

In the Supreme Court of the United States

IONIA MANAGEMENT S.A.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari to the
United States Supreme Court

BRIEF FOR PETITIONER

TEAM 3
Counsel for Petitioner

CORPORATE DISCLOSURE STATEMENT

Ionia Management S.A. (“Ionia”) is a closely held Liberian corporation headquartered in Greece. It has no parent company and no public company owns any of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... iv

QUESTIONS PRESENTED FOR REVIEW..... ix

JURISDICTIONAL STATEMENT..... x

STATEMENT OF THE CASE..... 11

STANDARD OF REVIEW..... 12

SUMMARY OF THE ARGUMENT..... 13

ARGUMENT

I. THE DISTRICT COURT’S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS NOT AUTHORIZED BY SUPREME COURT PRECEDENT OR FEDERAL STATUTORY LAW..... 14

A. The District Court Misinterpreted and Misapplied the Holding in *New York Central & Hudson River Railroad v. United States*..... 14

1. The Holding in *New York Central & Hudson River Railroad v. United States* is Limited in its Application to the Elkins Act..... 15

2. Congress Did Not Intend to Create a General Federal Statutory Law Authorizing Corporate Criminal Liability..... 16

B. As There is No Federal Statutory Law or Supreme Court Case Instructive on Corporate Criminal Liability, this Court Should Look to Analogous Supreme Court Decisions Addressing Vicarious Liability in the Civil Context..... 18

II. THE PRINCIPLES OF VICARIOUS CORPORATE CRIMINAL LIABILITY SHOULD BE CONSISTENT WITH SUPREME COURT PRECEDENT AND THE GOALS OF CRIMINAL LAW..... 21

A. The Goals of Criminal Law are Not Met Under the Theory of *Respondeat Superior* as Applied in the Instant Case..... 22

B. Analogous Supreme Court Precedent Provides an Application of Vicarious Liability that Satisfies the General Principles of Criminal Law..... 24

C.	Alternative Approaches Encourage a Reform of Strict <i>Respondeat Superior</i> Principles.....	26
	CONCLUSION.....	30

TABLE OF AUTHORITIES

CITATIONS TO THE RECORD BELOW

D.C.T. Indictment, No. 07-00134.....11

United States v. Ionia Management SA, 526 F. Supp.2d 319 (D. Conn. 2007).....11, 14, 16, 17

CASES

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).....24

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).....19, 20, 21

Exxon Shipping Co. v. Baker, 2008 U.S. LEXIS 5263 (June 25, 2008).....25, 26

Faragher v. City of Boca Raton, 524 U.S. 775 (1998).....19, 20, 21

J.C.B. Super Markets, Inc., v. United States, 530 F. 2d 1119 (2d Cir. 1976).....18

Kansas v. Hendricks, 521 U.S. 346 (1997).....24

Kolstad v. American Dental Association, 527 U.S. 526 (1999).....19, 20, 21, 24, 25, 26, 27, 28

Lathrop v. Adams, 133 Mass. 471 (1882).....16

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

Salve Regina College v. Russell, 499 U.S. 225 (1991).....12

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).....26

United States v. Beusch 596 F. 2d 871 (9th Cir. 1979).....18

United States v. Brown, 381 U.S. 437 (1965).....22

United States v. Cincotta, 689 F. 2d 238 (1st Cir. 1982).....18

United States v. Demauro, 581 F. 2d 50 (2d Cir. 1978).....18

<i>United States v. George F. Fish, Inc.</i> , 154 F. 2d 798 (2d Cir. 1946).....	18
<i>United States v. Koppers, Inc.</i> , 652 F. 2d 290 (2d Cir. 1981).....	18
<i>United States v. Twentieth Century Fox Film Corp.</i> , 882 F. 2d 656 (2d Cir. 1989).....	18
<i>Washington Gaslight Co. v. Lansden</i> , 172 U.S. 534 (1899).....	16

STATUTES

1 U.S.C. § 1.....	16
7 U.S.C. § 2(a)(1)(B).....	18
7 U.S.C. § 15(b)(i).....	18
7 U.S.C. § 63.....	18
7 U.S.C. § 87(d).....	18
7 U.S.C. § 223.....	18
7 U.S.C. § 473(c)(3).....	18
7 U.S.C. § 499(p).....	18
7 U.S.C. § 5111.....	18
7 U.S.C. § 2139.....	18
7 U.S.C.A. § 8318(c).....	18
15 U.S.C. § 431.....	18
18 U.S.C. § 371.....	x, 11, 17
18 U.S.C. § 1505.....	x, 11, 17
18 U.S.C. § 1519.....	x, 11, 17

