Nos. 15-1890, 15-1891

IN THE
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

AUSTIN DECOSTER, also known as "JACK," & PETER DECOSTER,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Iowa
Case No. 14-cr-3024 (Hon. Mark W. Bennett)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS, URGING REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENTS

Washington Legal Foundation (WLF) is a non-profit, tax-exempt corporation organized under Section 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, issues no stock, and no publicly held company has an ownership interest in WLF.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a non-profit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. As part of its ongoing Business Civil Liberties Project, WLF has regularly appeared before this and other federal courts in cases addressing the proper constitutional scope of criminal prosecutions against members of the business community. *See, e.g.*, *Yates v. United States*, 135 S. Ct. 1074 (2015); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *Friedman v. Sebelius*, 686 F.3d 813 (D.C. Cir. 2012).

WLF does not condone the introduction of adulterated foods into interstate commerce, and it supports robust regulatory efforts to protect consumers from such foods. At the same time, WLF has long criticized the growing problem of over-criminalization—the disturbing trend at the federal level to criminalize normal, everyday business activities. To that end, WLF opposes the expansive use of the "responsible corporate officer" doctrine, commonly known as the *Park* doctrine, to punish business executives for employee misconduct that the corporate officers

[1] Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus* WLF states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief.

neither condoned nor were even aware of. *See, e.g.*, Brian R. Stimson, *"Responsible Corporate Officer": Business Executives Face Strict Liability*, WLF LEGAL BACKGROUNDER (April 9, 2010). In particular, WLF believes that the district court's extraordinary decision below, by imposing a sentence of incarceration on corporate executives solely on the basis of their supervisory roles in the company, vastly expands the permissible scope of the *Park* doctrine. Such unwarranted expansion offends traditional notions of due process, significantly erodes individual and business civil liberties, and should be reversed.

STATEMENT OF THE CASE

The facts of this case are set out in more detail in Appellants' opening brief. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Appellants Austin and Peter DeCoster are the owner and chief operating officer, respectively, of Quality Egg LLC ("Quality Egg")—a leading Iowa-based egg producer. DCD 85 ¶ 9. After a Salmonella outbreak was traced back to Quality Egg's facilities in August 2010, the company issued voluntary nationwide recalls for hundreds of millions of previously shipped shell eggs. DCD 116 at 4. Despite cooperating fully with the Food and Drug Administration's (FDA) investigation, Appellants were charged with violating the Food, Drug, and Cosmetic Act (FDCA), which prohibits the "introduction into interstate commerce of any food,

drug, device, tobacco product, or cosmetic that is adulterated or misbranded." *See* 21 U.S.C. §§ 331(a) and 333(a)(1).

Appellants pled guilty to one count each of introducing adulterated food into interstate commerce under §§ 331(a) and 333(a)(1) of the FDCA—a strict liability misdemeanor for which no proof of knowledge or intent is required. The plea agreements stipulated that no "personnel employed by or associated with Quality Egg, including the defendant[s]," had any knowledge "that eggs sold by Quality Egg were, in fact, contaminated with *Salmonella Enteriditis*." DCD 17-1 ¶ 7. Because Appellants had no knowledge of the statutory violation or the conduct underlying it, their guilty pleas were based solely upon their status as "responsible corporate officers" at the relevant time of the offense.

Appellants' plea agreements were accompanied by the payment of considerable monetary compensation to those injured by the Salmonella outbreak. In addition to paying a $6.79 million criminal fine, Quality Egg paid, through its insurer, nearly $7.8 million in compensation for damages caused by the company's shipment of contaminated eggs. DCD 99 at 6. Appellants also agreed to pay an additional $83,000 in criminal restitution. *Id.* at 2.

Following entry of their guilty pleas but before sentencing, Defendants sought a ruling from the district court that the imposition of a sentence of incarceration would violate their constitutional rights. DCD 74. In particular,

Defendants argued that the Due Process Clause prohibits incarceration for offenses based solely on strict supervisory liability—where no personal knowledge or wrongdoing by the defendant has been established. *Id.* The district court rejected that argument, concluding that the Supreme Court's decision in *United States v. Park*, 421 U.S. 658 (1975), precluded Appellants' due process challenge. DCD 116.

