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.)

APPELLANTS' OPENING BRIEF

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SUMMARY OF THE CASE

Appellants pleaded guilty to a "responsible corporate officer" violation of the Food, Drug, and Cosmetic Act. The basis of their strict liability misdemeanor convictions was that they held positions of responsibility at Quality Egg LLC when the company unknowingly shipped eggs containing *Salmonella* into interstate commerce. Offenses defined in these terms are a distinct minority in American law, but have existed for over a century. Almost without exception, such crimes have been punished with light fines, amid substantial doubt whether "imprisonment [is] compatible with the reduced culpability required for such regulatory offenses." *Staples v. United States*, 511 U.S. 600, 617 (1994) (citing *People v. Sheffield Farms-Slawson-Decker Co*, 121 N.E. 474, 477, 478 (N.Y. 1918)).

Appellants were fined and sentenced to prison terms. They contend that their prison sentences are unconstitutional, or at a minimum are invalid as an abuse of discretion. Because these constitutional issues have never before been decided by this Court and are of critical importance to executives in many industries, Appellants respectfully request oral argument, with 30 minutes allotted to each side.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231 and entered final judgments of conviction and sentence on April 15, 2015. DCD 117; DCD 121. Appellants timely filed notices of appeal on April 27, 2015. DCD 124; DCD 125. Their appeals were consolidated and docketed on April 30, 2015. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(1).

STATEMENT OF ISSUES

I. Whether the Due Process Clause prohibits a district court from imposing a term of imprisonment for a misdemeanor conviction premised on a "responsible corporate officer" theory, absent a finding that the defendant personally participated in the company's violation.

> *See* U.S. Const. Amend. V; *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *Davis v. City of Peachtree City*, 304 S.E.2d 701 (Ga. 1983); *People v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474 (N.Y. 1918).

II. Whether the Eighth Amendment prohibits a district court from imposing a term of imprisonment for a misdemeanor conviction premised on a "responsible corporate officer" theory, absent a finding that the defendant intended to bring about the company's violation.

See U.S. Const. Amend. VIII; *Graham v. Florida*, 560 U.S. 48 (2009); *United States v. Lee*, 625 F.3d 1030 (8th Cir. 2010); *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001).

III. Whether the district court committed procedural and substantive error in imposing a nearly unprecedented sentence based on (a) factual findings contrary to or without support in the record, (b) Appellants' supposed failure to meet a standard of care more stringent than federal regulations required, and (c) unrelated regulatory violations, or crimes, committed by Quality Egg employees.

See United States v. Stokes, 750 F.3d 767 (8th Cir. 2014); *United States v. Kane*, 639 F.3d 1121 (8th Cir. 2011).

STATEMENT OF THE CASE

A. Statutory Background

The Food, Drug, and Cosmetic Act (FDCA), Pub. L. No. 75-717, 52 Stat. 1040, was first enacted in 1938. The FDCA's operative criminal provision originally listed a dozen "prohibited" acts, including "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded." *See* 52 Stat. at 1042–43. It now encompasses several dozen separate offenses, ranging from recordkeeping violations to misuse of trade secrets. *See* 21 U.S.C. § 331(a)–(ccc).

These violations generally are classified as misdemeanors punishable by maximum penalties of one year in prison and a $100,000 fine. *See* 21 U.S.C. § 333(a)(1); *see also* 18 U.S.C. § 3571(b)(5) (setting maximum fine). However, a second or successive violation of § 331, or one committed with intent to defraud or mislead, is a felony punishable by up to three years' imprisonment and a $250,000 fine. 21 U.S.C. § 333(a)(2); *see also* 18 U.S.C. § 3571(b)(3).

The Supreme Court first considered the personal criminal liability of corporate officers under these provisions in *United States v. Dotterweich*, 320 U.S. 277 (1943). There, a company and its president were charged with shipping misbranded drugs in violation of what is now § 331. The jury acquitted the company but convicted the president, who was sentenced to a $500 fine and 60 days' probation. *See United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 501 (2d Cir. 1942), *rev'd*, 320 U.S. 277. The Supreme Court upheld the conviction, concluding that an officer can face personal criminal liability under § 333, based on the corporation's violation of § 331, if he "shares responsibility in the business process resulting in unlawful distribution." 320 U.S. at 284.

Four justices dissented. They invoked the "fundamental principle of Anglo-Saxon jurisprudence that guilt is personal," and argued that "in the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge." *Id.* at 286 (Murphy, J., dissenting). They also cautioned that the liability approved by the Court was not cabined by clear standards. *Id.* at 292–93.

In *United States v. Park*, 421 U.S. 658 (1975), the Court made clear the broad sweep of *Dotterweich*'s "responsible corporate officer" theory. Park was the president of a national supermarket chain. He was convicted under § 331 on the basis that his company had sold food adulterated through storage in a rodent-infested warehouse. *See id.* at 660–62. Park was fined $250. *Id.* at 666. The court of appeals reversed, holding that the jury instructions could have permitted conviction without a finding of "gross negligence" or some similar "wrongful action." *Id.* at 667. The Supreme Court reversed, holding that no such finding of "wrongful action" is necessary because the Act "imposes the highest standard of care and permits conviction of responsible corporate

officials who, in light of this standard of care, have the power to prevent or correct violations of its provisions." *Id.* at 676.

The United States, which was the petitioner in both *Dotterweich* and *Park,* did not ask the Supreme Court to consider in either case whether a prison sentence would be constitutionally permissible. The issue was raised by the Court at oral argument in *Park*, however. The government conceded that a sentence of imprisonment would present a "difficult situation" that "might conceivably" raise "serious due process problems," but urged that Mr. Park's case did not present any such concern because only a fine had been imposed. Tr. of Oral Arg. at 6–7, *United States v. Park*, No. 74-215 (App. 83–84).[1] In both *Park* and *Dotterweich*, moreover, the dissenters noted with evident concern the prospect that the government might someday seek a prison sentence in a "responsible corporate officer" case. *See Park*, 421 U.S. at 682–83 (Stewart, J., dissenting); *Dotterweich*, 320 U.S. at 293 (Murphy, J., dissenting).

[1] Documents in Appellants' appendix are cited as "App. __." The addendum to this brief is cited as "Add. __."

B. Factual Background

1. The Parties

Appellants Jack and Peter DeCoster were the owner and chief operating officer, respectively, of Quality Egg LLC, an egg production company. DCD 85 ¶ 9. Quality Egg operated 13 facilities that together housed roughly 5 million egg-laying hens (or "layers") as well as many "pullets"—younger chickens that have not yet begun to lay eggs. The chickens were housed across 97 barns, spanning a combined 3 million square feet of floor space. *See id.* ¶ 6. Quality Egg also operated facilities that cleaned, packaged, and stored eggs. *Id.* ¶ 8. Quality Egg was one of the nation's largest suppliers of table eggs in 2010, when the offenses at issue occurred.

2. *Salmonella* Enteritidis

"*Salmonella* microorganisms are ubiquitous and are commonly found in the digestive tracts of animals, especially birds and reptiles." Dep't of Health & Human Servs., Food & Drug Admin. ("FDA"), *Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation*, 74 Fed. Reg. 33,030, 33,031 (Jul. 9, 2009) ("Egg Safety Rule"). In humans, "*Salmonella* infections are characterized by diarrhea, fever, abdominal cramps, headache, nausea, and vomiting."

Id. at 33,031. These symptoms can be severe, but "[m]ost healthy people recover without antibiotic treatment" in 4 to 7 days. *Id.* In unusual cases, *Salmonella* may "spread into the bloodstream, then to other areas of the body," leading to illness that can be "severe" or even "fatal." *Id.*

Salmonella Enteritidis ("SE") accounts for approximately 20% of *Salmonella* infections. *Id.* at 33,032. Approximately 2.3 million SE-positive eggs are consumed in the United States each year, "exposing a large number of people to the risk of illness." *Id.* Thoroughly cooking eggs before consumption greatly minimizes that risk. *See id.* at 33,049.

It was once thought that SE enters eggs only after they are laid, by way of contact with contaminated materials. Today, however, "SE experts … believe that the predominant route through which eggs become contaminated with SE is the transovarian route." *Id.* at 33,032. That process is "not well understood," but involves infection of the "ovaries and oviducts of some egg-laying hens, permitting transovarian contamination of the interior of the egg while the egg is still inside the hen." *Id.* Even "an infected hen," however, "may lay many uncontaminated eggs." *Id.*

3. Federal Egg Safety Regulations

The Egg Safety Rule "is the first and only Federal rule that addresses the introduction of SE into the egg during production." *Id.* at 33,033. It was published in July 2009, and took effect for large-scale producers like Quality Egg on July 9, 2010. *Id.* at 33,034.

The Egg Safety Rule imposed several new industry mandates. Among them was a requirement that covered egg producers must "have and implement a written SE prevention plan that is specific to each farm where you produce eggs and that includes, at a minimum," five sets of "SE prevention measures," 21 C.F.R. § 118.4, three of which are particularly pertinent here.

First, producers must adopt "biosecurity" measures designed to prevent "introduction or transfer of SE into or among poultry houses," *id.* §118.4(b), including by "[p]revent[ing] stray poultry, wild birds, cats, and other animals from entering poultry houses," *id.* § 118.4(b)(4).