18 U.S.C. § 3551.....	22, 23
18 U.S.C. § 3554.....	22
18 U.S.C. § 3555.....	22
18 U.S.C. § 3556.....	22
18 U.S.C. § 3563.....	22
18 U.S.C. § 3601.....	22
21 U.S.C. § 63.....	18
21 U.S.C. § 461.....	18
21 U.S.C. § 1041.....	18
28 U.S.C. § 1254(1).....	x
28 U.S.C. § 1291.....	x
33 U.S.C. § 1908(a).....	x, 11, 17
47 U.S.C. § 217.....	18
Pub. L. No. 57-103, ch. 708, 32 Stat. 846.....	17

OTHER AUTHORITIES

Andrew Weissman with David Neuman, <i>Rethinking Criminal Corporate Liability</i> , 82 Ind. L.J. 411 (2007).....	22, 23, 27, 28
Andrew Weissman, Richard Ziegler, Luke McLoughlin, & Joseph McFadden, <i>Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior</i> , 2 (U.S. Chamber Institute for Legal Reform 2008).....	14, 15, 16, 18, 21, 26, 27, 28, 29
Charles J. Walsh & Alissa Pyrih, <i>Corporate Compliance Programs as a Shield to Criminal Liability: Can a Corporation Save Its Soul?</i> , 47 Rutgers L. Rev. 605, 689 (1995).....	28

Christopher Green, <i>Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law</i> , 87 Neb. L. Rev. 197 (2008).....	25, 29
Diana E. Murphy, <i>The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics</i> , 87 Iowa L. Rev. 697, 710-711 (2002).....	28
Elizabeth K. Ainslie, <i>Indicting Corporations Revisited: Lessons of the Arthur Anderson Prosecution</i> , 43 Am. Crim. L. Rev. 107, 126-142 (2006).....	29
<i>Final Report of the Attorney General’s Committee on Administrative Procedure</i> , S. Doc. No. 8, (1941).....	27
Harvard Law Review Association, <i>Developments in the Law – Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction</i> , 92 Harv. L. Rev. 1227, 1241-59 (1979).....	28
Model Penal Code § 2.07(1) (1962).....	29
Model Penal Code § 2.07(5) (1962).....	28
Model Punitive Damages Act § 1(2) (1996).....	24
Restatement of Agency (Second) § 228(1) (1958).....	20
Restatement of Agency (Second) § 230 (1958).....	20
Richard S. Gruner & Louis M. Brown, <i>Organizational Justice: Recognizing and Rewarding the Good Citizen Croproation</i> , 21 J. Corp. L. 731, 764-65 (1996).....	28

QUESTIONS PRESENTED FOR REVIEW

- I. There are no general federal statutes that hold corporations vicariously criminally liable for the illegal actions of their agents or employees. The only one-hundred-year-old Supreme Court case to address the issue of vicarious corporate liability in the criminal context is *New York Central & Hudson River Railroad v. United States*. The Supreme Court found only that Congress had the constitutional power to impute criminal liability to a corporation through the expressed provisions of a statute, which in that case, was the Elkins Act. Should *New York Central's* limited holding be construed to mean that all courts must apply strict *respondeat superior* principles in every case involving corporate criminal liability, regardless of the text of the statute in question?

- II. The general goals of criminal law are to deter and punish misconduct society finds repugnant. The strict application of *respondeat superior*, as misinterpreted from *New York Central & Hudson River Railroad v. United States*, holds corporations vicariously liable for the misconduct of their employees, regardless of their compliance with statutory law. Recent Supreme Court decisions abandon the strict *respondeat superior* theory of liability, in the analogous context of awarding civil punitive damages. Should this Court adopt a new standard of vicarious corporate criminal liability more consistent with the general principles of criminal law?

JURISDICTIONAL STATEMENT

This case arises under Federal Statutes 18 U.S.C. §§ 371, 1505, 1519, and 33 U.S.C § 1908(a). The Court of Appeals for the Second Circuit had jurisdiction over the appeal from the District Court judgment pursuant to 28 U.S.C. § 1291. The final decision of the Court of Appeals was entered September 1, 2008 and respondent filed a timely notice of appeal. Petition for writ of certiorari to the United States Supreme Court was granted on January 9, 2009. The jurisdiction of the Supreme Court is invoked under the Supreme Court Case Selection Act, 28 U.S.C. § 1254(1) (2006).

STATEMENT OF THE CASE

Ionia Management, S.A. (“Ionia”), Petitioner, is a ship management company incorporated in Liberia and headquartered in Piraeus, Greece. D.C.T. Indictment, No. 07-00134, ¶1 (2008). Ionia operates a fleet of commercial tanker vessels, which includes the M/T Kriton. *Id.* at ¶1. The M/T Kriton was engaged in the carriage of oil and petroleum products to ports in the United States. *Id.* at ¶3.

On or about March 20, 2007, the M/T Kriton arrived in the Port of New Haven, Connecticut. There, the United States Coast Guard conducted an inspection of the M/T Kriton and initiated a criminal investigation. *Id.* at ¶3. The Respondent, United States of America, brought an indictment against Ionia, who was subsequently convicted of conspiracy, 18 U.S.C. § 371, violations of the Act to Prevent Pollution from Ships, 33 U.S.C. § 1908(a), obstruction of justice, 18 U.S.C. § 1505, and falsification of records, 18 U.S.C. § 1519. *United States v. Ionia Management S.A.*, 526 F.Supp.2d at 321.

