirmative defense in the limited instance where a discriminatory supervisor acted outside the authority conferred to him. Id. at 764.

The district court’s instructions were consistent with the holdings in both Burlington and Faragher. The instructions specifically required that the jury must find that the Government proved “beyond a reasonable doubt that acts attributable to Ionia were acts or omissions of its agents performed within the scope of their employment.” (R. at 325.) In Burlington and

Faragher, the supervisor acted outside the scope of employment, allowing the policy as a defense. Likewise, the district court properly instructed the jury that if they found that the employee was acting within the scope of his employment, they may “consider whether the agent disobeyed instructions or violated company policy.” (R. at 325.) Furthermore, the jury instructions provided that even if the “the agent’s act was . . . against the corporation’s policies [it would] not necessarily relieve the corporation of responsibility for the agent’s act.” (R. at 325.) Burlington and Faragher allowed a policy as an affirmative defense only where an employee did not suffer a tangible employment action in employment discrimination cases. In all other instances, the jury may only consider the policy’s existence. For this reason, the district court correctly instructed the jury that an agent’s act against Ionia’s policies did not necessarily relieve the corporation of responsibility for the act. Therefore, the district court properly instructed the jury by applying the definition of vicarious corporate criminal liability authorized by the Supreme Court.

B. The District Court Properly Instructed The Jury That Ionia Could Be Vicariously Liable For The Crimes Of Its Employees Pursuant To Advancing The Congressional Purpose Of The APPS.

Congress also authorized the application of vicarious liability in criminal cases. The absence of an express statutory provision for corporate vicarious criminal liability does not necessarily mean that Congress did not intend for corporations to be liable for the statute’s violation. United States v. Dotterweich 320 U.S. at 280-81. This Court has found that where a federal statute lacked a provision that explicitly authorized the application of corporate vicarious liability this Court could apply agency law principles to advance the congressional purpose of the statute. Meyer, 537 U.S. at 289; Am. Soc’y of Mech. Eng’rs Inc. v. Hydrolevel Corp., 456 U.S.

556, 568-69 (1982). Vicarious liability is especially applicable to laws Congress intended to have broad deterrent and remedial effects. Hydrolevel Corp., 456 U.S. at 568-69.

The Sherman Anti-Trust Act is illustrative because Congress did not include a specific authorization of vicarious criminal liability. 15 U.S.C. § 1 (2006). However, the central interest of the Sherman Anti-Trust Act was to assure the public fair business competition and to protect the economic freedom of participants in the market. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538 (1983). Therefore, it is reasonable to assume that Congress intended to impose criminal liability upon business entities for the acts of those to whom they chose to delegate authority under the Sherman Anti-Trust Act. United States v. Hilton Hotels Corp. 567 F.2d 1000 (9th Cir. 1973); Hydrolevel Corp., 456 U.S. at 572.

Additionally, this Court applied unusual rules of agency law that do not hold a corporation solely responsible for the acts of its employees only where Congress specified that such was its intent. Dotterweich, 320 U.S. at 280-81. In United States v. Dotterweich, this Court held that Congress's failure to include a provision for vicarious corporate criminal liability of the Federal Food and Drugs Act of 1938 did not imply that ordinary vicarious liability principles should not apply. Id. at 282. Instead, the deletion of the provision from an earlier version of the statute was because by 1938, the evolving legal standards and practice rendered such a statement superfluous and obvious for holding a corporation liable. Id.

Similar to the Sherman Act, the APPS does not have a statutory provision that explicitly authorizes the application of vicarious criminal liability. The legislative history of the APPS indicates that the purpose of the act was to prevent pollution from ships and indiscriminate discharge of oil waste at sea. H.R. Rep. 96-1224, at 11(1980). Additionally, the prospect of intentional pollution of the marine environment due to the operation of oil tankers continues to

be a “grave concern of the United States.” H.R. Rep. 96-1224, at 3. Furthermore, pollution laws are ostensibly enacted for the public good and may impose a form of strict criminal liability punishable even in the absence of intent. Stephen L. Ox, Sources of American Criminal Law, 26 Tul. Mar. L. J. 145, 172 (2001). In order to fulfill the Congressional intent for the APPS, it was necessary for the district court to apply vicarious corporate criminal liability in its instructions.