The district judge sentenced both Appellants to three-month terms of imprisonment and imposed on each a $100,000 criminal fine, plus restitution and probation. DCD 117; DCD 121. Although it was undisputed that Quality Egg had taken substantial steps, informed by expert advisors, to comply with newly promulgated federal egg-safety standards—including rigorous FDA testing protocols designed to prevent Salmonella contamination—the court relied on its "inference" of "careless oversight" to conclude that Defendants "created a work environment" that allowed the Salmonella outbreak to occur. The prison terms were warranted, the district judge concluded, based on the "philosophical justification" that incarceration will "serve to effectively deter against the marketing of unsafe food and widespread harm to public health by similarly situated corporate officials and other executives in the industry." DCD 116.

SUMMARY OF ARGUMENT

Our system of criminal law is founded on the fundamental principle that, before convicting a defendant of a crime, the government must establish beyond a reasonable doubt that the defendant possessed a criminal state of mind, or *mens rea*. The responsible corporate officer doctrine, first recognized by the Supreme Court in *Dotterweich*[2] and later reaffirmed in *Park*, is—and must remain—a very narrow exception to this rule. That doctrine relieves prosecutors of the *mens rea* element of proof for certain violations of the FDCA by holding a defendant criminally liable for the wrongful conduct of others within the company, solely because the defendant held a responsible position within the company when the conduct occurred. Both *Dotterweich* and *Park* involved violations of the same FDCA provision for which Appellants pled guilty. Neither case, however, affords government prosecutors or the federal courts a shortcut to incarcerate otherwise innocent individuals.

Although the Supreme Court has sanctioned the imposition of criminal liability in the absence of *mens rea* in the narrow category of "public welfare offenses," it has done so with the understanding that the penalties imposed in such cases "are relatively small, and conviction does no grave damage to an offender's reputation." *Morissette v. United States*, 342 U.S. 246, 256 (1952). Yet the

[2] *United States v. Dotterweich*, 320 U.S. 277 (1943).

government's position in this case asks the Court to expand the *Park* doctrine far beyond the constitutional bounds recognized by any federal appeals court since the Supreme Court first articulated the doctrine over 70 years ago.

Over Appellants' due-process objections, the district court imposed a three-month term of imprisonment on each defendant, based on nothing more than their supervisory roles in the company. In the only two Supreme Court cases upholding strict criminal liability under the FDCA, the penalties were a $250 fine, and a $500 fine with 60-days' probation. *See United States v. Park*, 421 U.S. 658 (1975) ($250 fine); *United States v. Dotterweich*, 320 U.S. 277 (1943) ($500 fine and 60-day probation). But if, as here, *Park* liability convictions can trigger incarceration, the penalties for such convictions will be pushed far outside the small-bore realm of *Dotterweich* and *Park*.

Such expansion would contravene the Supreme Court's express limitation of strict liability crimes to cases where penalties are small and conviction does no great harm to reputation. For that reason, numerous federal appeals courts have held that a term of incarceration or confinement, with the attendant reputational impact, is simply not the type of "small penalty" that can be sustained in the absence of *mens rea*. If allowed to stand, the district court's decision here would work a manifest injustice and violate due process by permitting the incarceration of individuals whom the government concedes did not even have knowledge of the

company's misconduct—let alone *mens rea*.

Moreover, the increased criminal prosecution of company executives under the *Park* doctrine will adversely affect the nation's business community by labeling responsible corporate officers as criminals—even if they never participated in, encouraged, or had knowledge of the violations alleged. By decoupling imprisonment from individual responsibility, federal prosecutors are pushing the *Park* doctrine well beyond what the Due Process Clause can tolerate. Bootstrapping a strict liability misdemeanor offense in order to deprive business defendants of their basic liberty is not only fundamentally unfair, but it will impose unjustified risks on the larger business community. If this trend continues, it will become intolerably risky to be an executive in the food and drug industries in the United States. As a result, only those executives with an unusually high tolerance for risk (*i*.e., executives who may be less compliance conscious that average) will be willing to run these companies. Moreover, the compensation required to attract and retain qualified executives who are willing to risk their liberty will substantially drive up prices for vital consumer goods in the food and drug sectors.

* * *

The interests of due process, fairness, and stare decisis were all injured in this case. WLF joins with Appellants in urging this Court to reverse the decision below.

ARGUMENT

I. DUE PROCESS REQUIRES *PARK* DOCTRINE PENALTIES TO BE "RELATIVELY SMALL" AND CAUSE NO "GRAVE DAMAGE TO AN OFFENDER'S REPUTATION"

Our legal system very rarely permits the transfer of liability from one individual or entity to another in civil cases, much less in criminal prosecutions. But the "responsible corporate officer" doctrine—or the *Park* doctrine as it is more commonly known—is a peculiar anomaly in criminal law. Under this doctrine, a corporate executive can be held criminally liable for FDCA violations based solely on his or her supervisory authority over an employee wrongdoer, even though that executive had no knowledge of, or culpability for, any wrongdoing. In fact, even the offending employee need not act with knowledge or intent; the liability is strict at both levels.

