07-5801-CR

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES,
Appellee,
v.

IONIA MANAGEMENT S.A.,
Appellant.

On Appeal From The United States District Court
For the District of Connecticut

BRIEF FOR THE ASSOCIATION OF CORPORATE COUNSEL, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT URGING REVERSAL

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None of the *amici* is owned by a parent corporation, and no publicly held corporation owns more than 10% of stock in any *amicus*.

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INTERESTS OF AMICI CURIAE

Amici are six institutions and associations that together represent the interests—and reflect the knowledge and experience—of thousands of corporate counsel, criminal defense lawyers in private and public practice, legal academics with expertise in corporate criminal liability, and association members dedicated to corporate compliance and responsibility. *Amici* submit this brief in support of the Appellant.

Amici have submitted a motion dated June 6, 2008 seeking leave to file. *Amici* have received the consent of the appellant. Appellee has informed *Amici* that it will not oppose the motion seeking leave to file.

The Association of Corporate Counsel ("ACC") was formed in 1982 to represent the professional interests of attorneys who practice in the legal departments of corporations and other private sector organizations. The association has more than 24,000 members in over 80 countries who represent over 10,000 corporations (public, private, and non-profit). As an *amicus curiae*, ACC offers the Court the perspective of counselors "on the scene," who provide the majority of corporate legal counseling on a day-to-day basis for their clients; accordingly, these lawyers develop and execute their client's defense strategies and their response to allegations brought against the company and its employees by prosecutors and enforcement officials.

The Chamber of Commerce of the United States of America ("Chamber") is the largest business federation in the world. The Chamber's underlying membership includes more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a subscribed membership of almost 11,000 national members, including military defense counsel, public defenders, private practitioners, and law professors, and an additional 28,000-plus state, local, and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice

and preserving, protecting, and defending the adversary system and the U.S. Constitution.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role that manufacturing plays in America's economic future and living standards.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a not-for-profit corporation with a subscribed membership of approximately 1,000 attorneys, which include private practitioners, public defenders, legal aid, and law professors. It is a recognized State Affiliate of the National Association of Criminal Defense Lawyers. The NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and the related disciplines. Its goals include promoting the proper administration of criminal justice; fostering, maintaining, and encouraging the integrity, independence, and expertise of defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; enlightening the public on such issues; and promoting the exchange of ideas and research, to

include appearing as *amicus curiae* in cases of significant public interest or of professional concern to the criminal defense bar.

The Washington Legal Foundation ("WLF") is a national, non-profit public interest law and policy center based in Washington, D.C. Founded 30 years ago, WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, business civil liberties, and a limited and accountable government. To that end, WLF has appeared before the Supreme Court and lower federal courts, including this one, in numerous cases that raise issues of scienter and *mens rea* in the civil and criminal context. *See, e.g., Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *United States v. Nacchio,* 519 F.3d 1140 (10th Cir. 2008); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.2d 134 (2d Cir. 2003). In addition, WLF publishes policy papers that discuss these issues in depth, including a recent study, *Special Report: Federal Erosion of Business Civil Liberties* (2008).

INTRODUCTION

Recent Supreme Court decisions and principles of the criminal law mandate that the lower federal courts' erroneous approach to vicarious corporate criminal liability be revisited. The district court applied a theory of *respondeat superior* borrowed from the civil justice system when it instructed the jury that a corporate defendant could be held criminally responsible for the conduct of a single low-level employee even if he or she acted in direct contravention of corporate policy and a robust compliance program. Although that instruction is common, it was not authorized by any of the four criminal statutes with which the corporate defendant was charged or by any decision of the Supreme Court. To the contrary, it is wholly inconsistent with three recent Supreme Court decisions—which severely restrict corporate *respondeat superior* principles—and turns upside down the public policy objectives of the criminal justice system.

The district court's instruction stems from a longstanding but indisputably mistaken application of the Supreme Court's decision almost a century ago in *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909). That decision determined only that Congress has the constitutional power to include *respondeat superior* principles in a criminal statute. The decision said nothing whatsoever about the criteria that govern the imputation of corporate criminal liability for those federal criminal statutes where Congress has made no

such choice. Instead, recent decisions of the Supreme Court expressly reject the applicability of *respondeat superior* principles in directly analogous areas. Remarkably, in light of those recent decisions, the district court's jury charge perpetuates a standard that makes it easier to impute liability in *criminal* settings than in a variety of *civil* settings. Notably, several states (as well as other countries) have adopted principles for the application of vicarious liability to corporate entities that are consonant with the holdings of recent Supreme Court opinions, and a wide array of commentators approaching the issue from a variety of legal and political perspectives have criticized the anomaly and unfairness of the expansive instruction given below.