This application is consistent with evolving legal standards that generally provide that corporations are held criminally liable for statutory violations protecting the public interest. Otherwise, corporations might escape criminal liability, leaving vital public interests unprotected. Therefore, the application of principle of vicarious liability to further the congressional purpose of federal law supports the district court’s instruction that Ionia could be criminally liable if “Ionia through its agents” violated the APPS. (R. at 324.)

Additionally, Congress codified a corporation’s ability to commit crimes when it enacted 1 U.S.C. § 1 (2006). When determining the meaning of a statute, “the words ‘person’ and ‘whoever’ include corporations” unless the context of the statute indicates otherwise. 1 U.S.C. § 1. Therefore, federal statutory law provides that a corporation could be held criminally liable under a federal specific intent crime statute as a “person”.

Congress enacted the APPS to execute the International Convention for the Prevention of Pollution from Ships (“MARPOL”). H.R. Rep. 96-1224, at 1. The APPS provides that a “person who knowingly violates the MARPOL protocol” by discharging oil waste directly into the ocean “commits a class D felony.” 33 U.S.C. § 1908(a) (2006). The definitional provision for the APPS, 33 U.S.C. § 1901(a)(10) (2006), provides that “person” specifically means “public or private corporation.” 33 U.S.C. § 1901(a)(10). This definitional provision was meant to “clearly indicate when and with whom certain responsibilities lie.” H.R. Rep. 96-1224, at 14. Therefore

Congress has authorized the district court's instruction that a corporation, through its agents, could be liable for violating the APPS if it "knowingly . . . failed to fully and accurately maintain an [ORB] in which the required disposal and discharge operations were recorded." (R. at 325.) Because the District Court applied the definition of vicarious corporate criminal liability authorized by the Supreme Court and federal statutory law, this Court should find that the jury instructions were proper.

II. THE DISTRICT COURT'S INSTRUCTIONS WERE CONSISTENT WITH THE REQUIRED ELEMENTS OF MENS REA AND ACTUS REUS NECESSARY TO IMPOSE PUNISHMENT ON A CORPORATION, AND THE PRINCIPLES OF STARE DECISIS ARE FORCEFULLY AGAINST REVISITING NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO. v. UNITED STATES.

The district court's jury instructions on vicarious corporate criminal liability provided for the required elements of *mens rea* and *actus reus* necessary to impose punishment upon a corporation. The district court instructed the jury that a "corporation may be held criminally liable for the act 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." (R. at 324.) These instructions were consistent with the general principles of criminal law because punishment is justified for a corporation that delegated authority to an agent who committed a criminal act. Furthermore, the principle of stare decisis is forcefully against revisiting this Court's landmark decision in New York Central, which established that a corporation may be subject to vicarious corporate criminal liability for the illegal acts of its agents. This Court should not revisit New York Central because no Congressional legislation has contravened this Court's decision and because vicarious corporate criminal liability has been consistently applied by federal courts and vigorously implemented in federal prosecutions.

A. The District Court's Jury Instructions On Corporate Criminal Liability Are Consistent With The General Principles Of Criminal Law Because A

Corporation Can Be Attributed With The Criminal Intent And Criminal Acts Of Its Agents.

1. The District Court’s Jury Instructions Provided That *Mens Rea* Could Be Imputed To A Corporation For The Culpable Mental State Of An Agent While Acting With Intent To Benefit The Corporation.

The district court’s jury instructions based upon vicarious corporate criminal liability are consistent with the “indispensable element” of showing a culpable mental state, or *mens rea*. United States v. Gypsum Co., 438 U.S. 422, 437 (1978). Although a corporation cannot be capable of guilt or fault in the traditional sense, imputation of criminal intent serves to allocate liability for the criminal act of an agent to a corporation. United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 971 (D.C. Cir. 1998). Federal courts consistently hold that the knowledge of a corporate agent acting within the scope of his employment will be imputed to the corporation. Lowell H. Brown, Vicarious Criminal Liability of Corporations for the Acts of their Employees and Agents, 41 Loy. L. Rev. 279, 298 (1995-1996) [hereinafter Vicarious Criminal Liability]. Therefore, imputing *mens rea* of an agent to the corporation provides the corporation with the culpable the intent necessary to justify punishment. Id. at 298.

