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 DECOSTER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Appellee,

v.

PETER DECOSTER,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Iowa (Bennett, J.)

BRIEF FOR *AMICI CURIAE* THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE CATO INSTITUTE SUPPORTING APPELLANTS AND REVERSAL

Matthew G. Kaiser
Scott S. Bernstein
KAISER, LEGRAND & DILLON PLLC
1401 K Street, NW, Suite 600
Washington, DC 20005
(202) 640-2850

Counsel for Amici Curiae

Linda E. Kelly
Patrick N. Forrest
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

Ilya Shapiro
Randal J. Meyer
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200

Counsel for the Cato Institute

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Association of Manufacturers and the Cato Institute certify that each has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM or the Cato Institute.

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial section and in all 50 states. The NAM has a substantial interest in ensuring that executives at companies that are members of the NAM are not subject to prison sentences for strict liability criminal offenses that occur at their companies without their knowledge or participation.

Manufacturing employs more than 12 million men and women and contributes more than $2.1 trillion to the U.S. economy annually. It has the largest economic impact of any major sector, accounting for two-thirds of private sector research and development. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting this brief. All of the parties have consented to the filing of this brief.

standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is important to Cato because it exemplifies a key aspect of the overcriminalization that has stifled personal and economic liberty.

If executives can be imprisoned for criminal violations of strict liability laws by virtue of the position they hold within a company, the United States economy would suffer. Executive business decisions would be motivated less by good business principles and more by fear of possible future prison sentences. And, even then, corporate officers would not be able to fully

protect themselves from criminal liability; under the responsible corporate officer doctrine, executives could be held criminally liable for conduct that is entirely outside their control. Executives would have to hope that one of their employees does not unwittingly commit a regulatory violation—or else they could face prison time.

Such a regime would be contrary to basic notions of fairness and justice, contrary to law, and would put at risk the liberty of every executive.

This concern is particularly real and acute in light of the expansiveness of the federal government's regulatory reach, particularly into criminal law. There are approximately 300,000 regulations that can trigger criminal sanctions.[2] These regulations are too often ambiguous or intricate. Many corporations—including many members of the NAM—must hire extensive staff to understand and comply with their regulatory obligations. The

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[2] *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (testimony of Richard Thornburgh).

likelihood that an employee of a company in a highly-regulated industry unintentionally violates a law that he or she misunderstands is high. An executive at her company should not be sent to prison as a result.

BACKGROUND[3]

Jack DeCoster owned Quality Egg LLC. Peter DeCoster was the company's Chief Operating Officer. They pled guilty to introducing eggs containing salmonella into interstate commerce in violation of 21 U.S.C. §§ 331(a) and 333(a)(1), even though they did not know about the salmonella-contaminated eggs and they did not personally participate in introducing those eggs into commerce. Section 333(a)(1), the Food, Drug, and Cosmetic Act's misdemeanor provision, is a strict liability offense, requiring no showing of intent or mental state—and so whoever at Quality Egg did introduce the eggs into interstate commerce did not know the eggs were contaminated either.

The DeCosters pled guilty to violating the FDCA as "Responsible Corporate Officers." They were subject to criminal liability merely because they had, "by reason of [their] position[s] in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct" the FDCA violations.

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[3] *Amici* adopt the Factual Background at pages 6-17 of Appellants' Opening Brief. It has included here only those facts necessary for its arguments in this brief.

United States v. Park, 421 U.S. 658, 673-74 (1975) ("*Park*"). This doctrine did not require them to have even known that the contaminated eggs existed to be criminally responsible. Even the government agrees; it stipulated that the government's "investigation [did] not identif[y] any personnel employed by or associated with Quality Egg, including [Jack DeCoster and Peter DeCoster], who had knowledge . . . that eggs sold by Quality Egg were in fact, contaminated with *Salmonella Enteritidis*." (Jack DeCoster Plea Agreement at 7(c); Peter DeCoster Plea Agreement at 7(c).)