With increasing criminal investigations of organizations—and the life-or-death consequences an indictment can bring—it is imperative that this Court revisit the key question of the principles and criteria that should govern the imputation of criminal misconduct by corporate employees to their employer.

ARGUMENT

I. Neither Congress nor the Supreme Court Authorized the District Court's Corporate Liability Instruction

A. Congress Did Not Authorize the District Court's *Respondeat Superior* Instruction

Congress has clearly determined that corporations are capable of committing crimes[1] but with rare exceptions has not chosen to legislate *how* the courts are to impute to a corporation the conduct and intent of its employees or other agents. In a handful of instances in the context of regulatory regimes, Congress has explicitly set out the method of imputing the acts of an employee to the corporation for criminal purposes.[2] An early and representative example, the Elkins Act, which

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[1] Unless the statute indicates otherwise, the words "person" and "whoever" in any federal statute are defined to include corporations, 1 U.S.C. § 1 (2000), and accordingly Congress has indicated that corporations may be liable for committing a wide variety of crimes. These include all four of the criminal statutes at issue in this appeal: 33 U.S.C. § 1908(a) (2000) ("A person who knowingly violates the MARPOL protocol . . . commits a class D felony."); 18 U.S.C. § 371 (2000) ("If two or more persons conspire . . . each shall be fined under this title or imprisoned not more than five years, or both."); 18 U.S.C. § 1519 (2000) ("Whoever knowingly alters . . . or makes a false entry in any record . . . with the intent to impede, obstruct, or influence the investigation . . . of any matter . . . shall be fined under this title, imprisoned not more than 20 years, or both."); 18 U.S.C. § 1505 (2000) ("Whoever, with intent to avoid, evade, prevent, or obstruct compliance . . . with any civil investigative demand . . . shall be fined under this title [or] imprisoned not more than 5 years . . . .").

[2] Congress typically adopts *respondeat superior* principles only in regulatory-type statutes that fall outside the general Federal Criminal Code, as Title 18 of the United States Code is popularly labeled. *See, e.g.*, Commodities Exchange Act, 7 U.S.C. § 2(a)(1)(B) (2000); United States Cotton Futures Act, 7 U.S.C. § 15b(i) (2000); United States Cotton Standards Act, 7 U.S.C. § 63 (2000); United States Grain Standards Act, 7 U.S.C. § 87d (2000); Packers and Stockyards Act, 7 U.S.C.

regulated price rebates by common carriers, expressly adopted *respondeat superior* principles in providing that "[i]n construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, *acting within the scope of his employment shall, in every case, be also deemed to be the act, omission, or failure of such carrier*, as well as that of the person." Pub. L. No. 57-103, ch. 708, 32 Stat. 847 (1903) (emphasis added).

In contrast, the statutes with which the corporate defendant was charged here contain no indication that Congress intended the misconduct of employees to be imputed to their employer through adherence to the least demanding *respondeat superior* principles. Indeed, the statutes contain no guidance whatsoever for courts to apply in determining how to impute the criminal misconduct of an employee to an employer. In the absence of any statutory authority for the application of

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§ 223 (2000); Cotton Statistics and Estimates Act, 7 U.S.C. § 473c-3 (2000); Perishable Agricultural Commodities Act, 7 U.S.C. § 499p (2000); Tobacco Inspection Act, 7 U.S.C. § 511*l* (2000); Act of Aug. 24, 1966 (regarding the handling of animals), 7 U.S.C. § 2139 (2000); Animal Health Protection Act, 7 U.S.C.A. § 8313(c) (West 2008); An Act To Prevent Discrimination Against Farmers' Cooperative Associations, 15 U.S.C. § 431 (2000); Filled Milk Act, 21 U.S.C. § 63 (2000); Poultry Products Inspection Act, 21 U.S.C. § 461; Egg Products Inspection Act, 21 U.S.C. § 1041 (2000); Communications Act, 47 U.S.C. § 217 (2000); ICC Termination Act of 1995 (regarding railroads), 49 U.S.C. § 11907 (2000); ICC Termination Act of 1995 (regarding tariff violations), 49 U.S.C. § 14903 (2000); ICC Termination Act of 1995 (regarding motor and water carriers), 49 U.S.C. § 14911 (2000); ICC Termination Act of 1995 (regarding pipeline carriers), 49 U.S.C. § 16106 (2000).

respondeat superior principles to the corporate defendant below, this Court must look to recent Supreme Court precedent for the appropriate principles to apply.