Although strict liability crimes are morally objectionable and have long been disfavored, courts have nonetheless permitted the imposition of strict liability for "public welfare offenses." But they have done so only in cases where the penalties are "relatively small" and conviction does not cause "grave damage to an offender's reputation." *Morissette*, 342 U.S. at 256. Such offenses are not crimes in the traditional sense, but are rather a means of regulating activities that pose a special risk to public health or safety. The *Park* doctrine, which allows corporate executives to be held strictly and criminally liable for FDCA violations, falls

within this narrow class of strict liability public welfare offenses. But the *Park* doctrine also goes at least one step beyond traditional public welfare offenses: it permits criminal prosecution of supervisors for the acts of subordinates even when the supervisor was unaware of those acts, and even in the absence of a finding that the supervisor was criminally negligent in failing to more closely supervise the subordinate.

The Supreme Court first recognized this doctrine in *United States v. Dotterweich*, a case involving the president and general manager of a pharmaceutical company who was convicted of a misdemeanor under the same FDCA provisions as Appellants after misbranded and adulterated drugs were shipped in interstate commerce. 320 U.S. at 278. The defendant received a $500 fine and 60 days' probation. *See United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 501 (2d Cir. 1942), *rev'd*, *Dotterweich*, 320 U.S. at 277. The Supreme Court upheld the conviction even though there was no evidence in the record that the president was personally guilty of the misconduct, that he actively participated in the misconduct, or that he even knew of the misconduct. *Dotterweich*, 320 U.S. at 285-86 (Murphy, J., dissenting). Instead, guilt was imputed to the president "solely on the basis of his authority and responsibility as president and general manager of the corporation." *Id.* at 286 (Murphy, J., dissenting).

The Supreme Court revisited this doctrine in *United States v. Park*, the case

from which the *Park* doctrine draws its name. In that case, the president of a national food store chain was convicted under similar FDCA provisions prohibiting the adulteration of food, when food products were exposed to contamination by rodents at a warehouse. 421 U.S. at 660. In upholding the conviction, the Supreme Court reiterated that the officer's criminal liability did not arise from knowledge of any wrongdoing, but flowed from his failure "to prevent the act complained of." *Id.* at 671. The Court accordingly upheld the relatively light sentence imposed on the company president: a $250 fine. *Id.* at 660, 666.

Consistent with *Morissette*, then, the Supreme Court has always justified the application of the *Park* doctrine in very narrowly defined cases where the penalties are small and there is no grave danger to the defendant's reputation (*e.g.*, a $500 fine and 60 days' probation in *Dotterweich*, and a $250 fine in *Park*). But if this Court permits Appellants' prison sentences, their underlying *Park* convictions would no longer be justifiable under this narrow reasoning. *See* Jennifer Bragg, *et al.*, *Onus of Responsibility: The Changing Responsible Corporate Officer Doctrine*, 65 FOOD & DRUG L.J. 525, 534 (2010) ("If the Court knew at the time of *Dotterweich* and *Park* that much higher penalties would be sought for [*Park*] convictions, it may not have endorsed the doctrine; if a [*Park*] case reached the Court today, it might not stand.").

Given the threat to fundamental fairness posed by strict liability offenses,

federal appeals courts have uniformly considered the size of the penalty and the gravity of the impact on the individual's reputation in determining whether convictions under the *Park* doctrine violate the Due Process Clause. *See, e.g., Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir. 1999) (noting that "*Park*'s only punishment was a fine; incarceration is a different matter" and holding that "due process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a 'responsible relation'"); *United States v. Heller*, 579 F.2d 990, 994 (6th Cir. 1978) ("[I]f Congress attempted to define a *Malum prohibitum* offense that placed an onerous stigma on an offender's reputation and that carried a severe penalty, the Constitution would be offended.").

The most widely cited decision addressing the constitutional implications of strict liability criminal prosecutions is an opinion from this Court, authored by then-Judge Blackmun. *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960). In that case, the court concluded that the elimination of a *mens rea* requirement did not violate due process where "the penalty is relatively small" and the "conviction does not gravely besmirch." *Id.* at 310. *Holdridge* has been widely followed by other circuits. *See United States v. Unser*, 165 F.3d 755, 762-64 (10th Cir. 1999) (applying *Holdridge*); *Tart v. Commonwealth of Massachusetts*, 949 F.2d 490, 502-03 (1st Cir. 1991) (same); *United States v. Wulff*, 758 F.2d 1121, 1125 (6th

Cir. 1985) (same).

