No. 16-877

IN THE

Supreme Court of the United States

AUSTIN "JACK" DECOSTER AND PETER DECOSTER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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QUESTIONS PRESENTED

(1) Whether the Due Process Clause prohibits the imposition of a term of imprisonment as punishment for a supervisory liability offense, such as the one described in *United States v. Park*, 421 U.S. 658 (1975).

(2) Whether *United States v. Park* and its predecessor, *United States v. Dotterweich*, 320 U.S. 277 (1943), should be overruled.

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INTERESTS OF *AMICUS CURIAE*[1]

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

WLF does not condone the introduction of adulterated foods into interstate commerce, and it supports robust regulatory efforts to protect consumers from such foods. At the same time, WLF has long criticized the growing problem of overcriminalization—the disturbing trend at the federal level to criminalize normal, everyday business decisions. *See, e.g.*, Sheila A. Millar & Kathryn M. Biszko, *CPSC's Misuse of RCO Doctrine Bodes Ill for CEOs and Consumers*, WLF Legal

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), more than 10 days prior to the due date for this brief, counsel for WLF notified counsel of record for all parties of WLF's intention to file. All parties have consented to the filing of WLF's brief.

Backgrounder (Aug. 31, 2013); John Hasnas, *Mens Rea Requirement: A Critical Casualty of Overcriminalization*, WLF Legal Opinion Letter (Dec. 12, 2008).

To that end, WLF opposes the government's increased use of the "responsible corporate officer" doctrine, commonly known as the *Park* doctrine, to punish business executives for employee misconduct that the company's officers neither condoned nor even were aware of. *See, e.g.*, Brian R. Stimson, *"Responsible Corporate Officer": Business Executives Face Strict Liability*, WLF Legal Backgrounder (April 9, 2010). In particular, WLF believes that the Eighth Circuit's decision below, by affirming the incarceration of corporate executives on the basis of their supervisory roles in the company, vastly expands the scope of the *Park* doctrine beyond constitutional limits. Such unprecedented expansion offends traditional notions of due process, significantly erodes individual and business civil liberties, and urgently warrants this Court's review.

STATEMENT OF THE CASE

Petitioners Jack and Peter DeCoster were the owner and chief operating officer, respectively, of Quality Egg LLC ("Quality Egg")—a leading Iowa-based egg producer. After a Salmonella outbreak was traced back to Quality Egg's facilities in August 2010, the company issued voluntary nationwide recalls for hundreds of millions of previously shipped eggs. Despite cooperating fully with the Food and Drug Administration's ("FDA") investigation, petitioners were charged with violating the Food, Drug, and Cosmetic Act ("FDCA"), which prohibits

the "introduction into interstate commerce of any food … that is adulterated or misbranded." *See* 21 U.S.C. §§ 331(a), 333(a)(1).

Petitioners pled guilty to one count each of introducing adulterated food into interstate commerce in violation of the FDCA—an offense that has been construed as a strict liability misdemeanor for which no proof of knowledge or intent is required. Indeed, petitioners' plea agreements with the government stipulated that no "personnel employed by or associated with Quality Egg, including the defendant[s]," had any knowledge "that eggs sold by Quality Egg were, in fact, contaminated." Pet. App. 159a. Because petitioners had no knowledge of the FDCA violation or any misconduct underlying it, their guilty pleas were based solely on their status as "responsible corporate officers" at the relevant time of the company's offense.[2] *Id*. at 153a.

Before sentencing, petitioners sought a ruling from the district court that the imposition of a sentence of incarceration would violate their constitutional rights. In particular, petitioners argued that the Due Process Clause prohibits incarceration for offenses based solely on strict supervisory liability—where no personal knowledge

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[2] Petitioners' pleas were accompanied by considerable monetary compensation to consumers injured by the Salmonella outbreak. In addition to Quality Egg's paying a $6.79 million criminal fine, Quality Egg's insurer paid nearly $7.8 million in compensation for damages caused by the company's shipment of contaminated eggs. Petitioners also personally agreed to pay an additional $83,000 in criminal restitution.

or wrongdoing by the defendant has been established. The district court rejected that argument, concluding that this Court's decision in *United States v. Park*, 421 U.S. 658 (1975), precluded petitioners' due process challenge. Pet. App. 106a-108a.