The District Court provided a strict *respondeat superior* instruction to the jury, requiring the jury to find Ionia guilty if it determined Ionia had committed crimes “by and through the acts of its agents and employees, who were acting in scope of their employment and for the benefit of their employer”. *Id.* at 324.

Ionia now appeals from a jury verdict in the United States District Court for the District of Connecticut, on the theory that the jury instructions were based on a misinterpretation of the holding in *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909) and not provided in any statutory regime enacted by Congress. Further, Ionia alleges that the *respondeat superior* instructions conflict with analogous Supreme Court precedent in the civil context and the general principles of criminal law.

STANDARD OF REVIEW

The appropriate standard for reviewing a lower court's determination of a question of law is *de novo*. "As a general matter, of course, the courts of appeals are vested with plenary appellate authority over final decisions of district courts." *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991).

SUMMARY OF THE ARGUMENT

- I. The District Court’s instruction on corporate criminal liability was not authorized by either Supreme Court precedent or federal statutory law. The guilt of Ionia Management, S.A. was founded solely on an erroneous reading of the common-law holding in *New York Central & Hudson River Railroad v. United States*. This Court should reverse the lower court’s finding of vicarious liability for three reasons. First, the lower court misinterpreted the holding in *New York Central & Hudson River Railroad v. United States* to mean that all corporations must be held vicariously liable for the acts of their agents or employees regardless of statutory text. Second, Congress has not enacted a doctrine of general vicarious corporate criminal liability. Third, all Supreme Court cases addressing vicarious corporate liability in the civil context reject a strict application of the *respondeat superior* principle. For these reasons, the District Court erred in their instruction on vicarious corporate criminal liability.

- II. The vicarious corporate criminal liability standard as misapplied from *New York Central & Hudson River Railroad v. United States* is inconsistent with the general principles of criminal law and should be abandoned for three reasons. First, the theory of *respondeat superior*, as applied in the instant case, does not meet the objectives of criminal law. Second, Supreme Court precedents in the analogous civil context provide guidance on how vicarious corporate criminal liability should be applied. Third, several states have adopted alternative standards of vicarious corporate criminal liability which should encourage this Court to adopt a similar standard.

ARGUMENT

I. THE DISTRICT COURT’S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS NOT AUTHORIZED BY SUPREME COURT PRECEDENT OR FEDERAL STATUTORY LAW

The frequently cited, but unjust standard of corporate criminal liability is not founded on either an act of Congress or Supreme Court precedent. “Unlike other criminal laws, which are embodied in statutes approved by Congress, the current doctrine has not been commanded by Congress, but instead created by courts through the common law. Its judge-made genesis is based on a fundamental misreading of the sole Supreme Court precedent to address the issue, [*New York Central & Hudson River Railroad v. United States*]. Andrew Weissman, et. al., *Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior*, 2 (U.S. Chamber Institute for Legal Reform 2008). The District Court’s misinterpretation of this 1909 holding lead to an erroneous jury instruction.

A. The District Court Misinterpreted and Misapplied the Holding in *New York Central & Hudson River Railroad v. United States*.

An erroneous reading of the holding in *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909) has lead to a longstanding mistaken application of the doctrine of corporate criminal liability in lower courts. District Judge Arterton held that, “the Supreme Court has long ago determined that the corporation may be held criminally liable for the acts of an agent within the scope of his employment and that the state and lower federal court have been consistent in their application of that doctrine” *U.S. v. Ionia Mgmt SA*, 526 F. Supp.2d 319, 323 (D. Conn. 2007). The Supreme Court in *New York Central* issued a limited holding, applicable only to the statute addressed in that case. However, the District Court and several other lower courts have applied varying formulations of the doctrine of corporate criminal

liability, under the misguided belief that *New York Central* created a general common law rule providing the courts with broad discretion to impute criminal liability to all corporations.

1. The Holding in *New York Central & Hudson River River Railroad v. United States* is Limited in its Application to the Elkins Act.

In the early case of *New York Central*, the Supreme Court addressed the limited question of whether Congress was vested with the constitutional power to subject a corporation to vicarious criminal liability under a statute. Specifically, whether under the Elkins Act, criminal liability could be imputed to a corporation whose employees granted illegal rebates. The Court, “determined only that Congress has the constitutional power to include *respondeat superior* principles in a criminal statute. The decision said nothing whatsoever about the criteria that govern the imputation of corporate criminal liability for those federal criminal statutes where Congress has made no such choice.” Weissman, Reforming, *supra*, at 4.