B. The Supreme Court Has Rejected the Application of *Respondeat Superior* in Analogous Cases

Remarkably, the Supreme Court has never addressed how vicarious criminal liability should be determined for corporations in the absence of a statute that explicitly includes instructions for imputing the liability of an employee to the corporation. However, recent cases in the analogous contexts of punitive damages and hostile workplace claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* (2000), make clear that the Supreme Court would be skeptical that *respondeat superior* should be applied by default in criminal cases.

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Supreme Court limited the traditional applicability of *respondeat superior* in determining vicarious liability for corporate defendants in civil sexual harassment cases under Title VII. *Faragher* and *Ellerth* were companion cases, and the court explicitly noted that it was adopting the same holding for both cases. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. In both *Faragher* and *Ellerth*, the Court narrowed the scope of vicarious corporate liability, rejecting the usual rule in civil cases that vicarious liability arises from all acts of employees acting within the scope of their employment. The Court first restricted liability to the acts of supervisors.

Faragher, 524 at 799-801; *Ellerth*, 524 U.S. at 762. Additionally, the Court determined an employer is entitled to an affirmative defense if it has reasonable policies in place to deter the offending employee's conduct, and if the aggrieved employee has not availed herself of the employer's system of redress. *Faragher*, 524 U.S. at 780; *Ellerth*, 524 U.S. at 765, 807. The Court reached this result even though Congress had explicitly included "agents" in the definition of "employer" and even though the Court determined that Congress intended civil agency principles to apply to Title VII.

Importantly, the Court reached its decision primarily based on the underlying purpose of Title VII, which the Court viewed as providing incentives to prevent sexual harassment rather than the typical purpose of a civil suit, which is to redress a plaintiff's injury. *Ellerth*, 524 U.S. at 765 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context . . . .").

A year after *Faragher* and *Ellerth*, the Supreme Court again rejected the application of *respondeat superior* principles, this time with respect to punitive damages. In *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 543 (1999), a discrimination case under Title VII that did not involve hostile work environment

claims, the Court held that punitive damages were only available in cases where the employer ratified the tortious act of an employee or where the tortious act was performed by an employee acting in a managerial capacity. Importantly, the Court explicitly rejected the application of expansive civil agency principles, by which "even an employer who makes every effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a 'managerial capacity.'" *Id.* at 544. The Court consequently held that an employer cannot be liable for punitive damages for a managerial employee's acts taken contrary to the employer's good faith efforts to comply with Title VII. *Id.* at 546.

In reaching its decision, the Court relied on the fact that Title VII was not designed primarily to provide redress but instead to prevent sex discrimination through the creation by employers of effective policies and grievance mechanisms. *Id.* at 545. The Court's analysis is instructive: it noted that the general common law of agency (as reflected in the Restatement (Second) of Agency (1957)) "places strict limits on the extent to which an agent's misconduct may be imputed to the principal for purposes of awarding punitive damages," *id.* at 542, beyond mere *respondeat superior* principles, but determined that those additional "strict limits" were still not demanding enough to protect against the inappropriate imposition of punitive damages in Title VII cases.

