

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

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**Ionia Management, S.A.,**

*Petitioner,*

v.

**United States of America,**

*Respondent.*

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT

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**BRIEF FOR PETITIONER**

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### **QUESTIONS PRESENTED**

- (1) Whether the District Court's jury instruction on vicarious corporate criminal liability was unauthorized when federal statutory law and Supreme Court precedent is analyzed and applied.
  
- (2) Whether the Criminal law theories of punishment and statutory elements of intent crimes are contradicted when vicarious corporate criminal liability is imposed.

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## STATEMENT OF THE CASE

This brief is filed in support of Ionia Management S.A., against the United States of America. Ionia Management S.A. is appealing the United States Court of Appeals for the Second Circuit's decision affirming the United States District Court of Connecticut's imposition of vicarious corporate criminal liability on the Appellant. Ionia Management S.A.'s motion for judgment of acquittal and a new trial was denied on December 12, 2007. *United States v. Ionia Mgmt. S.A.*, 526 F.Supp.2d 319, 332 (D. Conn 2007). Ionia Management S.A. (Ionia) asserts that "the government failed to introduce sufficient evidence to establish that Ionia could be held vicariously liable for the acts of its employees and agents." *Id.* at 322. The United States Court of Appeals for the Second Circuit subsequently affirmed the District Court's ruling and entered its decision on September 1, 2008. Consequently, Ionia timely filed its notice of appeal. The Supreme Court granted certiorari on December 12, 2008.

The case at issue surrounds the events that occurred on the M/T Kriton, a vessel owned and operated by Ionia Management. Ionia is a ship management company that is incorporated in Liberia and headquartered in Piraeus, Greece. *Id.* Efstratios Tsigonakis, the Kriton's Chief Engineer, instructed Second Engineer Edgardo Mercurio "not to use the oily water separator and to pump the oily waste overboard without utilizing the oil pollution prevention equipment." *Id.* at 325-26. Both men then ordered the engine room crew to "dispose of the waste directly into the ocean." *Id.* This action was in direct violation of the Act to Prevent Pollution from Ships (APPS). *Id.* at 321. The dumping of oily water was also in violation of Ionia's "official policies prohibiting the conduct by the crew." *Id.* at 326.

On March 20, 2007, the Kriton arrived at the port of New Haven, Connecticut. *Id.* It was here that the United States Coast Guard inspected the ship and subsequently began a criminal

investigation. *Id.* This investigation led to the indictment of Edgardo Mercurio. *Id.* Given that Edgardo Mercurio was employed for the corporation during the commission of the criminal conduct, liability was attached to Ionia Management as well. *Id.*

### **SUMMARY OF THE ARGUMENT**

The jury instructions given by the District Court in the present case called for the application of *respondeat superior* for determining whether liability for an employee's criminal conduct could be imputed to a corporation. This instruction was not authorized by Congress in any of the four statutes that the Appellant is charged with violating. Further, the instruction was not mandated by Supreme Court precedent and is in direct conflict with three recent Supreme Court cases concerning vicarious corporate liability. In each of these decisions, the Supreme Court adopted a more restrictive scope of vicarious corporate liability, while expressly rejecting the application of *respondeat superior*.

The District Court interpreted the holding of *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 492-93 (1909) to mandate the application of *respondeat superior* in the corporate criminal liability setting. This interpretation, along with numerous prior interpretations by other courts, is erroneous. The holding in *New York Central* merely determined that Congress had the authority to impose criminal liability on corporations for the acts of their employees. Consequently, the decision in no way required the application of *respondeat superior* in all corporate criminal liability cases. *Id.* As a result of its mistaken application of *respondeat superior*, the District Court's jury instructions not only contradict recent Supreme Court precedent, but essentially make it less difficult to impute criminal liability to a corporation that it would be in a case of civil liability.