Read in accordance with its plain meaning, the Court concluded that it is *possible* for a corporation to be held liable for the actions of its agents or employees, when a statute expressly provides for such vicarious criminal liability. The Court, however, did not conclude that a corporation *must* or *will* be held liable for the criminal actions of its agents or employees, absent an express statutory provision. The Court in *New York Central* clearly stated,

We think a fair construction of *the act* permits both the corporation and the agent to be joined in one indictment for the commission of the offense. The purpose of *the act* was to make the act one of the corporation as well as the agent, and to include both within the prohibitions and restrictions of the statute. 212 U.S. 481, 497 (1909). (emphasis added).

Additionally, the Court declared, “[i]t is now well established that, in actions for tort, the corporation *may* be held responsible for damages for the acts of its agent within the scope of his employment. *Id.* at 493. The statements of the Supreme Court should not be construed to have a broad sweeping affect over all cases in which the issue of corporate criminal liability is raised.

In circumstances where vicarious criminal liability is imputed to corporations through the express provisions of a statute, the Court cites from cases which clarify when a corporation, through the authority of a statute, may be held vicariously criminally liable.¹ Lower courts have mistakenly relied on [the] decision from 1909,

as if it instructed the trial courts that they *must* apply the least demanding *respondeat superior* rule in the criminal context. Not at issue was whether in all cases – even in the absence of explicit statutory mandate – federal common law required that the criminal actions of an employee be imputed to the corporation based on the least demanding principles of *respondeat superior*, regardless of the employee’s position of responsibility or the corporation’s actions to prevent such criminal acts.” Weissman, Reforming, *supra*, at 4.

The District Court misapplied the limited holding in *New York Central* and therefore, its jury instruction was inappropriate. The District Court’s charge to the jury regarding corporate criminal liability, included in pertinent part, “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 the authority to perform.” *U.S. v. Ionia Mgmt SA*, 526 F. Supp.2d 319, 324 (D.Conn. 2007). *New York Central* authorized no such holding.

2. Congress Did Not Intend to Create a General Federal Statutory Law Authorizing Corporate Criminal Liability.

Title 1 of the United States Code § 1 (2000) makes it plausible for a corporation to be charged with a crime. “Unless the statute indicates otherwise, the words ‘person’ and ‘whoever’

¹ *Lothrop v. Adams*, 133 Mass. 471 (1882) (“In such cases, liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal.”); *Washington Gaslight Co. v. Lansden*, 172 U.S. 534, 544 (1899). (“A corporation is held responsible for acts...the agent assumed to perform for the corporation when employing the corporate powers actually authorized, and 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.”)

in any federal statute are defined to include corporations.” Therefore, under the United States Code, Ionia *could* have been charged with violating an act of Congress. However, in the instant case, Ionia was not directly charged. The indictments against Ionia are based solely on a *respondeat superior* theory of liability.² Ionia was being charged by and through the acts of its agents and employees. The District Court instructed the jury that it would have to, “find that acts attributable to Ionia were acts or omissions of its agents performed ‘within the scope of their employment’ with Ionia.” *U.S. v. Ionia Mgmt SA*, 526 F. Supp.2d 319, 324 (D. Conn. 2007).

In the case of *New York Central*, the defendant corporation was held responsible for its employees’ violations of the Elkins Act. Within this act, Congress included an explicit provision for imputing criminal liability to a corporation. “In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment shall, in every case, be also deemed to be the act, omission or failure of such carrier, as well as that person.” Pub. L. No. 57-103, ch. 708, 32 Stat. 846 (1903). In the instant case however, Congress has included no such provision for imputing criminal liability to a corporation under any of the four statutes with which Ionia has been charged.

Had Congress intended to hold a corporation liable for the acts of its employees under 18 U.S.C. §§ 371, 1505, 1519, or 33 U.S.C § 1908(a), it would have included an explicit provision within those particular statutes. There are numerous instances in which Congress has statutorily

² Ionia has been charge with violating 33 U.S.C. § 1908(a) (2000)(“A person who knowingly violates the MARPOL protocol . . . commits a Class D felony.”; 18 U.S.C. § 371 (2000) (“If two or more persons conspire . . . each shall be fined under this title or imprisoned not more than five years, or both.”); 18 U.S.C. § 1519 (2000) (“Whoever knowingly alters . . . or makes a false entry in any record . . .with the intent to impede, obstruct, or influence the investigation . . . of any matter . . .shall be fined under this title, imprisoned not more than 20 years, or both.”); 18 U.S.C. § 1505 (2000) (“Whoever, with intent to avoid, evade or prevent, or obstruct compliance with any civil investigative demand . . . shall be fined under this title [or] imprisoned not more than 5 years . . .”).

expressed their desire to hold corporations vicariously criminally liable.³ Congress' silence on the issue in the statutes of this case indicates its decision not to impute vicarious criminal liability to employers.