Second, egg producers must "monitor for rodents" and "flies" using specified methods, and "when monitoring indicates unacceptable rodent activity within a poultry house, use appropriate methods to achieve satisfactory" levels. *Id.* § 118.4(c)(1)–(3). FDA acknowledged that these

pest-control requirements were aimed at an industry-wide problem: "rodents and flies had access to feed in feed troughs on nearly all farms …. Producers rated almost 30 percent of farms as having a moderate or severe problem with mice and almost 9 percent as having a moderate or severe problem with rats." Proposed Rule, *Prevention of Salmonella Enteritidis in Shell Eggs During Production*, 69 Fed. Reg. 56,824, 56,830 (Sept. 22, 2004). FDA observed, further, that "rodent control may take up to 4 years to be fully effective." 74 Fed. Reg. at 33,062.

Third, if "an environmental test or an egg test … was positive for SE at any point during the life of a flock," the affected "poultry house" must be "clean[ed] and disinfect[ed] … according to [specified] procedures before new laying hens are added to the house." 21 C.F.R. § 118.4(d). The required cleaning and disinfection need not be performed immediately. Instead, *after* a flock is removed from a barn, a producer should "make every effort to rid the environment of SE before new laying hens are placed into that house to prevent the SE problem from being perpetuated in the replacement flock." 74 Fed. Reg. at 33,040.

Apart from the mandate to create SE-prevention plans, a "cornerstone" of the Egg Safety Rule, *see* 69 Fed. Reg. at 56,825, was its adoption of specific standards for SE testing, beginning with required microbial tests of the environments in which chickens are raised. *See* 21 C.F.R. §§ 118.4(a) (pullets), 118.5(a) (laying hens), 118.5(b) (following induced molting).

The Egg Safety Rule sets out a specific two-part protocol for responding to positive environmental SE tests. First, the producer may "divert eggs to treatment," *id.* §§ 118.5, 118.6, removing them from the table egg market by subjecting them to a form of processing that will substantially destroy SE, *id.* § 118.3. In the alternative, a producer may test 4,000 eggs (in 4 sets of 1,000 appropriately sampled eggs each, *see id.* § 118.7(b)(1)) to determine whether the producer's eggs remain safe to consume. FDA estimated that this sampling approach would have a "95 percent probability of accurately detecting an SE-positive egg from a flock producing contaminated eggs." 74 Fed. Reg. at 33,044.

"If all four tests are negative for SE," the producer is "not required to do further egg testing." 21 C.F.R. § 118.6(c). But "[i]f any of the four egg tests is positive for SE," the producer must divert "all eggs from

that flock to treatment" until further testing produces only negative results. *Id.* § 118.6(d). The producer may then "return" the affected flock "to table egg production," so long as further tests continue to be "negative for SE." *Id.* § 118.6(e)(1).

4. Quality Egg's Response to the Egg Safety Rule.

Relying principally on the advice of Dr. Charles L. Hofacre, Professor and Director of Clinical Services at the University of Georgia's College of Veterinary Medicine, and Dr. Maxcy P. Nolan, III, a professional entomologist specializing in poultry and livestock pest management, Quality Egg supplemented its existing SE-prevention measures to meet the Egg Safety Rule's new mandates. *See* DCD 100 ¶¶ 3, 5, 10; DCD 100-2 ¶¶ 3, 6, 10. This SE prevention plan placed particular focus on cleaning and disinfection, rodent control, SE testing and monitoring, and vaccination. DCD 100-2 ¶¶ 9–10.

Cleaning: Between roughly annual flock changes, Quality Egg removed all manure and cleaned its barns using high-powered air compressors to remove any dust or dirt that could contain SE or other contaminants. DCD 99 at 8. Quality Egg also fumigated the barns to kill remaining bacteria, *id.*, and implemented a cleaning process designed to

remove contaminants from the surface of the egg prior to shipping, *id.* at 10.

Pest Control: With Dr. Nolan's assistance, Quality Egg designed and implemented a pest and rodent control system that included traps and poisons and the identification and sealing of holes found in barns. DCD 100-2 ¶¶ 9–11, 14. Quality Egg implemented these rodent control measures in its pullet barns in early 2010 and began to implement these measures in barns housing laying hens during the summer of 2010. *Id.* ¶ 15. Quality Egg also hired a pest control company that worked with Dr. Nolan to conduct regular facilities checks and lay out poisons. *Id.* ¶ 14.

By the summer of 2010, Quality Egg had substantially reduced the number of pests in the pullet barns below the levels required by the Egg Safety Rule. *See* DCD 41-9 at 32–33 (App. 50–51). The numbers in Quality Egg's laying facilities began to drop as well. DCD 100-2 ¶¶ 11, 13. FDA's August 2010 inspection report observed that Quality Egg's "rodent index number overall is decreasing." DCD 41-9 at 43 (App. 61).

Vaccination: FDA determined that there was "insufficient data on the efficacy of vaccines … to support a mandatory vaccination require-

ment." 74 Fed Reg. at 33,035. FDA nonetheless "encourage[d] the use of the vaccine as an additional SE prevention measure." *Id.* Unlike most other egg producers, Quality Egg administered multiple vaccines for protections against SE and other poultry diseases and conducted additional tests to ensure the vaccinations were administered correctly. DCD 100 ¶ 11.

Testing: Quality Egg commenced testing for environmental SE in 2004, long prior to the Egg Safety Rule, and in 2009 hired Iowa State University to manage and conduct those tests. *See id.* ¶ 12.

Thousands of environmental tests were performed between 2004 and 2010. Most of these tests returned negative, and until early 2010, the level of positive test results remained within a range normal for the industry. *See id.* ¶¶ 12, 14.

Quality Egg responded to a 2010 increase in the frequency of positive environmental SE tests by thoroughly cleaning barns and continuing to administer SE vaccines. At Dr. Hofacre's recommendation, Quality Egg began administering a second SE vaccine. *Id.* ¶ 16. In May 2010, Quality Egg discontinued induced molting—a process that extends the egg-laying life of a chicken—based on Dr. Hofacre's advice

that the practice could increase susceptibility to SE. *Id.* Quality Egg also increased the number of SE tests performed and opted to stop using animal feed that Dr. Hofacre suspected could be a source of SE. *Id.* At Dr. Nolan's direction, Quality Egg continued to monitor and replace rodent traps, repair holes, and clean and treat the barns. DCD 99 at 13.

In addition, after the Egg Safety Rule took effect, Quality Egg began SE testing individual eggs, consistent with the sampling protocol set forth in the Rule. None of the sampled eggs tested positive for SE. Add. 82.

5. The SE Outbreak at Quality Egg

During the week of August 9, 2010, FDA notified Quality Egg that it had linked SE-infected eggs to Quality Egg facilities. On August 13 and August 18, 2010, in cooperation with FDA, Quality Egg announced voluntary nationwide recalls of hundreds of millions of eggs. DCD 116 at 4.

In addition, working in conjunction with Iowa State University, Quality Egg conducted approximately 900 environmental tests and

70,200 egg tests. These tests confirmed the presence of SE in some of the company's eggs. DCD 99 at 13–14.

Quality Egg took a number of steps to address the outbreak. First, at FDA's recommendation, every bird suspected of being infected with SE was euthanized. DCD 100 ¶ 21. Second, Quality Egg stopped shipping eggs from August through November 2010 and cleaned, fumigated, and disinfected all of its barns and facilities. *Id.* Third, Quality Egg continued environmental SE testing. *Id.*

FDA conducted an investigation during August 2010 and issued an inspection report in September 2010, in which the inspectors expressed their "appreciation for the firm's cooperation and professionalism." DCD 41-9 at 35 (App. 53). FDA inspectors found that Quality Egg had followed appropriate environmental sampling and testing procedures; implemented appropriate egg testing procedures; and followed appropriate procedures to collect manure sampling for SE testing. *Id.* at 23–24 (App. 41–42).

The inspectors, however, also cited a number of conditions that they found to reflect incomplete implementation of the biosecurity and pest control measures set out in Quality Egg's SE prevention plan. For

example, the inspectors concluded that Quality Egg had not "[e]liminate[d] hiding places and nesting sites," identifying tall grass outside one barn, a "2x6 inch wood board … with approximately 8 frogs living underneath," and "unused wooden structures" near barns. *Id.* at 36 (App. 54). The inspectors found that hen houses had not been properly sealed, noting the presence of wild birds, and non-chicken feathers inside several barns, birds' nests near other barns, and observed gaps, holes and structural damage at laying houses. *Id.* at 36–37 (App. 54–55). They found "[u]n-baited, unsealed holes appearing to be rodent burrows" along baseboards in several barns. *Id.* at 37 (App. 55). They also observed "[d]ark liquid which appeared to be manure … seeping through the concrete foundation to the outside of the laying houses" at several barns. *Id.*

The report also faulted Quality Egg for the design of some of its barns, for not requiring workers to wear protective clothing or clean their feet when entering and leaving the barns, for having too many live rodents and flies in some of the barns, and for failing to maintain complete records of equipment-cleaning measures. *Id.* at 40–42, 45–46 (App. 58–60, 63–64). The report acknowledged, however, that FDA's

own draft "guidance for industry" on Egg Safety Rule compliance was released only after the start of the inspection, and Quality Egg had not yet received a copy. *Id.* at 39, 41 (App. 57, 59).[2] The FDA also observed that Quality Egg had cooperated fully with the investigation, and that many of the problems noted in the initial report had been repaired within a few weeks' time. *Id.* at 3, 39, 48 (App. 21, 57, 66).