Generally, to establish *mens rea* for a specific intent crime the government must prove that the defendant knew the facts which render his actions illegal. Dixon v. United States, 548 U.S. 1, 4 (2006). Vicarious corporate liability for the violation of a specific intent crime requires that a corporate agent act within the scope of his employment. Gypsum Co., 438 U.S. at 437. Furthermore, the agent must possess “intent to benefit” the corporation. Id. at 437. For the purposes of imputing *mens rea* to a corporation, it is not necessary that the corporation receive an actual benefit. United States v. Automated Med. Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985). A corporate agent can possess “intent to benefit” if the agent acts to further the employer’s business. Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 128 (5th Cir.

1962). An agent's knowingly committed criminal act will still be imputed to the corporation "if from such intended conduct no benefit accrues, a benefit is indiscernible, [or] the result turns out to be adverse." Standard Oil Co. of Tex., 307 F.2d at 128. Therefore, federal case law has established that an agent who commits a criminal act while possessing intent to benefit the corporation will impute *mens rea* to the corporation.

The district court provided the essential instructions to establish *mens rea*. The district court's instructions satisfied the *mens rea* requirement by instructing that a "corporation may be held criminally liable for the acts of its agent done on behalf of and for the benefit of the corporation." (R. at 324.) The district court's instructions allowed the jury to consider whether a corporate "agent disobeyed instructions or violated company policy in determining whether the agent intended to benefit the corporation." (R. at 325.) However, federal case law has rejected the proposition that a corporation cannot possess *mens rea* if it has enacted corporate policies to prohibit the criminal acts in question. U.S. v. Potter, 463 F.3d 9, 26 (1st Cir. 2006).

Additionally, the district court's instruction that the "government need not prove that the agent was only concerned with benefiting the corporation" was consistent with the prevailing rule that no benefit to the corporation was necessary. (R. at 325.) The *mens rea* requirement was satisfied by instructing the jury that a corporation could be liable if "one of the agent's purposes was to benefit the corporation." (R. at 325.) It is sufficient to impute the knowledge of an employee to a corporation where the employee has acted "at least in part-by intent to benefit the corporation." United States v. Cincotta, 689 F.2d 238, 242 (1st Cir. 1982). These instructions followed the prevailing view that a corporation may be subject to criminal liability for specific intent crimes by imputing a knowing violation of the law committed by a corporate agent while performing tasks within the agent's general line of work. Hilton Hotels Corp., 467 F.2d at 1004.

Therefore, the district court provided the instructions necessary to satisfy the *mens rea* requirement in order to find a corporation criminally liable for the acts of its agents.

2. The District Court’s Jury Instructions Provided That *Actus Reus* Can Be Imputed To A Corporation For The Criminal Acts Of Its Agents Acting Within The Scope Of Their Delegated Authority.

The district court’s instructions on vicarious corporate criminal liability were consistent with the requirement of *actus reus* to be punished for a crime. The instructions were consistent with the general principle that criminal liability subsists only when the accused has an *actus reus* by committing a criminal act. Powell v. State of Tex., 392 U.S. 514, 533 (1968). The basic premise of vicarious corporate criminal liability is that a corporation can act only through its agents. United States v. Carter, 311 F.2d 934, 942 (6th Cir. 1963). As a result, the criminal conduct of corporate agents will be imputed to the corporation. Carter, 311 F.2d at 942. Therefore, the district court properly instructed the jury that a “corporation may be held criminally liable for the acts of its agent” because a corporation can be imputed with the criminal acts of their agents. (R. at 324.)

To impute *actus reus* to a corporation, the corporate agent must be performing acts of the kind which the agent is authorized to perform. Cincotta, 689 F.2d at 241-42. Illegal conduct is within the scope of authority if the illegal acts somehow further the corporation’s business. Carter, 311 F.2d at 941 (a corporation was convicted when one of its officers responsible for negotiating labor disputes illegally provided a union representative with funds during the course of negotiations). However, federal courts broadly construed the scope of the agent’s employment. Vicarious Criminal Liability, at 291. Otherwise, a corporation could immunize itself by shifting responsibility upon an individual actor, claiming that the actions were outside the authority afforded to the agent Id. at 219.