Ironically, the charge by the district court in the criminal case below did not even apply the stricter limits the common law itself provides in the *civil* punitive damages context (principally requiring that the *respondeat superior* "scope of employment" rule be applied only to agents employed at a managerial level). Instead, the jury was charged that the misconduct of Appellant's employees, regardless of their position with the company, could be imputed to the company if the acts were done within the scope of employment and to benefit the company. [3]

In rejecting the common law's agency rule for punitive damages as inadequate, the *Kolstad* Court reasoned that "[a]pplying the Restatement of Agency's 'scope of employment' rule in the Title VII punitive damages context . . . would reduce the incentive for employers to implement antidiscrimination programs." *Id.* at 528. It determined that the "scope of employment" rule, even if limited to imputing conduct of managerial level agents, would create "perverse incentives" for a corporation to avoid taking remedial measures if such measures

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[3] The district court charged the jury that "[a] corporation may be held criminally liable for the acts of its agent done on behalf of and for the benefit of the corporation, and directly related to the performance of the duties the employee has authority to perform" (Jury Instructions, R. at 164:10) and later referred to acts "'within the scope of their employment.'" (*Id.* at 164:19.) The court elaborated: "[e]ven 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." (*Id.*). The court also noted: "[t]he 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.*). Appellant points out the dearth of evidence regarding the "benefit" prong of this instruction.

provide no defense and may expose the corporation to liability. *Id* at 545. The Court therefore felt "compelled to modify these principles" to assure that, "in the punitive damages context, an employer may not be vicariously liable for the [misconduct] . . . of managerial agents where [the misconduct is] . . . contrary to the employer's good faith efforts to comply with Title VII." *Id.* at 528.[4]

The decision in *Kolstad* is directly analogous to the application of vicarious liability in the criminal context. The Supreme Court has described punitive damages as "quasi-criminal" in nature because they are designed to punish and deter. *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 569 (1996). Like punitive damages, the two primary goals of criminal law are retribution and deterrence. *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997). Thus, where a company has undertaken all reasonable measures to deter and detect the employee's criminal actions, the company has done all that can be expected, i.e., there is nothing that the criminal law is serving to deter or punish since there is no action by the *corporation* that it should have otherwise taken. If the corporation has taken all

[4] Notably, this Court had previously held in a civil rights case under 42 U.S.C. § 1983 (2000) that "the employer himself must be shown to have acted or failed to act to prevent known or willfully disregarded actions of his employee to be liable in punitive damages." *Fort v. White*, 530 F.2d 1113 (2d Cir. 1976).

actions that can be expected, applying criminal liability would result in the same "perverse incentives" rejected by the Supreme Court in *Kolstad*.[5]

Here, the district court's instruction on vicarious liability was plainly erroneous: the instruction made it easier to impute conduct and knowledge to a corporation in a criminal case than it would be in a civil case under Title VII.[6] Such a result is highly anomalous. The purposes of the civil justice system typically make application of *respondeat superior* principles sensible, at least when the key objective is to afford redress to the plaintiff. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-417 (2003) (noting the different purposes of compensatory and punitive damages in civil cases, explaininfg that compensatory damages are designed to afford redress to a plaintiff while punitive damages "serve the same purposes as criminal penalties"). In contrast, the criminal justice system seeks to promote compliance with society's dictates as expressed in the criminal code. Vicarious liability principles with respect to

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[5] The record below includes evidence of a compliance program created by the corporate defendant. (Appellant's Opening Br. 33). The corporate defendant should have been allowed to both present and argue such evidence to a properly instructed jury.

[6] In extending the decisions of *Ellerth* and *Faragher* to claims of constructive discharge, the Supreme Court noted that it would be anomalous to make a graver claim easier to prove than a lesser one. *Pa. State Police v. Suders*, 542 U.S. 129, 149 (2004). The Court's underlying reasoning is equally applicable in the criminal context.

corporate criminal liability should foster that objective; the district court's jury charge failed to do so.

C. The Supreme Court's *New York Central* Decision Did Not Mandate the District Court's Jury Instructions Adopting *Respondeat Superior*

Although the Supreme Court has addressed the appropriate standard of vicarious liability in the context of certain civil statutory remedies, the Court has never addressed the issue in the criminal context. Lower courts have mistakenly relied on a decision from 1909 as if it instructed the trial courts that they *must* apply the least demanding *respondeat superior* rule in the criminal context. That decision, *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909), decided no such thing. Instead, the Court considered a constitutional challenge to a particular statute, the Elkins Act, which created criminal liability for common carriers for illegal rebates granted by their agents and officers. The statute, as noted above in section I.A, explicitly imposed vicarious criminal liability on a company by providing that whenever an employee was acting within the scope of employment, the employee's acts or omissions would be imputed to the corporation for purposes of liability under the act. *Id.* at 492.