B. As There is No Federal Statutory Law or Supreme Court Case Instructive on Corporate Criminal Liability, this Court Should Look to Analogous Supreme Court Decisions Addressing Vicarious Liability in the Civil Context

All of the cases the District Court cites as supporting a strict application of the corporate criminal liability doctrine - the most recent of which is from 1989 - are non-binding, lower court decisions.⁴ The only binding Supreme Court decision referenced by the District Court is *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909), which did not address how vicarious corporate criminal liability should be determined in the absence of statutory instruction. As there is no Supreme Court precedent or federal statutory law instructing the courts on whether or when they should impute criminal liability to a corporation, this Court should look to analogous Supreme Court decisions addressing corporate liability in the civil context for the appropriate principles to apply. Weissman, Reforming, supra, at 7.

³ See, e.g., Commodities Exchange Act, 7 U.S.C. § 2(a)(1)(B)(2000); United States Cotton Futures Act, 7 U.S.C. § 15(b)(i) (2000); United States Cotton Standards Act, 7 U.S.C. § 63 (2000); United States Grain Standards Act, 7 U.S.C. § 87(d) (2000); Packers and Stockyards Act, 7 U.S.C. § 223 (2000); Cotton Statistics and Estimates Act, 7 U.S.C. § 473(c)(3)(2000); Perishable Agricultural Commodities Act, 7 U.S.C. § 499(p) (2000); Tobacco Inspection Act, 7 U.S.C. § 5111 (2000); Act of Aug. 24, 1996 (regarding the handling of animals), 7 U.S.C. § 2139 (2000); Animal Health Protection Act, 7 U.S.C.A. § 8318(c) (West 2008); An Act to Prevent Discrimination Against Farmers' Cooperative Associations, 15 U.S.C. § 431 (2000); Filled Milk Act, 21 U.S.C. § 63 (2000); Poultry Products Inspection Act, 21 U.S.C. § 461; Egg Productions Inspection Act, 21 U.S.C. § 1041 (2000); Communications Act, 47 U.S.C. § 217 (2000).

⁴ See *United States v. George F. Fish, Inc.*, 154 F. 2d 798, 801 (2d Cir. 1946); *United States v. Koppers, Inc.*, 652 F. 2d 290, 298 (2d Cir. 1981); *J.C.B. Super Markets, Inc., v. United States*, 530 F. 2d 1119, 1122 (2d Cir. 1976); *United States v. Twentieth Century Fox Film Corp.*, 882 F. 2d 656, 660 (2d Cir. 1989); *United States v. Beusch* 596 F. 2d 871, 877 (9th Cir. 1979); *United States v. Demauro*, 581 F. 2d 50, 54 n. 3 (2d Cir. 1978); *United States v. Cincotta*, 689 F. 2d 238, 241-42 (1st Cir. 1982).

The relatively recent Supreme Court decisions of *Faragher v. City of Boca Raton*, 524 U.S. 742 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Kolstad v. American Dental Association*, 527 U.S. 526 (1999) all address corporate civil liability in the context of hostile workplace claims under Title VII. In this particular line of cases, the Supreme Court rejects the strict application of the *respondeat superior* principle. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765; and *Kolstad* at 545.

Despite the statutory language that indicated Congress had intended civil agency principles to apply to Title VII, in both *Faragher* and *Ellerth*, the Court rejected the rule that vicarious liability results from any act of an employee acting within the scope of their employment, but rather restricted liability to acts of “managerial” employees. *Faragher*, 524 at 799-801; *Ellerth*, 524 U.S. at 762. The Court determined that an employer could invoke an affirmative defense if the employee failed to avail herself of the employer’s system of redress, and if the employer had a compliance program in place to reach the goals of the statutory law in question. *Faragher*, 524 U.S. at 780, *Ellerth*, 524 U.S. at 765, 807. The Court stated that providing employers with an opportunity to present an affirmative defense, would encourage them to implement programs aimed at preventing sexual harassment in the workplace, the underlying purpose of Title VII. *Ellerth*, 524 U.S. at 765.

One year following the *Faragher* and *Ellerth* cases, the Supreme Court reaffirmed their rejection of the traditional *respondeat superior* principle in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). This Title VII discrimination case, not involving a hostile work environment claim, addressed the issue of punitive damages against an employer. *Id.* at 543. The Court held that punitive damages were only available in cases where the employer

ratified the tortious act of an employer or where the tortious act was performed by an employee acting in a managerial capacity. *Id.* at 546.

One of the most important aspects of the Court's decision in *Kolstad* was its clear rejection of strict civil agency principles. To determine whether a corporation should be held vicariously liable for an employee's violation of Title VII, the Court looked to the Restatement of Agency's "scope of employment" rule. The rule provides that if the conduct is "the kind the employee is employed to perform, occurs substantially within the authorized time and space limits, and is actuated, at least in part, by a purpose to serve the employer" it falls within the purview that an employee may be said to have acted within the scope of employment even "if the employee engages in acts 'specifically forbidden' by the employer and uses 'forbidden means of accomplishing results.'" *Id.* at 544 (citing Restatement of Agency (Second) §§ 228(1), 230).

