

Team 6

ISSUES PRESENTED

- I. WHETHER THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS AUTHORIZED BY SUPREME COURT PRECEDENT AND FEDERAL STATUTORY LAW.

- II. WHETHER THE DISTRICT COURT'S INSTRUCTIONS ON CORPORATE CRIMINAL LIABILITY WERE CONSISTENT WITH GENERAL PRINCIPLES OF CRIMINAL LAW AND, IF NOT, WHETHER THIS COURT SHOULD REVISIT ITS HOLDING IN *NEW YORK CENTRAL & HUDSON RIVER RAILROAD* v. *UNITED STATES*

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CORPORATE DISCLOSURE

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.

STATEMENT OF THE CASE

Ionia appeals the decision of the United States Court of Appeals for the Second Circuit ___ F.3d ___, WL 116966 (2nd Cir. 2009), which affirmed the judgment of the United States District Court for the District of Connecticut, 526 F. Supp.2d 319 (D. Conn. 2007). On September 6, 2007, at the conclusion of a jury trial, Ionia was convicted on eighteen counts, including violating the Act to Prevent Pollution from Ships (“APPS”), falsification of records, obstruction of justice, and conspiracy. These charges were the product of four initially separate indictments returned in the District of Connecticut, the Southern District of Florida, the Eastern District of New York, and the District Court of the Virgin Islands. The latter three were transferred to be consolidated with the Connecticut indictment. The Second Circuit affirmed on January 20, 2009, and this Court granted *certiorari*.

STATEMENT OF FACTS

Ionia is a ship management company headquartered in Greece that managed the commercial oil tanker M/T *Kriton* (“*Kriton*”), the vessel on which the charges for this case arose. On October 27, 2004, Ionia was sentenced to a three-year term of probation in the Eastern District of New York for making false statements in violation of 18 U.S.C. § 1001.

One of the conditions of probation required Ionia to follow a special compliance program, which included increased inspections, personnel training, and the issuance of periodic reports to the United States Coast Guard (“USCG”). Specifically, Ionia had to certify the accuracy and proper operation the Oil Record Book (“ORB”), Oily Water Separator, Stern Gland, and Incinerator for each vessel. Indictment, *United States v. Ionia Mgmt. S. A.*, No. 07-CR00134 (D.Conn. June 7, 2007), 2007 WL 4998560 (“Indictment”).

From January 2006 to April 2007, the *Kriton* made deliveries of oil along the eastern coast of the United States. The indictment charged that during this time, Ionia’s eleven person engine room crew, under the direction and participation of the Chief Engineer and Second Engineer, routinely discharged oily waste water “at various times and places” into the high seas through a “magic hose” designed to bypass the vessel’s Oily Water Separator. *Id.* The government further alleged that the *Kriton’s* engine room crewmembers engaged in this conduct because “they perceived [it] would save their employer time and expenses associated with proper disposal....” *Id.* The “magic hose” was not produced at trial.

Because none of the alleged discharges occurred in or affected US waters, Ionia could not be prosecuted for illegal discharges. Instead, the indictment alleged that Mercurio made false entries in the ORB and obstructed a federal investigation by (1) lying to USCG inspectors himself and (2) instructing two subordinates to do the same. *Id.*

Mercurio plead guilty and testified at trial for the government as part of his plea agreement. Rather than use the *Kriton's* pollution control system, he wanted to make his job “a little bit easier,” by not having to clean or maintain the equipment. Trial Record (“TR”):1227-28. He admitted that his actions to conceal his earlier misconduct were motivated entirely out of self-interest, because he would be fired “on the spot” if caught. TR:1093, 1126.

The government also secured testimony from other engine room crewmembers, under the shield of immunity. Ricky Lalu, an “oiler” in the engine room, described the improper discharges (TR: 510) and Ionia’s “zero-tolerance policy for [such] discharges.” TR:547. The waste processing equipment was in proper working order. TR:531-35. Before sailing on the *Kriton*, Ionia required him to receive a week’s training on MARPOL (an international maritime pollution convention, recognized worldwide) and Ionia’s environmental policies. TR:560-61.

Elmer Senolay, a “wiper” in the engine room, stated that in addition to their training ashore, the *Kriton* crew received weekly MARPOL training aboard ship. TR:661. Senolay did not report the improper discharges out of fear of Mercurio, who he described as “sometimes” lazy (TR:669), but acknowledged that Ionia provided ways in which he could report and be protected. TR:708,719.

No proof was offered that Ionia would have incurred higher costs as a consequence of using the *Kriton's* filtration system, or that not using it saved them money. The government’s expert stated that retaining waste for proper disposal would not delay the ship and that he did not know what cost there might be. TR:1556. The crew was paid by the month, not by the hour, with overtime set at a fixed amount. TR:448. Moreover, Ionia was paid a fixed management fee of \$8,000 per month plus reimbursements by the ship’s owner. TR:1347.

Based upon these factors, the only person or entity to gain any benefit was Mercurio. From the initial investigation to the trial, he told “many, many different stories.” TR:1210.