The Court addressed only the issue of whether Congress had the constitutional *authority* to impose vicarious corporate liability if Congress so chose. Not at issue was whether in all cases—even in the absence of explicit

statutory mandate—federal common law required that the criminal actions of an employee be imputed to the corporation based on the least demanding principles of *respondeat superior*, regardless of the employee's position of responsibility or the corporation's actions to prevent such criminal acts.

The erroneous reading of *New York Central* and the failure to consider recent Supreme Court authority—or even the stricter limits on *respondeat superior* that the common law provides for punitive damages—were precisely the errors made by the district court. Appellant was charged under four separate federal statutes, none of which contained language about how to impute the conduct and knowledge of an employee to a corporation. The district court advanced a view of vicarious liability tethered erroneously to *New York Central* and persisted in its view in its post-trial hearing, citing *United States v. Twentieth Century Fox*, 882 F.2d 656, 660 (2d Cir. 1989), and *United States v. George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1946), for the unremarkable proposition that the corporation "may" be held criminally liable for the acts of its employees.

The Second Circuit's early corporate criminal liability cases correctly recognized the limits of *New York Central*, though subsequent cases drifted into a judicial assumption that application of expansive *respondeat superior* principles to determine vicarious corporate criminal liability is *required* regardless of the text of the statute in question or the intent of Congress. In *Fish,* the Second Circuit

appropriately read *New York Central* only as *permitting* Congress's imposition of corporate criminal liability. 154 F.2d at 801. In the years following *Fish*, the Second Circuit has simply relied upon a purported "general rule" that an employee's actions are imputed to the corporation even when the statute in question does not specify when the acts or intents are to be imputed. *See, e.g.*, *United States v. Paccione*, 949 F.2d 1183, 1200 (2d Cir. 1991); *United States v. Demauro*, 581 F.2d 50, 53 (2d Cir. 1978). This outcome, in the context of criminal liability, cannot be reconciled with the Supreme Court's rejection of the same "general rule" in *Kolstad* in the context of punitive damages.[7]

II. The Second Circuit Should Adopt an Approach to Vicarious Criminal Liability Consistent with Supreme Court Precedent and the Objectives of Criminal Liability

The reasoning of the recent Supreme Court cases limiting the use of *respondeat superior* principles to impose vicarious liability on corporations makes eminent sense. By contrast, the district court's view of vicarious liability in the

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[7] The rule of lenity is instructive by analogy in this context, as it applies when a court is attempting to choose between two alternatives in the absence of any congressional guidance. As Justice Scalia has recently noted:

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, No. 06-1005, slip op. at 6 (U.S. June 2, 2008) .

criminal context is inconsistent with the criminal law's goals of deterrence and punishment. In cases where corporations have done everything reasonable to prevent criminal conduct on the part of their employees, the corporation itself is not morally culpable yet is disincentivized from taking steps to expose the wrongdoing because of the risk that expansive *respondeat superior* principles will lead to its own criminal liability. These are exactly the incentives that led the Supreme Court to adopt a more limited approach to vicarious liability in *Faragher*, *Ellerth*, and *Kolstad*. An alternative approach to corporate criminal liability is called for not only by *Faragher*, *Ellerth*, and *Kolstad*, but by numerous commentators who have criticized the *respondeat superior* approach.

A. Application of Broad *Respondeat Superior* Rules Undermines the Goals of the Criminal Law

The criticism of the prevailing scope of corporate vicarious criminal liability is widespread and growing, particularly given the rise of corporate investigations and prosecutions by the federal and state governments.[8] While the availability of

[8] Numerous judges, former prosecutors, and legislative counsel have criticized the current system. *See, e.g.*, Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411 (2007); Preet Bharara, *Corporations Cry Uncle and their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 Am. Crim. L. Rev. 53 (2007); Edwin Meese III, *Closing Commentary on Corporate Criminal Liability: Legal, Ethical, and Managerial Implications*, 44 Am. Crim. L. Rev. 1545 (2007); George J. Terwilliger III, *Under-Breaded Shrimp and Other High-Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 Am. Crim. L. Rev. 1417 (2007); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma*

of Artificial Entities and Artificial Crimes, 44 Am. Crim. L. Rev. 1279 (2007); Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 Am. Crim. L. Rev. 1319 (2007); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 Law & Contemp. Probs. 23 (1997; Hon. Lewis A. Kaplan, Remarks to the New York State Bar Association: Should We Reconsider Corporate Criminal Liability? (Jan. 24, 2007), *available at* http://nysbar.com/blogs/comfed/2007/06/should_we_reconsider_corporate.html.