The Court was concerned that, despite a corporation's stringent effort to comply with Title VII, it would still be held liable for an employee's actions. *Kolstad*, at 544. The Court held that, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.'" *Id.* As in *Faragher & Ellerth*, the Court feared that holding corporations strictly liable for their employees' actions would reduce the incentives for employers to implement measures to decrease or prevent harm, such as antidiscrimination programs. *Kolstad*, at 544. The Court stated that, "[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII." *Id.* at 545. The Court felt "compelled to modify these principles" to assure that, "in the punitive damages context, an employer may not be vicariously liable for [the misconduct] . . . of managerial agents where [the misconduct is] . . .

contrary to the employer's good faith efforts to comply with Title VII." *Id.* at 528. Ultimately, the Court found it appropriate not to hold an employer vicariously liable under the Restatement of Agency's standard, but rather to hold an employer vicariously liable only where there is an incomplete showing of an employer's good-faith efforts to comply with Title VII. *Id.* at 544.

There is an important parallel between the recent application of civil corporate liability, and the concept of criminal corporate liability. The evolution of the principles of *respondeat superior* in civil cases is significant in criminal law; vicarious liability was developed in the civil context and was applied in the criminal context because, some lower court judges did not differentiate between civil and criminal vicarious liability. Weissman, Reforming, supra, at 7. In each of these cases, the Court has rejected a strict *respondeat superior* approach to corporate liability.

The rulings in these cases provide further support for the belief that the holding in *New York Central* is and should be limited. The Supreme Court in *Faragher*, *Ellereth*, and *Kolstad* discusses the importance of limiting the scope of the vicarious corporate liability. It is important, therefore that this Court re-examining and clarifying the proper application of vicarious liability in the criminal context. The Supreme Court in these three cases has offered logical reasons for why the holding in *New York Central* should not be applied broadly.

II. THE PRINCIPLES OF VICARIOUS CORPORATE CRIMINAL LIABILITY SHOULD BE CONSISTENT WITH SUPREME COURT PRECEDENT AND THE GOALS OF CRIMINAL LAW

The principle of *respondeat superior*, which has encouraged the misapplication of *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909), stands in direct conflict with the general principles of criminal law. If lower courts continue to misconstrue the holding in *New York Central*, and apply a strict *respondeat superior* standard in all cases where

the issue of vicarious corporate criminal liability is raised, it will be impossible for a corporation that complies perfectly with statutory regulation, to escape criminal liability for the misconduct of its employees. This is a direct perversion of the well-accepted general principles of criminal law, which seek to deter and punish intentional criminal conduct.

In light of recent analogous Supreme Court decisions regarding vicarious corporate liability in the civil context and an obvious legal reform movement within various states, this Court should abandon the *respondeat superior* principles adopted from the misinterpretation of *New York Central*, and adopt a new standard of vicarious corporate criminal liability.

A. The Goals of Criminal Law are Not Met Under the Theory of *Respondeat Superior* as Applied in the Instant Case

Criminal law aims to deter conduct “so repugnant as to warrant the severest sanction.” Andrew Weissman with David Newman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411, 427 (2007). The goal of deterring criminal misconduct is often achieved through punishment. Punishment can also have the dual function of imposing on criminals some form of retributive justice. *U.S. v. Brown*, 381 U.S. 437, 457 (1965). The criminal law seeks to deter misconduct both generally and specifically. Weissman, *Rethinking*, *supra*, at 428. Specific deterrence is achieved when punishment of an individual or organization prevents the individual or organization from engaging in further illegal conduct. In regards to individuals, one achieves specific deterrence through punishment, including the threat of imprisonment or the restriction of an individual’s personal liberty. 18 U.S.C. §§ 3551(b), 3554-3556, 3563, 3601 (2000 & Supp. 2006). For an organization, such as a corporation, punishments aimed at deterring specific conduct may include dissolving the a corporation, barring the corporation permanently or temporarily for a period of time from participating in business activities, or requiring the

corporation to subject itself to a form of probation, wherein its conduct is restricted and monitored by a court. 18 U.S.C. s 3551(c) (2000).

General deterrence, on the other hand, is achieved when a particular person or organization is punished and that punishment effectively deters others from committing similar crimes. Weissman, *Rethinking*, supra, at 427. General deterrence has a greater effect on crimes that require forethought, wherein the criminal weighs the potential outcome of their actions. *Id.* at 428. General deterrence is especially suitable to corporate criminal liability, as corporations, by and through its Board of Directors, counsel and general processes, pay “particular attention to precedent in determining the risks and rewards of contemplated actions.” *Id.*