Likewise, three state supreme courts (including one within the Eighth Circuit) have squarely held that due process precludes the deprivation of a defendant's liberty when the underlying conviction is based solely on a theory of strict supervisory liability. *See State v. Guminga*, 395 N.W.2d 344, 346 (Minn. 1986) (holding that "criminal penalties based on vicarious liability … are a violation of substantive due process"); *Davis v. City of Peachtree City*, 304 S.E.2d 701, 703-04 (Ga. 1983) (holding that "a possible restraint of [a defendant's] liberty" solely because an "employee fails to exercise good judgment … cannot be justified under the due process clauses of the Georgia or United States Constitutions"); *Commonwealth v. Koczwara*, 155 A.2d 825 (Pa. 1959) (finding "*no* case in any jurisdiction which has permitted a *prison term* for a vicarious offense" and holding that a defendant's "liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment"). As demonstrated in greater detail below, these cases are entirely consistent with the long history and tradition of criminal law in this country, which requires a showing of personal guilt before a person can be deprived of liberty.

A strict liability criminal conviction violates due process where, as here, the penalty is not relatively small and causes grave harm to the defendant's reputation. As this Court has already recognized, "the imposition of severe penalties,

especially a felony conviction, for the commission of a morally innocent act may violate the due process clause of the fifth amendment." *United States v. Enochs*, 857 F.2d 491, 494 n.2 (8th Cir. 1988). The prison sentences imposed on Appellants in this case cannot plausibly be described as "relatively small" penalties that do not "gravely besmirch." *Holdridge*, 282 F.2d at 310. The Supreme Court has long recognized that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment." *Scott v. Illinois*, 440 U.S. 367, 373 (1979). Indeed, "the combination of stigma and loss of liberty involved in a … sentence of imprisonment sets that sanction apart from anything else the law imposes." HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 123 (1968).[3]

Moreover, a prison sentence is precisely the sort of grave reputational harm that, when arising from a strict liability conviction, raises serious constitutional concerns. After all, "damage will be done to [a defendant's] good name by having a criminal record; and his future will be imperiled because of possible disabilities or legal disadvantages arising from the conviction." *Davis*, 304 S.E.2d at 703. Simply put, the Due Process Clause does not allow incarceration as a punishment

[3] The size of the criminal fines imposed below also likely run afoul of the Supreme Court's rationale for strict supervisory liability. A criminal fine of $100,000 would almost certainly not meet *Morissette*'s requirement of a "relatively small" penalty. A fine of $500 in 1943 (the year *Dotterweich* imposed a $500 fine) would be roughly $6,900 today; a fine of $250 in 1975 (the year *Park* imposed a $250 fine) would be roughly $1,100 today. *See* United States Bureau of Labor Statistics, Inflation Calculator, *available at* http://bls.gov/inflation_calculator.htm.

for a strict supervisory liability offense. Accordingly, that portion of the district court's judgment imposing sentences of imprisonment on Appellants must be vacated.

II. THE LONG HISTORY AND TRADITION OF THE CRIMINAL LAW HAS BEEN TO NARROWLY CABIN, NOT EXPAND, THE REACH OF STRICT CRIMINAL LIABILITY

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be …. deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Supreme Court has held that the Clause "guarantees more than fair process" and accords substantive protection to the rights it guarantees. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). As *Glucksberg* makes clear, the Due Process Clause protects those liberties "deeply rooted in this Nation's history and tradition." *Id*. at 721 (citation omitted). "Freedom from imprisonment … lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In this case, the district court's deprivation of Appellants' liberty in the absence of any criminal intent violates the bedrock tenet of criminal law that "wrongdoing must be conscious to be criminal," *Morissette*. 342 U.S. at 252. That understanding that is deeply rooted in the history and tradition of our country.

Strict vicarious criminal liability represents a sharp departure from the common law tradition. The English common law unqualifiedly accepted the broad and longstanding consensus that there could be no criminal punishment without

"the ancient requirement of a culpable state of mind." *Morissette*, 342 U.S. at 250. All common law crimes required proof of *mens rea*—a guilty mind. *See, e.g.*, 1 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 227, at 260 (2d ed. 1858) ("[N]either in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow, that a man should be deemed guilty unless his mind were so."); 4 WILLIAM BLACKSTONE, COMMENTARIES *21 (1769) ("[A]n unwarrantable act without a vicious will is no crime at all.").