The critique from scholars and practitioners has also been persistent and compelling. *See, e.g.*, Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. Legal Stud. 833 (1994); Kathleen F. Brickey, *Rethinking Corporate Liability Under the Model Penal Code*, 19 Rutgers L.J. 593 (1988); H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 Loy. L. Rev. 279, 324 (1995); Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Criminal Liability*, 75 Minn. L. Rev. 1095 (1991); Pamela H. Bucy, *Trends in Corporate Criminal Prosecutions*, 44 Am. Crim. L. Rev. 1287 (2007); John C. Coffee, Jr., *"No Soul To Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386 (1981); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193 (1991); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319 (1996); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 Sydney L. Rev. 468 (1988),; Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. Corp. L. 731 (1996); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477 (1996); V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. Rev. 355 (1999); Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 Geo. Wash. L. Rev. 715 (2001); William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 Am. Crim. L. Rev. 1307 (2007); Craig S. Lerner & Moin A. Yahya, *Left Behind After Sarbanes-Oxley*, 44 Am. Crim. L. Rev. 1383 (2007); Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 Am. Crim. L. Rev. 1343 (2007); Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 Am. Crim. L. Rev. 1537 (2007); Paul H. Robinson, *The Practice of Restorative Justice: The Virtues of Restorative Process, the Vices of "Restorative Justice,"* 2003 Utah L. Rev. 375, 384-85; Charles J. Walsh & Alissa Pyrich, *Corporate Compliance*

corporate criminal liability is congressionally mandated, the means by which such liability is established are critical. A criminal indictment can be a life-or-death matter for a company.[9] Yet, the vast sweep of the district court's standard for the imposition of vicarious criminal liability makes corporations accountable for almost all criminal acts of any low level employees—even those acting against explicit instructions and in the face of the most robust corporate compliance program. This has caused a tremendous imbalance between the power of a prosecutor and a corporate defendant. Given the hair-trigger for corporate liability even for the most responsible corporate citizen, many corporations forego any defenses in order to resolve threatened prosecution. District Judge Gerald E. Lynch phrased the problem with precision:

Programs as a Shield to Criminal Liability: Can a Corporation Save Its Soul?, 47 Rutgers L. Rev. 605, 689 (1995); Bruce Coleman, Comment, *Is Corporate Criminal Liability Really Necessary?*, 29 Sw. L.J. 908, 927 (1975); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 Harv. L. Rev. 1227 (1979); John Baker, *Corporations Aren't Criminals*, Wall St. J., Apr. 22, 2002, at A3.

[9] In addition to significant reputational harm, numerous federal laws disqualify indicted corporations from participating in critical regulated activities. Such consequences include the loss of deposit insurance for banks, being unable to engage in securities transactions for broker-dealers, and suspension and debarment from government contracts for defense and other contractors. *See* Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 Wash. U. L.Q. 329, 352 (1993); *see also* Commodity Exchange Act, 7 U.S.C. § 12a (2000); Federal Deposit Insurance Act, 12 U.S.C. § 1818(a)(2) (2000); Securities Act of 1933, 15 U.S.C. § 77t(b) (2000); Securities Exchange Act of 1934, 15 U.S.C. §§ 78o(b)(4)-(6), 78u(d)-(e) (2000); Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(e) (2000); Medicare and Medicaid Patients and Program Protection Act, 42 U.S.C. § 1320a-7 (2000); 48 C.F.R. § 9.405(a) (West 2008).

> If a corporation is criminally liable for the unauthorized acts of mid-level managers, the corporation will often not have a viable defense, despite legitimate questions about the justice of punishing it. . . . Such defendants are increasingly relegated to making their most significant moral and factual arguments to prosecutors, as a matter of "policy" or "prosecutorial discretion," rather than making them to judges, as a matter of law, or to juries, as a matter of factual guilt or innocence.

Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 Law & Contemp. Probs. 23, 59 (1997).

