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' PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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REASONS FOR GRANTING PANEL REHEARING OR REHEARING *EN BANC*

Rehearing is warranted because the panel's decision conflicts with the Supreme Court's decision in *United States v. Park*, 421 U.S. 658 (1975), with every prior decision construing *Park*, and with every prior appellate opinion—state or federal—addressing whether Due Process permits imprisonment for vicarious liability crimes. *See* FRAP 35(b)(1).

By a 2-1 vote, across three divergent opinions, the panel held that a supervisor may be *imprisoned* if a subordinate's unknowing regulatory offense is imputed to the supervisor through the "responsible corporate officer" doctrine. In the panel's view, all that must be proved to justify incarceration is that the supervisor's oversight was negligent, in the sense that it could support tort liability in a civil case.

The panel's analysis followed a tortured path. It acknowledged that courts have held that due process bars the government from locking up a supervisor on a vicarious liability theory, *see, e.g.*, *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir. 1999), because "guilt is personal," *Scales v. United States*, 367 U.S. 203, 224 (1961), and the uniquely personal scar of imprisonment must be reserved for those who *personally* committed an act prohibited by law.

But the lead and concurring opinions failed to grapple with these principles. They claimed this case does not involve vicarious liability because the convictions (and thus the sentences) rest on the defendants' personally negligent supervision of the company. Op. 8 (lead), 14–15 (concurrence). That contention, however, flatly conflicts with established law. As the Supreme Court and lower courts have recognized, *Park* made "responsible corporate officers" liable under the Food Drug and Cosmetic Act (FDCA) for *company* offenses, without requiring proof of individual fault. *Park* thus imposed liability that is both strict and vicarious. Further, *Park* neither involved imprisonment nor any question of whether imprisonment could be constitutionally imposed—the only punishment directly at stake was a $250 fine. 421 U.S. at 666.

The panel's approach also failed to reconcile this case with the acknowledged rule that imprisonment is an unconstitutional punishment for a vicarious liability offense. Vicarious liability *often* is strict, but it is perfectly possible to have a negligence-based version that narrows, somewhat, the range of people who can be held vicariously liable. *See, e.g.*, C.Y. Cyrus Chu & Yingyi Qian, *Vicarious Liability Under A Negligence Rule*, 15 INT'L REV. L. & ECON. 305, 320 (1995) (comparing

civil liability rules). If a tavern owner goes to jail because a negligently trained employee served an underage patron, that is still a vicarious punishment. The employee does the crime; the owner does the time. And contrary to the panel's view, the constitutional problem remains—the *owner* cannot be locked up for the *employee's* criminal act.

At bottom, the panel's opinion embraces an unprecedented expansion of federal power to imprison. *Any* person in the chain of command of *any* FDA-regulated company—*e.g.*, pharmaceutical executives, warehouse supervisors, family farmers, and food distributors—can be jailed for any of a slew of regulatory violations; the government need only show a "failure[] to exercise reasonable care" on the part of the defendant. *See* Op. 18 (concurrence). But as Judge Beam cogently observed, mere "negligence in performing executive functions" has never been thought sufficient to justify putting a supervisor behind bars, Op. 25 (dissent), in no small part because (as this country's civil dockets grimly reflect) negligence can be alleged *whenever* something has gone wrong. Rehearing should be granted to correct this "exceptional[ly] importan[t]" decision. FRAP 35(b)(1).

STATEMENT

In 2010, Quality Egg unknowingly shipped *salmonella*-contaminated eggs to customers. Appellants Jack and Peter DeCoster were Quality Egg's owner and chief operating officer, respectively. Quality Egg and the DeCosters were charged with introducing adulterated food into interstate commerce, a misdemeanor offense. *See* 21 U.S.C. §§ 331(a), 333(a)(1). The charges against the DeCosters rested on the allegation that they were "Responsible Corporate Officers of Quality Egg." DCD 4 at 3. They pleaded guilty, stipulating that each had been "in a position of sufficient authority at Quality Egg to detect, prevent, and correct the sale of the contaminated eggs" *if* the contamination "had been known." *See* DCD 16-1 ¶ 7(b). But the government also stipulated that there was no evidence that anyone, including the DeCosters, actually knew that any eggs were contaminated. *Id.* ¶ 7(c).