The application of vicarious criminal liability in the corporate setting does not support the

theories of criminal law. This type of liability runs contrary to both deterrence and retribution theories. Deterrence is not accomplished because as applied today, vicarious corporate criminal liability is essentially strict liability. This means that no matter how relentlessly a corporation attempts to prevent crime it is nonetheless held liable for the actions of its employee.

Accordingly, vicarious criminal liability is being applied to corporations that cannot be deterred.

As far as retribution is concerned, if a corporation is doing everything it can possibly do to prevent crime, society does not need or benefit from retribution against that corporation.

Vicarious criminal liability is also being employed despite the fact that courts do not require the proof of *mens rea*. As mentioned above, vicarious criminal liability is being attached to corporations as a strict liability. Corporations who have demonstrated that their policies and procedures are the most that could have been implemented to prevent crimes are still being criminally charged. Liability is being attached even though society has been reluctant to punish those who are unable to form the necessary intent as shown through the insanity defense. It is necessary for intent to be shown in order to attach liability, and the current system fails to execute this requirement.

Due to the fact that vicarious corporate criminal liability is being attached as strict liability, the criminal process is heavily weighted against the defendant. Prosecutors have an absorbent amount of power in prosecuting corporate crimes, which has left corporations with little or no bargaining power. This powerlessness has led corporations to fold under the fear of prosecution forcing them to act as arms of the prosecution implementing any program that it deems appropriate. This extreme disparity in bargaining power has denied corporations of their due process in criminal court.

## ARGUMENT

### **I. When neither the facts nor witnesses are in question, a de novo standard is applied for appeals on jury instructions.**

The question of law presented for review is whether the District Court properly instructed the jury on vicarious corporate criminal liability. In appeals cases regarding questions of law, the court is compelled to hear the case *de novo*. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). The *de novo* standard requires the reviewing court is to disregard the conclusions reached by the district court and formulate its own. *Id.*

### **II. A more in depth analysis of both Congress' legislation and Supreme Court precedent shows that the District Court's jury instruction on vicarious corporate criminal liability was not authorized.**

The District Court's jury instructions in the present case called for the application of *respondeat superior* for determining whether a corporate defendant could be held vicariously liable for the criminal acts of its employee. The given instruction was not authorized by any of the four statutes that the Appellant is charged with violating. Additionally, this instruction was not mandated by Supreme Court precedent, but is in direct conflict with three recent Supreme Court decisions pertaining to vicarious corporate liability. These decisions expressly reject the application of *respondeat superior* and call for a more narrow scope of vicarious corporate liability.

The District Court's instruction applying *respondeat superior* originates from its erroneous interpretation of *New York Central*. The holding in *New York Central* merely determined that Congress had the authority to impose liability on corporations. *Id.* at 492-93. The decision in no way mandated the application of *respondeat superior* in the present case. *Id.* Consequently, the District Court's instruction on vicarious corporate criminal liability was not only contradictory to Supreme Court precedent but actually makes it easier to impute liability to

a corporation in a criminal scenario than it would be to do so in a civil context.

**A. Excluding a few instances, Congress has declined to legislate exactly how criminal liability should be imputed to a corporation when specific conduct of an employee is in question.**

Historically, both federal legislation and judicial decisions have determined that corporations are in fact capable of committing criminal offenses. *N.Y. Cent.*, 212 U.S. 481. Although on rare occasions Congress has specified how liability should be imputed to a corporation, in the overwhelming majority of instances, Congress has declined to provide explicit application procedures that should be employed. *See* 33 U.S.C. § 1908(a) (2000); 18 U.S.C. § 371 (2000); 18 U.S.C. § 1519 (2000); 18 U.S.C. § 1505 (2000). When circumstances are such that legislation pertains to issues that are both highly controversial and have an extremely profound effect on the parties affected by the legislation, Congress has tended to explicitly state how the essential elements of the legislation should be applied. *See* 18 U.S.C. (2000).