In sum, the offense with which the DeCosters were charged—and to which they pled guilty—did not require that they were the ones who put the eggs with salmonella into interstate commerce, did not require that they even knew that Quality Egg was putting bad eggs into interstate commerce, and did not require that whoever at Quality Egg did put the contaminated eggs into interstate commerce knew they were contaminated.

Prior to their sentencing, the DeCosters asked the district court to rule that prison is an unconstitutional penalty under the

responsible corporate officer doctrine, since a person convicted under that doctrine has not been shown to either know about the criminal conduct or participate in it.

The district court denied the motion. It sentenced Jack DeCoster and Peter DeCoster each to three months in prison, one year of supervised release, and a $100,000 fine.

They now appeal their sentences.

SUMMARY OF ARGUMENT

Should an executive be subject to prison time because, without his or her knowledge or participation, direct or indirect, an employee in the executive's company unknowingly committed a criminal offense? The district court erroneously said yes. *Amici* ask this Court to reaffirm a century-long legal tradition of federal courts and answer this question "decidedly not."

Putting someone in prison without a showing of intentional personal wrongdoing is irreconcilable with our legal traditions. For centuries, "this single consideration, the want or defect of *will*" has protected the innocent from punishment. *See* 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 20-21 (1769) (emphasis in original). American courts have followed suit since Blackstone's days, generally rejecting prison sentences for crimes that lack a *mens rea* requirement because it offends our usual notions of when prison should be an available sanction. *See, e.g.*, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015).

Prison time for a conviction under the responsible corporate officer doctrine is even more offensive. "Responsible corporate

officer" cases—particularly when they involve a strict liability offense, as here—stack *mens rea*-free doctrines on top of each other. Not only does the employee lack knowledge of the facts that make up the wrongdoing, the executive lacks knowledge of what the employee is doing; the executive is prosecuted based solely on his or her position at the company. If prison sentences are generally disfavored for strict liability offenses because they violate the long-standing tradition that it is unfair to imprison those who act without blameworthy intent, then, *a fortiori*, allowing prison time for a more attenuated prosecution under the responsible corporate officer doctrine is even more unjust.

The Constitution affirms our legal traditions by prohibiting the imprisonment of executives based solely on their job description. A prison term for an executive who neither knew nor did anything in relation to the offense is not small; given the lack of culpability, such a sentence is severe. Accordingly, the Fifth Amendment Due Process Clause and the Eighth Amendment's bar on cruel and unusual punishment do not permit the district court's prison sentences.

The imprisonment of executives for things about which they did not know and in which they did not participate would also be unfair and potentially arbitrary. There are no enforceable standards that limit when the government can charge an executive under the responsible corporate officer doctrine—a scenario which creates a reasonable fear that prison time can be meted out arbitrarily and inconsistently. Without a narrowing of the possible sentences available under the responsible corporate officer doctrine, an executive of a U.S. company can reasonably fear prison time when his or her company inadvertently commits the wrong high-profile regulatory violation. Corporations try very hard, for a variety of reasons, to stay in regulatory compliance. But when there are more than 300,000 regulations, many of which could lead to a potential criminal prosecution, employees will inevitably make mistakes despite best efforts to the contrary. Each such mistake, under the district court's ruling, could expose an executive to prison. This potentially limitless criminalization of the C-suite is simply not right and stands to create substantial uncertainty regarding the criminal liability of corporate

managers. It will accordingly chill commerce by creating a near-limitless exception to the traditional rule regarding, and benefits of, vicarious corporate liability. Moreover, if an executive has a limited ability to prevent a regulatory violation, the prospect under the responsible corporate officer doctrine has limited deterrence value.

The message to executives from this case is that they should fear prison time by virtue of their positions. *Amici* are gravely concerned about the district court's use of the responsible corporate officer doctrine to justify a prison sentence, and urges this Court to overturn these sentences. The Court should establish a bright-line prohibition on criminal sentences under the responsible corporate officer doctrine where there was no personal involvement by the manager in the underlying regulatory offense.

ARGUMENT

I. The Constitution and Our Values Are Clear: Executives Should Not Be Sent to Prison Because of Their Jobs.

The notion that any executive can be sent to prison because a subordinate committed a criminal a regulatory offense without his or her knowledge is incompatible with our established principles of fairness and justice. Yet, that's exactly what this case allows.