Although it was undisputed that Quality Egg had taken substantial steps, informed by expert advisors, to comply with newly promulgated federal egg-safety standards—including rigorous FDA-testing protocols designed to prevent Salmonella contamination—the district judge concluded *at sentencing* that petitioners had been "negligent" in carrying out their corporate responsibilities. The district court sentenced each petitioner to serve a three-month term of imprisonment and to pay a $100,000 criminal fine, plus restitution and probation.

On appeal, a fractured panel of the Eighth Circuit affirmed the district court's sentences. Although conceding that "courts have determined that due process is violated when prison terms are imposed for vicarious liability crimes," Pet. App. 8a, Judge Murphy's lead opinion insisted that *Park* liability "is not equivalent to vicarious liability" because it hinges on the defendant's "own failure to prevent or remedy" the violation. *Id.* at 9a. Therefore, because petitioners "failed to take sufficient measures to improve" the unsanitary conditions on Quality Egg's farms, they were liable for the company's FDCA violations. *Id.* at 9a-10a.

Concurring with the judgment, Judge Gruender also conceded that "imprisonment based

on vicarious liability would raise serious due process concerns." Pet. App. 17a. But because he understood the district court to have found petitioners "negligent in failing to prevent" Quality Egg's FDCA violations, Judge Gruender concluded that this case "does not implicate those [constitutional] concerns." *Id.* at 20a, 17a. He wrote separately to clarify his view that *Park* permits liability "only when the violation resulted from the corporate officer's negligence," *Id.* at 20a—a requirement he believed to have been satisfied in this case.

Judge Beam dissented. He emphasized that the "sole basis" for petitioners' guilty pleas was "contamination of eggs sold by Quality Egg," which the government "fully conceded" that petitioners knew nothing about. Pet. App. 24a-25a. For that reason, the district court's finding (at sentencing) of "supposed negligence" could not possibly satisfy the government's burden to prove that petitioners had "some measure of a guilty mind" to justify their incarceration. *Id.* at 30a. Absent some evidence that petitioners "personally participated" in any wrongdoing, Judge Beam concluded, "the improvident prison sentences imposed in this case were due process violations." *Id.* at 30a-31a.

Petitioners sought rehearing *en banc*, which was denied. Chief Judge Riley and Judges Wollman and Loken voted in favor of rehearing. Pet. App. 110a.

SUMMARY OF ARGUMENT

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

Although this Court has sanctioned the imposition of criminal liability in the absence of *mens rea* in the narrow category of "public welfare offenses," it has done so with the explicit understanding that the penalties imposed in such cases "are relatively small, and conviction does no grave damage to an offender's reputation." *Morissette v. United States*, 342 U.S. 246, 256 (1952). Yet the Eighth Circuit's decision in this case extends strict criminal liability far beyond the constitutional bounds recognized by any federal appeals court since this Court first articulated the *Park* doctrine over 70 years ago, in direct conflict with the Eleventh Circuit. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999).

Over petitioners' due-process objections, the district court imposed and the appeals court affirmed a three-month term of imprisonment for each

defendant—based on little more than his supervisory role in the company. But if, as here, *Park* liability convictions can trigger prison sentences, the penalties for such convictions have been pushed far outside the small-bore realm of *Dotterweich* and *Park*. Because such an expansion would undermine this Court's express limitation of strict liability crimes to cases where the penalties are small and conviction does not greatly harm the defendant's reputation, the petition should be granted.

Absent further review by this Court, the federal government's increased use of the *Park* doctrine to prosecute company executives will adversely impact American businesses by labelling "responsible corporate officers" as criminals—even if they never participated in, encouraged, or had knowledge of the violations alleged. By decoupling imprisonment from individual responsibility, federal prosecutors are pushing the *Park* doctrine well beyond what due process permits. Bootstrapping a business defendant's strict-liability misdemeanor plea into a term of incarceration is not only fundamentally unfair, but it imposes unjustified risks on the larger business community. If this trend persists, it will become intolerably risky to be an executive in the food and drug industries in the United States, and the compensation required to attract and train qualified executives who are willing to risk their liberty will substantially drive up prices for vital consumer goods.