In the present case, the four statutes that the Appellant has been charged with violating fail to supply any express guidance for imputing criminal acts of an employee to his or her employer. *See* 33 U.S.C. § 1908(a); 18 U.S.C. § 371; 18 U.S.C. § 1519; 18 U.S.C. § 1505. These four statutes do not expressly state that the principle of *respondeat superior* should be employed to allow for the imputation of liability to the Appellant. This principle has traditionally been defined as the principle of holding an employer vicariously liable for the torts committed by an employee while acting within the scope of his/her employment. Restatement (Third) of Agency § 2.04 (2006).

The fact that Congress declined to expressly specify how the principle of vicarious liability should be determined under the involved statutes, offers evidence to show that it is

unlikely that Congress' intention was for the least demanding and most easily proven application to govern. Given that Congress has not adopted new legislation or drafted amendments addressing the specific issue of vicarious corporate criminal liability under these four statutes, Supreme Court precedent should be considered and analyzed in order to arrive at the correct and fair outcome.

**B. Although the Supreme Court has never considered when and how criminal liability should be imputed to a corporation in the absence of statutory instruction, it has rejected the application of respondeat superior in similar cases.**

The Supreme Court has rejected the application of *respondeat superior* in cases analogous to criminal liability such as hostile workplace claims and punitive damages under Title VII of the Civil Rights Act of 1964. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Kolstad v. ADA*, 527 U.S. 526 (1999). In *Faragher*, the Supreme Court expressly rejected the Court of Appeals' view that employers are "always automatically liable for sexual harassment by their supervisors." 524 U.S. at 792. Both *Faragher* and *Ellerth* dealt with hostile workplace claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et. seq.* (2000). *Faragher*, 524 U.S. at 780; *Ellerth*, 524 U.S. at 749. Instead of applying the principle of *respondeat superior*, the Supreme Court began by narrowing the applicability of vicarious liability to acts of supervisors who had direct authority over the employee. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. The Supreme Court also created an affirmative defense for employers when the action was not a tangible employment action. *Id.*

[A] defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises of two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

*Faragher*, 524 U.S. at 806.

Subsequent to the Court's ruling in *Ellerth* and *Faragher*, the Supreme Court refused to adopt the application of *respondeat superior* again in 1999. *Kolstad v. ADA*, 527 U.S. 526 (1999). *Kolstad* dealt with the granting of punitive damages in relation to a discrimination claim under Title VII. *Id.* at 529. The Court stated that "the common law has long recognized that agency principles limit vicarious liability for punitive damages." *Id.* at 541. Recognizing these limitations, the Supreme Court rejected the principle of *respondeat superior* and maintained that imposing liability and punitive damages on employers who "engage in good faith efforts to comply with Title VII" would go directly against these limitations. *Id.* at 544.

This being so, the Court agreed 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.* at 545. The Court also subsequently reasoned that because Title VII's primary objective is to prevent discrimination, imputing liability to a corporation based simply on the fact that the employee was acting in the scope of his employment, "would reduce the incentive for employers to implement antidiscrimination programs...Disuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII." *Id.* at 544-45.

In these civil cases dealing with punitive damages and hostile workplace, the Supreme Court expressly rejected the use of *respondeat superior* and adopted a more narrow scope of vicarious liability. In the present case, the Supreme Court is asked to determine the scope of vicarious corporate liability in the criminal context. Vicarious corporate criminal liability is arguably analogous to corporate liability where punitive damages are concerned, as in *Kolstad*.

The goal of punitive damages is to punish a party who “practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” *Id.* at 534. Similarly, criminal law serves the purpose of punishing those who violate the law and commit crimes. Accordingly, the outcome of the present case will determine whether or not punishment is to be inflicted on the Appellant.