At the close of the trial, the district court instructed the jury that Ionia could be held vicariously liable for the unlawful acts or omissions of its employees, if such acts were performed “within the scope of their employment,” i.e. specifically authorized. Jury Instruction, *United States v. Ionia Mgmt. S.A.*, No. 3:07cr134 (D. Conn. Sept. 6, 2007), 2007 WL 4998564 (“Jury Instruction”). If not specifically authorized, the scope of employment prong may still be satisfied if “(1) the agent acted for the benefit of the corporation and (2) the agent was acting within his authority.” *Id.* No actual benefit is necessary, “only that the agent intended it would be.” *Id.*

Even if the act was “illegal, contrary to his employer’s instructions or against the corporation’s policies,” it will not relive Ionia of responsibility. *Id.* The court did, however, instruct the jury that it may consider “whether the agent disobeyed instruction or violated company policy in determining whether the agent intended to benefit the corporation and/or was acting within his authority.” *Id.* These instructions did not require that, in order to convict Ionia, the jury find that the offending employees were of any particular level of seniority or managerial authority. Ultimately, the jury convicted Ionia on all counts. Ionia was sentenced to pay a fine of \$4.9 million, penalty assessments of \$7,200, and was placed on probation for four years.

SUMMARY OF ARGUMENT

Over the last century, as America's economy grew increasingly sophisticated, the common law used by federal courts to enforce corporate criminal vicarious liability remained primitive. The current standard borrows *respondeat superior* from civil law and awkwardly applies it to criminal law. As a result, courts apply a notoriously low standard of vicarious liability, such that virtually any act of any employee will be imputed to his employer.

The decisions of the lower courts should be set aside because the *Kriton's* engine room crewmembers do not fit into this framework. The evidence was insufficient to prove the elements of *respondeat superior* as it applies to corporate criminal liability. They acted in complete opposition to Ionia's corporate policy, their training, and the law.

In addition, the district court's jury instruction on corporate criminal liability was contrary to this Court's longstanding precedent and federal statutory law. It took a three-prong test and whittled it down to two. As a result, the jury failed to apply proper principles of agency.

For these reasons, this Court should revisit the foundational case in this field and provide corporations with the legal protection to develop genuine compliance programs. Such programs not only allow companies to more effectively police themselves, it would permit a new doctrine to emerge; one that recognizes the array of federal regulatory agencies that have sprouted since the early twentieth century. Moreover, it would help to synchronize the often conflicting goals of civil and criminal law.

III. THE DISTRICT COURT'S INSTRUCTION ON CORPORATE CRIMINAL LIABILITY WAS NOT AUTHORIZED BY SUPREME COURT PRECEDENT AND FEDERAL STATUTORY LAW

STANDARD OF REVIEW

This Court reviews a defendant's sentencing for *abuse of discretion*, *United States v. Booker*, 543 U.S. 220, 244-45 (2005). The *abuse of discretion* standard includes review to determine that the discretion was not guided by erroneous legal conclusions. *Koon v. United States*, 518 U.S. 81, 100 (1996).

ARGUMENT

For the past century, courts have recognized that a corporation may be held criminally liable for the illegal actions of its employees based upon the tort theory of *respondeat superior*. Borrowed from the civil context, this doctrine states that the criminal intent and acts of the agent are imputed to his principal. As a consequence, the corporation is subject to criminal vicarious liability for the conduct of its supervisory employees, even where they intentionally break the law or act contrary to their employer's policies.

E. The three-part test of *New York Central*

Originally stated in *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481, 493 (1909), a corporation is liable if (1) its agent commits a criminal act (2) within the scope of his employment (3) and with the intent to benefit the corporation. This landmark decision recognized Congress' ability to criminalize corporate behavior through the Elkins Act. It did not articulate how courts should apply *respondeat superior* under common law, absent specific statutory language. Over time, this narrow holding evolved into an expansive test that

today recognizes nearly *any* act of *any* employee. No amount of compliance planning or internal policing can save a company from the harsh penalties of criminal prosecution.

First, the person committing the illegal act must be an agent of the corporation. Courts are generally not discerning in their application of this standard, and have found corporations liable for all employees' actions, from high-level executives to the unskilled day laborer. *E.g.*, *United States v. George F. Fish, Inc.*, 154 F.2d 798 (2nd Cir. 1946), *cert. denied*, 328 U.S. 869 (1947). A corporation is considered to possess 'knowledge' that the agent acts on its behalf, so it usually must bear responsibility for the agent's behavior. The agent's authority may be actual or apparent; that is, authority which outsiders would normally assume an agent to have, judging from his position within the company and the circumstances surrounding his past conduct. *United States v. B.I.-C.O. Payers, Inc.*, 741 F.2d 730, 737 (5th Cir. 1984).

Here, the indictments specifically charged Second Assistant Engineer Mercurio, an employee of Ionia and member of the *Kriton's* crew. He was responsible for certain supervisory duties in the engine room, including overseeing the proper filtration of bilge waste. In the jury instructions, the district court considered Mercurio and the other engine room crewmembers to be agents of Ionia.

Second, under the *scope of employment* prong, the employee's illegal act must have been committed while he was "clothed with authority." *New York Central*, 212 U.S. at 494. "The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment." *United States v. A & P Trucking Co.*, 358 U.S. 121, 126 (1958). Furthermore, liability may attach without proof that the conduct was within the agent's actual authority, and even though it may have been

contrary to express instructions. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3rd Cir. 1970).