At the time the U.S. Constitution was ratified and the Fifth Amendment adopted, "the doctrine that a defendant was not criminally liable if she was free from moral fault was universally recognized and accepted. Strict liability crimes did not exist." Ann Hopkins, *Mens Rea and the Right to Trial by Jury*, 76 CAL. L. REV. 391, 394 (1988). This requirement of the "concurrence of an evil-meaning mind with an evil-doing hand" has deep roots "in American soil." *Morissette*, 342 U.S. at 251–52. The common law *mens rea* requirement persisted without exception well into the 19th Century. *See, e.g.*, Eugene J. Chesney, *Concept of Mens Rea in the Criminal Law*, 29 AM. INST. CRIM. L. & CRIMINOLOGY 627 (1938-39) (tracing the historical development of *mens rea* in American law).

By the 1850s and 1860s, however, the increasingly complex society ushered in by the Industrial Revolution saw a dramatic rise in the number of workers exposed to injury. The dangers posed by this highly mechanized, industrial

economy soon required administrative regulation unrelated to questions of personal guilt. As the Supreme Court has explained, there was

> an accelerating tendency, discernable both here and in England, to call into existence new duties and crimes which disregard any ingredient of intent. The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct.
>
> Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

Morissette, 342 U.S. at 253-54.

By the late 19th and early 20th Centuries, some states began to accommodate calls for greater regulation of the business community by enacting "public welfare offenses," which—for the first time—sought to punish certain conduct without proof of *mens rea* in a limited number of cases. *See* Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 55-88 (1933) (distinguishing between such "regulatory offenses" and "true crimes"). Historically, nearly all crimes were aimed at conduct that was *malum in se*, or

wrong in itself (*e.g.*, murder, rape, robbery, *etc*.). Public welfare offenses, however, proscribed conduct that was *malum prohibitum*, or wrong only because it is legally prohibited. Accordingly, prosecutions for public welfare offenses were seen primarily as a means of encouraging compliance with government regulations, not as a means of punishing guilty people. *See, e.g.*, *United States v. Behrman*, 258 U.S. 280, 290 (1922) (Holmes, J., dissenting) ("It seems to me impossible to construe the statute as tacitly making such acts, however foolish, crimes.").[4]

During the early 20th Century, federal and state courts generally upheld strict liability convictions for public welfare offenses in the absence of *mens rea*, but only in those cases in which the defendant had some direct involvement with the offense. Thus, in 1910, the Massachusetts Supreme Judicial Court upheld the conviction of a driver for transporting a barrel of liquor inside the city limits without a license, despite the absence of any evidence that he knew or should have

[4] Another important distinction between public welfare offenses and traditional crimes was the relatively light penalty imposed for the former. Such offenses uniformly involved "a social injury so direct and widespread and a penalty so light that in such exceptional cases courts could safely override the interests of innocent individual defendants and punish without proof of any guilty intent." Sayre, *supra*, at 68. Indeed, "the small penalties attached to such offenses logically complemented the absence of a *mens rea* requirement: In a system that generally requires a 'vicious will' to establish a crime, … imposing severe punishments for offenses that require no *mens rea* would seem incongruous." *Staples v. United States*, 511 U.S. 600, 616-17 (1994). "[C]ommentators collecting the early cases have argued that offenses punishable by imprisonment cannot be understood to be public welfare offenses, but must require *mens rea*." *Id.* at 617 (citing ROLLIN M. PERKINS, CRIMINAL LAW 793-98 (2d ed. 1969)).

known the barrel contained liquor. *Commonwealth v. Mixer*, 93 N.E. 249 (Mass. 1910). At the same time, the court made clear that the driver's employer, a common carrier, could not be convicted of the crime without knowing that the barrel in question contained liquor. *Id.* at 251.

Even those courts that accepted the imposition of criminal liability in the absence of *mens rea* nevertheless continued to insist upon the relatively light penalty available for such convictions. In *People v. Sheffield Farms-Slawson-Decker Co*., 121 N.E. 474 (N.Y. 1918), for example, then-Judge Cardozo considered a New York child-labor statute that imposed strict criminal liability on managers for the company's violations. In upholding the conviction, the New York State Court of Appeals reasoned that because the monetary fines imposed for the violation could also have been recovered "through the form of a civil action," the state legislature had not altered the "substance of constitutional power." *Id*. at 476. But Judge Cardozo went on to emphasize:

> [I]n sustaining the power to fine we are not to be understood as sustaining to a like length the power to imprison. … That there may be reasonable regulation of a right is no argument in favor of regulations that are extravagant. … This case does not require us to decide that life or liberty may be forfeited without tinge of personal fault through the acts or omissions of others. … The statute is not void as a whole, though some of its penalties may be excessive. The good is to be severed from the bad. The valid penalties remain.