This case also presents the Court with an opportunity to revisit the very notion of *Park* doctrine liability. This Court has interpreted the Due Process Clause to require that criminal statutes put

the world on notice, in words with sufficient definiteness that ordinary people can understand, of what conduct will meet with criminal sanction. This requirement proceeds from two concerns: providing fair warning to potential violators and cabining the discretion of police, prosecutors, and juries. Because the text of the FDCA does not contemplate criminal liability where no personal culpability exists, it does not establish an "ascertainable standard of guilt" as construed by this Court's binding precedents. Likewise, this Court's *Park* doctrine jurisprudence imposes no cognizable limits or standards on when prosecution may be warranted, but rather invites arbitrary enforcement by federal prosecutors.

Because the Eighth Circuit's expansive application of the *Park* doctrine effectively precludes company executives from conforming their conduct in advance to avoid incarceration, the interests of fairness, predictability, and the rule of law were all injured in this case. WLF joins with petitioner in urging the Court to grant certiorari.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO ENSURE THAT *PARK* DOCTRINE PENALTIES ARE "RELATIVELY SMALL" AND CAUSE NO "GRAVE DAMAGE TO AN OFFENDER'S REPUTATION"

Although strict liability crimes are morally objectionable and have long been disfavored, this Court has permitted the imposition of strict criminal liability in narrow instances for so-called "public welfare offenses." But it has only done so in cases where the penalties are "relatively small" and the

conviction does not cause "grave damage to an offender's reputation." *Morissette*, 342 U.S. at 256. Such offenses are not crimes in the traditional sense, but are rather a means of regulating activities that pose a unique risk to public health or safety.

The *Park* doctrine, which allows corporate executives to be held strictly and criminally liable for a company's FDCA violations, has been understood to fall within this narrow class of strict liability public welfare offenses. This Court first recognized the doctrine in *United States v. Dotterweich*, 320 U.S. 277 (1943), a case involving the president and general manager of a pharmaceutical company who (after misbranded and adulterated drugs were shipped in interstate commerce) was convicted of a misdemeanor under the FDCA. The defendant received a $500 fine and 60 days' probation. *See United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 501 (2d Cir. 1942), *rev'd*, *Dotterweich*, 320 U.S. at 277.

The Court upheld Dotterweich's conviction even though there was no evidence that he was personally guilty of any misconduct, that he actively participated in the misconduct, or that he even knew of the underlying misconduct. *Dotterweich*, 320 U.S. at 285-86 (Murphy, J., dissenting). Instead, guilt was imputed to the defendant "solely on the basis of his authority and responsibility as president and general manager of the corporation." *Id.* at 286 (Murphy, J., dissenting).

Notwithstanding *Dotterweich*, the bedrock requirement of *mens rea* continued to remain "the rule of, rather than the exception to, the principles

of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). In *Morissette v. United States*, for example, the Court reiterated its "philosophy of criminal law" that a crime is "generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand." 342 U.S. at 250-51. Reaffirming in the strongest possible terms the presumption against imposing criminal liability without proof of personal culpability, the Court observed:

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

Id. at 250. *Morissette* held that, unless Congress clearly stated a contrary intent, all federal statutes based on common law crimes should be construed to require *mens rea*. *Id.* at 250-51.

The Court subsequently revisited strict criminal liability under the FDCA in *United States v. Park*, the case from which the *Park* doctrine draws its name. In *Park*, the president of a national food store chain was convicted under the FDCA when food products were exposed to contamination by rodents at a warehouse. 421 U.S. at 660. In upholding the conviction, the Court emphasized that the defendant's criminal liability did not arise from knowledge of any wrongdoing, but flowed from the

officer's failure "to prevent the act complained of." *Id*. at 671. As a result, the Court upheld the relatively light sentence imposed on the company president: a $250 fine. *Id.* at 660, 666.