Despite an employer's best efforts, proof of corporate compliance programs and even personal reprimands will not "immunize the corporation from liability," *United States v. Twentieth Century Fox Corp.*, 882 F.2d 656, 660 (2nd Cir. 1989), and has been described as "marginally relevant". *American Radiator*, 433 F.2d at 204. The defendant in *Twentieth Century Fox*, a large film producer and distributor, successfully maintained an antitrust consent decree for thirty-five years. Yet, due to the actions one rogue branch manager, it was nonetheless accountable and fined over \$500,000. 882 F.2d at 658. The Ninth Circuit held that the defendant's attempts to offer evidence of "reasonable diligence" standards constituted an improper importation of civil contempt elements into the criminal context. *Id.* at 660.

On the contrary, this Court now recognizes compliance efforts within corporate civil liability, based on several recent decisions concerning workplace discrimination (*infra*, Section I, D). These cases offer some helpful tools for approaching the modern corporate hierarchy. Besides, *New York Central's* main issue involved "applying the principle governing civil liability" to the criminal context. 212 U.S. at 307.

In this case, Renieris and Mercurio were responsible for operating the *Kriton's* engine room, including supervision of daily operations, following procedures, and verifying the system's functionality. They exercised authority over the other engine room crewmembers as part of their duties on the *Kriton*. All of these men received considerable MARPOL training before leaving port and weekly sessions while aboard the *Kriton*. They also studied Ionia's particular environmental policies, signing affirmations that they fully aware of the "zero-tolerance" policy for violations. Ionia's good faith attempts to incorporate a compliance program

in an atypical work environment was given little stock in the district court's jury instructions.

Third, the agent must have acted, at least in part, with the intent to benefit the corporation. While not determinative, a benefit is "evidential in determining the purpose and motive for which the agent does the act in question, [such as] if it is done with a view of furthering the master's business." *Standard Oil Co. v. Texas*, 307 F.2d 120, 128 (5th Cir. 1962). Liability attaches to the principal based his "expectation or hope of a benefit, whether direct or indirect." *Id.*

On the contrary, a corporation will not be liable if the employee acted exclusively for his own benefit. For instance, in *Standard Oil*, the defendant employer was relieved of liability where two employees conspired with a third-party to steal its oil. *Id.* at 129. Beyond these extreme cases, courts will impute liability, "so long as during this time the company received some ancillary benefit." *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1973).

The primary issue is the third prong of the *New York Central* test, which requires that Mercurio and the other crewmembers must have furthered Ionia's business, at least in part, by illegally dumping tons of bilge waste and lying about it to the government. The *New York Central* test is satisfied even if no actual benefit accrues, a benefit is indiscernible, or the results turn out to be adverse. *Standard Oil*, 307 F.2d at 129.

The government argued in its indictment that Ionia received a benefit from their actions, because, "they perceived [it] would save their employer time and expenses associated with proper disposal...." Indictment. The government's own witness stated that properly filtering the bilge water would not require extra time. TR:1556. The crewmembers were paid monthly, rather than by the hour, with a fixed rate of overtime, so Ionia would not incur significant labor costs.

TR:448. For operating the *Kriton*, Ionia received a fixed management fee of \$8,000 per month plus reimbursements by the ship's owner. TR:1347. Based on these factors, Mercurio was not thinking about helping Ionia, he wanted to make his job "a little bit easier," by not having to clean or maintain the equipment. TR: 1227-28.

The filtration system worked perfectly and possessed "abundant storage capacity" (TR:270), "capable of handling any amount of [waste] generated on the ship...." TR:1556. Yet, Mercurio ordered several subordinates to bypass the filtration system. One employee admitted to complying out of fear of Mercurio, who he described as "sometimes" lazy. TR:669. If caught, all these men would be fired immediately and released at the next port. It is difficult to discern even some 'ancillary benefit' from these events, outside of Ionia having its filtration system remain idle. Mercurio's then tried to cover up these violations by lying and ordering his subordinates to do the same. He lied to Ionia's own representatives as freely as he lied to USCG inspectors. TR:1218. If Ionia was receiving a benefit, its employees were not talking.

Ionia is a shipping company with employees working all over the globe, outside a traditional corporate hierarchy and with little direct oversight. It was already on probation for earlier violations, so the risk of further fines and litigation provided an added incentive to ensure employee compliance, both through the law and by standards of its own. Ionia's zero-tolerance policy and meticulous training is well documented. It maintained the *Kriton's* filtration system and provided extensive MARPOL training to the engine room crewmembers. At sea however, these employees were far from the watchful eye of corporate officials, subject only to the commands of Mercurio. Such gross disregard for regulations subverts the "character" of the corporation and effectively severs the corporation's culpability.

Regardless, the district court employed *New York Central*, which treats virtually all corporate criminal acts the same. Under such broad *respondeat superior* principles, corporations are all too easily exposed to harsh penalties for the most unforeseeable acts of its employees. Therefore, this Court should reevaluate how it apportions criminal liability in the corporate context.