C. District Court Proceedings.

On May 21, 2014, the government filed a criminal information against Quality Egg and Appellants Jack and Peter DeCoster. DCD 4. Quality Egg was charged in all three counts: (1) felony bribery of a U.S. Department of Agriculture official; (2) felony misbranding of eggs with intent to defraud or mislead; and (3) misdemeanor introduction of adulterated shell eggs into interstate commerce.[3] Quality Egg pleaded guilty to all three charges, and has not appealed. Appellants were

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[2] *See also* FDA, *FDA Publishes Final Guidance on the Egg Safety Rule* (Dec. 27, 2011), http://www.fda.gov/Food/NewsEvents/ConstituentUpdates/ucm285171.htm (draft was released on August 12, 2010).

[3] The bribery charge against Quality Egg related to two incidents in 2010 when Quality Egg employees used the company's petty cash to pay USDA inspectors to release eggs for sale without complying with USDA standards. The eggs were restricted from sale for quality control, not contamination, reasons. Neither Appellant was found to have known of the bribes. DCD 116 at 13–14, 44 n.24.

charged only in Count Three, which alleged that each had been a "Responsible Corporate Officer of Quality Egg within the meaning of the Food, Drug and Cosmetic Act."

Appellants entered guilty pleas to the "responsible corporate officer" offenses and, in connection with those pleas, stipulated with the government to three central facts. *First*, the parties stipulated that each Appellant had exercised control "over the operations of Quality Egg and related entities and assets in Iowa." *Second*, it was stipulated that during 2010, "Quality Egg introduced … into interstate commerce food, that is shell eggs, that were adulterated" due to SE contamination, and that "if the contamination of the eggs had been known to the defendant, he was in a position of sufficient authority at Quality Egg to detect, prevent, and correct the sale of the contaminated eggs." *Third*, it was agreed that "the government's investigation has not identified any personnel employed by or associated with Quality Egg, including the defendant, who had knowledge [prior to the date of Quality Egg's first voluntary recall] that eggs sold by Quality Egg were, in fact, contaminated with [SE]." *See* DCD 16-1 ¶ 7; DCD 17-1 ¶ 7.

Substantial compensation was paid to individuals harmed by the outbreak. Through its insurance company, Quality Egg paid nearly $7.8 million in compensation for medical bills and other damages. DCD 99 at 6. Appellants agreed to pay an additional $83,000 in criminal restitution. *Id.* at 2. In addition, Quality Egg paid a $6.79 million criminal fine.

D. Sentencing.

The parties agreed with the Probation Office that the applicable guideline range was 0 to 6 months (the lowest available). Many other aspects of sentencing were sharply contested, however. Appellants filed a motion contending that the district court lacked constitutional authority to impose a sentence of incarceration in a case premised on a "responsible corporate officer" violation. DCD 64. The government opposed that motion, arguing that there was no applicable constitutional constraint. DCD 74.

The parties also sharply disputed the factual predicates for the district court's sentencing decision. Appellants objected to many aspects of the Probation Office's Pre-Sentence Investigation Reports (PSIRs), arguing that the Reports did not accurately describe certain

facts pertaining to Appellants' offenses and included irrelevant information. The government largely defended the accuracy of the Reports, and proposed to meet Appellants' objections by putting forward as much as a week's worth of testimonial and documentary evidence at sentencing.

The parties agreed to narrow their factual disputes by adopting a second set of stipulated facts, including the following:

- "[I]n 2009, Quality Egg began working with a pest-control expert, Dr. Maxcy Nolan, and a poultry disease expert, Dr. Charles Hofacre, and started vaccinating some of its birds for *salmonella* strains."
- "[A] number of recommendations" made by Drs. Hofacre and Nolan "were implemented" by Quality Egg, but "the measures implemented were not effective in stopping the outbreak of *salmonella* that occurred at Quality Egg."
- Apart from one occasion, "prior to July 2010, Quality Egg did not conduct SE tests on eggs or divert eggs from the market based upon the receipt of a positive environmental SE result. The parties further stipulate that, until adoption of the Egg Safety Rule in July 2010, there was no legal or regulatory requirement to do so."
- "[A]fter implementation of the Egg Safety Rule, Quality Egg did have eggs tested after receipt of a positive environmental SE test result and none of these eggs tested positive for SE."
- "[T]here is evidence that Quality Egg received positive environmental SE test results for some barns, and that Quality Egg dry cleaned these and other barns before placing a new flock in the barn."

- Appellants "often received copies of, or were made aware of, positive SE environmental test results received by" a Quality Egg employee.
- The parties' respective experts "would offer conflicting expert opinions regarding the expected efficacy of certain preventative measures and the actual cause of the *salmonella* outbreak at Quality Egg."

See Add. 81–87. In connection with this second set of stipulations, Appellants withdrew some of their prior objections to the PSIRs. DCD 89. The government opted not to present evidence at sentencing pertaining to other disputed points of fact.

At sentencing, the district court rejected Appellants' constitutional arguments and announced that each Appellant would receive a three-month sentence. The court also issued a memorandum opinion setting forth its constitutional analysis. *See* DCD 116.[4]

The opinion first held that a sentence of imprisonment would not violate the Eighth Amendment in light of the harm caused by the SE outbreak, Appellants' "involvement" by virtue of their corporate positions, Appellants' failure to take sufficient steps to prevent SE contamination, Jack DeCoster's prior misdemeanor conviction for employing al-

[4] The district court also rejected Appellants' contention that the Sixth Amendment limited its fact-finding abilities in this context. DCD 116 at 24–32. Appellants do not seek review of that conclusion here.

iens unauthorized to work in the United States, and regulatory violations and crimes committed by certain Quality Egg employees.

The court also concluded that the Supreme Court's decision in *Park* foreclosed Appellants' due process challenge, and sought to distinguish a series of state court decisions cited by Appellants below, at points accusing Appellants of having mischaracterized those opinions.[5] Despite rejecting Appellants' constitutional arguments, the district court recognized that this Court may well disagree, and encouraged Appellants to appeal. *See* Sent. Tr. 163:25 ("You should [appeal]. I would if I were you.").

On April 15, 2015, the district court entered judgment against each Appellant, imposing a criminal fine of $100,000 and a three-month term of imprisonment, plus restitution and probation. DCD 117; DCD 121.

SUMMARY OF ARGUMENT

I. The FDCA's "responsible corporate officer" offense is a distinct outlier in American law. Because the doctrine imposes individual criminal liability based solely on the defendant's position in a company

[5] Appellants respectfully submit that their description of those cases (*see infra* pp. 29–34) was and is accurate.

where a violation occurs, it has long been criticized as inconsistent with the fundamental principle that criminal liability should be based on personal conduct and personal culpability. Many courts (though not all) have concluded that the doctrine is constitutionally defensible as applied to convictions punished through fines or probation. In the few cases squarely presenting the issue, however, appellate courts have held that due process principles forbid a deprivation of liberty based on supervisory liability alone. These decisions are correct. The Due Process Clause guards with special rigor against (a) physical restraint by the government, and (b) governmental departures from deeply rooted legal traditions consonant with the protection of liberty. These considerations firmly support the orthodox answer to the question posed by the judgment below: The Due Process Clause does not permit imprisonment as a punishment for a supervisory liability offense.

II. The Eighth Amendment bars criminal punishments that are grossly disproportionate to the offense committed by the defendant, as measured in part by the defendant's culpability—his "motive and intent" for committing the crime. Appellants had no motive and no intent. They did not even have *knowledge* of the events constituting the

crime when it occurred. Nonetheless, the district court imposed a sentence that is among the harshest on record for an FDCA case prosecuted on a supervisory liability theory, and the *only one*, to Appellants' knowledge, in which a prison sentence was imposed without a finding that the defendant was substantially and personally involved in knowing criminal conduct. That sentence violates the Eighth Amendment.

III. The district court also committed non-constitutional error sufficient to warrant, at a minimum, remand for resentencing. Indeed, the Court could reverse on this basis alone without reaching the constitutional questions presented.

The district committed procedural error by finding facts not supported by or clearly contradicted by the record, and committed substantive error by making clear errors of judgment in weighing even those facts on which reliance was proper. In particular, the court clearly erred in finding, contrary to the uncontested evidence of proactive SE containment measures, that Appellants "ignore[d]" the risk of SE contamination, and improperly faulted them for failing to meet a standard of care that went well beyond anything FDA has ever required. The court also relied heavily on unrelated offenses or regulatory violations

by other Quality Egg personnel. In all of these respects, the district court erred, and abused its discretion, in imposing sentences that conflict with longstanding practice and, at a minimum, raise very serious constitutional questions that courts, and the Executive Branch, traditionally have sought to avoid.

ARGUMENT

I. The District Court Exceeded Constitutional Constraints by Imposing Prison Sentences based on Appellants' "Responsible Corporate Officer" Offenses.

This Court reviews de novo whether a sentence violates the Due Process Clause, *United States v. Clemmons*, 461 F.3d 1057, 1061 (8th Cir. 2006), or the Eighth Amendment, *United States v. Martin*, 677 F.3d 818, 821 (8th Cir. 2012).