A. Use of the Responsible Corporate Officer Doctrine to Imprison Executives Is Contrary to a Century of American Legal Tradition.

It is an axiom of the American legal system that criminal liability requires both a bad act and a guilty mind. *See, e.g.*, *Morissette v. United States*, 342 U.S. 246, 250 (1952) ("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."). As this Court has recognized, the *mens rea* requirement "took deep and

early root in American soil." *United States v. Brugier*, 735 F.3d 754, 772 (8th Cir. 2013) (quoting *Morissette*, 342 U.S. at 251-52).

There are, however, rare exceptions: "public welfare" offenses, for instance, punish certain conduct without proof of *mens rea*. "Such public welfare offenses have been created by Congress, and recognized by [the Supreme] Court, in limited circumstances." *Staples v. United States*, 511 U.S. 600, 607 (1994). They "[t]ypically . . . involve statutes that regulate potentially harmful or injurious items." *Id.* Nevertheless, as outliers in the American legal tradition, it has long been recognized that public welfare offenses that do not require *mens rea* are not punishable by prison sentences.[4] "Crimes punishable with prison sentences

[4] *See, e.g.*, *id.* ("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."); Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72 (1933) ("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."); Geraldine Szott Moohr, *Playing with the Rules: An Effort to Strengthen the Mens Rea Standards of Federal Criminal Laws,* 7 J.L. ECON. & POL'Y 685, 697 (2011) ("[P]ublic welfare offenses are marked by light penalties that do not include incarceration . . . ."); Kepten D. Carmichael, *Strict*

. . . ordinarily require proof of a guilty intent." Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 72 (1933).

This principle is not just based on notions of fairness and justice—it makes practical sense as well. Among other things, a threat of prison is meant to deter forward-looking people from committing crimes. However, that rationale loses all force when it comes to crimes that lack a *mens rea* requirement. An executive cannot consider the penalty of prison for conduct of which he or she is not aware.

The fact alone that the district court sentenced the DeCosters to prison for a crime that did not require them to have knowledge puts the court's decision far outside the mainstream of the American legal tradition. But this case is even more extraordinary than that. The DeCosters received prison sentences on the basis of what the Supreme Court has called an "unusually strict" application of vicarious liability known as the "responsible

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Criminal Liability for Environmental Violations: A Need for Judicial Restraint, 71 IND. L. J. 729, 742 (1996) ("The cases which first defined the public welfare offense involved primarily statutes which imposed light fines for violations, not prison terms." (collecting cases)).

corporate officer" doctrine.[5] *See Meyer v. Holley*, 537 U.S. 280, 286 (2003). Not only did the DeCosters not know that eggs with salmonella were released into interstate commerce, whoever at the company released the bad eggs did not know either. If it is contrary to our sense of justice to send someone to prison who commits a crime without any guilty intent—and it is—to send a person to prison for a crime committed by someone else who was acting without criminal intent on a theory of vicarious liability is even more clearly unjust. The degree of attenuation from any sort of guilty mind or act itself creates serious concerns over the constitutionality of the doctrine such that prison is wholly inappropriate.

B. The Constitution Does Not Allow the Disproportionate and Severe Penalty of Prison for a Responsible Corporate Officer Offense.

Prison is too severe a penalty for a responsible corporate officer offense. For this reason, it is prohibited by the Fifth and

[5] The responsible corporate officer doctrine (also referred to as the "*Park*" doctrine) originated in two Supreme Court decisions, *United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1975). The origins of the doctrine are discussed in Appellants' Opening Brief at 3-5.

Eighth Amendments. The Fifth Amendment Due Process Clause permits criminal offenses without *mens rea* requirements only when they carry a "relatively small" penalty; prison is far from a small penalty for an executive that may be morally innocent but criminally liable solely due to her job description. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir. 1999) ("[D]ue process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a 'responsible relation.'"). And it would be cruel and unusual to impose a prison sentence for an offense that requires neither knowledge nor participation, making the sentences imposed here barred by the Eighth Amendment as well. *See Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001) ("In deciding whether a sentence is 'grossly disproportionate' to a crime, we first compare the gravity of the offense committed to the harshness of the penalty imposed.").

