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
(Hon. Mark W. Bennett)

RESPONSE IN OPPOSITION TO APPELLANTS' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

PETER E. DEEGAN, JR.
Assistant United States Attorney
117 7th Avenue SE, Box 1
Cedar Rapids, IA 52401

LISA K. HSIAO
Trial Attorney
Consumer Protection Branch
U.S. Department of Justice
P.O. Box 386
Washington, DC 20044

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

KEVIN W. TECHAU
United States Attorney

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
JEFFREY E. SANDBERG
Attorneys, Appellate Staff
Civil Division, Room 7214
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 532-4453

INTRODUCTION AND SUMMARY

Defendants Jack and Peter DeCoster are the owner and chief operating officer of an egg producer whose *Salmonella*-contaminated eggs sickened as many as 56,000 Americans in 2010. Defendants pled guilty as responsible corporate officers to misdemeanor counts of introducing adulterated food into interstate commerce.

At sentencing, the district court found that defendants had known for years of widespread *Salmonella* contamination throughout their company's facilities, including inside the bodies of egg-laying hens. The court found that defendants understood the risk that this contamination posed to the safety of their eggs, and knew the remedial measures needed to resolve it. Yet defendants chose not to take those known measures to address *Salmonella* contamination. They also generally decided not to test their eggs or divert them to pasteurization, even though their policies required such diversion in the event of environmental contamination. Concluding that defendants were not "'mere unaware corporate executive[s],'" but instead had personally engaged in blameworthy conduct, the district court sentenced each defendant to three months' imprisonment. Panel Opinion ("Op.") at 6. This Court affirmed, holding "[o]n this record" (Op. 8, 11) that the sentences were neither unconstitutional nor unreasonable.

In seeking rehearing, defendants assert that imprisonment for "vicarious" conduct would be unconstitutional. But rehearing on this ground is plainly not appropriate because that issue is not presented in this case. The district court found that defendants personally engaged in blameworthy acts and omissions, and it

sentenced them based on those findings. This Court then affirmed those findings, and in seeking rehearing, defendants do not challenge the findings as clearly erroneous. Because defendants' sentences were predicated on their own culpable conduct, this case "does not implicate" the issue whether a defendant may receive a jail sentence for a purely "vicarious" offense. Op. 14 (Gruender, J., concurring).

Defendants similarly err in seeking rehearing to address the elements of responsible-corporate-officer liability under *United States v. Park*, 421 U.S. 658 (1975). Defendants conceded liability by pleading guilty, and their sentences are based not solely on their pleas but on the sentencing record. It is irrelevant whether *Park* imposes "strict and vicarious liability" or instead requires negligence. Pet. for Reh'g ("Pet.") at 7-10. The sole question before this Court is whether defendants' sentences are lawful in light of the findings at sentencing. Because the sentences are amply supported by those now-undisputed findings, the rehearing petition should be denied.

STATEMENT

1. This case arises from criminal violations of the Federal Food, Drug, and Cosmetic Act ("FDCA"). Among other conduct, the FDCA prohibits the introduction of adulterated food into interstate commerce, as well as "the causing thereof." 21 U.S.C. § 331(a). Food is adulterated if, among other problems, it "bears or contains any poisonous or deleterious substance which may render it injurious to health." *Id.* § 342(a)(1). Misdemeanor violations of the FDCA may be punished by a jail sentence of up to one year, a fine, or both. *Id.* § 333(a)(1).

Recognizing the industrial scale of modern commerce, the FDCA imposes legal duties not merely on the low-level employees who physically produce, package, and ship a covered product, but also on the corporate officials who control the production and distribution process. *See United States v. Park*, 421 U.S. 658 (1975). The FDCA treats as "responsible corporate agents" those individuals who, "by reason of [their] position in the corporation," have the "responsibility and authority" to take necessary measures to prevent or remedy violations of the statute. *Id.* at 670, 673-74.

To establish liability, the government need not prove that a corporate officer intended to violate the FDCA. Nor need it prove the officer knew of the violation. Instead, it suffices that a defendant had a "'responsible share in the furtherance of the transaction which the statute outlaws,'" such as the shipment of contaminated food in interstate commerce. *Id.* at 669; *see also id.* at 671 ("'The accused, [even] if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect . . . from one who assumed his responsibilities.'").