F. The district court's instructions to the jury were erroneous

STANDARD OF REVIEW

This Court reviews jury instructions for *plain error*. Under that review, relief is not warranted unless there has been (1) error, (2) that is plain, and (3) affects substantial rights. *Jones v. United States*, 527 U.S. 373, 389 (1999).

ARGUMENT

At the conclusion of Ionia's trial, the district court instructed the jury to consider various definitions of corporate entities, agency law, and culpability. However, on two occasions the court's failure to provide proper instructions lead directly to further misapplication of these principles within the criminal context.

First, the instructions allowed the jury to convict without finding that the employees acted with the intent to benefit Ionia. While corporate criminal liability traditionally requires proof that an employee acted within the scope of his employment *and* acted with intent to benefit, the court's instructions erroneously combined the two, such that the jury was permitted to convict based upon evidence of the former without necessary proof of the latter.

“You must find that the Government has proven beyond a reasonable doubt that acts attributable to Ionia were acts or omission of its agents performed “within the scope of employment” with Ionia as I will now define that term.

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

(Jury Instruction) Here, the jury was allowed to convict based on these instructions if the violation was either (1) specifically authorized *or* (2) was within the scope of scope of employment and committed with intent to benefit. This is entirely inconsistent with the *New York Central* test. The effect is to constructively amend the indictments, since none of the four indictments permitted conviction based on this theory of corporate criminal liability.

An indictment is constructively amended when the proof at trial broadens the basis of conviction beyond that charged in the indictment. *United States v. Miller*, 471 U.S. 130, 144-45 (1985). Constructive amendment of an indictment is a *per se* violation of the grand jury clause of the Fifth Amendment. *United States v. Zingaro*, 858 F.2d 94, 98 (2nd Cir. 1988).

However, an impermissible alteration of the charge must affect an essential element of the offense, *United States v. Weiss*, 752 F.2d 777, 787 (2nd Cir. 1985), and this Court has “consistently permitted significant flexibility in proof, provided that the defendant was given notice of the ‘core of criminality’ to be proven at trial.” *United States v. Heimann*, 705 F.2d 662, 666 (2nd Cir. 1963) (citing *United States v. Sindona*, 636 F.2d 792, 797-98 (2nd Cir. 1980), *cert. denied*, 451 U.S. 912 (1981)).

In changing the jury’s instruction on corporate vicarious liability to an *either/or* test, rather than requiring that all prongs be satisfied, the district court altered an “essential element” of the indictment. The jury could not review engine room crewmembers behavior according to

recognized standards. As a result, the *New York Central* test was misapplied. These actions served to constructively amend the indictment and constitute a *per se* violation of petitioner's Fifth Amendment rights. Therefore, this Court should reverse the findings of the lower courts based on plain error by permitting the jury to convict on an alternative basis.

Second, the instructions omitted the requirement that the employee must be a manager, and instead stated that all of the *Kriton's* engine room crewmembers were capable of acting as agents of Ionia:

So when we refer to the term "agents" in this case, it's the entire crew of the engine room during the entire period of the time that's relevant to the indictments in this case. So it's all the chief engineers, all the second engineers...and the rest of the engine room crew [that] were unlicensed members of the crew, that is, the oilers, the wipers, the fitters and the cadets. All of those gentlemen are agents of the defendant, and all of their actions can bind the defendant in this case and make the defendant criminally liable based upon their actions.

(Jury Instruction) This instruction is contrary to the Second Circuit's requirement that corporate criminal liability arises out of the acts of managerial agents, i.e. "officer[s] of a corporation or an agent...having duties of such responsibility that his conduct may fairly be assumed to represent the corporation." *United States v. Koppers*, 652 F.2d 290, 298 (2nd Cir. 1981), *cert denied* 454 U.S. 1083 (1981).¹ Here, the district court's instructions lumped together the engineers with the unlicensed members of the engine room crew. This latter group could not exercise 'apparent authority' on behalf of Ionia because they were the bottom rung of the *Kriton's* crew. Ionia did not entrust them with positions of great responsibility, nor did they exercise broad, express authority. Their only concern was to follow the orders of their superiors, the Engineers.

Ultimately, the jury instructions were contrary to this Court's requirement that courts should be hesitant to "enlarge the reach of enacted crimes by constituting them from anything

¹ See also, *Continental Baking Co. v. United States*, 281 F.2d 137, 149 (6th Cir. 1960) (outlining the basic concept: "There is an officer or agent of a corporation with broad express authority, generally holding a position of some responsibility, who performs a criminal act related to the corporate principal's business.")

less than the incriminating components contemplated by the words used in the statute.” *Morissette v. United States*, 342 U.S. 246, 263 (1952). Here, neither the statutes nor the common law recognizes an *either/or* test for determining corporate criminal vicarious liability. The jury relied upon them to the detriment of Ionia. The instructions therefore were made in error and this Court should reverse the lower courts’ holdings.

G. The long term, consistent misapplication of *New York Central* imposes an improperly low threshold for corporate liability

The modern doctrine of corporate criminal liability is largely the creation of the courts. While Congress “can subject corporations to criminal accountability for acts of this kind committed by unfaithful servants,” it consistently refuses to legislate whether a uniform *respondeat superior* standard is appropriate for measuring a corporation’s criminal intent, based upon vicarious liability. *Standard Oil Co.*, 307 F.2d at 125. So, courts are left to decipher legislative intent on their own and ultimately end up administering a very general concept of *respondeat superior* on corporations, primarily due to a misapplication of the foundational case.