Since *Park*, this Court has persisted in its view that strict criminal liability prosecutions are strongly "disfavored" under the law. In *Staples v. United States*, 511 U.S. 600, 619 (1994), the Court expanded the default rule of *Morissette* to non-common-law crimes, holding that the mere possession of a firearm is innocent conduct that does not qualify as a "public welfare offense" subject to strict criminal liability. Emphasizing that it has recognized such "public welfare offenses" only in very narrow circumstances, the Court criticized the government for ignoring "the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'" *Id*. at 610 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)); *see also Staples*, 511 U.S. at 620 n.1 (Ginsburg, J., concurring in the judgment) ("Contrary to the dissent's suggestion, we have not confined the presumption of *mens rea* to statutes codifying traditional common-law offenses, but have also applied the presumption to offenses that are 'entirely a creature of statute.'").[3]

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[3] Justice Thomas has cautioned that extending the "public welfare offense" beyond its intended limits could lead to the abandonment of *mens rea* for virtually the entire range of commercial, social, and economic activity. *See United States v. Hanousek*, 528 U.S. 1102 (2000) (Thomas, J., joined by O'Connor, J., dissenting from denial of *certiorari*) ("[S]uch a suggestion would extend this doctrine to virtually any criminal

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

The decision below simply cannot be squared with this Court's precedents, which make clear that a strict liability criminal conviction violates due process where, as here, the penalty is not relatively small and causes grave harm to the defendant's reputation. As this Court has long recognized, "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment." *Scott v. Illinois*, 440 U.S. 367, 373 (1979). The prison sentences imposed on petitioners in this case cannot plausibly be characterized as "relatively small" penalties that do not gravely besmirch the

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statute applicable to industrial activities. I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety.").

defendants' reputations. Indeed, "the combination of stigma and loss of liberty involved in a … sentence of imprisonment sets the sanction apart from anything else the law imposes." Herbert L. Packer, *The Limits of the Criminal Sanction* 123 (1968). Inevitably, "damage will be done to [a defendant's] good name by having a criminal record; and his future will be imperiled because of possible disabilities or legal disadvantages arising from the conviction." *Davis v. City of Peachtree City*, 304 S.E.2d 701, 703 (Ga. 1983).

In sum, incarceration inflicts precisely the sort of reputational harm that, when arising from a strict criminal liability conviction, raises serious constitutional concerns and warrants this Court's further review. The petition should be granted to vindicate this Court's own *Park* doctrine precedents.

II. IF LEFT IN PLACE, THE EIGHTH CIRCUIT'S DECISION WILL INCENTIVIZE GREATER USE OF THE *PARK* DOCTRINE AT THE EXPENSE OF CORPORATE OFFICERS' LIBERTY

For many years after *Park*, "responsible corporate officer" prosecutions remained rare. Recently, however, federal prosecutors have increasingly come to view the *Park* doctrine as a powerful and attractive weapon in the government's arsenal. Indeed, use of the doctrine is dramatically on the rise, and the government has publicly announced a newfound enthusiasm for *Park* prosecutions. Unless this Court intervenes, increased criminal prosecutions of company executives under the *Park* doctrine will adversely affect the nation's business community by imposing

unjustified risks—including the risk of incarceration—on corporate officers in the performance of their everyday supervisory duties.

A. The Government's Reliance on the *Park* Doctrine Is Growing, and the Decision Below Incentivizes Even Greater Use

In recent years, the government has signaled its unmistakable intention to step up *Park* prosecutions. On March 4, 2010, FDA sent a letter to U.S. Senator Charles Grassley announcing FDA's intention to "increase the appropriate use of misdemeanor prosecutions … to hold responsible corporate officers accountable." Letter from Margaret Hamburg, Comm'r of Food and Drugs, to Sen. Charles E. Grassley, Ranking Member, Senate Committee on Finance (Mar. 4, 2010).

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

Likewise, in a September 17, 2014 address at New York University's School of Law, then-U.S.