Id. at 477. In a separate concurrence, Judge Crane cautioned that "when an employer may be prosecuted as for a crime to which there is affixed a penalty of

imprisonment for an act which he in no way can prevent, we are stretching the law regarding acts *mala prohibita* beyond its legal limitation." *Id*. at 478.

Although the Supreme Court in 1922 rejected the argument that the imposition of criminal sanctions in the absence of *mens rea* violates a defendant's due process rights in all instances, *United States v. Balint*, 258 U.S. 250 (1922),[5] such prosecutions continued to be heavily disfavored under the law. Indeed, Justice Cardozo's concerns were echoed in 1933 by Harvard Law School Professor Francis B. Sayre, whose view was representative of the wider consensus among criminal law experts. Having chronicled the dramatic rise in prosecutions of public welfare offenses, Sayre warned that the doctrine might one day be misused as a shortcut to impose substantial penalties, including imprisonment:

> To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. … The modern rapid growth of a large body of offenses punishable without proof of guilty intent is marked with real danger. Courts are familiarized with the pathway to easy convictions by relaxing the orthodox requirement of a *mens rea*. The danger is that in the case of true crimes where the penalty is severe and the need for ordinary criminal law safeguards is strong, courts following the false analogy of the public welfare offenses may now and again similarly relax the *mens rea* requirement, particularly in the case of unpopular crimes, as the easiest way to secure detailed convictions.

[5] *Balint* rejected the due process challenge of a defendant who was convicted of selling opium and cocaine without providing the required IRS forms (in violation of the Harrison Narcotics Tax Act of 1914), despite the absence of a finding that the defendant actually knew the substances being sold were opium and cocaine. 258 U.S. at 252.

Sayre, *supra*, at 72, 79.[6]

After World War II, the requirement of *mens rea* remained "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 1952, the Supreme Court in *Morissette v. United States* reiterated its "philosophy of criminal law" that a crime is "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand." 342 U.S. at 250-51. *Morissette* held that, unless Congress clearly stated a contrary intent, all federal statutes based on common law crimes should be construed to require *mens rea*. *Id.* Reaffirming in the strongest possible terms the presumption against imposing criminal liability without proof of culpability, Justice Robert H. Jackson observed:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Id. at 250.

Since *Morissette*, the Supreme Court has persisted in its view that strict liability criminal prosecutions are strongly "disfavored" under the law. In *Staples*

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[6] As the case at bar demonstrates, the day that Sayre so presciently feared would come—when courts would impose severe penalties, including incarceration, despite a lack of *mens rea*—has finally arrived.

v. United States, the Court expanded the default rule of *Morissette* to non-common-law crimes, holding that the mere possession of a firearm is innocent conduct that does not qualify as a "public welfare offense" subject to strict criminal liability. 511 U.S. 600, 619 (1994). Emphasizing that it has recognized such "public welfare offenses" only in narrow circumstances, the Court criticized the government for ignoring "the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Id.* at 610 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)). In the Court's view, the fact that a federal crime is an invention of Congress rather than a direct inheritance from the common law bears little weight in the analysis. *See Staples*, 511 U.S. at 620 n.1 (Ginsburg, J., concurring in the judgment) ("Contrary to the dissent's suggestion, we have not confined the presumption of *mens rea* to statutes codifying traditional common-law offenses, but have also applied the presumption to offenses that are 'entirely a creature of statute.'").[7]

[7] More recently, Justice Thomas has cautioned that extending the public welfare doctrine beyond its intended limits could lead to the abandonment of *mens rea* for virtually the entire range of commercial, social, and economic activity. *See United States v. Hanousek*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from denial of certiorari) ("[S]uch a suggestion would extend this doctrine to virtually any criminal statute applicable to industrial activities. I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety.").

As the historical record conclusively demonstrates, there is *no* tradition of imprisoning individuals in the absence of a criminally culpable mental state. The district court's decision sentencing Appellants to a term of imprisonment in the absence of *mens rea*, based solely on their status as business executives, not only runs directly counter to the long "history and tradition of our country," it offends traditional notions of fairness and due process. On appeal, this Court should not abandon the centuries-old understanding that the imposition of harsh criminal sanctions—especially imprisonment—in the absence of *mens rea* is highly disfavored under the law.