1. Prison for an Offense That Requires No Particular Mental State or Even Participation Is Not "Relatively Small" and Therefore Violates the Fifth Amendment's Due Process Clause.

A prison sentence for a responsible corporate officer offense does not pass Constitutional muster under the Due Process Clause. It is not the sort of "relatively small" penalty that the Supreme Court and this Court have allowed for offenses that do not require a guilty mind, such as a fine or probation, *see Park*, 421 U.S. at 666-67 (approving of a fine); *Dotterweich*, 320 U.S. at 284 (approving a fine and probation).

The Fifth Amendment Due Process Clause restricts the criminalization of behavior that lacks any *mens rea*—specifically, the Constitution only permits punishment in such circumstances where "the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, [and] where conviction does

not gravely besmirch." *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960) (J. Blackmun).[6]

This Court should follow the lead of the courts that have addressed the constitutionality of strict, vicarious liability laws. They are in unison that prison for such offenses violates due process. Concerns over this "serious due process problem[]" made their way into oral argument in *Park*, and were at the forefront of the concerns of the dissenters in *Park* and *Dotterweich*,[7] but that question was not before the Court.

The Eleventh Circuit has held quite plainly that "due process prohibits the state from imprisoning a person without some proof of personal blameworthiness . . . . [C]riminal liability based on *respondeat superior* is acceptable . . . only if the penalty

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[6] *See also United States v. Heller*, 579 F.2d 990, 994 (6th Cir. 1978) ("if 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"); *United States v. Unser*, 165 F.3d 755, 762-64 (10th Cir. 1999) (applying *Morissette*); *Tart v. Massachusetts*, 949 F.2d 490, 502-03 (1st Cir. 1991) (same); *United States v. Wuff*, 758 F.2d 1121, 1125 (6th Cir. 1985) (same).

[7] *See Park*, 421 U.S. at 682-83 (Stewart, J., dissenting); *Dotterweich*, 320 U.S. at 293 (Murphy, J, dissenting); Tr. of Oral Arg. at 6-7, *Dotterweich*.

does not involve imprisonment." *Lady J. Lingerie,* 176 F.3d at 1367.

Additionally, in Pennsylvania, the Supreme Court put it aptly that "[a] man's liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment." *Commonwealth v. Koczwara*, 155 A.2d 825, 830 (Pa. 1959). And, in *State v. Guminga*, 395 N.W.2d 344 (Minn. 1986), the Supreme Court of Minnesota held that "in Minnesota, no one can be convicted of a crime punishable by imprisonment for an act he did not commit, did not have knowledge of, or give expressed or implied consent to the commission thereof." *Id.* at 349. [8]

The district court below determined that courts have previously held that "short jail sentence[s]" for strict liability crimes are the sort of "relatively small" penalties that do not violate the Due Process Clause. *United States v. Quality Egg*, 14

[8] *See also Davis v. City of Peachtree City*, 304 S.E.2d 701, 702-03 (Ga. 1983) (finding that it violates the due process clauses of the Georgia and United States Constitutions to hold a corporate officer criminally liable "for acts not committed by him, not accomplished at his direction, not aided by his participation, and not done with his knowledge.").

Civ. 3024, 2015 WL 1769042, at *28 (N.D. Iowa April 14, 2015). That, though, misses the point. This is not a run-of-the mill strict liability case. Rather, the district court imposed prison sentences on executives on the bases of both strict and vicarious liability (under a theory of *respondeat superior*): the executives had no knowledge or intent with respect to the violations (nor did anyone else, for that matter), and they did not participate in the underlying acts.

Indeed, in the sole written judicial opinion in the last century in which a court has approved as constitutional a sentence of imprisonment (much shorter than the one at issue here) under the responsible corporate officer doctrine, the court specifically noted the "*deliberate* circumvention" of FDA regulations, and the existence of "*carefully constructed*, *meticulously* implemented, and patently illegal, clinical trials." *United States v. Higgins*, No. 09-403-4, 2011 WL 6088576, *9-10 (E.D. Pa. Dec. 7, 2011) (emphasis added). Distinguishing that case from the matter at bar is the clear participation and intent of the corporate officers, the hallmarks of traditional criminal conduct where prison sentences

are appropriate—which stand in contrast to the ignorance and FDA-recognized efforts to cure that are present in this case.