Similar to *Kolstad*, the Appellant took reasonable, good faith measures to comply with the statutes in question. Ionia Management had a no dumping policy in place and all employees knew that violating the policy was against the law. Accordingly, the District Court should have considered this when assigning the jury instructions. The District Court’s instructions were not only erroneous, but they realistically make it easier to impute liability to a corporation in the criminal context than it is in a civil case under Title VII for punitive damages or hostile workplace.

It has been adopted that in a civil case, the main objective is to provide some type of reparation to the plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Punitive damages on the other hand, serve essentially the same purpose as criminal sanctions in that they “are aimed at deterrence and retribution.” *Id.* Seeing as both criminal penalties and punitive damages in the civil context serve to punish wrongdoers, imputing liability to corporation should arguably be handled in the same or similar manner. It seems completely contrary to the objectives of the United States legal system to make it easier to impute criminal liability to an employer than to do so in a civil context. The principle of *respondeat superior* should never be applied in the criminal context and the District Court’s jury instruction both welcomed and encouraged its general application.

**C. Correct analysis of the New York Central ruling confirms that the Supreme Court did not mandate the application of respondeat superior in the present case.**

The holding in the benchmark case of *New York Central* in no way mandated the application of *respondeat superior* in the context of vicarious criminal liability. Although it was not mandated, lower courts have mistakenly interpreted the decision to hold that they are required to employ the principles of *respondeat superior* in all cases where criminal liability of a corporation is at issue. The statute at issue in *New York Central* imposed criminal liability on a corporation by adopting the “scope of employment” rule. *Id.* at 496-97. The Supreme Court only considered the question of whether Congress possessed the authority to impose vicarious corporate liability in a criminal context. *Id.* at 492-93. The issue was not whether the principles of *respondeat superior* should be applied in all cases where an employee’s criminal conduct is at issue. *Id.*

Although the Supreme Court answered this question in the affirmative, it in no way mandated the application of *respondeat superior* in the context of vicarious corporate criminal liability. The District Court in this case however, erroneously interpreted this decision as requiring the application of *respondeat superior*, thus resulting in the imputation of liability to the Appellant. Since *New York Central.*, it has been properly recognized that the benchmark case simply allowed for Congress to authorize vicarious liability in the criminal context. *See United States v. Fish*, 154 F.2d 798, 800-01 (2d Cir. 1946).

Although it has been established that vicarious corporate criminal liability is permitted, but is in no way mandatory, the Second Circuit has adopted the proposition that an employee’s criminal actions are imputed to his or her employer under all circumstances where the employee is acting in the scope of employment. *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991). This so-called rule has even been adopted even in cases where the controlling statute remains

completely silent as to whether or not liability should be imputed to the corporation at all. *Id.*

The Supreme Court expressly rejected the idea of a general rule for vicarious corporate liability in *Faragher*, *Ellerth*, and *Kolstad*. Accordingly, Supreme Court precedent in cases analogous to the present case calls for a more stringent and demanding approach to imputing liability to an employer than is offered by the principle of *respondeat superior*. For this reason, the District Court's jury instructions should have taken into account these similarities and properly rejected the application of *respondeat superior*.

**III. The application of vicarious criminal liability in the corporate context is contradictory to the criminal law theories of punishment and the statutory elements of intent crimes.**

Vicarious corporate criminal liability has developed over the last 100 years in a manner that has resulted in an unjust system. The enforcement of vicarious corporate criminal liability does not realize the goals of deterrence or retribution, which are the backbones of United States Criminal law. Vicarious corporate criminal liability, also attaches liability to corporations where there is no proof of *mens rea* on the part of the corporation. This attachment amounts to vicarious corporate criminal liability being enforced as a strict liability crime. Because of this strict liability enforcement, the prosecution of vicarious criminal liability cases is extremely unfair for corporate defendants, denying them of fair trials.