In sentencing Appellants Jack and Peter DeCoster to prison for a "responsible corporate officer" offense, the district court departed from the courts' long-standing practice of punishing such offenses with fines only. Because only a handful of trial courts have ventured so far, very few appellate courts have squarely considered whether the Constitution permits a supervising officer to be sent to prison based on imputed responsibility for a company's regulatory failings. Those courts, however,

have spoken with one voice. They have rejected that proposition on state or federal constitutional grounds, explaining that while criminal fines may be imposed based on a theory of supervisory liability, "due process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a 'responsible relation'" to the violation. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir. 1999).

This Court should likewise conclude that imprisonment for a "responsible corporate officer" offense would be inconsistent with fundamental constitutional protections, and should vacate Appellants' prison sentences.

A. Due Process Prohibits a District Court from Imposing a Term of Imprisonment Based on a "Responsible Corporate Officer" Violation.

1. The "responsible corporate officer" offense is an anomaly in American criminal law. In "our philosophy of criminal law," crime is "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand." *Morissette v. United States*, 342 U.S. 246, 250–51 (1952). The rule that crime is characterized by wrongful intent "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. Accordingly, "[t]he 'central thought'" of American criminal law is that "a defendant must be 'blameworthy in mind,'" as well as in deed, "before he can be found guilty." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015).

This general rule has exceptions. Traditional "strict liability" offenses impose criminal liability whenever an individual *personally* commits a wrongful act, regardless of whether he also had an evil-meaning mind. *See Staples v. United States*, 511 U.S. 600, 606 (1994). These offenses have been much criticized, but generally have been held consistent with due process where "the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person," "the penalty is relatively small," and "conviction does not gravely besmirch." *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960). This Court has cautioned, however, that "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 "responsible corporate officer" doctrine takes a significant step beyond even the traditional strict liability offense. As defined in *Park*, it permits criminal liability where the defendant had *neither* an "evil-meaning mind" nor an "evil-doing hand." It does not "depend on [an executive's] knowledge of, *or personal participation in*, the act made criminal by the statute." 421 U.S. at 670 (emphasis added). Under *Park*, personal criminal liability may be imposed so long as "the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and … failed to do so." *Id.* at 673–74. What this form of supervisory criminal liability punishes is not any traditional notion of "wrongful action" by the officer, but rather his or her failure to successfully carry out an implied "duty to implement measures that will insure that violations will not occur." *Id.* at 672. In that sense, the doctrine goes beyond even the usual civil rule that "it is the corporation, *not its owner or officer*, who is … subject to vicarious liability for torts

committed by its employees or agents." *Meyer v. Holley*, 537 U.S. 280, 286-87 (2003) (emphasis added).

The *Park* standard is "onerous," 471 U.S. at 672, but it is concededly one that legislatures have at times placed on corporate executives, typically on the rationale that "'the public interest in the purity of its foods,'" or other analogous goods, is "'so great as to warrant the imposition of the highest standard of care on distributors.'" *Id.* at 671.[6]

2. Even while accepting that "responsible corporate officers" may be forced to bear the stigma of a personal criminal conviction and fine, several courts have seriously questioned—or rejected—the idea that imprisonment is a permissible penalty for such an offense. The first and most influential of these cases is *People v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474 (N.Y. 1918). Then-Judge Cardozo there confronted a New York statute that imposed criminal liability on managers for a company's child-labor violations. Liability under that

[6] Nevertheless, even the FDCA's enforcers have questioned whether this standard is too strict. In particular, the Executive Branch previously sought to abrogate *Park* by legislation, arguing that the responsible corporate officer standard "violates our society's basic concept of fairness. Criminal liability should be based on fault." *See* Drug Regulation Reform Act of 1978: Hearings on S. 2755 Before the Senate Subcommittee on Health and Scientific Research, 95th Cong., at 244 (1978). The bill containing this revision ultimately was not enacted.

statute could be imposed without any proof that the supervisor had any direct role in the violation; a supervisor "breaks the command of the statute if he employs the child himself," and "equally if the child is employed by agents to whom he has delegated 'his own power to prevent.'" *Id.* at 476.

The court held that the state legislature had "constitutional power" to "impose this stringent penalty and to punish offenders by fines moderate in amount." *Id.* Importantly, the court's conclusion turned in substantial part on its observation that only fines were at issue, which equally could have been recovered "through … a civil action." *Id.* In Judge Cardozo's view, the "substance of constitutional power" was "not changed though the remedy for the collection of the fine is by information or indictment." *Id.* That rationale for upholding the power to impose criminal fines plainly would not support a judgment of imprisonment, which the New York statute facially appeared to permit. To that point, Judge Cardozo wrote:

> in sustaining the power to fine we are not to be understood as sustaining to a like length the power to imprison. We leave that question open. That there may be a 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 per-

> sonal 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 (emphasis added); *see also id.* at 478 (Crane, J., concurring) (a legislature may not "make acts mala prohibita with the result that an employer can be imprisoned for the acts of his servant").

Though the New York Court of Appeals did not squarely resolve the constitutional question in this case, courts—including the Supreme Court—have understood this passage as reflecting strong doubt that "imprisonment [is] compatible with the reduced culpability required for such regulatory offenses." *Staples*, 511 U.S. at 617 (citing *Sheffield Farms*, 121 N.E. at 477, 478 (opinions of Cardozo, J. and Crane, J.)). And the Eleventh Circuit and three state supreme courts have squarely held that it would violate state or federal due process principles to rest a sentence of imprisonment on supervisory liability.

In *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), the Eleventh Circuit struck down an ordinance that made "owners of adult entertainment establishments criminally liable for acts committed by their servants, agents and employees," and punished violations with fines and jail sentences of up to 90 days. *Id.* at

1367. The court acknowledged that *Park* and *Dotterweich* had approved the imposition of criminal *fines* based on supervisory liability but explained that "incarceration is a different matter," *id.*, because "due process *at least* requires individualized proof of intent *or* act" when imprisonment is at stake. *Id.* at 1368. The Eleventh Circuit thus held that "due process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a 'responsible relation,'" and found the ordinance unconstitutional "at least to [the] extent" that it authorized imprisonment in cases prosecuted under a *Park* theory. *Id.* at 1367. "[C]riminal liability based on *respondeat superior* is acceptable if the defendant is in a 'responsible relation' to the unlawful conduct or omission, but only if the penalty does not involve imprisonment." *Id.*

The supreme courts of three states have reached similar conclusions. In *Commonwealth v. Koczwara*, the Pennsylvania Supreme Court upheld a $500 criminal fine imposed because the defendant's employees had sold alcohol to minors, but invalidated under state due process principles a three-month prison term imposed for the same offense. *See* 155 A.2d at 830. The court had approved supervisory offenses "on

the theory that the Code established petty misdemeanors involving only light monetary fines," but refused to expand the doctrine to terms of imprisonment: "Liability for all true crimes, wherein an offense carries with it a jail sentence, must be based exclusively upon personal causation. … A man's liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment." *Id.* The court also noted that it had "found *no* case in any jurisdiction which has permitted a *prison term* for a vicarious offense." *Id.*

The Minnesota Supreme Court's decision in *State v. Guminga*, 395 N.W.2d 344 (Minn. 1986), is similar. The same court had earlier described *Koczwara* as "persuasive authority for holding that imprisonment may not be ordered" based on supervisory liability, but sustained a conviction punished only by a $350 fine. *State v. Young*, 294 N.W.2d 728, 730 (Minn. 1980). *Guminga* revisited that conclusion in light of a then-new sentencing regime that would require a sentencing court to include a prior supervisory liability misdemeanor when calculating a defendant's criminal history score. *See* 395 N.W.2d at 346. Given this potential collateral consequence, the court held that "criminal penalties based on vicarious liability … are a violation of substantive due process

and that only civil penalties would be constitutional. … Such an intrusion on personal liberty is not justified by the public interest protected, especially when there are alternative means by which to achieve the same end, such as civil fines." *Id.*

The Georgia Supreme Court similarly has held that a person should not "face[] a possible restraint of his liberty" simply because an "employee fails to exercise good judgment": "damage will be done to his good name by having a criminal record; and his future will be imperiled because of possible disabilities or legal disadvantages arising from the conviction. … In balancing this burden against the public's interests, we find that it cannot be justified under the due process clauses of the Georgia or United States Constitutions." *Davis v. City of Peachtree City*, 304 S.E.2d 701, 703–04 (Ga. 1983).

These decisions are not just consistent. They are also correct. The Due Process Clause "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). "Freedom from imprisonment … lies at the heart of the liberty [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

The Supreme Court has thus "made clear beyond peradventure that … due process … protections extend, to some degree, 'to determinations that go not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000). These principles well explain why courts repeatedly have held that the Due Process Clause bars governmental efforts to shift deeply rooted criminal law traditions in ways that make criminal convictions easier to achieve. *See, e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970); *Patterson v. New York*, 432 U.S. 197, 210 (1977).

Likewise, in other constitutional contexts, the common-sense recognition that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment" has led courts to draw a bright line that distinguishes cases involving imprisonment from all others. *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (an indigent defendant may not be sentenced to a term of imprisonment unless he or she was afforded a right to assistance of appointed counsel); *cf. Winship*, 397 U.S. at 374 (Harlan, J., concurring) (incarceration inflicts "a complete loss of [the defendant's] personal liberty through a state-imposed confinement away from his home, family, and friends").