The district court's ruling is a chilling extension of previous law—wholly inconsistent with the precedent of the Supreme Court, sister circuits, and state courts of last resort—that should concern any executive in America.

2. Prison for an Offense That Requires Neither Guilty Knowledge nor Actual Participation Is Severe and Therefore Violates the Eighth Amendment.

The Eighth Amendment's bar on cruel and unusual punishment does not allow prison sentences for a responsible corporate officer offense absent direct participation or knowledge—it is too severe a penalty for an executive that has no knowledge of the criminal conduct and who did not participate in the acts that were the basis for the crime.

Punishment for a crime is cruel and unusual, and thus barred by the Eighth Amendment, if it is not "graduated and proportioned to the offense." *Graham v. Florida*, 560 U.S. 48, 59 (2010). Cruelty may also be determined by comparing the severity

of the sentence to the severity of the crime committed. *Harmelin v. Michigan*, 501 U.S. 947, 994-96 (1991). The Supreme Court has laid out the steps that courts must take to determine whether a sentence is proportional.

First, "[a] court must begin by comparing the gravity of the offense and the severity of the sentence." *Graham*, 560 U.S. at 59. If the court finds "an inference of gross disproportionality[,] the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.* (internal quotation marks and alterations omitted). Should the comparison confirm the inference of gross disproportionality, the sentence is cruel and unusual. *Id.*

As to the first step in the Eighth Amendment analysis, the question is not a close one—the gravity of an offense brought under the responsible corporate officer doctrine is the most minimal in criminal law. The executive charged with the offense has no culpability and no involvement beyond his position at the company. *See Henderson v. Norris*, 258 F.3d 706, 709 (2001) ("To

evaluate the severity of a crime, we consider the harm caused or threatened to the victim or to society and the culpability and degree of involvement of the defendant."). And if, in consideration of the crime's severity, the Court "look[s] to the defendant's intent and motive in committing the crime," it will find none. *Id.* (internal citation omitted).

At the very least, imprisonment of a person on the basis of his or her position within a company weighs strongly in favor of a finding of gross disproportionality.

Moreover, under a pure cruelty analysis, there is no culpable conduct nor culpable mental state required of these corporate officers beyond their mere existence. A prison sentence of any length is severe enough to warrant the claim of unconstitutional cruelty when the culpable conduct is merely being a corporate officer. *See Harmelin*, 501 U.S. at 994-96.

Accordingly, the Court must engage in a comparative examination of the sentences imposed on the DeCosters versus other similarly situated executives. The Court will find that there is no comparison: until 2011, no executive was imprisoned under

the responsible corporate officer doctrine where he or she was not personally involved in the criminal conduct.[9] (*See* Appellants' Opening Brief at 38-43.)

Additionally, such sentences are in no way "usual" within the plain meaning of the Eighth Amendment: between the Supreme Court's decision in *Park*, and the prosecution of three pharmaceutical company executives in 2007,[10] prosecutions of executives for violation of the FDCA based solely on their job descriptions were few and far between—and, based on the reported cases, it appears none resulted in prison sentences.[11] As a

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[9] As discussed further below, in 2011, the government changed its policy with respect to responsible corporate officer prosecutions for violations of the FDCA and determined that it would pursue executives without regard to whether they knew of the underlying criminal conduct or participated in it. The first casualty of this policy change may have been the executive in *United States v. Hermelin*, who received a 17-day sentence for violating the FDCA based solely on the authorities and responsibilities of his job as CEO of a pharmaceutical company. *United States v. Hermelin*, No. 4:11-cr-85, Amended Judgment at 2 (E.D. Mo. Mar. 24, 2011).

[10] *See United States v. Purdue Frederick Co., Inc.*, 495 F. Supp. 2d 569, 570 (W.D. Va. 2007).