**A. The application of vicarious corporate criminal liability has failed to support the criminal law theories of deterrence and retribution for the past 100 years.**

The Supreme Court decision in *New York Central* must be revisited not only because was it misapplied to the case at hand, but it was incorrect and has led to an unjust corporate criminal law system. This system, which has developed due to the Supreme Court's holding in *New York Central*., completely fails to support the two theories that drive criminal law in the United States; deterrence and retribution.

*New York Central* drastically changed vicarious criminal liability because the Supreme Court allowed an intent crime to be charged to a corporation. Prior to the holding in *New York Central*, corporations were not believed to be capable of “possess[ing] the moral blameworthiness necessary to commit crimes of intent.” V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1480 (1996). In this landmark case however, the corporation was being charged with violating a statute that prohibited giving rebates to companies. *N.Y. Cent.*, 212 U.S. at 494-95. This crime also contained an element of intent. *Id.* A manager within the company had been giving rebates in violation of that statute and the Supreme Court found that there was “no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.” *Id.* The Court used the civil theory of *respondeat superior* by stating that there was “no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine.” *Id.* Unfortunately, its ruling has since been construed in such a manner that vicarious criminal liability in the corporate setting is no longer a just practice, but acts as a tyrannical force wielded by the government in such a manner that deprives corporations of their due process and fails to serve the deterrence and retribution theories of criminal law.

The doctrine of vicarious criminal liability has been developed to today’s standard that includes three elements. “First, a corporate agent must have committed an illegal act (the *actus reus*) with the requisite state of mind (the *mens rea*)... Second, the agent must have acted within his scope of employment... Finally the agent must have intended to benefit the corporation.” Khanna, *supra*, at 1489-90.

The first element is attached to the corporation through respondeat superior as established in *New York Central*. Because the American system uses respondeat superior, liability attaches regardless of that agents level within the corporation. Khanna, *supra*, at 1491. “A single low-level employee’s criminal conduct can be sufficient to trigger criminal liability on the part of the corporation. Andrew Weissmann, *Symposium: Corporate, Criminality: Legal, Ethical, and Managerial Implication: Why Punish?: A New Approach to Corporate Criminal Liability*, 44 *Am. Crim. L. Rev.* 1319, 1320 (2007) [hereinafter Symposium]. This presents a serious problem relating to the corporations ability to monitor and control crimes that may occur in the corporation. The Model Penal Code, has even taken into consideration the impossibility of defeating such a high standard and “has limited vicarious criminal corporate liability to cases involving conduct by ‘high managerial agents’” as opposed to the federal governments all inclusive rule. Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 *Ind. L.J.* 411, 423 (2007) [hereinafter Rethinking].

The second element, like the first, has been interpreted extremely loosely. The “scope of employment includes any act that ‘occurred while the offending employee was carrying out a job-related activity.’” Khanna, *supra*, at 1489. Courts have expanded this interpretation to include actions expressly forbidden by the corporation. *Id.* at 1490.

This further impairs the defense of corporate crimes, allowing liability to attach by the lowest employees even when the corporation expressly forbids the actions taken.

The third element, on its face should improve a corporation’s ability to defend against vicarious corporate criminal liability. However, the element that an employee must have intended to benefit the corporation, has also been expanded to include actions that were “motivated at least in part by a desire to serve” the corporation, meaning that the primary goal

need not be the benefit of the corporation. *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3d Cir. 1970). The corporation also need not actually benefit from the criminal acts to be held liable. Khanna, *supra*, at 1490.

With these three elements, that define vicarious corporate criminal liability, being interpreted in the manner that they are, this type of liability has slowly evolved into crimes of strict vicarious liability. However, the crimes that corporations are being charged with still contain an intent element. The problem that now needs to be addressed is that the prosecutions of these strict vicarious liability crimes in the area of vicarious corporate criminal liability do not help to further the theories of deterrence or retribution, that are the backbones of criminal law in the United States.