Criminal law punishes those who engage in conduct that society has determined to be “wrong” or “evil” in an attempt to voice their dislike for such conduct *Id.* at 429. Punishment can have a very damaging effect on either a person or organization. Therefore, before imposing retributive punishment on an individual, it must be proven that the individually intentionally and willfully committed an illegal act. *Id.* To impose retributive punishment on a corporation for the actions of its employees should require a much different showing. The Court must, “ first determine what it is that the corporation did or did not do that warrants criminal sanction.” *Id.* Where an employer asks an employee to engage in a criminal act, there is obvious liability on behalf of the corporation. However, imposing criminal liability on a corporation that has taken all reasonable action to prevent criminal conduct by its employees fails to further the traditional goals of criminal law. *Id.*

In the present system, corporations are held strictly liable for criminal acts of their agents and employees, abolishing any incentive for corporations to create statutory compliance programs. Under the current *respondeat superior* standard, organizations cannot avoid

responsibility for the criminal acts of its employees that it fully intended to prevent. Not only is this ineffective to furthering the goals of criminal law, but it also has created a vast contrast between the scope of criminal and civil corporate liability.

B. Analogous Supreme Court Precedent Provides an Application of Vicarious Liability that Satisfies the General Principles of Criminal Law

As previously discussed, this Court has never address how vicarious criminal liability should be determined for corporations in the absence of a statutory instruction. Instead, it has relied on an improper interpretation of *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909). Thus, this Court should look to analogous precedent in determining if the Court’s interpretation of vicarious liability is productive to promoting the general principles of criminal law.

This Court determined in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), how vicarious corporate civil liability should be applied in the context of punitive damages. The decision in *Kolstad* provides an analogous example of how the principles of criminal law can be met in an application of vicarious corporate criminal liability. The parallel from the civil context to the criminal is based on the idea that punitive damages are analogous to criminal punishment. Weissman, Reforming, supra at 7. This Court has described punitive damages as “quasi-criminal,” since they serve to punish and deter misconduct. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *see also* Model Punitive Damages Act § 1(2) (1996).

Like punitive damages, the two primary goals of criminal law are retribution and deterrence. *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997). Therefore, a change in law affecting punitive damages is persuasive precedent in addressing criminal liability. *Kolstad*, 527 U.S. 526, discusses the limit the scope of corporate liability in awarding punitive damages. The Court’s

decision in *Kolstad* and the instant case should share the same theory of vicarious corporate liability.

Where a corporation has taken all reasonable measures to deter and detect an employee's criminal actions, there is nothing the criminal law is serving to deter or punish. An application of the current standard of criminal liability as misinterpreted in *New York Central*, would result in the "perverse incentives" rejected in *Kolstad*. *Kolstad's* logic must be extended, otherwise the decision will result in a corporation having a greater ability to defend itself in the civil realm than to defend itself against a criminal indictment. Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*, 87 Neb. L. Rev. 197, 213 n. 72 (2008).

This Court has drawn similarities between the aims of criminal liability and punitive damages in other cases. In *Exxon Shipping Co. v. Baker*, 2008 U.S. LEXIS 5263 (June 25, 2008), several arguments were raised in favor of limiting the scope of vicarious corporate criminal liability. Although the Court did not reach a majority decision, in a 4-4 split, the Supreme Court Justices discussed whether punitive damages for the acts of managerial employees were available. Justice Souter agreed with Exxon's argument that even if Supreme Court precedent from the late 19th century did not bar punitive damages in this case,

The Court [should] fall back to a modern-day variant adopted in the context of Title VII of the Civil Rights Act of 1965 in *Kolstad v. American Dental Assn.*, that employers are not subject to punitive damages for discriminatory conduct by their managerial employees if they can show that they maintained and enforced good-faith antidiscrimination policies. Slip op. at 9, 2008 U.S. Lexis 5263 at *22.

The Court drew an analogy between civil punitive damages cases and criminal law cases. It stated, "[p]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law," and that "the points of similarity are

obvious.” *Id.* at 31-32. The decision in *Exxon* only strengthens *Kolstad’s* determination that corporations should not be held strictly liable in the criminal context. Weissman, Reforming, supra, at 10.

In the instant case, the District Court’s instruction on vicarious liability makes it easier to impute conduct and knowledge to a corporation in a criminal case than it would be in a civil case under Title VII. The civil justice system makes the application of vicarious liability sensible, as its objective is to restore the plaintiff’s damages. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-417 (2003). Criminal law seeks to prevent and deter conduct outlawed by the criminal code, and the application of vicarious corporate criminal liability should exemplify that objective. The District Court’s jury instruction does not serve such a purpose.

This Court’s recent civil liability and punitive damages decisions suggest that a reform of the current system of corporate criminal liability and the abandonment of traditional *respondeat superior* principles is necessary. The case before this Court provides the opportunity to evolve the vicarious corporate criminal liability standard, and provide instruction where statutory language is silent.