These principles demonstrate that Judge Cardozo was correct to question whether "life or liberty" may be "forfeited without tinge of personal fault through the acts or omissions of others." *Sheffield Farms*, 121 N.E. at 477. The ideal that "guilt is personal," *Scales v. United States*, 367 U.S. 203, 224 (1961), and therefore that the most severe forms of criminal punishment may be meted out only to those who personally participated in the crime, has exceptionally deep roots. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting) ("[I]f any fundamental assumption underlies our system, it is that guilt is personal …."); *Rex v. Huggins* (1730), 93 Eng. Rep. 915, 917 (KB) ("[I]n criminal cases the principal is not answerable for the act of the deputy … they must each answer for their own acts, and stand or fall by their own behaviour."); *Deuteronomy* 24:16 (King James) ("[F]athers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin.").

This principle also has broad modern resonance. Many commentators have denounced the prospect of imprisonment for vicarious liability, including supervisory liability, as clearly contrary to legal and mor-

al norms. *See, e.g.*, Dennis J. Baker, *The Moral Limits of Criminalizing Remote Harms*, 10 NEW CRIM. L. REV. 370, 372–73 (2007) ("Criminalization for another's conduct is morally objectionable, because it ignores the separateness of each person as a responsible autonomous agent."); Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 702 (1930) ("Vicarious liability is a conception repugnant to every instinct of the criminal jurist."); *see also Lady J.*, 176 F.3d at 1367 (collecting sources).

This criticism has force. Imprisonment is a special and especially harsh form of punishment, quintessential to the criminal law and lawfully imposed only in accordance with the special dictates of that body of law—including, at a minimum, the "fundamental principle" that "guilt is personal." *Scales*, 367 U.S. at 224; *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting); *see also* Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 395 (1989) ("[C]rimes involving imprisonment create a feeling of 'guilt, disgrace, a record … [and] are not lightly imposed on one's fellow man. … Your society regards [prison] as a disgrace, and puts it on a totally different footing from payment of a fine.'"); Paul J. Larkin, Jr.,

Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause, 37 HARV. J. L. & PUB. POL'Y 1065, 1071 n.21 (2014) (quoting HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 123 (1968)) ("[T]he combination of stigma and loss of liberty involved in a … sentence of imprisonment sets that sanction apart from anything else the law imposes.").[7]

3. The district court overlooked this history. Though there have long been statutes that facially authorize imprisonment for vicarious liability offenses, Appellants are not aware of any case prior to 2011—shortly after the FDA announced that it "intended to make use of individual misdemeanor prosecutions 'to hold responsible corporate officials accountable,'" *see* Katrice Bridges Copeland, *The Crime of Being in Charge: Executive Culpability and Collateral Consequences*, 51 AM. CRIM. L. REV. 799, 802 (2014)—in which any individual was actually imprisoned by an American court based solely on supervisory liability. *See United States v. Hermelin*, No. 4:11-cr-85, Amended Judgment at 2

[7] Non-criminal detention is constitutionally permissible "in certain special and 'narrow' nonpunitive 'circumstances'" not at issue here, provided demanding procedural safeguards are met. *See Zadvydas*, 533 U.S. at 690. The narrow contours of this rule underscore the Constitution's concern with freedom from bodily restraint.

(E.D. Mo. Mar. 24, 2011) (17-day sentence). "[S]ometimes 'the most telling indication of [a] severe constitutional problem ... is the lack of historical precedent.'" *Nat'l Fed. of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.). Until the onset of the government's current enforcement campaign, supervisory liability had coexisted for over a century, largely in peace, with the historic principle that the personal loss and stigma of imprisonment should attach only to personal criminal conduct.

The district court erred by reading *Park* to decide these constitutional questions. *See* DCD 116 at 59 ("[*Park*] does *not* find that the prospect of a year in prison for violating the FDCA is unconstitutional"). As the Eleventh Circuit has explained, "Park's only punishment was a fine; incarceration is a different matter." *Lady J.*, 176 F.3d at 1367. Because the district court had imposed only a modest fine, 421 U.S. at 666, the Supreme Court did not need to decide whether a prison sentence could rest on a "responsible corporate officer" conviction. Indeed, as noted above, at argument in *Park*, counsel for the United States urged the Supreme Court *not* to reach the "conceivably … more serious due process problems" presented by a case "where there was in fact in-

carceration." Tr. of Oral Arg. at 6 (App. 83). The government got its wish then, and cannot seriously contend today that *Park* answered the question it asked the Supreme Court to leave unresolved.

Finally, the district court was wrong to view this case as an analogue to *United States v. Higgins*, No. 09-403-4, 2011 WL 6088576 (E.D. Pa. Dec. 7, 2011), which appears to be the sole written judicial opinion approving as constitutional a sentence of imprisonment in a case prosecuted under the "responsible corporate officer" doctrine. *See* DCD 116 at 44, 56. The *Higgins* court imposed prison sentences on the senior executives of a medical device company, who had pleaded guilty to FDCA "responsible corporate officer" offenses, explaining that the misconduct in that case was "without compare." 2011 WL 6088576, at *10. The *Higgins* defendants had known about, and directly participated in, "carefully constructed, meticulously implemented, and patently illegal, clinical trials." *Id.* They "deliberately circumvented" regulatory processes, "intentionally deceiv[ed] the FDA," and even "disregarded two deaths" caused by their illicit experiments. *Id.* at *9–10. The *Higgins* court also concluded, "most importantly," that "Higgins' case stands

apart from other *Park* doctrine cases *because the criminal conduct at issue is his own*." *Id.* at *10 (emphasis added).

In other words, the *Higgins* court found imprisonment justifiable because the defendants' conduct was both personal and intentionally wrongful. That issue was clouded to a degree by the government's decision to charge a "responsible corporate officer" misdemeanor rather than a felony under 21 U.S.C. § 333(a)(2), which reaches violations of § 331(a) that are committed "with the intent to defraud or mislead," but the *Higgins* court stated plainly its rationale. The district court here missed that point. It treated *Higgins* as having turned on whether the defendants "knew, or should have known" that certain risks might materialize. DCD 116 at 43. But that phrase was merely used in passing in *Higgins*, which expressly turned on the court's conclusion that the defendants had *personally* engaged in an "extended course of intentional and knowing wrongful behavior." 2011 WL 6088576, at *10. Here, in contrast, the district court expressly found that "[n]othing in the record indicates that [Appellants] had actual knowledge that the eggs sold by Quality Egg were infected with SE." DCD 116 at 45. Even if correct on

its own terms, *Higgins* does not support the district court's sentence in this very different case.

What *Higgins* does illustrate, however, is the potential for mismatch between charge and sentence presented by the government's recent deployment of the *Park* doctrine. The FDCA's felony provision allows willful violations of the regulatory requirements set forth in § 331—those committed with "intent to defraud or mislead"—to be punished with terms of imprisonment for up to three years. 21 U.S.C. § 333(a)(2). This heightened sanction dovetails naturally with the standard required for conviction—evidence of intentional personal conduct and a culpable mindset. When the government thinks prison is warranted, that is what it should charge and prove. But if the government can obtain a prison sentence under a "responsible corporate officer" theory, much of the incentive to charge and prove a felony offense will be lost, and the vital distinction between the truly culpable and (to use the district court's term) a person responsible merely as the "captain of the ship" will be blurred. *See* Sent. Tr. 155:20–21. That is precisely the distinction that the criminal law has always treated as vital. It should be preserved.

The district court's path-marking sentence squarely raises the question whether a corporate executive may be punished with imprisonment for a supervisory offense, as to which "personal participation" in "the act made criminal" need not be charged or proved. This Court should hold that the Due Process Clause bars a district court from imposing a prison sentence in these circumstances.

B. The Eighth Amendment Prohibits a District Court from Imposing a Term of Imprisonment Based on a "Responsible Corporate Officer" Violation.

The Eighth Amendment equally bars a court from imposing a sentence of imprisonment on defendants whose "liability … [does] not depend on their knowledge of, or personal participation in, the act made criminal." *Park*, 421 U.S. at 671. Appellants acknowledge that the Supreme Court has construed the FDCA to make them, and all other executives engaged in an FDA-regulated industry (which is to say, roughly one-quarter of the national economy) liable in such cases. They further acknowledge that criminal fines may be imposed as punishment, and indeed agreed to pay criminal fines of $100,000 each—amounts that far exceed the fines paid in *Park* ($250), *Dotterweich* ($500), and

perhaps every other "responsible corporate officer" case on record.[8] Appellants here contend only that the court cannot imprison them as well. That aspect of the judgment is grossly disproportionate, and thus a "cruel and unusual punishment[]" prohibited by the Eighth Amendment.

"The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham v. Florida*, 560 U.S. 48, 59 (2010). The Eighth Amendment thus bars prison sentences that are "grossly disproportionate for [the] particular defendant's crime." *Id.* at 60.