III. IF ALLOWED TO STAND, THE DISTRICT COURT'S DECISION WILL POSE UNJUSTIFIED RISKS TO CORPORATE OFFICERS' LIBERTY, TO THE DETRIMENT OF THE PUBLIC INTEREST

A. The Government's Use of the *Park* Doctrine is Growing

For years after *Park*, strict liability prosecutions were rare, but federal regulators are increasingly viewing the *Park* doctrine as a powerful weapon in the government's arsenal. Indeed, use of the doctrine is dramatically on the rise, and the FDA has publicly announced its newfound enthusiasm for *Park* prosecutions. On March 4, 2010, FDA Commissioner Margaret Hamburg wrote a letter to U.S. Senator Charles Grassley announcing FDA's intention to "increase the appropriate use of misdemeanor prosecutions … to hold responsible corporate officers accountable." *See* Letter from Margaret Hamburg, Commissioner of Food and

Drugs, to Sen. Charles E. Grassley, Ranking Member, Senate Committee on Finance (Mar. 4, 2010). On April 22, 2010, Eric M. Blumberg, FDA's Deputy Chief Counsel for Litigation, gave a highly publicized speech at the Food and Drug Law Institute (FDLI) in which he warned corporate officials of impending misdemeanor prosecutions. Blumberg, one of the authors of the government's briefs in the original *Park* case, reportedly told the gathering: "Very soon, and I have no one particular in mind, some corporate executive is going to be the first in a long line." *See* Remarks of Eric M. Blumberg, April 22, 2010, *quoted in* Parija Kavilanz, "Recall Fallout: FDA Puts Execs On Notice," *CNN Money* (Aug. 24, 2010).[8]

True to its word, the FDA in recent years has pursued *Park* doctrine convictions with unprecedented vigor and frequency against the senior executives of American companies. This surge in *Park* prosecutions has resulted in the imposition of increasingly severe penalties on corporate officers. *See, e.g.,*

[8] These announcements are both noteworthy and curious. They are noteworthy because they represent a clear desire on the part of the FDA to use the *Park* doctrine to increase the numbers of criminal convictions of corporate officers. They are curious, however, to the extent that they purport to be predictive of *future* criminal activity. Take, for example, Blumberg's assertion that "very soon," "some corporate executive is going to be the first in a long line." Ordinarily, a prosecutor is unable say what crimes will be prosecuted in the future, because those crimes have not yet occurred, much less been investigated. Yet it is a unique attribute of the *Park* doctrine that supervisory oversight that is perfectly legal in one year may, under the scrutiny of a zealous prosecutor, become illegal in the next year.

Friedman v. Sebelius, 686 F.3d 813 (D.C. Cir. 2012) (upholding the exclusion of three executives from federal health care programs for 12 years on the basis of their misdemeanor guilty pleas under the *Park* doctrine); *United States v. Higgins*, No. 2:09-CR-403-4, 2011 WL 6088576 (E.D. Pa. Dec. 7, 2011) (upholding a $100,000 fine and nine months' imprisonment for executive on the basis of a single misdemeanor guilty plea under the *Park* doctrine).

The FDA is obviously seeking to test the outer boundaries of *Park* doctrine liability.[9] This disturbing trend marks a radical shift in the government's reliance on strict liability offenses. As one federal judge has observed, "[t]he line … between a conviction based on corporate position alone and one based on a 'responsible relationship' to the violation is a fine one, and arguably no wider than a corporate bylaw." *United States v. New. Eng. Grocers Supply Co.*, 488 F. Supp. 230, 234 (D. Mass. 1980).

B. Expanding the Reach of the *Park* Doctrine Further Exacerbates the Problem

Drastically expanding the *Park* doctrine to now include the penalty of imprisonment, as the prosecution here urged and the district court allowed, will

[9] Nor is FDA alone. In 2013, the Consumer Product Safety Commission (CPSC) named individually the former CEO of a dissolved company (Maxfield and Oberton) as a respondent in a recall case by applying the *Park* doctrine outside a criminal context. *See* Sheila A. Millar & Kathryn M. Biszko, *CPSC's Misuse of RCO Doctrine Bodes Ill for CEO's and Consumers*, WLF LEGAL BACKGROUNDER (August 23, 2013).

usher in a whole new level of risk—untenable risk—for corporate managers. In many cases, it is virtually impossible for corporate officers to personally guarantee that every subordinate is following the latest regulatory maze of complex rules at all times. "Prosecutors have unfettered discretion to bring *Park* doctrine cases as a result, which creates reason for substantial fear and uncertainty among corporate executives in industries regulated by the FDA." Joshua D. Greenberg & Ellen C. Brotman, *Strict Vicarious Criminal Liability for Corporations and Corporate Executives: Stretching the Boundaries of Criminalization*, 51 AM. CRIM. L. REV. 79, 93 (2014).