What the DeCosters did know, prior to the outbreak, was that there were increasing signs of *salmonella* contamination in the hens' environment. It is undisputed that *salmonella* is endemic to poultry populations, and thus a risk factor that can never be fully eliminated from egg production. It is undisputed that the DeCosters hired recog-

nized experts to help them address the environmental contamination that had been observed. While the government disputes the comprehensiveness of this effort, it is undisputed that the DeCosters followed many of the experts' recommendations and implemented and applied egg testing protocols required by FDA regulations once those then-novel regulations came into effect.

The district court nonetheless sentenced each individual defendant to a fine of $100,000 and three months' imprisonment. DCD 117; DCD 121. This decision rested largely on the court's view that the DeCosters knew about, but failed to effectively implement, "proper ... measures to reduce the presence of" *salmonella* on Quality Egg's farms. DCD 116 at 43.

The DeCosters appealed, arguing principally that the Due Process Clause bars the government from imposing a sentence of incarceration for a vicarious liability offense. A divided panel affirmed. Judge Murphy's lead opinion acknowledged that "courts have determined that due process is violated when prison terms are imposed for vicarious liability crimes." Op. 8. She concluded, however, that FDCA officer liability is not vicarious, reasoning that there is a distinction between vicarious li-

ability and unknowingly but "negligently failing to prevent" a company from violating the law. *Id.* at 9.

Judge Gruender concurred. He too conceded that "imprisonment based on vicarious liability would raise serious due process concerns." *Id.* at 14. But he read *Park* to impose liability "only when the violation resulted from the corporate officer's negligence," *id.* at 17, and said that "because the district court found the DeCosters negligent, they were not held vicariously liable," *id.* at 14.

Judge Beam dissented. He would have held that "the improvident prison sentences imposed in this case were due process violations," Op. 25, because the district court improperly relied on a "vicarious-liability standard" in imposing sentence, *id.* at 21. The "sole basis" of the charges against the DeCosters was "salmonella contamination of eggs sold by Quality Egg," which the government "fully conceded" the DeCosters did not know about. *Id.* at 20–21 & n.2. He explained further that the DeCosters' "supposed negligence in performing executive functions on behalf of Quality Egg" cannot establish the "measure of a guilty mind" or "personal[ ] participa[tion]" required by Due Process. *Id.* at 25.

ARGUMENT

I. The Panel's Decision Conflicts With The Supreme Court's Decision in *Park* And Numerous Cases Applying *Park*.

The cornerstone of the panel's ruling was its view that a *Park* conviction rests on proof of personal negligence, and thus does not hold a defendant vicariously liable for the company's crimes. *See* Op. 9 (lead) (citing 421 U.S. at 678–79 (Stewart, J., dissenting)); *id.* at 15 (concurrence) ("*Park* requires a finding of negligence in order to convict"). But as many courts have recognized, that is not a plausible reading of *Park*.

A *Park* conviction instead rests on "strict and vicarious liability." *United States v. O'Mara*, 963 F.2d 1288, 1295 (9th Cir. 1992) (Kozinski, J., concurring), just as the Supreme Court itself has explained, *see Austin v. United States*, 509 U.S. 602, 618 n.11 (1993) (*Park* holds a "corporate officer strictly liable"); *Meyer v. Holley*, 537 U.S. 280, 286 (2003) (*Park* is an exception to "traditional vicarious liability rules" that usually make "the corporation, not its owner or officer . . . subject to vicarious liability for torts committed by its employees or agents").

Until now, the courts of appeals had uniformly adopted the same view, describing *Park* as approving "the imposition of strict liability," *e.g.*, *Novicki v. Cook*, 946 F.2d 938, 942 (D.C. Cir. 1991), and permitting

liability to be "imputed to [a corporate officer] by virtue of his position of responsibility," *United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991); *see also Lady J.*, 176 F. 3d at 1367 (*Park* creates "*respondeat superior*" liability for those in "responsible relation" to a company's offense); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 52 (1st Cir. 1991) (*Park* creates "strict liability misdemeanors"). And they have held that "a 'responsible corporate officer,' to be held criminally liable, *would not* have to 'willfully or negligently' cause a ... violation." *Brittain*, 931 F.2d at 1419 (emphasis added).[1]