The problem began in *New York Central*, when this Court considered a constitutional challenge to the Elkins Act, which imposed criminal liability on common carriers whose managerial agents granted illegal rebates on shipped goods. *New York Central*, 212 U.S. at 492. The issue hinged on whether the express language of the Elkins Act imputed liability to their employer, and the Court held that in this context it did. *Respondeat superior* was already well entrenched in the civil law. So, applying civil principles merely required “go[ing] a step farther,” and imputing criminal liability to the defendant for “the act of the agent [that is done] while exercising the authority delegated to him.” *Id.* at 494. The Court arrived at this decision primarily by analyzing the statutory language and uncovering Congressional intent.

In drafting the Elkins Act, Congress purposely imposed criminal liability on common carriers based on *respondeat superior*. In particular, the illegal acts of employees, that are committed while, “acting within the scope of his employment shall, *in every case*, be also deemed to be the act, omission, or failure of such carrier, as well as that of the person.” Pub. L. No. 57-103, ch. 708, 32 Stat. 847 (1903) (emphasis added).² Here, express Congressional language defined the scope of liability which this Court enforced because “agents were bound to respect the regulation of interstate commerce enacted by Congress.” *New York Central*, 212 U.S. at 494.

One of *New York Central*'s weaknesses is the short, sweeping policy argument, which courts have consistently misinterpreted as applying to all corporate criminal law statutes. *Id.* at 494-95. At that time, the Court's only option was to transplant *respondeat superior* into the criminal mold, no matter how messy. Otherwise it would eliminate the “only means” of regulating interstate commerce. *Id.* at 496. So, *New York Central* was an attempt to enforce the Elkins Act based on express statutory language. It follows therefore, that when Congress does not explicitly extend such penalties to the corporation, courts should be reluctant to increase the scope of liability, out of deference to the legislative process. Currently, the modern approach treats express and constructive intent the same, applying the same low threshold of *respondeat superior*, a method that fails to account for differences between the bad acts of upper-management from those of the clerk.

The expansive development of *New York Central* also clashes with this Court's approach towards criminal statutory interpretation. “Penal statutes should be strictly construed,” in order

² The specificity of “in every case” is unique here because Congress normally reserves *respondeat superior* principles for regulatory statutes outside the general Federal Criminal Code. See e.g., *United States v. Wise*, 370 U.S. 405, 407 (1962) (recognizing that a corporate officer is subject to prosecution for price fixing under the Sherman Act).

to avoid violating the defendant's due process rights. *United States v. Cook*, 384 U.S. 257, 262 (1966). Therefore, "any ambiguity must be resolved in favor of lenity." *United States v. Enmons*, 410 U.S. 396, 411 (1973). The doctrine of lenity is "founded on the...plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 94 (1820).

Here, the statutes used to convict Ionia provided criminal sanctions, but failed to mention a particular standard of corporate liability.³ Herein lays the dilemma for the district court. Unlike the Elkins Act, there is no express language dealing with vicarious liability and consequently there is no guidance for the courts. A corporation is a fictional entity created entirely by statute. It also has fictional *mens rea* requirements, incurring liable automatically regardless of its best efforts otherwise.

More importantly, the burden for the latter two prongs of the *New York Central* test is so low, that in terms of judicial analysis they are essentially an afterthought. An employee's actions are considered to be *within his scope of employment* even though they are in direct opposition to his employer's stated policies or good faith efforts to comply with the law. Likewise, his actions are *for the benefit* of his employer, even though the employer received no actual benefit and no one in the corporate hierarchy was aware of the illegal acts. Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095, 1102-03 (1991). The criterion for imputing vicarious criminal liability in these situations oversimplifies the

³ 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 intent to impede, obstruct, or influence the investigation...of any matter...shall be fined under this title, imprisoned not more than 20 year, or both."); 18 U.S.C. § 1505 (2000) ("Whoever, with intent to avoid, evade, prevent, or obstruct compliance...with any civil investigation demand...shall be fined under this title [or] imprisoned not for than five years....").

complexities of a corporation's employment hierarchy. Furthermore, the incentives for creating compliance programs are totally lost when no amount of effort or detail will absolve the company from its employee's actions.

For example, in *Hilton Hotels*, the Ninth Circuit upheld the conviction of a purchasing agent from one of the defendant's hotels for violating the Sherman Act. He admitted to extorting payments from distributors for personal reasons, in defiance of stated company policy and his boss' personal reprimands. *Id.* at 1004. The court held that although the Sherman Act did not specifically impose liability for Hilton Hotels, it was justified nonetheless in exposing them to it because Congress wanted to "provide a substantial spur to corporate action to prevent violations by employees." *Id.* at 1005-06. So, while *respondeat superior* focuses on the intent of the agent, for purposes of criminal corporate liability intent is irrelevant. The corporation is automatically culpable even for its agents whose actions are far outside the lines of permissible conduct. The bottom line is that regardless of a corporation's actions, the government need only secure the conviction of one maverick employee to expose his employer to harsh, unfocused penalties.