[11] *See United States v. Gel Spice Co., Inc.*, 773 F.2d 427 (2d Cir. 1985); *United States v. Torigian Labs., Inc.*, 577 F. Supp. 1514, 1529-31 (E.D.N.Y. 1984); *United States v. Treffiletti & Sons*, 496

result, executives have not had to wrestle with whether they could face criminal liability because—through no fault or act of their own—a criminal violation occurred at their company. This, of course, has depended upon the "conscience and circumspection" of prosecutors, *Dotterweich*, 320 U.S. at 284, and the lack of any application of the prison sentence provisions in regulatory offenses by prosecutors in the decades after *Dotterweich* cuts strongly in favor of a determination of unusualness.

The prison sentences imposed here are therefore cruel and unusual.

C. Use of the Responsible Corporate Officer Doctrine Has Been Rare—and, Until Recently, Never Employed to Put Executives That Neither Participated in nor Knew of the Underlying Conduct in Prison.

Recognizing that it would be "treacherous" to identify those parties potentially subject to criminal liability under the responsible corporate officer doctrine, the Supreme Court in *Dotterweich*, 320 U.S. at 284, entrusted its application to the

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F. Supp. 53 (N.D.N.Y. 1980); *United States v. Acri Wholesale Grocery Co.*, 409 F. Supp. 529 (S.D. Iowa 1976).

"conscience and circumspection in prosecuting officers." Perhaps in appreciation of the far-reaching implications of the doctrine—that it could lead to criminal liability for *any* executive through no fault of his or her own—the Department of Justice has, until recently, invoked it conservatively and rarely.

II. If Prison Under the Responsible Corporate Officer Doctrine Is Permissible, Every Executive Can Reasonably Fear Imprisonment for Acts Outside His or Her Control.

The imposition of a prison sentence under the responsible corporate officer doctrine is troubling because it dramatically increases the risks of being a business executive in a regulated industry. As a result of the breadth of federal regulations—concerning, among other things, worker safety, environmental issues, and, lately, cyber security—virtually every corporation in America is subject to numerous overlapping regulatory obligations. In heavily-regulated industries the regulatory maze is even more onerous. Broad swaths of these regulations can be enforced by criminal prosecution, and these criminal provisions frequently count as "public welfare" offenses that lack a

requirement that conduct be knowing. The lack of a *mens rea* requirement for these offenses makes it extraordinarily difficult to totally guard against violations. *See, e.g.,* Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 754-56 (2014).

The sheer number of federal crimes exacerbates the difficulty. No one knows for sure how many federal crimes exist. "For decades, the task of counting the total number of federal criminal laws has bedeviled lawyers, academics and government officials."[12] According to one analysis, the United States Code contains more than 4,450 federal crimes. *See* Brian Walsh & Tiffany Joslyn, The Heritage Foundation and National Association of Criminal Defense Lawyers, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 6 (2010). And that number does not include the approximately

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[12] Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J., July 23, 2011, *available at* http://www.wsj.com/articles/SB10001424052702304319804576389601079728920.

300,000 regulations that may trigger criminal sanctions. *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (testimony of Richard Thornburgh). As one law professor that has sought to count the number of federal crimes has put it, "[t]here is no one in the United States over the age of 18 who cannot be indicted for some federal crime." Fields & Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J., July 23, 2011.

Moreover, criminal regulatory provisions "can be extraordinarily abstruse, demanding almost as much scientific or technical knowledge as legal skill to ensure their proper interpretation." Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, at 753. With respect to the FDCA in particular, one commentator lamented over fifty years ago that "[i]t takes familiarity with chemistry, pharmacology, and processing nomenclature to parse the continual supplements, deletions,

revisions, and modifications. However necessary all of this may be in the public interest, it is not only delegation running riot—but it is plainly rule making not expressed in ordinary English or even familiar legal jargon." H. Thomas Austern, *Sanctions in Silhouette: An Inquiry into the Enforcement of the Federal Food, Drug, and Cosmetic Act*, 51 CAL L. REV. 38, 43 (1963).