In examining whether a specific sentence imposed by a district court is "grossly disproportionate," this Court weighs "the harshness of the penalty" against "the gravity of the offense." *United States v. Lee*, 625 F.3d 1030, 1037 (8th Cir. 2010). Relevant to the "gravity of the offense" prong are the "harm caused or threatened to the victim or to so-

[8] In 2015 dollars, a $500 fine in 1943 (*Dotterweich*) translates to roughly $6,800, and a $250 fine in 1975 (*Park*) to roughly $1,100. *See* Bureau of Labor Statistics, CPI Inflation Calculator, http://data.bls.gov/cgi-bin/cpicalc.pl.

ciety, and the culpability and degree of the defendant's involvement," as well as "a defendant's history of felony recidivism, if there is one." *Id.* If this initial examination "leads to an inference of gross disproportionality," a court must "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." *Graham*, 560 U.S. at 60. Where "this comparative analysis 'validates an initial judgment that the sentence is grossly disproportionate,'" the sentence is unconstitutional. *Id.* (alterations omitted).

The three-month sentences imposed here may seem modest in the abstract, but the question of whether a sentence is disproportionate "cannot be considered in the abstract." *Robinson v. California*, 370 U.S. 660, 667 (1962) (vacating ninety-day sentence). The Eighth Amendment is as concerned with disproportionate punishment for minor offenses as it is with severe punishment for major ones. *Cf. Knecht v. Gillman*, 488 F.2d 1136, 1140 (8th Cir. 1973) (barring a prison from inducing vomiting as punishment for a "minor breach of the [prison] rules"). Just as one day in prison is too severe a punishment for the "crime" of being addicted to drugs, *see Robinson*, 370 U.S. at 667, even a

short term of imprisonment is grossly disproportionate to the crime of failing to "insure that violations will not occur" within a corporation. *Park*, 421 U.S. at 672. That is especially true where the corporation's underlying violation was a strict liability failure to prevent a bacteria that is "ubiquitous" in poultry—and can be transmitted *in utero* through a biological process that is "not well understood"—from making its way into *any* eggs shipped across state lines. *See* 74 Fed. Reg. at 33,031–33,032.

The district court's fundamental error was its failure to acknowledge the extremely limited "culpability and degree of the defendant[s'] involvement," *see Lee*, 625 F.3d at 1037, in their offense. As this Court has explained, that aspect of the analysis turns on a "defendant's intent and motive in committing the crime." *See Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001).

That focus is critical because Appellants' offenses were not characterized by *any* degree of intent or motive. Again, a misdemeanor conviction under *Park* "[does] not depend on [an executive's] knowledge of, or personal participation in, the act made criminal"—here, the shipment of adulterated eggs. 421 U.S. at 671. It instead rests on the executive's

position and accompanying "power" and "authority" within a corporate hierarchy. *Id.* at 674. Unless it would have been "objectively impossible" to "insure that violations will not occur," the officer bears criminal responsibility for the fact that it did. *Id.* at 673. That sort of failure, and no more, was the substance of Appellants' criminal offenses: "Quality Egg introduced … into interstate commerce … shell eggs, that were adulterated"; and "if the contamination of the eggs had been known to the defendant, he was in a position of sufficient authority at Quality Egg to detect, prevent, and correct the sale of the contaminated eggs." DCD 16-1 at 3; DCD 17-1 at 3.

These characteristics of Appellants' offenses should have played a central role in the district court's assessment of "culpability and degree." They played no role. The district court skipped past questions of motive and intent entirely and instead honed in on the undisputed fact that contaminated products distributed by Quality Eggs caused illness to many and serious illness in some. DCD 116 at 37. That was error.

The district court also erred in resting its judgment in part on Jack DeCoster's prior misdemeanor conviction for continued employment of unauthorized aliens. *See* 8 U.S.C. §§ 1324a(a)(2), 1324a(f)(1).

It is not clear precisely what role this fact played in the court's ultimate sentencing decision, given that Peter DeCoster was not convicted of this offense (DCD 116 at 38 n.20) but received the same sentence. But any degree of reliance was error under this Court's Eighth Amendment precedents, which permit consideration of "a defendant's history of *felony* recidivism," *Lee*, 625 F.3d at 1037 (emphasis added), but not prior misdemeanors. The district court cited the correct standard, but does not appear to have recognized that Jack DeCoster's prior conviction involved a misdemeanor rather than a felony.[9]

The defendants' *de minimis* culpability, as measured in terms of their non-existent "intent and motive in committing the crime," *see*

[9] The district court also pointed to a number of factors that have no bearing on the Eighth Amendment analysis. Among these factors were that Quality Egg employees provided misleading information to auditors, that a Quality Egg employee bribed a USDA inspector to approve the release of "restricted" eggs that did not meet quality standards, and that Quality Egg employees mislabeled some packages of eggs with incorrect expiration dates. As discussed below, Appellants were unaware of much of this conduct, and none of it has been linked to the SE outbreak. In addition, over Appellants' objection and on the barest of factual predicates, the district court concluded that "Peter DeCoster delivered a presentation to Walmart that consisted of inaccurate information regarding Quality Egg's food safety and sanitation practices." DCD 116 at 46. Appellants continue to believe this finding was incorrect, but either way, these 2008 statements do not have any relationship to Appellants' 2010 "responsible corporate officer" offense.

Henderson, 258 F.3d at 709, taken together with their respective records of zero prior felony convictions, should lead the Court to draw an initial inference that the terms of imprisonment imposed by the district court are grossly disproportionate in relation to Appellants' "responsible corporate officer" offenses. And any fair comparison between "the defendant's sentence [and] the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions" compels the further conclusion that "the sentence [of imprisonment] is grossly disproportionate," and thus invalid. *Graham*, 560 U.S. at 60.

For more than a century, sentencing courts reached the same conclusion in nearly every "responsible corporate officer" case reported in the United States. They imposed fines or probation, but not prison time, on convicted offenders. *See, e.g.*, *Friedman v. Sebelius*, 686 F.3d 813, 816 (D.C. Cir. 2012) (400 hours of community service, $5,000 fine, three years' probation); *United States v. Gel Spice Co.*, 773 F.2d 427, 432 (2d Cir. 1985) (two years' probation and $10,000 fine); *United States v. Starr*, 535 F.2d 512, 514 (9th Cir. 1976) ($200 fine); *United States v. H. B. Gregory Co.*, 502 F.2d 700, 702 (7th Cir. 1974) ($2,000 fine); *see*

also Tr. of Oral Arg. at 7 (App. 84) (government counsel in *Park* conceding that "in violations of this sort district courts are disinclined to impose penalties including imprisonment").[10] These courts therefore concluded, at least implicitly, that the stigma and far-reaching collateral consequences of a criminal conviction, *see Sibron v. New York*, 392 U.S. 40, 54–58 (1968), together with the prospect of criminal fines, are a sufficient punishment for executives who fail to meet the "onerous" requirements of "foresight and vigilance imposed on responsible corporate agents" under *Park*, 421 U.S. at 672. By the same token, courts have repeatedly expressed doubt that "imprisonment [is] compatible with the reduced culpability required for such regulatory offenses," *Staples*, 511 U.S. at 617 (citing *Sheffield Farms*, 121 N.E. at 477, 478 (opinions of Cardozo, J. and Crane, J.)), and very few have ever tested the proposition.

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[10] Cases imposing jail sentences under the FDCA have involved personal misconduct by the defendant. *See, e.g.*, *United States v. Siler Drug Store Co.*, 376 F.2d 89, 90–91 (6th Cir. 1967) (per curiam) (McAllister, J., concurring) (government sought and district court imposed prison term because defendant threatened to shoot investigating agents); *United States v. Kaadt*, 171 F.2d 600, 603 (7th Cir. 1948) (affirming misbranding convictions where defendants were personally involved in concocting and marketing a "worthless" diabetes "cure").

The district court sought to cast this case as comparable to one of the primary outliers: *Higgins*. As described above, however, the defendants in *Higgins* engaged in conduct that is difficult to classify as a "responsible corporate officer" offense at all. They carried out "carefully constructed, meticulously implemented, and patently illegal, clinical trials"; they "deliberately circumvented" regulatory processes and "intentionally deceiv[ed] the FDA." 2011 WL 6088576 at *9–10. In short, their conduct was marked by the kind of "intent and motive," *see Henderson*, 258 F.3d at 709, typical of crimes for which sentences of imprisonment are imposed.

Nothing similar can be said of Appellants, who did not act personally in shipping contaminated eggs into interstate commerce, did not know that contaminated eggs were being shipped, would not have had any conceivable motive to do so intentionally, and did not "deliberately circumvent[]" FDA regulations or "intentionally deceive" the FDA. *Cf. Higgins*, 2011 WL 6088576 at *9–10. To the contrary, the government stipulated that after the Egg Safety Rule took effect, "Quality Egg *did* have eggs tested after receipt of a positive environmental SE test result and none of these eggs tested positive for SE." Add. 82 (emphasis add-

ed). The government further stipulated that "until adoption of the Egg Safety rule in July 2010, there was no legal or regulatory requirement" to "conduct SE tests on eggs or divert eggs from the market based on the receipt of a positive environmental SE result." *Id.* The Egg Safety Rule said as much on its face. And as the FDA's inspection report observed, Quality Egg cooperated in all respects with FDA's review and efforts to halt the outbreak, DCD 41-9 at 49 (App. 67), including by recalling hundreds of millions of eggs from the market and shuttering its business for months, *see* DCD 116 at 9. Appellants' conduct was not remotely comparable to that of the *Higgins* defendants.