The limited holding in *New York Central* and the consistent misapplication of its holding created a modern standard that fails to provide consistent and foreseeable standards. Regardless of Ionia's best efforts, once the *Kriton* put to sea, no amount of managerial oversight or training was going to absolve them from the crew's behavior. Moreover, the district court issued faulty jury instructions that mixed up the three-prong *New York Central* test, and as a consequence the jury applied erroneous standards in its deliberations. For these reasons, the *New York Central* test is archaic and demands renovation.

H. This Court should extend its recent limitations on the scope of civil vicarious corporate liability to the criminal context

Neither the statutes at issue, nor this Court’s jurisprudence addresses how to apply the principles of corporate criminal liability in situations where the statute lacks explicit instructions. As a result, district courts routinely apply a form of *respondeat superior* with a minimal threshold of culpability. However, recent decisions by this Court concerning corporate civil liability highlight a trend towards imposing higher standards, giving credence to corporate compliance programs.

In the companion cases, *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), this Court refused to impute liability to corporate defendants named in sexual harassment claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* (2000). While corporate civil liability had previously attached to any act an employee made within the scope of his employment, it now was restricted to a supervisor’s acts. More importantly, this Court recognized that employers are entitled to an affirmative defense if it’s determined “(a) that the employer exercised reasonable care to prevent and correct [inappropriate behavior], and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer....” *Faragher*, 534 U.S. at 807.

The underlying purpose of Title VII was to encourage companies to create their own grievance policies, so as to redress problems internally rather than through litigation. Under a default approach to *respondeat superior*, a company would be vulnerable to liability for all employee acts, all the time, making it disadvantageous to create the programs in the first place. *Ellerth*, 524 U.S. at 765. Moreover, this Court chose to restrict liability in the face of overwhelming statutory language to the contrary (Congress included “agents” in the definition of

“employer”), and the conclusion that Congress intended for civil agency principles to apply to Title VII. *Id.*

A year later, this Court addressed vicarious criminal liability as it relates to punitive damages under Title VII discrimination cases, in *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999). In *Kolstad*, this Court ruled that an employer should not be held liable for such damages where the managerial employee committed illegal acts contrary to his employer’s good faith efforts to comply with Title VII. *Id.* at 546. “In light of the perverse incentives that the Restatement’s “scope of employment” rules create, we are compelled to modify these principles to avoid undermining the objectives underlying Title VII.” *Id.* at 545.

Punitive damages are “quasi-criminal” and “operate as ‘private fines’ intended to punish the defendant and to deter future wrongdoing.” *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Like criminal statutes, “punitive damages may have a retributive or expressive function, designed to embody social outrage at the action of serious wrongdoers.” Sunstein, Kahneman, & Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2074 (1998). This Court should employ these standards when analyzing corporate criminal liability because the goals are similar: deterrence and retribution.

Recently, in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008), this Court analogized the common goals of punitive damages and criminal law, stating: “The points of similarity are obvious. Punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law.” *Id.* at 2628, citing, *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989). In both situations, courts strive for predictability. In punitive damages, this means moving toward a graduated fault-based scale

where standardized penalties ensure fair punishment and effective deterrence. This approach can easily be applied to corporate criminal liability. By taking into account the level and intensity of compliance programs, and setting graduated position-based standards, courts can apply vicarious criminal liability more consistently and with greater deterrent effect.

IV. THE DISTRICT COURT'S INSTRUCTIONS ON CORPORATE CRIMINAL LIABILITY WERE NOT CONSISTENT WITH GENERAL PRINCIPLES OF CRIMINAL LAW

It is time for this Court to revisit its landmark decision in *New York Central*. Modern business practices continue to grow evermore sophisticated, while the blending of civil and criminal theories remains problematic. This Court should refine its methodology for assessing corporate guilt by (1) allocating different levels of penalties depending upon the agent's role within the company's employment hierarchy, and (2) adopting an affirmative defense for corporations who can successfully demonstrate authentic compliance programs according to recognized standards of "due diligence". This also requires re-examining how *respondeat superior* squares with the goals of criminal law in an era where civil and administrative remedies offer compelling alternatives.

D. This Court should adopt a heightened standard of vicarious liability under which a corporation would be liable only for the acts of its managerial employees, and only where the company lacked effective compliance policies

Just as the lines between civil and criminal concepts continue to blur together, criminal law continues to expand into the corporate world, to the detriment of traditional *mens rea* requirements. "The existence of *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). In the corporate context, the *mens rea* associated with an agent's illegal act is

attributed to his principal, since corporations are incapable of possessing a guilty mind. Once the agent breaks the law, the corporation becomes automatically liable, regardless of the agent's independent scheming and despite the corporation's best efforts to comply with the law. Such a low threshold of vicarious liability fails to provide enough legal cover, under which companies could develop genuinely effective compliance programs.

Therefore, this Court should adopt a heightened standard for *vicarious criminal liability* that arises out of the illegal acts of management level employees. Furthermore, corporations should be entitled to an affirmative "good faith" defense similar to this Court's requirements in the civil context. It is unfortunate that by the current standards, civil defendants are held to a higher standard of culpability than those indicted under criminal statutes.