That *Park* imposes strict and vicarious liability, and does *not* require proof of negligence, is plainly illustrated by this fact: *Park* actually *reversed* a decision that sought to limit corporate officer liability to cases involving "gross negligence and inattention" by an individual defendant. 421 U.S. at 667. The Supreme Court instead held that the FDCA imposes "the *highest* standard of care on [food] distributors." *Id.* at 671 (quoting *Smith v. California*, 361 U.S. 147, 152 (1959)); *see also*

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[1] Congress, too, understood that "[u]nder present law, as it has been interpreted by the Supreme Court in *United States v. Park* ... misdemeanor liability is strict." Drug Regulation Reform Act of 1978: Hearings on S. 2755 Before the Senate Subcommittee on Health and Scientific Research, 95th Cong., at 244 (1978) (Statement of Sec'y Califano).

Smith, 361 U.S. at 152 (explaining that this is "an *absolute standard* which will not hear the distributor's plea as to the amount of care he has used" (emphasis added)). The Court thus made clear that the government may carry its burden of proof simply by introducing "evidence sufficient to warrant a finding by the trier of the facts that 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 that he failed to do so." *Park*, 421 U.S. at 673–74. Indeed, the convictions in this case rest on just the footing described in that holding, rather than any finding or admission of negligence (an issue that came up for the first time in relation to sentencing).[2]

The panel did not address any of this controlling language in *Park*. It focused on a single line in *Park*, *i.e.*, its statement that the

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[2] The government charged that the DeCosters held substantial authority at Quality Egg, and the DeCosters admitted the same in pleading guilty. That was the sole basis of the *conviction*. To be sure, the district court made findings *at sentencing*, under a preponderance standard, that the panel construed as sufficient to support a negligence finding. *See* Op. 9 (lead), 17 (concurrence). But a *conviction* may enter only upon facts "pro[ved] beyond a reasonable doubt," *In re Winship*, 397 U.S. 358, 364 (1970), or admitted by the defendant, *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

FDCA "punishes neglect where the law requires care." *See* Op. 7, 9 (lead), 16 (concurrence). But that line does not contradict the rest of the opinion and should not be read as though it did. It was a quote from Justice Jackson's opinion in *Morissette v. United States*, 342 U.S. 246, 256 (1952), and specifically from a passage of *Morissette* that concerns offenses that "do[] not specify intent as a necessary element," and in which "the guilty act alone makes out the crime." *Id.* In short, Justice Jackson was addressing *strict liability*, not negligence.

The panel thus erred in concluding that *Park* liability is not "based on the relationship between" the defendant and the company. Op. 8 (lead). *Park* says just the opposite: the very measure of guilt "in such cases [is] that, by virtue of the relationship he bore to the corporation, the [defendant] had the power to prevent the act complained of." 421 U.S. at 671.

II. The Panel's Decision Conflicts With Decisions Holding That Due Process Does Not Permit Vicarious Liability Offenses To Be Punished With Incarceration.

The panel appeared to believe that if it could treat the DeCosters as having been found "liable for negligently failing to prevent the salmonella outbreak," Op. 9 (lead), it could avoid the "serious due process

concerns" that "imprisonment based on vicarious liability would raise," *id.* at 14 (concurrence). The resulting quest for a way to avoid the constitutional question presented by this appeal led the panel astray.

There is no crime of what the lead opinion called "negligently failing to prevent" an outbreak, Op. 9, or what Judge Beam, in dissent, aptly dubbed "negligence in performing executive functions," Op. 25. Congress, which is the only body constitutionally empowered to create and define federal crimes, *see, e.g.*, *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812), has said only that, as relevant, it is unlawful to "introduc[e]" (or "caus[e]" to be introduced) "into interstate commerce . . . any food, drug, device, tobacco product, or cosmetic that is adulterated." 21 U.S.C. § 331(a). It is the shipment—and only the shipment—that is the crime.

That offense here was directly committed by Quality Egg—*the company*—when it unknowingly shipped contaminated eggs to customers. And the only relationship that was charged or admitted between those *shipments* and the DeCosters was the "responsible relationship" to the company's conduct that came about by virtue of their positions of "authority at Quality Egg." DCD 16-1 ¶ 7(b) (plea agreement).