Attorney General Eric Holder called for expanding *Park* liability to encompass the financial services industry. Contending that "the buck needs to stop *somewhere* where corporate misconduct is concerned," Holder suggested the "responsible corporate officer doctrine" as an effective shortcut to "a criminal charge against" those "who were in a position to do something about it." Dep't of Justice, *Attorney General Holder's Remarks on Financial Fraud Prosecutions at NYU School of Law* (Sep. 17, 2014).[4]

The current version of the U.S. Attorneys' Manual reminds federal prosecutors that liability under § 333(a)(1) of the FDCA "does not require proof of fraudulent intent, or even of knowing or willful conduct," but rather "an individual who stands in responsible relation to the violative conduct, even if he or she did not engage in the conduct itself, may be liable." Dep't of Justice, *U.S. Attorneys' Manual* § 4-8.210 (2017).

True to its word, the federal government has been pursuing *Park* convictions against senior

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[4] These collective pronouncements are both noteworthy and curious. They are noteworthy because they represent a clear desire on the part of the government to rely on the *Park* doctrine to increase the numbers of criminal convictions of corporate officers. They are curious, however, to the extent that they purport to be predictive of *future* criminal activity. Ordinarily, a prosecutor is unable to say what crimes will be charged in the future, because those crimes have not yet occurred, much less been investigated. But it is a unique attribute of the *Park* doctrine that supervisory oversight that is perfectly legal in one year may, under the scrutiny of a zealous prosecutor, become illegal in the next year.

corporate executives with unprecedented vigor and frequency. This surge in *Park* prosecutions has been accompanied by the imposition of increasingly severe penalties on corporate officers. *See, e.g., Friedman*, 686 F.3d at 813 (upholding the exclusion of three executives from federal health care programs for 12 years on the basis of their misdemeanor guilty pleas under the *Park* doctrine); *United States v. Higgins*, No. 2:09-cr-403-4, 2011 WL 6088576 (E.D. Pa. Dec. 7, 2011) (imposing a $100,000 fine and 9 months' imprisonment on the basis of a single misdemeanor guilty plea under the *Park* doctrine); *United States v. Hermelin*, No. 11-cr-85 (E.D. Mo. Mar. 24, 2011) (imposing a $1 million fine and 17 days' imprisonment on the basis of two misdemeanor guilty pleas under the *Park* doctrine).

As is plain to see, federal prosecutors are testing the outer bounds of *Park* doctrine liability—well beyond the small-bore realm of *Dotterweich* and *Park*. By decoupling imprisonment from individual responsibility, prosecutors and judges have ushered in a disturbing trend in the criminal law that raises serious due process concerns. That trend, as manifested most recently by the Eighth Circuit's splintered decision below, warrants further review by this Court.

B. The Decision Below Poses Untenable Risks to Corporate Executives in the Performance of Their Everyday Duties

Drastically expanding the *Park* doctrine to include the penalty of imprisonment, as the government urged here and the Eighth Circuit allowed, will create untenable risks for corporate

managers and executives. As one federal judge has observed, "[t]he line … between a conviction based on corporate position alone and one based on a 'responsible relationship' to the violation is a fine one, and arguably no wider than a corporate bylaw." *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230, 234 (D. Mass. 1980).

In many cases, it is virtually impossible for corporate officers to personally guarantee that every subordinate is following the latest regulatory morass of impenetrable rules at all times. Given the complexity of the FDCA, no chief executive of a large company can reasonably be expected to maintain up-to-date expertise in FDCA regulations and provide direct oversight of compliance with all of those provisions, while simultaneously discharging his or her duty to manage the company's day-to-day affairs. Such executives have no choice but to delegate *some* responsibility for FDCA compliance to their subordinates.