1. The offending agent must be a managerial agent who acts with the intent to benefit the corporation

This Court's more nuanced approach towards corporate civil liability, particularly punitive damages, serves as a useful tool when considering whether to apply similar standards in the criminal context. Courts struggle to apply the appropriate amount of punishment within a corporation's hierarchy because this Court has not provided them with an articulable standard. Part of this standard should include limiting corporate liability to the acts of managerial personnel, which corresponds with the *Restatement Third, Agency* § 703⁴ and *Restatement Second, Torts* § 909⁵. This is not an automatic shield for corporate agents, but rather the first step in recognizing that corporations are complex structures. Remediating their ills requires

⁴ Ct.(e): "[A] tortious act committed by a non-managerial agent subjects a principal to liability for punitive damages only when the principal is itself implicated in the act, either by approving it before or after its commission, or by recklessly selecting or retaining the tortfeasor as agent."

⁵ Punitive damages can properly be awarded against the master if ... "(c) the agent was employed in a managerial capacity and was acting within the scope of employment...."

surgical precision, not a sledgehammer. After all, a criminal indictment can be devastating for stock holders and employees, not to mention the public relations nightmare.

When the American Law Institute drafted the Model Penal Code, they restricted corporate liability to the acts of some corporate agents who, “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.” *Model Penal Code* § 2.07 (1962).

“High managerial agent” is defined to include “any agent of a corporation...having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association. *Id.* at § 2.07(4)(c). In addition, a corporation could also be held liable for its agents who, acting within the scope of employment, violated a provision in which a legislative purpose to impose corporate criminal liability “plainly appears.” *Id.* § 2.07(1)(a).⁶

The MPC starts by defining the class of culpable employees according to civil law principles, which over time have developed due to the sheer volume of cases. A “high managerial agent” exercises apparent authority, and is criminally liable based on the *New York Central* test only when the statute expressly identifies him. Although the MPC’s suggestions have not gained much traction with federal courts, state legislatures are incorporating them. MPC-style statutes on corporate criminal liability have been adopted in twenty jurisdictions; cases from another four follow similar rules. Christopher R. Green, *Punishing Corporations: The Food-Chain Schizophrenia in Punitive Damages and Criminal Law*. 87 Neb. L. Rev. 197, 205 (2008).

⁶ “Agent” includes “any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association....” *Model Penal Code* § 2.07(4)(b).

2. The corporation should be permitted an affirmative defense based on reasonable care

In addition to limiting the scope of liability, this Court should adopt an affirmative defense for corporations who face criminal charges, so as to provide some legal cover. If a company knows that it can develop compliance programs and protective measures that shield it in certain situations, it is by the same token policing itself. Under the current model, “due diligence” carries no weight, as courts continue to operate under the empty assumption that “it is this rule of vicarious liability that encourages companies to establish compliance programs.” *Twentieth Century Fox*, 882 F.2d at 661.

MPC § 2.07(5) states: “In any prosecution of a corporation...other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves through a preponderance of the evidence that the high managerial agent having supervisory responsibility of the subject matter of the offense employed due diligence to prevent its commission.” It would not apply where it is “plainly inconsistent with the legislative purpose in defining the particular offense.” *Id.*

For example, in *Holland Furnace Co. v. United States*, 158 F.2d 2 (6th Cir. 1946), the Sixth Circuit approached corporate criminal liability with elasticity and recognized such an affirmative defense. If the defendant can show that the employee acted “not only without its knowledge and consent, but in express violation of its instructions to them,” he could break the chain of agency, and thus absolve himself of liability. *Id.* at 8, citing *John Gund Brewing Co. v. United States*, 204 F. 17, 23 (8th Cir. 1913). The court in *Holland Furnace* focused on the salesman’s position among the company’s 4,000 employees, who were spread across forty states. In addition, it considered evidence of management’s “emphatic admonition[s]” against violating company policy. *Id.* at 8. The salesman’s duplicitous tactics were not imputed to the company

because neither the main office, nor his branch manager, was aware of his behavior. *Id.* This analysis was based on the court’s understanding that *New York Central* “must be read in the context of the [Elkins Act].” *Id.* at 6.

Likewise, in the case at bar, Ionia was able to demonstrate through witness testimony that its employees were expertly trained, were aware of the consequences of not following all applicable rules, and that the waste disposal system was functioning normally. The engine room crew submitted falsified reports to management personnel who were stationed at offices in Greece, and could not possibly monitor the *Kriton* crewmembers’ day-to-day behavior. Their company was already on probation for making false statements, so they implemented a plan to curb such behavior, to the best of their abilities. The government presented no proof of collusion between the *Kriton* and Ionia management, nor was there any attempt to show how exactly the *Kriton* engine room crew’s behavior actually benefited Ionia. Instead, the *New York Central* test enabled the government to merely show that the employees, regardless of their rank, committed illegal acts while on the clock. Such a standard fails to honor this Court’s recent decisions, and is contrary to this Court’s understanding of *respondeat superior*.

E. The *New York Central* decision failed to address the inherent differences between civil and criminal law

When this Court chose to address corporate criminal liability by importing civil law concepts, it stated that, “no good reason can be seen” otherwise. *New York Central*, 212 U.S. 494. Today, there are legitimate reasons for revisiting this decision, especially considering the inherent differences between civil and criminal law.