Established Eighth Amendment standards thus makes clear that the prison sentences in this case are "grossly disproportionate." Although many were harmed by the SE outbreak, Appellants did not commit the underlying act of placing adulterated eggs in interstate commerce and their culpability was minimal at best, as measured by Appellants' "motive and intent." For more than a century, crimes like these have been punished by fines, occasionally probation, and above all the serious stigma and collateral consequences of criminal conviction. Con-

sidered against that backdrop, it would be "cruel and unusual," and thus unconstitutional, to send Appellants to prison.

II. The District Court Committed Procedural Error and Abused Its Discretion in Sentencing Appellants to Prison.

In the alternative, the Court should vacate Appellants' sentences on non-constitutional grounds and remand for resentencing because the district court relied on clearly erroneous factual findings, resulting in a substantively unreasonable sentence.

"A sentence is substantively unreasonable if the district court '… gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but commits a clear error of judgment in weighing those factors.'" *United States v. Lozoya*, 623 F.3d 624, 626 (8th Cir. 2010). Indeed, "'substantive review [of sentences] exists, in substantial part, to correct sentences that are based on unreasonable weighing decisions.'" *United States v. Kane*, 639 F.3d 1121, 1136 (8th Cir. 2011). Further, a sentencing decision that "stems in large measure from clearly erroneous factual findings" is both substantively unreasonable, *id.*, and procedurally erroneous, *United States v. Stokes*, 750 F.3d 767, 771 (8th Cir. 2014).

It is, of course, "'the unusual case when [this Court will] reverse a district court sentence … as substantively unreasonable.'" *United States v. Vanhorn*, 740 F.3d 1166, 1169 (8th Cir. 2014). But this is an unusual case. The district court imposed a sentence that, at a minimum, raises serious constitutional issues that courts have frequently sought to avoid confronting unnecessarily. *See, e.g.*, *Sheffield Farms*, 121 N.E. at 477. It involves a sentence that several courts have found invalid under state or federal constitutional principles in similar circumstances. *See supra* pp. 29–34. And it involves a sentence that even the district court thought appropriate for appeal. *See* Sent. Tr. 163:25.

Just as the "canon of constitutional avoidance trumps *Chevron* deference" when an agency's interpretation of a statute "presents serious constitutional difficulties," *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008), the deference this Court usually pays to a district court's sentencing determinations should be tempered here by "the prudential concern that constitutional issues not be needlessly confronted," *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Those constitutional questions can be avoided if this Court concludes, as it should, that the

district court imposed a procedurally erroneous and substantively unreasonable sentence in this case.

The district court appeared to accept that the strong norm in responsible corporate officer cases is to impose fines but not jail time. Nevertheless, the court relied on certain facts "to distinguish this case from a mere unaware corporate executive, and explain why a probationary sentence is inappropriate under the circumstances presented." DCD 116 at 47. Two of those factual findings, central to the district court's analysis, are clearly erroneous: that the Appellants "ignore[d]" the uptick in positive environmental SE tests in 2010, and that they should have, but failed to, implement the same SE control measures in Iowa that they employed in their Maine operations. The district court also erred by faulting Appellants for not meeting a standard of care that went well beyond what the FDA itself required, and by giving substantial weight to regulatory breaches committed by Quality Egg employees that were unrelated to Appellants' offense of conviction. *See* DCD 116 at 44–45. The resulting sentences are procedurally flawed and substantively unreasonable.

1. The driving force behind the district court's sentencing decisions appears to have been its conclusion that the Appellants knew about, and should have taken steps to address, the increase in positive environmental SE tests at Quality Egg's Iowa farms, but failed to do so. In particular, the district court found that the Appellants "deci[ded] to ignore the SE test results" they received, DCD 116 at 44, and "failed to follow the methods used at their Maine plants" to address SE contamination in Iowa, *id.* at 41. Thus, the district court concluded, the Appellants "did not minimize SE contamination in their [Iowa] plants, despite having knowledge of how to effectively deal with SE contamination" based on their experience in Maine. *Id.* at 41. Each element of this conclusion rests on clear error.

First, the district court's factual finding that Appellants made a "decision[] to ignore" the increase in positive environmental SE tests at Quality Egg, *id.* at 44, is contradicted by the record, which shows that Quality Egg responded by thoroughly cleaning its barns and, at the recommendation of Dr. Hofacre, by administering a second SE vaccine to its chickens—a step that the Egg Safety Rule (by then promulgated but not yet binding) "encourage[d]" but did not require. *See* 74 Fed Reg. at

33,035. Indeed, the Egg Safety Rule did not require *one* round of vaccination, let alone two, *id.*, and prior to 2010 "almost no layer company in the U.S. gave this number of SE vaccines or tested in [the] way [Quality Egg did] to insure the vaccine was properly given," DCD 100 ¶ 11. Working with Dr. Hofacre and Dr. Nolan, Quality Egg also implemented a comprehensive pest control regime, stepped up its SE testing, stopped using induced molting, and changed animal feeds. *See supra* pp. 13–14. When the Egg Safety Rule took effect in July 2010, Quality Egg implemented egg testing protocols as set forth in the Rule. None of the eggs sampled by Quality Egg tested positive for SE. *See* Add. 82. These are *not* the actions of a company that has "deci[ded] to ignore" a problem. The district court's contrary conclusion is unsupportable.

Second, there is no record support for the district court's conclusion that "after SE was detected in Quality Egg's Iowa facilities, the defendants failed to follow the methods used at their Maine plants to resolve that problem, such as depopulating, cleaning, and retesting the barns." DCD 116 at 41. The district court appears to have drawn this statement from the government's arguments at sentencing and in its

resistance brief, *see id.* at 40, which asserted that the "government *plan*[*ned*] to present evidence" showing that the Appellants did not follow the same procedures in both states, *see* DCD 74 at 5 n.1 (emphasis added). But the government never did so. Thus, "rather than use record evidence, the court misused a statement government counsel made" to infer a factual conclusion. *See Stokes*, 750 F.3d at 771.

The district court also cited portions of the PSIRs in support of this same conclusion, but those documents do not say that Quality Egg failed to implement in Iowa the methods it followed in Maine. *See* DCD 85 ¶¶ 16–22. The PSIRs note that Quality Egg's Maine farms employed "stringent rodent monitoring and control measures," "dry cleaning … between flocks," and vaccinations, *see* DCD 85 ¶ 20, but Quality Egg did all of those things in Iowa as well, *see supra* pp. 11–13. Indeed, the PSIRs cite Dr. Hofacre's and Dr. Nolan's testimony that Quality Egg followed all of their recommendations in Iowa. *See* DCD 85 ¶ 21 nn. 4–5. What the PSIRs assert is not that "the defendants failed to follow the methods used at their Maine plants," but that Quality Egg "failed to *effectively* implement" those measures in Iowa. *Id.* ¶ 21 (emphasis added). That is critically different from the district court's finding that

Quality Egg simply "failed to follow the methods used at [its] Maine plants … despite having knowledge of how to effectively deal with SE contamination." To try and not succeed is a far cry from a knowing failure to act.

By themselves, these two erroneous factual findings require vacatur and remand for resentencing. It is plain that the district court believed Appellants' violations were greatly exacerbated by their supposed failure to respond to the positive environmental tests on their Iowa farms, despite possessing relevant experience from their Maine operations. DCD 116 at 40–41, 43–44. Because that conclusion is without any factual foundation, the district court's sentences cannot stand. *Cf. Stokes*, 750 F.3d at 772 (vacating sentence where an unsupported factual finding was "a principal basis" for the district court's decision).

2. The district court also erred by giving substantial weight to a number of irrelevant or tangential factors.

First, having found erroneously that the Appellants "decid[ed] to ignore" SE-positive tests on their Iowa farms, the district court compounded that error by basing its assessment of what they *should* have done on a standard drawn not from any applicable regulation or indus-

try practice, but instead from a combination of the prosecutors' arguments and the district court's own assumptions about typical poultry farm conditions. In so doing, the district court failed to acknowledge that Quality Egg began to test for SE long before any FDA rule required such testing, and fully complied with Egg Safety Rule's testing standards once they took effect.

Both the government and the district court emphasized that "[p]rior to July 2010"—*i.e.*, prior to the effective date of the Egg Safety Rule—"despite the receipt of positive [environmental] SE test results, Quality Egg did not test or divert eggs from the market." DCD 116 at 44; *see also id.* at 27 (noting government's argument that "eggs … were sold to consumers and not diverted"); *id.* at 43 ("additional testing needed to be performed before the suspected shell eggs were distributed to consumers"). But as the court acknowledged, prior to July 2010 "*there was no legal or regulatory requirement*" to take either step. *Id.* at 44 n.23 (emphasis added). In fact, prior to the Egg Safety Rule's effective date, Quality Egg was not required to conduct *any* environmental SE tests, let alone take any specific measures in response to a positive test.

Nevertheless, Quality Egg began to conduct such tests in 2004, and performed thousands of tests between 2004 and 2010. *See* DCD 100 ¶ 12.