Under the *Park* doctrine, however, delegating responsibility is no defense; a responsible corporate officer can be convicted without any knowledge that a specific violation has even occurred. Indeed, it is highly unlikely that a CEO exists today who cannot potentially be convicted under the *Park* doctrine, as there is little if anything within corporate operations that is not, at least on paper, within a CEO's supervisory sphere of responsibility. Even if the most thorough and assiduous executive supervisor uncovers no evidence of a problem, it will always be "objectively possible" for the CEO, who has authority over an entire company, to have prevented the wrongdoing somehow. *See, e.g., United States v.*

Starr, 535 F.2d 512, 516 (9th Cir. 1976) (affirming a secretary-treasurer's *Park* conviction for failing to anticipate and counteract a janitor's insubordination in refusing the officer's directive to remedy a warehouse rodent problem).

Expanding the reach of the *Park* doctrine to encompass incarceration as an available punishment exacerbates the problem. If allowed to stand, the holding below threatens to confer "designated felon" status on countless business managers across America. Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer Doctrine: Designated Felon or Legal Fiction?*, 25 Loy. U. Chi. L.J. 169, 170 (1994). Indeed, the increased potential for loss of liberty on the basis of *Park* liability imposes on corporate officers "a massive legal risk, unjustified by law or precedent." *United States v. Weitzenhoff*, 35 F.3d 1275, 1299 (9th Cir. 1994) (Kleinfeld, J., dissenting), *cert. denied*, 513 U.S. 1128 (1995).

Absent this Court's intervention, corporate officers in the food and drug industries (and beyond) will need to seriously rethink their career choices. Under such a strict criminal liability regime, only those executives with an unusually high tolerance for risk (*i.e.*, executives who may be less compliance conscious than average) will be willing to run companies in regulated industries. As a result, the compensation required to attract and retain qualified executives who are willing to risk their very freedom in order to manage a company will substantially drive up prices for vital consumer goods in the food and drug sectors.

To prevent these unpalatable results from occurring and to safeguard the rule of law, WLF urges the Court to grant the petition.

III. REVIEW IS FURTHER WARRANTED TO CONSIDER WHETHER *PARK* AND *DOTTERWEICH* SHOULD BE OVERRULED

As the petition persuasively demonstrates, the actual text of the FDCA provides *no* basis for imposing criminal liability on so-called "responsible corporate officers" on the basis of their supervisory status. Indeed, on its face, § 331 merely provides that certain "acts and the causing thereof are prohibited," and § 333(a)(1) states that "[a]ny person who violates a provision of § 331" is criminally liable. Contrary to *Park* and *Dotterweich*, then, nothing in the FDCA's statutory language permits imposing liability on corporate officers who lacked all knowledge of an FDCA violation (and the misconduct underlying it). By criminalizing so broad a range of innocent conduct, this Court's *Park* doctrine fails to give corporate officers "fair warning" of what conduct is forbidden and invites arbitrary enforcement of the law. *Certiorari* is thus additionally warranted to consider whether *Park* and *Dotterweich* should be overturned.

A. As Construed by *Park* and *Dotterweich*, the FDCA Fails to Provide "Fair Warning" of What Conduct It Forbids

This Court has long understood that "the dividing line between what is lawful and unlawful cannot be left to conjecture." *Connally v. General*

Constr. Co., 269 U.S. 385, 393 (1926). To the contrary, due process guarantees that no person can be forced "to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Because "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed," every law must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1954).

To pass constitutional muster, then, a statute must "describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Kolender v. Lawson*, 461 U.S. 352, 361 (1983). Although "it is not likely that a criminal will carefully consider the text of the law before he murders or steals," a "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Accordingly, criminal laws must "enable those within their reach to correctly apply them." *Connally*, 269 U.S. at 391 (citations omitted).