This imbalance and the problems it engenders are not theoretical. For example, one judge found that prosecutors violated the Constitution by causing KPMG to cut off attorneys' fees to employees in the hope of obtaining a deferred prosecution agreement. *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *appeal docketed*, No. 07-3042-cr (2d Cir. 2007). In another instance, as part of a deferred prosecution agreement, Bristol-Myers Squibb agreed to endow a professorship at Seton Hall University, the prosecutor's alma mater. *Interview of Mary Jo White*, Corp. Crime Rep., Dec. 12, 2005, at 14-15; *see also* Andrew Weissmann with David Newman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411, 415 n.5 (2007). The potential for abuse is manifested as well in the then-common requirement that corporations agree to broad waivers of attorney-client privilege as a factor to be considered for a deferred prosecution agreement.[10]

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[10] Weissmann, *Rethinking*, *supra*, at 415 n.5 (discussing expansive provisions required as part of deferred prosecution agreements, such as the creation of jobs in

The potential for inappropriate prosecutorial pressure is particularly heightened in the area of corporate criminal investigations that end in Draconian non-prosecution and deferred prosecution agreements, where *no* court has oversight authority. There, the prosecutor effectively serves as both judge and jury.[11] Because of the disastrous consequences of a corporate indictment and the ease with which corporations may be liable under the doctrine of *respondeat superior*, corporations are under immense pressure to agree to almost any terms. The vast majority of these negotiations go on behind closed doors, with little public scrutiny and no judicial review.[12] *See* Lynch, *Policing Corporate Misconduct*, *supra*, at 55 ("[G]uilt and punishment are increasingly decided not in

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a particular state); *see also Testimony of Andrew Weissmann Before the S. Comm. on the Judiciary* (2006), *available at* http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/1403/Weissmann_Congressional_Testimony.pdf (addressing prosecution demands to waive the attorney client privilege and describing a common practice among some prosecutors of seeking a blanket waiver of all attorney-client communications).

[11] Former prosecutors have publicly acknowledged the problem, noting:

> One of the problems with the process of negotiating a deferred prosecution agreement is that it is not really a negotiation. Any pushback by the company on a provision that the government requests is not only going to be shot down, but the government may see it as a reflection that the company's claimed contrition is not genuine.

Interview of David Pitofsky, Corp. Crime Rep., Nov. 28, 2005, at 8.

[12] The use of deferred prosecution agreements and non-prosecution agreements continues to grow. From 1992 to 2002, there were a combined total of 18 corporate deferred and non-prosecution agreements. From 2003 to 2007, there were 85 of these agreements, with 20 of them in 2006 and 38 in 2007. Washington Legal Foundation, *Special Report: Federal Erosion of Business Civil Liberties*, 6-2 (2008), *available at* www.wlf.org/upload/Ch6DeferredProsec.pdf.

courts, but through a kind of administrative adjudication, in which prosecutors play the part of magistrates or administrators.").

B. The Principles of Vicarious Corporate Criminal Liability Should Be Consistent with Supreme Court Precedent and the Goals of the Criminal Law

This Court can mirror the recent Supreme Court decisions in this area, in part, by adding an additional element to criminal liability that requires the prosecution to prove that a corporation lacks "effective policies and procedures to deter and detect criminal actions by their employees." Weissmann, *Rethinking*, *supra*, at 411; *id.* at 414 ("[T]he government should bear the burden of establishing as an additional element that the corporation failed to have reasonably effective policies and procedures to prevent the conduct."); *see also* Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. Corp. L. 731, 764-65 (1996) (proposing a due diligence defense to corporate criminal liability); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Shield to Criminal Liability: Can a Corporation Save Its Soul?*, 47 Rutgers L. Rev. 605, 689 (1995) (proposing an affirmative defense based on a corporate compliance program); Harvard Law Review Association, *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 Harv. L. Rev. 1227, 1241-58 (1979).

Applying this principle has the dual benefit of encouraging effective self-policing while also protecting corporations and shareholders from rogue employees who commit crimes despite a corporation's diligence.[13] The Supreme Court has recognized that creating a limit to *respondeat superior* where a company has sought to prevent the offending employee's actions is appropriate and fair, and also serves to incentivize companies to take such measures. *Kolstad*, 527 U.S. at 545. Indeed, promoting such compliance programs is a central goal of the United States Sentencing Guidelines. *See* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697, 710-11 (2002).