Given the complexity of the FDCA, no chief executive of a large company can reasonably be expected to maintain expertise in FDCA regulations and provide direct oversight of compliance with those provisions, while simultaneously discharging his or her duty to run the company. Such executives have no choice but to delegate *some* responsibility for FDCA compliance to their subordinates. Under the *Park* doctrine, however, delegating responsibility is no defense; a responsible corporate officer can be convicted without knowledge that a specific violation has occurred.

Indeed, it is highly unlikely that a CEO or COO exists today who cannot be convicted under the *Park* doctrine, as there is little if anything within most companies' operations that is not, at least on paper, within their supervisory sphere

of responsibility. More than 70 years ago, Justice Jackson cautioned:

> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone.

Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. OF CRIM. L. & CRIMINOLOGY 3, 5 (1941). "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1876).

C. An Expanded Park Doctrine Incentivizes Greater Use of Prosecutorial Shortcuts at the Expense of the Public Interest

Even if the most thorough and assiduous supervision produces no evidence of a problem, it will always be "objectively possible" for a CEO, who has authority over an entire company, to have prevented wrongdoing. *See United States v. Starr*, 535 F.2d 512, 516 (9th Cir. 1976) (affirming secretary-treasurer's *Park* conviction for failing to anticipate and counteract the janitor's insubordination in refusing a directive to address rodent problem in warehouse). And given the breadth of the FDCA's prohibitions, the very real danger exists that federal prosecutors will increasingly use an FDCA misdemeanor, coupled with the threat of imprisonment, as powerful leverage by to obtain settlements or extract guilty pleas to vindicate

suspicions that they otherwise could never prove. Due process rights stand as a bulwark against such prosecutorial abuses. An expanded *Park* doctrine undermines that bulwark and erodes those rights.

Rather than fully investigating alleged criminal conduct, government prosecutors will come to view the *Park* doctrine as an easy way to procure guilty pleas without lengthy investigations and court trials. Although such prosecutorial shortcuts at first may appear to be efficient (by prosecuting company misconduct without protracted jury trials), they come at a greater cost to the public interest. Beyond the clear danger to companies and corporate officers, this approach could harm the cooperative relationship between the business community and government regulators. The additional possibility of jail time creates a perverse incentive for corporate officers to avoid reporting product hazards to regulators, out of fear that their liberty could be put at risk. Such a disincentive is contrary to the public interest.

If this Court allows the district court's decision to stand, corporate managers in the food and drug industries (and beyond) may want to seriously rethink their career choices. As some commentators have observed, such expansion of the *Park* doctrine threatens to confer "designated felon" status on countless business managers. *See* Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer Doctrine: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L. J. 169

(1994). Incarceration on the basis of *Park* liability would impose on these officers "a massive legal risk, unjustified by law or precedent." *United States v. Weitzenhoff*, 35 F.3d 1275, 1299 (9th Cir. 1994) (Kleinfeld, J., dissenting), *cert. denied*, 513 U.S. 1128 (1995). As a result, only those executives with an unusually high tolerance for risk (*i*.e., executives who may be less compliance conscious that average) will be willing to run these companies. Moreover, the compensation required to attract and retain qualified executives who are willing to risk their liberty will substantially drive up prices for vital consumer goods in the food and drug sectors.

To prevent this parade of horribles from arriving and to safeguard the rule of law, WLF urges this Court to clarify that imprisonment is wholly incompatible with strict supervisory criminal liability.

CONCLUSION

For the foregoing reasons, *amicus* Washington Legal Foundation respectfully requests that the Court reverse the judgment below and vacate the district court's April 14, 2015 order.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,932 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Word 2010 in 14-point Times New Roman font.

3. A virus detection program (VIPRE Business, Version 5.0.4464) has scanned the electronic file and no virus was detected.

Dated: July 27, 2015

/s/ Cory L. Andrews
Cory L. Andrews

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on July 27, 2015, the foregoing *amicus curiae* brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system, which will electronically serve a copy of the brief on all parties.

/s/ Cory L. Andrews
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