Both deterrence and retribution are used as justifications for the most severe and controversial punishment that the government can impose on a criminal; the death penalty. Deterrence is defined as “the interest in preventing... crimes by prospective offenders,” and can be expanded to non-death penalty cases to include the interest of preventing the same crime by the same offenders. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). Retribution, the other main theory behind criminal law, is defined as “the interest in seeing that the offender gets his ‘just desserts.’” *Id.* While a brief look at vicarious criminal liability in the corporate context appears to show that deterrence and retribution are realized, a more in depth analysis shows that as applied today, neither goal is actually met.

Vicarious corporate criminal liability today is nothing more than strict liability. Therefore, both the worst offending corporations such as Enron are treated the same as a corporation that has done everything in its power to detect and prevent criminal actions by the corporation’s employees. In the case of Enron, the company’s policies and executives “either

actively encouraged crime or tolerated it.” *Symposium, supra*, at 1326. There is no justification for permitting imputation of that same criminal liability to a corporation with extensive oversight and sound procedures for deterring, detecting, and dealing with criminal activity within the corporation. In fact, applying vicarious corporate criminal liability to the latter through today’s strict liability standard flies in the face of deterrence theory.

Deterrence theory contains two basic elements: specific deterrence and general deterrence. The goal of specific deterrence is to prevent an offender from repeating his or her crime. Corporations, however, cannot control their agents with the same ease that a person can control his or her actions. The only way a corporation can increase the control over its agents is to increase oversight and initiating policies that prohibit, prevent, and detect criminal activity within the corporation. Therefore, the corporation achieves the goal of deterrence by implementing these programs. A corporation that has done all that “it reasonably could to prevent such conduct...does not need to be specifically deterred.” *Id.* Unfortunately, courts have found corporations liable even when the corporation has shown that it took extensive measures to prevent its employees from engaging in the criminal conduct. *Dollar S.S. Co. v. United States*, 101 F. 2d 638 (9<sup>th</sup> Cir. 1939). Therefore, it is impossible to specifically deter a corporation which has already been complying with the law to the best of its ability but has suffered the fate of hiring an employee who shows a blatant disregard for the law.

Ionia Management should not only be given the opportunity to show that it had programs in place to prevent the oil dumping, but it should also be given the opportunity to put a more efficient program in place if its current program is not satisfactory, since the Court’s current stance on vicarious corporate criminal liability was not a valid general deterrent as applied. General deterrence is thought to have a profound effect on white collar crime due to the risk and

reward analysis. *Symposium, supra*, at 1325. However, because of the Court's strict liability stance on vicarious corporate criminal liability, that risk reward analysis has been significantly skewed. It has been skewed because corporations have had to take into consideration the fact that any illegal act carried out by an employee will be linked to the corporation. Therefore, the cost of implementing policies to prevent such behavior may be avoided due to their high cost and lack of ability to protect the corporation if and when a crime is committed.

The retribution theory encounters the same issues regarding the enforcement of vicarious criminal liability in the corporate setting. "Retribution requires us to first determine what it is that the corporation did or did not do that warrants criminal sanctions." *Id.* at 1326. The theory cannot be advanced by seeking retribution against corporations that have done everything in their power to prevent the problem. A corporation's preventative measures do not warrant criminal sanctions, but should be encouraged by the courts. Seeking retribution on a person or corporation who has done all it can to prevent the crime that was committed is not a justifiable ends to criminal law.

The Supreme Court must adjust its stance on vicarious corporate criminal liability to support and advance the theories of deterrence and retribution. This in turn, will result in corporations implementing the best programs possible to prevent employees from committing criminal conduct. It will also assist the government in discovering and prosecuting the individual criminals within the corporation, thus complying with the principals of deterrence and retribution and eliminating the strict liability effect from intent crimes involving corporations.

**B. The enforcement of vicarious corporate criminal liability ignores the statutory element of *mens rea*.**

Another problem is that the courts are applying crimes that contain a *mens rea*. The two main elements in a criminal law statute are the *mens rea* and *actus reus*. The *actus reus* for the

purpose of vicarious criminal liability in the corporate context is committed by an agent of the corporation because corporations are legal fictions and cannot actually commit crimes. The *actus reus* attaches through *respondeat superior*.