The DeCosters' liability, therefore, is necessarily vicarious. It is a textbook variant of the "[l]iability that a *supervisory party (such as an employer)* bears for the actionable conduct of a subordinate or associate *(such as an employee)* based on the relationship between the two parties." *See* BLACK'S LAW DICTIONARY (10th ed. 2014) ("vicarious liability") (emphasis added). That is why the Supreme Court has described the *Park* doctrine as establishing an "unusually strict" kind of vicarious liability rule, *Meyer*, 537 U.S. at 287, and others have described it as creating liability that is "imputed," *Brittain*, 931 F.2d at 1419, or in the nature of "respondeat superior," *Lady J.*, 176 F.3d at 1367.

Further, every appellate court to consider the question has held that "due process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a 'responsible relation.'" *Id.*[3] The panel's decision thus conflicts with the Eleventh

[3] *See also State v. Guminga*, 395 N.W.2d 344, 346 (Minn. 1986) ("criminal penalties based on vicarious liability ... are a violation of substantive due process"); *Davis v. City of Peachtree City*, 304 S.E.2d 701, 703–04 (Ga. 1983) ("the use of criminal sanctions in vicarious liability cases [is] unjustifiable"); *Commonwealth v. Koczwara*, 155 A.2d 825, 830 (Pa. 1959) ("It would be unthinkable to impose vicarious criminal responsibility in cases involving true crimes."); *cf. People v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 477 (N.Y. 1918) (Cardozo, J.) (ex-

Circuit's *Lady J.* decision, as well as the decisions of several state high courts. *See* FRAP 35(b)(1)(B).

To be sure, the panel disagreed that this case involves vicarious liability, suggesting that *Park* convictions rest on proof of negligence. Section I of this petition explained why the panel's reading of *Park* cannot stand, but there is a second critical point as well. Even if *Park* were properly read to incorporate a negligence element, a *Park* conviction would *still* involve vicarious liability, and thus would pose precisely the same constitutional question that the panel sought to avoid.

Again, that is because it is the *shipment* that gives rise to the FDCA offense. *See* 21 U.S.C. § 331(a). To hold a supervisor liable because the shipment occurred is to impose vicarious punishment. Nothing changes if we say the supervisor was held liable for failing to *prevent* the shipment—the words have changed but the substance is the same. And if the supervisor is held liable for *negligently* failing to prevent the shipment, that too is a form of vicarious liability. The negligence requirement may narrow the *range* of people who may be held vicariously liable but it does not change the essential character of the

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pressing strong doubt that liberty may be forfeited "through the acts or omissions of others").

punishment. It is still the case that the supervisor suffers a personal loss of liberty because the company, by an employee, broke the law.

Substantial policy considerations further undermine the panel's approach. A negligence gloss on vicarious liability does not meaningfully limit who can be incarcerated at the hands of aggressive federal regulators or prosecutors. The panel made clear that, in its view, the government can win prison sentences by establishing *civil* negligence, consistent with the standard used in tort cases. *See* Op. 16 (concurrence). This ignores that "[t]he criminal law traditionally has looked askance on negligence as a basis for liability." Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 754–55 (2014). And for good reason. Especially with benefit of hindsight, simple negligence is not hard to allege where an injury has occurred.

The criminal law has always been far more protective of liberty. In the rare instances where the criminal law uses the notion of negligence, it requires the far more rigorous showing of a "*gross* deviation" from a preexisting standard of care, in the face of "a substantial and unjustifiable risk." ALI, MODEL PENAL CODE § 2.02(2)(c)–(d) (emphasis

added); *see Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1759–60 (2013) (citing this standard).

The panel's embrace of a civil negligence standard here only compounds the problem with its approach. A huge range of industries—by some estimates, comprising one-quarter of the national economy—are regulated by the FDA. Under the FDCA, every one of those companies is strictly liable for a crime every time a non-compliant product leaves its doors. Under *Park*, every supervisor in the chain of command shares the company's criminal liability for the non-compliant shipment. And under the panel's unprecedented opinion, every one of those supervisors may be sent to *prison* if the government can establish the modest predicates necessary to hold that person liable in *tort*.

It is difficult to imagine a framework less protective of individual liberty, or further out of step with this country's criminal law traditions, than the one adopted by the panel in this case. This Court should sit *en banc* to review its decision, and it should vacate the challenged prison sentences.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on August 3, 2016, a copy of the foregoing petition was filed with Court's CM/ECF system, which will serve copies on all registered counsel.

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