Virtually the same approach is embraced by the Model Penal Code ("MPC"), which notably provides an affirmative defense for corporations whose officers "exercised due diligence to prevent [the crime's] commission." Model Penal Code § 2.07(5) (1962). This important principle has also been adopted in

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[13] To escape criminal liability, the company's internal compliance program would need to be an effective one, not merely a "paper" program. *See* Weissmann, *Rethinking*, *supra*, at 440-41. As a result, application of a criterion for imputing criminal liability that turns on the existence of effective measures to avoid misconduct would not have exonerated the likes of Enron, Worldcom, or other recent enterprises whose compliance programs were more "façade" than real. *See generally* Linda Klebe Trevino, *Corporate Misbehavior by Elite Decision-Makers*, 70 Brook. L. Rev. 1195, 1202 (2005); Richard F. Ziegler, *New Obstacles in Setting the Tone at the Top . . . and Some Solutions* 7 (2008) *available at* www.cebcglobal.org/KnowledgeCenter/Publications/EthicalLeadership/NewObstaclesInSettingTheToneAtTheTop.pdf.

countries in both Europe and Asia.[14] In addition, the MPC generally restricts vicarious criminal liability to circumstances in which senior corporate officers are at fault. *See id.* § 2.07(1)(a), (c). This element is also necessary (but not sufficient in the absence of a due diligence defense) to ensure consistency with *Kolstad.* The majority of states have limited vicarious liability by adopting provisions similar to MPC § 2.07(1) in their criminal codes, and several states, including Illinois, Montana, New Jersey, Ohio, and Pennsylania, have also included the due diligence defense contained in MPC § 2.07(5). *See* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 Am. Crim. L. Rev. 107, 126-142 (2006).[15]

This alternative set of principles both encourages effective corporate compliance programs while mitigating the harsh effects of *respondeat superior*, which allows a corporation to be liable for the acts of one low-level individual

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[14] Italy, Austria, and Japan have created corporate criminal liability systems that provide a defense to corporations that institute effective compliance programs and take precautions to prevent their employees from committing crimes. *See* Angelo Castaldo & Giorgio Nizi, *Entity Liability and Deterrence: Recent Reforms in Italy*, 1 Erasmus L. & Econ. Rev. 1, 8-9 (2007); Gudrun Stangl, *Corporate Criminal Liability*, Int'l Fin. L. Rev. (Nov. 2005); Markus Wagner, Int'l Ctr. For Criminal Law Reform & Criminal Justice Policy, *Corporate Criminal Liability: National and International Responses* 5 (1999).

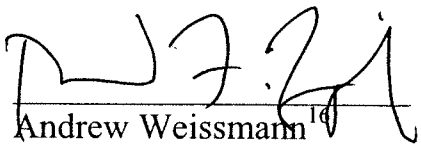
[15] Similarly, the National Commission on Reform of Federal Criminal Laws proposed limiting criminal liability to instances where an offense was committed by an agent whose action was authorized, commanded, or requested by the board of directors, an executive officer, a person who controls the organization, or a person otherwise considered responsible under a statute. 1 *Working Papers of the National Commission on Reform of Federal Criminal Laws* 168 (1970).

employee acting against the corporation's express instructions. The application of vicarious liability principles that allows corporations to present evidence of an effective compliance programs is far more consistent with Supreme Court precedent and the purpose of corporate criminal liability than an approach based on a minimal application of *respondeat superior*.

CONCLUSION

The Second Circuit should adopt a standard for vicarious corporate criminal liability consistent with the goals of the criminal law and the Supreme Court's recent decisions limiting the application of *respondeat superior*. In adopting such a standard, the Second Circuit can look to the MPC and models allowing limitations where a company has implemented a strong compliance program. Such a system benefits the public by providing strong incentives to corporations to enforce vigorously their compliance programs and by punishing those that do not. The judgment below should accordingly be reversed.

Respectfully submitted,



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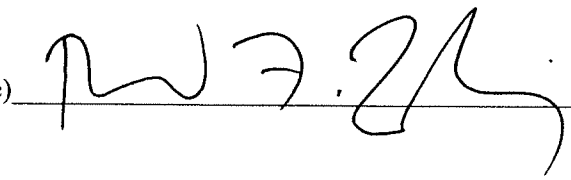
(Your Signature) 

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AFFIRMATION OF SERVICE

SHEILA RONAN, pursuant to 28 U.S.C. § 1746, declares:

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