In this regulatory entanglement, there is very little that executives can do to protect themselves against responsible corporate officer offenses. Without a *mens rea* requirement (in both the application of the responsible corporate officer doctrine and the many public welfare laws that underlie its use) there is no "constructive notice" of potential criminal liability. *See* Arthur Leavens, *Beyond Blame—Mens Rea and Regulatory Crime*, 46 U. LOUISVILLE L. REV. 1, 2 (2007). "[S]uch notice can be the difference between acceptable hardship and unfair surprise." *Id.*

And even if executives institute a robust set of compliance practices, they are not protected from responsible corporate officer liability. *See* 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, 94 (2014). In this case, Quality Egg established a set of measures that often went above and beyond what is required under the Federal rule addressing the introduction of salmonella into eggs during production. (*See* Appellants' Opening Brief at 11-14.) Still, two of their executives were convicted of offenses based on conduct of which they were not aware and in which they did not participate. They now face prison time for those offenses.

There is a narrow exception to the breadth of liability under the responsible corporate officer doctrine—the "impossibility defense." This is an affirmative defense that allows executives to argue that they were "powerless to prevent or correct the violation." *Park*, 421 U.S. at 673. While this defense could, in theory, cure many of the problems with responsible corporate officer liability, in practice, it "offers sparse refuge" for corporate officers.[13] As long as executives have broad managerial authority

[13] Steven M. Morgan & Allison K. Obermann, *Perils of the Profession: Responsible Corporate Officer Doctrine May Facilitate*

over their company's operations, they may always have the power to prevent an employee from engaging in an act.[14] It is thus no surprise that a corporate officer has never successfully invoked the impossibility defense.[15] In light of what must be shown, and how modern corporations are organized, this defense is illusory.

Indeed, it is "highly unlikely that a CEO or COO exists who cannot be convicted under the [responsible corporate officer doctrine], as there is little if anything within most companies' operation that is not, at least on paper, within their supervisory authority and responsibility." Richard A. Samp & Cory L. Andrews, *Restraining Park Doctrine Prosecutions Against Corporate Officials Under the FDCA*, 13 ENGAGE: J. FEDERALIST

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a Dramatic Increase in Criminal Prosecutions of Environmental Offenders, 45 SW. L. J. 1199, 1202 (1991).

[14] George B. Breen & Jonah D. Retzinger, *The Resurgence of the Park Doctrine and the Collateral Consequences of Exclusion*, 6 J. HEALTH & LIFE SCI. L. 90, 100-101 (2013) ("[A]s a practical matter, it may always be theoretically possible for an executive to prevent an employee from engaging in wrongdoing.").

[15] Katrice Bridges Copeland, *The Crime of Being in Charge: Executive Culpability and Collateral Consequences*, 51 AM. CRIM. L. REV. 799, 804 (2014); Andrew R. Ellis, *The Responsible Corporate Officer Doctrine: Sharpening a Blunt Health Care Fraud Enforcement Tool*, 9 N.Y.U. J. L. & BUS. 977, 1027 (2013).

SOC'Y PRAC. GROUPS, Oct. 2012, at 19, 24. This notion should be terrifying for American business. Risking a felony conviction and a fine for taking a job is scary enough; but imprisoning executives under the responsible corporate officer doctrine for criminal offenses they are unable to prevent will discourage the smartest, most capable people from leading those companies that have the greatest impact on the public welfare.

If one had supreme confidence that the government would only use the responsible corporate officer doctrine in rare cases, this result may be palatable. But there is good reason to be skeptical of the government's restraint given that government prosecutors have pushed for prison terms in at least two such cases in the last five years, in contravention of near a century of prosecutorial discretion practice.