C. Alternative Approaches Encourage A Reform of Strict *Respondeat Superior* Principles

There are several alternative approaches that encourage a reform of the present concept of corporate criminal liability. The common-law concept of vicarious corporate criminal liability initially developed during a time in which corporations were just beginning to grow in size, complexity and number, and there was a lack of corporate regulations to prevent public harm. The legal regime was not yet adequately suited to support the rapid growth of such corporations. Weissman, Reforming, supra, at 14. However, as a result of the growth of the regulatory state

over the past century, the current standard of vicarious corporate criminal liability has outlived its historical justification, and thus, reform is necessary. *Id.*

The number of regulatory agencies increased substantially between 1900 and 1940. *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, (1941). Many of those agencies critical to ensuring corporate responsibility did not exist at the time of *New York Central & Hudson River Railroad*, thus, courts turned to the common law to develop a standard in the criminal context. Weissman, *Reforming*, supra, at 15. However, civil and criminal laws serve different purposes. Civil law compensates victims for their losses, and as previously discussed, criminal law punishes and deters. The pre-*Kolstad* standard of vicarious liability in the criminal system existed only because the courts could not articulate a theory for why principles of vicarious liability in the civil system should not apply in the criminal context. Weissman, *Reforming*, supra, at 16. Thus, considering the recent changes to vicarious corporate civil liability, why should corporations receive *less* protection under the doctrine of corporate criminal liability? Weissman, *Rethinking*, supra, at 436-437.

This Court should mirror its recent decisions in the corporate civil liability context by adopting a “due diligence” approach in the corporate criminal liability context. Such an approach would either create an obligation to require the prosecution to show that a corporation lacks “effective policies and procedures to deter and detect criminal actions by their employees” or would require corporate defendants to make such a showing as an affirmative defense to criminal liability. Weissman, *Rethinking*, supra, at 411.

It is appropriate that the government should bear the burden of establishing that the corporation “failed to have reasonably effective polices and procedures to prevent the conduct.”

Id. at 414.⁵ Moreover, adoption of this principle has the dual benefit of self-policing, while protecting corporations and shareholders from employees who commit crimes despite a corporation's diligence and compliance with the law.⁶ This Court has recognized that limiting *respondeat superior* where a corporation has taken all reasonable measures to comply with the law, is appropriate and fair, and serves as an incentive to encourage compliance. *Kolstad*, 527 U.S. at 545. Further, such compliance by corporations is the *central* goal of the United States Sentencing Guidelines.⁷ A due diligence approach not only promotes compliance with the law, and acts in requiring corporations to self-police, but also rewards corporations' efforts to engage in compliance programs. Weissman, Reforming, *supra* at 17.

Almost the exact same approach is adhered to by the Model Penal Code ("MPC"), which provides an affirmative defense for corporations whose officers exercise due diligence in prevention of criminal conduct. Weissman, Reforming, *supra* at 18. Section § 2.07(5) provides that,

Other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the *high managerial agent* having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. Model Penal Code § 2.07(5) (1962) (emphasis added).

⁵ See also Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Croproation*, 21 J. Corp. L. 731, 764-65 (1996) (proposing a due diligence defense to corporate criminal liability); Charles J. Walsh & Alissa Pyrih, *Corporate Compliance Programs as a Sheid to Criminal Liability: Can a Corporation Save Its Soul?*, 47 Rutgers L. Rev. 605, 689 (1995) (proposing an affirmative defense based on a corporate compliance program); Harvard Law Review Association, *Developments in the Law – Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 Harv. L. Rev. 1227, 1241-59 (1979).

⁶ It is suggested that to escape criminal liability, a corporation's internal compliance program would need to be effective, not just a "paper program" that avoids application. Weissman, *Rethinking*, *supra*, at 440-41.

⁷ See Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 710-711 (2002).

At least 19 states have imposed these or similar limits on vicarious corporate criminal liability.

Christopher Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive*

Damages and Criminal Law, 87 Neb. L. Rev. 197, 205 (2008). The majority of states have

limited vicarious liability by adopting similar language to that of Model Penal Code § 2.07(1)

(1962), which provides that a corporation can be convicted of an offense if:

- (a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or
- (b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or
- (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.⁸

The adoption of the MPC points directly to the idea that corporate hierarchy matters in assessing corporate liability, as well as providing an alternative set of principles both encourages corporate compliance programs and adapting *respondeat superior* principles to the new era of vicarious corporate liability. Weissman, *Reforming*, supra at 19. Further, the mere fact that there is wide-spread adoption of vicarious liability principles that provides corporations with the opportunity to utilize effective compliance programs as a defense mechanism is much more consistent with Supreme Court precedent and the principles of criminal law. The traditional

⁸ See also Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Anderson Prosecution*, 43 Am. Crim. L. Rev. 107, 126-142 (2006).

application of *respondeat superior* has overstayed its welcome, and the instant case provides this Court with ample opportunity to evolve vicarious corporate criminal liability.

CONCLUSION

For the foregoing reasons, we ask this Court to reverse the decision court of appeals and remand this case for a new trial. Additionally, we ask that this Court require the lower court to provide the jury with an instruction regarding vicarious corporate criminal liability, more consistent with Supreme Court precedent and the general principles of criminal law.

Respectfully submitted,

Team 3
Counsel for the Petitioner