Even after the Egg Safety Rule took effect in July 2010, the Rule did not require producers to divert eggs after a positive environmental test (presumably because "[d]etecting SE in the environment does not mean that eggs produced in those facilities contain SE," DCD 100-2 ¶ 8). It allowed producers to begin egg testing instead. *See* 21 C.F.R. § 118.5(a)(2). Quality Egg followed that protocol to the letter. Had any of the egg tests come back positive for SE, Quality Egg *then* would have been required to at least temporarily divert its eggs from the market. *See id.* § 118.6. But as the government concedes, not one of the eggs sampled by Quality Egg tested positive for SE. Add. 82. Under the Egg Safety Rule, a producer in that situation is "not required to do further egg testing," 21 C.F.R. § 118.6(c), much less divert eggs from the market.

The district court's conclusion that the Appellants should have diverted eggs—and that they should go to jail for failing to do so—thus effectively overrules the balance FDA struck in promulgating the Egg Safety Rule. The Rule gives a company two options if it receives a posi-

tive environmental test: Divert eggs, or conduct egg tests. The district court's approach implicitly adds a startling qualifier: If you do not divert eggs, and test instead, your executives may be sent to prison. Quality Egg's compliance with FDA's own testing protocol, which the agency presented as a "cornerstone" of its SE-prevention measures, *see* 69 Fed. Reg. at 56,825, plainly should have counted *for* Appellants. The district court clearly erred in holding it against them.

Equally improper was the weight the district court accorded to its finding that "Quality Egg failed to meet FDA regulatory standards." DCD 116 at 46. It is true that an FDA inspection of Quality Egg's facilities after the outbreak found deficiencies in the company's implementation of its SE prevention plan, including structural or landscaping features that increased pest access to barns and lapses in sanitary practices as workers moved between barns. The FDA also noted significant rodents and insect activity in some barns. *See supra* pp. 15–16. But the district court badly misunderstood the investigators' findings. Indeed, the district court erroneously stated that "FDA officials … described the insanitary conditions observed [at Quality Egg] as 'egregious.'" DCD 116 at 46. Not so. That term does not appear in the FDA report. *See*

generally DCD 41-9 (App. 13–77). That is the *probation officer's* characterization of the report, presented for the first time in the PSIRs. *See* DCD 85 ¶ 66.

A fair reading of the FDA report itself produces a very different impression: that of a "cooperative" company that, in August 2010, was working diligently to implement a compliance program designed to meet new regulatory requirements that had gone into effect just one month before. *See* DCD 41-9 at 3 (App. 21); *see also supra* pp. 16–17 & n.2 (FDA draft guidance not released until mid-August 2010). The inspectors reported that most of their concerns had been remedied in less than a month. *See supra* p. 17. They also found that Quality Egg had followed appropriate environmental sampling and testing procedures; implemented appropriate egg testing procedures; and followed appropriate procedures to collect manure sampling for SE testing. *See supra* p. 15. And, as the district court acknowledged, "there is no evidence that Austin Jack DeCoster or Peter DeCoster had actual knowledge" of the supposedly "horrendous sanitary conditions." Sent. Tr. 155:7–8.

The district court's conclusion that Quality Egg had "egregious" sanitary conditions that should have placed the Appellants on notice

"that additional testing needed to be performed before the suspected shell eggs were distributed to consumers," DCD 116 at 43, was based on a misconception of both *Salmonella* and poultry farms. "*Salmonella* microorganisms are ubiquitous," 74 Fed. Reg. 33,031, and it has long been recognized that efforts to completely eradicate *Salmonella* from egg-laying environments "are likely to be ineffective," *see* J.P. Duguid & R.A.E. North, *Egg and Salmonella Food-Poisoning: An Evaluation*, 34 J. MED. MICROBIOLOGY 65 (1991). It is common for a poultry farm to experience positive environmental SE tests.

The PSIR similarly singled out as "egregious" a report of a building with "manure piled to the rafters … which was below the laying hens." DCD 116 at 18 (quoting PSIRs). That too is common. As FDA acknowledged, poultry houses "with a manure pit at ground level with the house above"—like Quality Egg's—"accounted for 63 percent of houses in the Great Lakes region and 48 percent of houses in the Central region." 69 Fed. Reg. at 56,830.

Likewise, USDA studies revealed that "rodents and flies ha[ve] access to feed in feed troughs on *nearly all* [poultry] farms." 74 Fed. Reg. at 33,032 (emphasis added). The Egg Safety Rule requires produc-

ers to take steps to combat that problem. Notably, the FDA also recognized that "rodent control [measures] may take up to *4 years* to be fully effective." *Id.* at 33,062 (emphasis added). That FDA inspectors found rodents in Quality Egg's barns approximately *one month* after the Egg Safety Rule took effect therefore is not evidence of "egregious" insanitary conditions warranting imprisonment. It is evidence that Quality Egg faced a problem common to "nearly all" poultry farms—one that FDA and industry are together working to resolve, and that Quality Egg was working with an expert to address.

Quality Egg moved proactively to address the increased risk of contamination revealed by the positive environmental SE tests it voluntarily performed. The company retained experts, whose advice it promptly implemented. When the Egg Safety Rule took effect, Quality Egg took affirmative steps to come into compliance by adopting and implementing an SE prevention plan. That implementation was imperfect, but that can be said of every responsible corporate officer offense. Under *Park*, an officer cannot be charged with a failure to do the "objectively impossible." 421 U.S. at 673. In other words, the crime occurs *only* if there was *something* more the officer might have done, as consid-

ered with benefit of hindsight. The identified shortcomings in Quality Egg's execution of its SE-prevention plan do not distinguish this case from others that could be prosecuted under *Park*.

Finally, the district court erred by giving substantial weight to a number of other offenses or regulatory violations by Quality Egg employees that were unrelated to the SE outbreak, or about which the Appellants knew nothing (or both). None of these events is relevant to the court's own (erroneous) conclusion that the Appellants knew about but ignored the risk of SE contamination. Accordingly, even if these events were properly considered, the court "commit[ted] a clear error of judgment in weighing'" them so heavily. *Lozoya*, 623 F.3d at 626.

That Quality Egg employees provided misleading information to auditors working for a customer is highly regrettable, but it establishes nothing about the Appellants' knowledge of *Salmonella* contamination. Appellants are not even *alleged* to have known about this misconduct when it occurred. *See* DCD 116 at 10–13. The same is true of a Quality Egg employee's conduct in bribing a USDA inspector to approve the release of "restricted" eggs. *Id.* at 13–14. The eggs were supposed to be removed from distribution not because of SE concerns, but because they

did not meet quality standards; too many were cracked, dirty, broken, or leaking. *Id.* at 13; *see also* 21 U.S.C. § 1033(g).

Likewise, the fact that Quality Egg employees mislabeled some packages of eggs with incorrect expiration dates is unacceptable, but the government identified no one who became ill (either from *Salmonella* or otherwise) as a result, and, more importantly, found "*no evidence* that Peter DeCoster and/or [Austin] DeCoster had knowledge of these mislabeling practices." DCD 116 at 18 (emphasis added).[11]

None of this conduct was acceptable. But none of it involved the Appellants themselves. *See* Sent. Tr. 37:13–15 (government counsel: "On specific instances of bad acts that happened at the company … [w]e're not alleging actual knowledge on the part of the individual defendants."). The district court nevertheless viewed these events as sup-

[11] The district court found that Peter DeCoster made a presentation to Walmart that included inaccurate information about Quality Egg's food safety practices. DCD 116 at 46. Discovery revealed two versions of this presentation. One contained a misleading statement. Because Peter's nametag was found in the same binder as the incorrect version, the district court decided that version must have been presented. Appellants continue to object to this finding. But in any event, as the district court observed, Jack DeCoster did not attend the presentation and there was no evidence that he reviewed any draft. *See* DCD 116 at 45 n.25. Thus, this event cannot support a sentence of imprisonment for Jack, just as Jack's prior misdemeanor conviction, *see supra* p. 47–48, cannot support a jail sentence for Peter.

porting a prison sentence because they "happened on [the Appellants'] watch." *Id.* at 44:11–15. In saying this, the district court doubled-counted. Appellants were liable under *Park* because adulterated eggs were shipped "on their watch," and then deemed punishable by imprisonment because other, unrelated acts also happened "on their watch." For the district court, it was apparently enough that Appellants were "the captain of the ship. And the ship went down." Sent. Tr. 155:20–21.

That certainly should not have been enough in this case. The district court made two clear factual errors, both going to the core of its reasoning for imposing jail sentences. Alone, that is enough to require reversal and remand. But the court went further. Rather than acknowledge Appellants' efforts to manage an inherent industry risk, including by meeting or exceeding testing standards imposed by federal law, the district court relied on its own after-the-fact determination that Quality Egg should have done more and faulted Appellants for unrelated misconduct by their employees. The district court "commit[ted] a clear error of judgment in weighing" these factors together to conclude that, contrary to the vast weight of historical practice, Appellants

should be imprisoned for their supervisory liability offense. *See Lozoya*, 623 F.3d at 626. The resulting sentences should be vacated.

CONCLUSION

For the foregoing reasons, the portion of the district court's judgment imposing sentences of imprisonment should be vacated. In the alternative, the sentences should be vacated and the case remanded for resentencing.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Undersigned counsel hereby certifies that on July 20, 2015, a copy of the foregoing brief was filed with Court's CM/ECF system, which will serve copies on all registered counsel.

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