As construed by this Court's *Park* doctrine jurisprudence, the FDCA does not provide corporate officers with adequate fair warning of "what the law intends to do if a certain line is passed." *McBoyle*, 283 U.S. at 27. To the contrary, *Park* imposes personal criminal liability in cases where, as here, the government concedes that the defendant was *wholly unaware* that the company he was supervising had *crossed any line whatsoever*. *See* Pet. App. 159a. Even a company supervisor who

theoretically "could have" stopped someone from violating the law cannot plausibly be said to have proximately caused that violation if he was unaware that a violation was about to occur. Yet because *Park* liability is indifferent to the nature and purpose of the defendant's conduct, this Court's construction of the FDCA imposes liability without causation, depriving a *Park* offense of the "sufficient definiteness" necessary for "ordinary people" to "understand what conduct is prohibited." *Kolender*, 461 U.S. at 357.[5]

As construed by *Dotterweich* and *Park*, the FDCA fails to establish such an "ascertainable standard of guilt" under this Court's binding precedents and is therefore constitutionally void for vagueness. *See United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). Accordingly, further review is warranted to consider whether this Court's *Park* doctrine jurisprudence should be overturned.

B. Under this Court's *Park* Doctrine Precedents, the FDCA Is Subject to Arbitrary Enforcement

This Court's construction of the FDCA in *Dotterweich* and *Park* also fails the "more important"

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[5] Although the government may suggest that the *Dotterweich* and *Park* decisions put corporate officers on notice of the strict liability standard to which they would be held, the fair warning principle ensures that a person should be able to "conform [his] conduct to law … by reading the *face* of a statute—not by having to appeal to outside legal materials." *Sabetti v. DiPaolo*, 16 F.3d 16, 17 (1st Cir. 1994) (Breyer, J.).

constitutional requirement for criminal statutes, "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). This deficiency arises not from the lack of notice the criminal law provides to potential offenders, but from the unfettered discretion it places in the hands of federal prosecutors and law enforcement personnel.

When criminal statutes are impermissibly vague or indefinite, law enforcement has no clear standards for enforcing those statutes. Such imprecision provides police and prosecutors with extraordinary leverage to make unfair demands on defendants, to threaten corporate executives with severe punishment for relatively minor infractions, or to exploit their positions of authority for improper motives. Indeed, a vague criminal statute "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Because they lend themselves to being enforced in such a subjective a manner, imprecise criminal laws also give government officials "the *de facto* power of determining what the criminal law in action shall be." Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 428 (1958). More than 70 years ago, Justice Robert Jackson cautioned:

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

Robert H. Jackson, *The Federal Prosecutor*, 31 Am. Inst. of Crim. L. & Criminology 3, 5 (1941). As this Court cautioned more than a century ago, "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1876). The *Park* doctrine waylays corporate officers with just such a menacing net.

Given the breadth of the FDCA's prohibitions, the decision below poses the very real danger that federal prosecutors will increasingly come to view an FDCA-misdemeanor charge, coupled with the threat of imprisonment, as powerful leverage by which to obtain settlements or extract guilty pleas to vindicate suspicions that the government otherwise could not prove. Rather than fully investigating alleged criminal conduct, government prosecutors will come to rely on the *Park* doctrine as an easy way to procure guilty pleas without lengthy investigations and court trials. Although due process

rights ordinarily stand as a bulwark against such prosecutorial abuses, an expanded *Park* doctrine undermines that bulwark and erodes those rights.

While such prosecutorial shortcuts may appear at first to be efficient (by prosecuting company misconduct without protracted jury trials), they come at a great cost to the public interest. Beyond the clear danger to companies and corporate officers, such an approach to criminal justice also erodes the cooperative relationship that government regulators have long enjoyed with the business community. The added potential for incarceration creates a perverse incentive for corporate officers to avoid reporting product hazards or other regulatory infractions to regulators, out of a rational fear that by disclosing a company mistake, they will risk their very liberty. Such a disincentive is contrary to the purpose of the FDCA and harms the public interest.

If arbitrary and discriminatory enforcement is to be avoided, "laws must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108. Otherwise, where the law fails to provide such minimal guidelines, "a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (quoting *Goguen*, 415 U.S. at 575).

That is precisely the problem that the *Park* doctrine poses to corporate officers. It fails to "establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (quoting *Goguen*, 415 U.S. at 574). Because the *Park* doctrine subjects defendants to criminal liability "under a

standard so indefinite that police, court, and jury [a]re free to react to nothing more than their own preferences," *Goguen*, 415 U.S. at 578, the petition should be granted.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the petition.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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