Additionally, whether a corporation is criminally liable will depend upon the authority it delegated to its agent. United States v. Inv. Enters., Inc., 10 F.3d 263, 266 (5th Cir. 1993). Federal courts broadly defined the scope of authority to include acts done in the agent's general line of work. Automated Med. Labs., Inc., 770 F.2d at 407. This proposition is not limited to corporate policy makers. United States v. Koppers Co., 652 F.2d 290, 298 (2nd Cir. 1981). Even the criminal acts of low level employees will impute *actus reus* to a corporation. United States v. Bank of New Eng., 821 F.2d 844, 857 (1st Cir. 1987); Standard Oil Co., 307 F.2d at 127. Furthermore, a corporation can still be attributed with *actus reus* even if the corporation did not specifically authorize its agents to commit the criminal acts in question. Potter, 463 F.3d at 26. Therefore, corporations may still be criminally responsible for the acts of their agents even if such acts were against corporate policy or express instructions. United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983).

In this case, the district court properly applied the broad definition of the scope of authority. The district court instructed "a corporation may be held criminally liable for the acts of its agent that are directly related to the performance of duties the employee has authority to perform." (R. at 324.) Therefore, under the district court's instructions, a corporation that has conferred authority to an agent can be found criminally liable for the illegal acts of agents acting within that authority.

Here, the district court's instructions provided that a corporation may be liable for the acts of its agents which are "directly related" to their "authority to perform." (R. at 324.) Under the district court's instruction, if it were found that the agent acted within the authority granted by the corporation, then a culpable act of an agent may be imputed to the corporation. Therefore,

a corporation may be criminally liable for the culpable conduct of an employee under the district court's instructions, satisfying the requirement of *actus reus* to justify punishment.

3. Vicarious Corporate Criminal Liability Advances Criminal Law's Goal Of Deterrence And Effectively Punishes Corporate Misconduct.

This Court established that the two primary goals of criminal law are retribution for criminal acts and deterrence of future criminal acts. Kansas v. Hendricks, 521 U.S. 346, 347 (1997). Deterrence is the primary rationale for imposing criminal sanctions upon corporate entities. Developments in the Law – Corporate Crime: Regulating Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1235-36 (1979). Deterrence will play a larger role in policing corporations because corporations engage in calculating the cost and benefits of their actions for economic gain. Id. at 1235-36. Additionally, criminal liability is understood as the “vehicle of moral condemnation.” Lawrence Friedman, In Defense of Corporate Criminal Liability, 23 Harv. J. L. & Pub. Pol’y 83, 858 (1999-2000). Therefore, pure civil liability could be perceived by a corporation as the “cost of doing business.” Id. at 858.

To fulfill the primary goals of criminal law, a corporation cannot be allowed to distance itself from the criminal acts of its agents. United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 661 (2nd Cir. 1989). Vicarious criminal liability is imposed upon business entities because it stimulates a “maximum effort by owners and managers to assure adherence by such agents to the requirements of the law.” Hilton Hotels Corp., 467 F.2d at 1005. Therefore the rule of vicarious corporate criminal liability is an effective means of policing corporate misconduct and provides an avenue for the law to hold a corporation accountable for the criminal conduct of its agents.

B. This Court Should Not Revisit Its Longstanding Decision In New York Central & Hudson River Rail Road Co. v. United States Because It Established The Rule

Of Vicarious Corporate Criminal Liability Which Is Consistently Applied And Promotes Vigorous Enforcement Of The Law

This Court should not revisit its decision in New York Central, because vicarious corporate criminal liability is well established in the prevention and prosecution of corporate criminal conduct. Stare decisis is a principle of policy and not an inexorable command. Payne v. Tennessee, 501 U.S. 808, 828 (1991). However, this Court has frequently declined to revisit a case because stare decisis promotes the consistent development of the law. United States v. Int'l. Bus. Machs. Corp., 517 U.S. 843, 856 (1996). Additionally, stare decisis is much stronger in non-constitutional decisions, because the decisions of this Court are subject to revision by Congress. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996).