First, civil and criminal liability have two, totally different primary objectives. “Tort law distributes the loss of a harmful occurrence,” while criminal law “coerce[es] the actual or potential wrongdoer to compliance with the set standards of society through the threat or

application of sanctions.” Gerhard Mueller, *Mens Rea and the Corporation*, 19 U. Pitt. L. Rev. 21, 37-38 (1957).

Criminal liability is rooted in compensating society for its losses through deterrence and retribution. People are prosecuted as punishment for a particular act, and so that others may be deterred from making the same decision. There are *mens rea* requirements for nearly every crime and the consequences of such actions include fines, incarceration, probation, and dishonor.

On the other hand, civil liability compensates the victim financially, based upon a measure of damages. Here, intent is a non-issue. A corporation is an artificial entity that becomes liable automatically upon its employee’s actions, regardless of its best intentions to comply with the law. There is no *mens rea* requirement, nor does deterrence play a role. The threat of litigation does not deter future conduct so much as the fear of actually having to pay an award for damages. For purposes of agency law, it is more equitable for the parent corporation to absorb the financial loss, rather than let the employee bear the entire risk. Ultimately, *respondeat superior* is a classic tort theory that was awkwardly installed in *New York Central*, because “every reason in public policy” justified “only go[ing] a step farther” and applying it to criminal law. 212 U.S. 493-95.

F. There are alternatives to imposing corporate criminal liability

This Court stated in *New York Central* that to not impose criminal liability on corporations would, “virtually take the only means of effectually controlling the subject matter and correcting the abuses aimed at.” 212 U.S. at 496. While this may have been true in 1909, currently there other methods available for curbing corporate crimes beyond applying broad *respondeat superior* principles to criminal conduct. There are two major options: (1) criminal

liability of responsible individuals within the corporations and (2) civil remedies against the corporation.

1. Civil remedies are easier to employ and have a greater deterrent effect

There are a great many civil and administrative procedures already in place that more suitably address corporate criminal liability. For starters, the evidentiary standard is lower. Also, criminal procedure is much more protective of the criminal defendant's rights. Therefore, corporate misconduct is better addressed by punitive civil sanctions because monetary sanctions are appropriate and corporate plaintiffs are relatively abundant. Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 *Law & Contemporary Problems* 23, 31 (Summer 1997).

When compared to imprisonment, the issuance of punitive damages is a much more effective punishment against corporations. Certainly, there are instances when incarceration is the most appropriate remedy, and the government should prosecute employees who violate the law. Yet, in most cases, the prosecution of corporations involves punishment through fines; a punishment more effectively realized in the civil courts. As Lynch points out, there is "little problem allowing administrative agencies or [civil] courts...to fine businesses, deprive them of valuable business licenses or opportunities, or forfeit their property." *Id.* In addition, civil compensation methods such as fee-shifting, treble and punitive damages, and the availability of class-action remedies or contingent fee arrangements ensure that fair solutions are available to aggrieved plaintiffs. *Id.* at 32-33. Therefore, by shifting this process away from the overburdened criminal justice system and into the civil and administrative courts, a corporation's punishment could be more adequately addressed.

2. Regulatory agencies are more effective at combating corporate crime

The modern regulatory framework of federal and state agencies offers a more substantial method of dealing with corporate malfeasance. It is the most powerful tool available for combating corporate criminal liability because of their expertise and power to regulate. Corporations are already governed by a galaxy of government agencies, so channeling the prosecution of corporate agents into these systems would not constitute a radical shift for enforcement purposes.⁷ The primary goal is to identify and punish violations. Left solely in the hands of prosecutors, corporate criminal liability only arises upon a major violation. On the other hand, regulators monitor the corporation's activity before violations arise, and punish them upon discovery of such violations. Agencies have specialized knowledge of corporate enforcement procedures, and when compared to the criminal prosecutor, possess a greater ability to ensure that the illicit acts of a corporation and its agents are more swiftly identified and remedied.

CONCLUSION

The importing of *respondeat superior* into the criminal context is currently the only means of litigating corporate crime in federal courts. Unfortunately, the pioneering case remains the foundation, and while it provided an initial solution, modern corporate practices demand a more modern, nuanced approach. This Court should revisit *New York Central* and articulate new standards that (1) restrict liability to situations involving managerial culpability and (2) provide for "due diligence" based affirmative defense. Such efforts would provide the necessary legal

⁷ *Examples include:* SEC, EPA, OSHA, EEOC, IRS, FTC, NLRB, SBA, FDA, FCC, CPSC, FDIC, in addition to corresponding state agencies.

protection for corporations to develop authentic and actionable compliance programs. Therefore, this Court should reverse the judgments of the lower courts.

Respectfully Submitted,

Team 6
Counsel for the Petitioner

CERTIFICATE OF SERVICE

Team Six (6) HEREBY CERTIFIES that on this 20nd day of February, 2009, six (6) hard copies and one (1) copy burned on CDR of the foregoing Brief for Respondent was mailed to the Wechsler Competition Chair at the University of Buffalo School of Law.

Respectfully Submitted,

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Counsel for the Petitioner