The *mens rea* on the other hand, should not attach to the corporation through *respondeat superior*. *Mens rea* is the intent required by the statute necessary to commit a crime. A corporation, as a legal fiction, is unable to form the necessary intent to commit a crime. This is not to say that corporations cannot be guilty of an intent crime, but finding them guilty under today's interpretation, which amounts to strict liability, does not follow the general principles of criminal law.

The problem with these principles as applied to vicarious criminal liability of a corporation is that the interpretation of this liability has eliminated any *mens rea* requirement on the part of the corporation. Therefore, if the government can show that an employee satisfied all the elements of the crime while acting in the capacity of his or her employment, the corporation is held strictly liable without the government needing to show any intent on the part of the corporation. This process of strict liability creates the same problem as mentioned above; corporations are treated equally whether they encouraged criminal conduct or did everything in their power to prevent criminal conduct.

In order to determine if a corporation should be held liable, this Court should apply a test that is similar to the insanity defense. The test for insanity that is currently used asks the question, "did she know the difference between right and wrong with a two – pronged approach that takes into account both the moral understanding of the accused and her ability to control her actions to conform with the law." *Rethinking, supra*, at 430. If this test is applied to the corporations, it will provide a means to decide which corporations should be held liable for the

criminal actions of the agents, and which corporations are victims of criminal employees.

The first prong of the test is not relevant when dealing with corporations. Corporations are responsible for conforming their operations to stay within the limitations of the law. The second prong is the important part of the test. “Society has recognized over the years that none of the three asserted purposes of the criminal law – rehabilitation, deterrence, and retribution – are satisfied when the truly irresponsible, those who lack substantial capacity to control their actions, are punished.” *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966). The second prong of the test will identify whether a corporation controlled its actions and maintained compliance with the law.

Agents carry out a corporation’s actions, whereas a person carries out his or her own actions. The differences between a corporation’s control over its actions and a person’s control over his or her actions are obvious. A corporation does not have the ability to exercise complete control over the actions of its agents whereas most people have complete control over their own actions. Therefore, it is easy to see that a corporation can understand the difference between right and wrong but not have the ability to force its agents to conform to the law. The courts have been reluctant to hold people liable for criminal acts that they were unable to control at the time the act was committed. “A corporation that has taken all practical efforts to prevent the conduct that underlies its criminal charge is similarly lacking in violation.” *Rethinking, supra*, at 431. The courts should also be reluctant to apply criminal liability to corporations when those corporations cannot control the actions of their agents no matter how many procedures are in existence.

To bring vicarious corporate criminal liability into conformity with the constructs of criminal law this Court must revisit its decision in *New York Central*, and reevaluate how

vicarious criminal liability is enforced in the corporate setting. Courts should require prosecutors to show *mens rea* by demonstrating that a corporation either tolerated or encouraged criminal conduct. This can be shown by analyzing the corporation's policies and guidelines in dealing with potential criminal conduct. If the prosecution can show that the policies in place were unreasonable and inadequate, then prosecutors can meet the burden, thus relieving vicarious criminal liability of its current injustice. Only when the burden of production regarding the *mens rea* aspect of vicarious corporate criminal liability has shifted back to the prosecution will corporations such as Ionia Management be afforded due process under the law.

**C. The enforcement of vicarious corporate criminal liability is procedurally unfair to defendants.**

Along with failing to meet the goals criminal law and the basic standards under which criminal law is supposed to be enforced, vicarious criminal liability is prejudiced against defendant corporations. Since the corporate prosecutions following the Enron case, corporate defendants are reluctant to take any case to trial due to the unfair manner in which defendants are treated. *Rethinking, supra*, at 425-26. Vicarious corporate criminal liability under today's standards has an easier burden of proof than corporate civil liability. This is completely contrary to all other areas of law in the United States. *Id.* at 413.