Among the "poisonous or deleterious substance[s]" that may render a food adulterated is *Salmonella* Enteritidis. Most persons infected with these bacteria develop diarrhea, fever, and cramps within days. In some patients, the illness requires hospitalization. Hundreds of Americans die each year from *Salmonella* poisoning, while others suffer long-term complications, such as chronic joint pain or arthritis. Persons may contract *Salmonella* poisoning by eating contaminated eggs, which may become infected as a result of contamination in barns or egg-processing facilities.

2. In 2010, a massive, nationwide outbreak of foodborne illness was caused by *Salmonella*-contaminated eggs produced by defendants' business, "Quality Egg." Defendant Jack DeCoster owned and operated Quality Egg, while his son, defendant Peter DeCoster, served as chief operating officer and helped control its day-to-day operations. The outbreak "may have affected up to 56,000 victims." Op. 12.

After tracing the outbreak to defendants' facilities, FDA inspected the company's operations. After extensive testing, federal investigators determined that the company's "eggs tested positive for salmonella at a rate of contamination approximately 39 times higher than the current national rate, and that the contamination had spread throughout all of the Quality Egg facilities." Op. 4. FDA also discovered a host of "insanitary conditions" at defendants' facilities. *Id.* at 8. For example:

> Investigators discovered live and dead rodents and frogs in the laying areas, feed areas, conveyer belts, and outside the buildings. They also found holes in the walls and baseboards of the feed and laying buildings. The investigators discovered that some rodent traps were broken, and others had dead rodents in them. In one building near the laying hens, manure was found piled to the rafters; it had pushed a screen out of the door which allowed rodents into the building. Investigators also observed employees not wearing or changing protective clothing and not cleaning or sanitizing equipment.

Id. at 4.

FDA also found considerable evidence of systematic mismanagement. FDA found that "Quality Egg had failed to comply with its written plans for biosecurity and salmonella prevention" in various critical respects, Op. 4, and produced "'minimal to no records'" that it had implemented any *Salmonella*-prevention measures

in the poultry barns, *id.* FDA also discovered that the company had "falsified records about food safety measures"; "lied to auditors for several years about pest control measures and sanitation practices"; "bribed a USDA inspector . . . to release" defective eggs for sale; and "misled state regulators and retail customers" by selling eggs with falsified date labels. *Id.* at 5. Moreover, Peter DeCoster personally "made inaccurate statements to Walmart about Quality Egg's food safety and sanitation practices," and FDA found evidence that Jack DeCoster had "reprimanded" an employee for failing to hide a pallet of eggs from federal inspectors. *Id.* at 5, 14. As particularly relevant here, FDA investigators discovered that both defendants had known for years of "positive salmonella environmental test results" throughout their facilities, *id.* at 3, 6, which signaled an "increased risk" of contamination to the eggs. DE#116, at 31, 41. Yet defendants chose not to implement the measures set forth in their *Salmonella*-prevention and biosecurity plans. Nor did they generally take steps to test their eggs or divert them to pasteurization, even though their plans required diversion of eggs from contaminated barns. Op. 3-4; DE#116, at 9, 13. Those choices led millions of tainted eggs to be sold to consumers, who were then sickened by the thousands.

3. Defendants pled guilty to introducing adulterated eggs into interstate commerce under 21 U.S.C. § 331(a). Defendants "stipulated that they were in positions of sufficient authority to detect, prevent, and correct the sale of contaminated eggs." Op. 5. Defendants further "agreed to be sentenced based on facts the sentencing judge found by a preponderance of the evidence." *Id.*

Appellate Case: 15-1890 Page: 6 Date Filed: 09/14/2016 Entry ID: 4448414

After considering extensive evidence concerning defendants' roles in causing the shipment of contaminated eggs, the district court sentenced each defendant to three months' imprisonment. "The court determined that although nothing in the record indicated that Peter and Jack had actual knowledge that the eggs they sold were infected with salmonella, the record demonstrated that their safety and sanitation procedures were 'egregious,' that they ignored the positive salmonella environmental test results before July 2010 by not testing their eggs, and that they knew that their employees had deceived and bribed" a USDA inspector. Op. 6. The district court further concluded that "the DeCosters had 'created a work environment where employees not only felt comfortable disregarding regulations and bribing USDA officials, but may have even felt pressure to do so.'" *Id.* at 6, 14.