Congress has refrained from reversing the New York Central holding which established the common law rule of vicarious corporate criminal liability under the doctrine of respondeat superior. This Court has established that when a federal court crafts a common law rule, its decision is “subject to the authority of Congress to legislate otherwise” if it disagrees with the rule. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2619 (2008). Therefore, in light of Congress’ continued abstention from legislating to reverse or revise this Court’s holding in New York Central, corporations should continue to be held responsible for the criminal acts of their employees under the rule of vicarious corporate criminal liability.

Even if this Court decided to revisit New York Central, the principle of stare decisis is strongly against overruling this longstanding precedent. While this Court stated that adhering to precedent is usually the wise policy, it has never felt constrained to follow decisions that are badly reasoned or unworkable. Payne, 501 U.S. at 827. Nonetheless, the doctrine of stare decisis carries such force that this Court requires some special justification to depart from precedent. Int'l Bus. Machs. Corp., 517 U.S. at 856 (declined to overrule longstanding precedent which had

been controlling for over 80 years without some special justification to depart from the rule). Additionally, it may not be appropriate to overrule precedent when subsequent developments in the law have not undermined its doctrinal underpinnings. Dickerson v. United States, 530 U.S. 428, 443 (2000). Furthermore, this Court has refrained from overruling precedent where new observations or divergences of fact have developed that does not bear on the validity of a case's central holding. Planned Parenthood of Se. Pa. Casey, 505 U.S. 843, 865 (1992).

This Court's decision in New York Central has not been proven to be poorly reasoned or shown to be impractical in its application. Payne, 501 U.S. at 825-26. In New York Central, this Court did not address the theoretical, policy, and practical issues of applying criminal liability to corporate entities, nor has it since. However, this Court's holding in New York Central unequivocally embraced respondeat superior as the basis for corporate criminal liability. N.Y. Cent. & Hudson R.R. Co., 281 U.S. at 494-95. Furthermore, federal courts have applied and expanded the common law rule of vicarious liability in order to reach a broad range of corporate criminal behavior for the past one hundred years. Kevin B. Huff, The Role of Corporate Compliance Programs In Determining Corporate Criminal Liability: A Suggested Approach, 96 Colum. L. Rev. 1252, 1257 (1996). Therefore, this Court should not revisit New York Central because there is no special justification for overruling this longstanding and widely accepted precedent.

Additionally, the application of vicarious corporate criminal liability established by New York Central remains vital to the enforcement of laws meant to prohibit corporate misconduct. Under the Department of Justice's "Principles of Federal Prosecution of Business Organizations," the government has maintained a substantial interest in vigorous prosecutions of corporations for the criminal acts of their agents under vicarious corporate criminal liability.

Memorandum from Larry D. Thompson, Deputy Att’y Gen., Principles of Federal Prosecution of Business Organizations (January 20, 2003) http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited Feb. 19, 2009). The Department of Justice has acknowledged that certain crimes that carry a substantial risk to the public, such as environmental crimes, and are by their nature most likely to be committed by a business. Id. at 2. Therefore, the doctrinal underpinnings of this Court’s decision in New York Central have not been undermined, because vicarious corporate criminal liability remains embedded in federal prosecutions of corporations.

Furthermore, this Court should not revisit New York Central because preventing corporate crime is just as imperative today as it was in 1909. Geraldine Szott Moore, Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation, 44 Am. Crim. L. Rev. 1343, 1357 (2007). The dramatic congressional expansion of corporate compliance standards and oversight during the early twenty-first century is indicative of the enduring need to impose criminal liability upon corporations. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 116 Stat. 745 (2002) (Congress enacted heightened penalties and established new corporate crimes within regulatory reforms). This expansion of corporate criminal law lends support to the continued application of this Court’s central holding in New York Central. The government should continue to hold a corporation accountable for the criminal conduct of its agents. Otherwise, statutorily proscribed behavior in the course of a corporations business may extend beyond the reach of the law.

Therefore, the district court’s jury instructions under the rule of vicarious corporate criminal liability advance the goals of criminal law, and this Court should not revisit New York Central because of the enduring necessity to hold corporations criminally responsible for the illegal acts of their agents.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the District Court of Connecticut, which was affirmed and adopted by the United States Court of Appeals for the Second Circuit.

Respectfully submitted.

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The United States of America