This unfair burden of proof places corporate defendants at a severe disadvantage when it comes to bargaining power with the prosecution. Prosecutions can develop and enforce "deferred prosecution agreement[s]," which is essentially probation, prior to any adjudication. *Id.* Corporations are forced to either accept these deferred prosecution agreements or subject themselves to potential business suicide that comes with a corporate criminal conviction. This newfound power by prosecutors post-Enron, has resulted in corporate defense work acting as an "arm of the prosecutor." *Symposium, supra*, at 1321.

The irony of these deferred prosecution agreements is that they require corporations to implement policies and programs that will help to monitor and prevent criminal activity by agents. Unfortunately, if “a corporation has already put in place the controls that the government would seek to impose, the primary effect of the current system is to render the corporation unable to defend itself and thus powerless in its dealings with a prosecutor.” *Rethinking, supra*, at 414. Again this furthers the injustice of vicarious criminal liability by punishing corporations who have tried to prevent crime.

The solution to the problem of the current injustice is already in place. The Department of Justice (D.O.J.) issued the Thompson Memorandum in 2003 for prosecutors which outlined factors to consider when deciding whether to bring charges. *Symposium, supra*, at 1338. The D.O.J. has also provided guidelines for structuring deferred prosecution agreements. If the courts would simply recognize corporations’ attempts at creating and complying with programs, instead of allowing the government to impose these programs upon corporations already guilty of criminal conduct then vicarious corporate criminal liability as a whole would change for the better. If corporations could use their internal procedures and oversight methods as a shield from prosecution then corporations would be much more likely to implement the most effective procedures possible for preventing criminal conduct within their company.

This Court should allow Ionia Management to show that the employee’s criminal conduct in question was done contrary to corporate policy. If given the opportunity to present a defense, showing a lack of intent on Ionia Management’s part, then vicarious criminal liability of corporations would finally be back supporting the theories of criminal law. If the ruling in *New York Central* is not overturned, then this Court must stipulate that the burden of proof still lies with the prosecutor to show that the corporation failed to enact programs meant to prevent

criminal conduct. If Ionia Management is permitted to present a defense, then corporate criminal liability will support the theories of deterrence and retribution.

**CONCLUSION**

For the foregoing reasons it is respectfully requested that the decision of the District Court of Connecticut be reversed.

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Team 9  
*Counsel for Petitioner*

## APPENDIX

The District Court's general jury instructions pertaining to criminal liability discussed when criminal liability can be imputed onto a corporation. "A corporation may be held criminally liable for the acts of its agent done on behalf of and for the benefit of the corporation, and directly related to the performance of the duties the employee has authority to perform."

*Ionia*, 526 F.2d at 324. The District Court also stated that in order to convict *Ionia* under the Act to Prevent Pollution from Ships, the prosecution must prove that,

*Ionia*, through its agents, was in charge of operating the oil pollution prevention and discharge equipment for the M/T *Kriton*, including the Oily Water Separator and Oil Content Monitor; [and] that for the M/T *Kriton*, *Ionia*, through its agents, knowingly, meaning intentionally or voluntarily, failed to fully and accurately maintain an Oil Record Book in which the required disposal and discharge operations were recorded. *Id.* at 324-25.

The District Court also discussed the meaning of scope of employment by saying,

Even if the act or omission was not specifically authorized, it may still be within the scope of an agent's employment if (1) the agent acted for the benefit of the corporation and (2) the agent was acting within his authority. It is not necessary that the Government prove that the corporation was actually benefitted, only that the agent intended it would be. If you find that the agent was acting within the scope of his employment, the fact that the agent's act was illegal, contrary to his employer's instructions, or against the corporation's policies will not necessarily relieve the corporation of responsibility for the agent's act. *Id.* at 325.