To take but one example, the FDA has produced a set of non-binding standards to guide the prosecution of responsible corporate officer offenses. Yet the FDA has weakened these standards in recent years and is clearly gearing up to make a

more muscular use of its ability to bring responsible corporate officer prosecutions.[16]

Until January 2011, the FDA's policy was to warn executives before bringing a prosecution against them. The FDA "ordinarily exercise[d] its prosecutorial discretion to seek criminal sanctions against a person only when a prior warning or other type of notice can be shown." FDA, *Regulatory Procedures Manual*, § 6-5-1 (Mar. 2007). "Establishing a background of warning or other type of notice," the FDA stated, "w[ould] demonstrate to the U.S. Attorney, the judge, and the jury that there has been a continuous course of violative conduct and a failure to effect correction in the past." *Id.* One of the great dangers of the responsible corporate officer doctrine is that it could be used to

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[16] *Compare* FDA, *Regulatory Procedures Manual*, § 6-5-1 (Mar. 2007) ("the agency ordinarily exercises its prosecutorial discretion to seek criminal sanctions against a person only when a prior warning or other type of notice can be shown") *with* FDA, *Regulatory Procedures Manual*, § 6-5-3, available at http://www.fda.gov/iceci/compliancemanuals/regulatoryproceduresmanual/default.htm (last updated June 19, 2015) ("Knowledge of an actual participation in the violation are not a prerequisite to a misdemeanor prosecution but are factors that may be relevant when deciding whether to recommend charging a misdemeanor violation.").

prosecute executives who have no ability to avoid criminal liability but to resign their positions. The FDA's prior policy recognized this and limited that danger from this kind of case.

The FDA changed its mind though. In a new procedures manual, the FDA describes a "[m]isdemeanor prosecution under the" Food, Drug, and Cosmetics Act as "a valuable enforcement tool" but removes the requirement that an executive have notice before a prosecution can happen. FDA, *Regulatory Procedures Manual*, § 6-5-3. According to the procedures, "[k]nowledge of and actual participation in the violation are not a prerequisite to a misdemeanor prosecution but are factors that may be relevant when deciding whether to recommend charging a misdemeanor violation." *Id.* Other relevant factors include "[w]hether the violation is obvious" and "[w]hether the violation is serious." *Id.*[17]

[17] Of course, the FDA is careful to note that "these factors are intended solely for the guidance of the FDA Personnel, do not create or confer any rights or benefits for or on any person, and do not operate to bind FDA." *Id.* The procedures also state that "the absence of some factors does not mean that a referral [to the Department to Justice] is inappropriate where other factors are evident." *Id.*

The non-binding and expansive nature of these standards give no comfort to an executive concerned about an FDA prosecution—making more reasonable a fear of prosecution for any executive of a company that is regulated, even in part, by the FDA. Moreover, the change from a standard that recognized the flaws in the responsible corporate officer doctrine to this standard should worry any executive concerned that the government may be overly aggressive.

The FDA's procedures also don't speak at all to the decision-making process of U.S. Attorneys that are tasked with carrying out the prosecutions. "[T]he fact of the matter is that we just do not know, in any systematic way, what kinds of standards are being used" by prosecutors. *Cf.* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 62 (1997).

The vast expansion of the penalties available to the government under the responsible corporate officer doctrine is troubling and should worry executives in any industry. For an American executive though, the district court's unprecedented

expansion of it—to allow executives to be imprisoned under this doctrine—should be affirmatively terrifying. *Amici* ask this Court to curb the district court's expansion of this doctrine.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to vacate the district court's judgment imposing sentences of imprisonment and the case should be remanded for resentencing.

Respectfully submitted,

/s/ *Matthew G. Kaiser*
Matthew G. Kaiser
Scott S. Bernstein
KAISER, LEGRAND & DILLON PLLC
1401 K Street NW, Suite 600
Washington, DC 20005
(202) 640-2850
(202) 280-1034

Counsel for Amici Curiae

Linda E. Kelly
Patrick N. Forrest
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000

Counsel for the National Association of Manufacturers

Ilya Shapiro
Randal J. Meyer
CATO INSTITUTE
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200

Counsel for the Cato Institute

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 6,292 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

3. This brief complies with Local Rule 28A(h)(2) because it has been scanned for viruses and is virus–free.

July 27, 2015

/s/ *Matthew G. Kaiser*
Matthew G. Kaiser

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2015, I caused the foregoing Brief of *Amici Curiae* the National Association of Manufacturers and the Cato Institute to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit through the Court's CM/ECF System. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Matthew G. Kaiser*
Matthew G. Kaiser