Defendants appealed to this Court, arguing that their sentences were "not proportional to their crimes as required by the Eighth Amendment" or, in the alternative, "violate[d] substantive due process." Op. 7. Defendants also contended that their sentences were procedurally or substantively unreasonable.

4. A divided panel of this Court affirmed the sentences. The majority (Judges Murphy and Gruender) rejected the Eighth Amendment challenge, concluding that defendants' sentences were "not grossly disproportionate." Op. 11. The majority also rejected the premise of defendants' argument that imprisonment for a "vicarious" offense would violate substantive due process, explaining that the sentences here rested on defendants' own wrongdoing. *Id.* at 7-10; *id.* at 14-15 (Gruender, J.,

concurring). Finally, the panel held that the sentences were procedurally and substantively reasonable. *Id.* at 12-14; *id.* at 14-15 n.1 (Gruender, J., concurring).

In reaching those conclusions, the panel relied squarely upon the district court's factual findings. The panel concluded that "the district court reasonably found that 'the defendants knew or should have known[] of the risks posed by the insanitary conditions at Quality Egg in Iowa,'" Op. 8; *accord id.* at 18 (Gruender, J., concurring), and that the DeCosters had "failed to take sufficient measures to improve" "[d]espite their familiarity with th[ose] conditions," *id.* at 8. The panel specifically affirmed the district court's factual finding that defendants personally "'ignore[d]'" the problems with *Salmonella* contamination, concluding that "[t]he [district] court did not clearly err by determining that the actions or inactions of the DeCosters [were] insufficient and blameworthy under these circumstances." *Id.* at 12-13. The panel thus concluded that defendants had personally been negligent in "failing to prevent the salmonella outbreak." *Id.* at 9; *accord id.* at 14-15 (Gruender, J., concurring) ("join[ing] Judge Murphy's opinion to the extent that it recognizes that the DeCosters were negligent").

Judge Beam dissented, arguing that imprisonment should be impermissible unless the underlying statute requires "proof of mens rea, or, a guilty mind" as an element of the offense. Op. 23. The dissent also disapproved of the panel's reliance on the sentencing record, noting that defendants in pleading guilty had not conceded that they "had knowledge of salmonella contamination at any relevant time." *Id.* at

25. Judge Beam further announced that, in his view, defendants had been sentenced "based upon almost wholly nonculpable conduct." *Id.* at 21.

ARGUMENT

Defendants seek rehearing to address the hypothetical question whether an executive can be sentenced to a term of imprisonment solely because an employee committed a strict-liability offense. But this case does not present that question. The district court expressly premised its jail sentences on findings about defendants' own acts and omissions. This Court, too, found that defendants' sentences rested on their own culpable conduct, and concluded "[o]n this record" (Op. 8, 11) that defendants' sentences were not grossly disproportionate. That fact-bound conclusion is both legally sound and amply supported by the record. No further review is warranted.

1. The Court properly concluded that defendants' sentences were not "grossly disproportionate" under the Eighth Amendment. Op. 11-12. As the panel explained, defendants' three-month sentences appropriately reflect the importance Congress has placed on "protect[ing] consumers 'who are wholly helpless,'" as well as the fact that defendants' conduct "may have affected up to 56,000 victims, some of whom were hospitalized or suffered long term injuries." *Id.* at 12. The panel also correctly noted that defendants' sentences "fell at the low end of the prescribed statutory range," and that this Court has "'never held a sentence within the statutory range to violate the Eighth Amendment.'" *Id.*

The Court also properly rejected defendants' argument that a jail sentence for a "vicarious" offense would violate principles of due process. The panel reasoned that defendants' own conduct was negligent and had led to the shipment of contaminated food in interstate commerce. Op. 8-9, 12-13; *id.* at 14-15, 17-18 (Gruender, J., concurring). Moreover, the panel explained that even where a statute authorizes a short jail sentence, "[t]he elimination of a mens rea requirement does not violate the Due Process Clause" where, as here, "the penalty 'is relatively small,' the conviction does not gravely damage the defendant's reputation, and congressional intent supports the imposition of the penalty." *Id.* at 9. That conclusion accords with precedent both in this Court and in other Circuits. *See United States v. Flum*, 518 F.2d 39, 43 (8th Cir. 1975) (en banc) (holding that one-year maximum sentence was "'relatively small'"); *cf.* Op. 7, 11 (citing *United States v. Greenbaum*, 138 F.2d 437 (3d Cir. 1943) (affirming three-month sentence for company president that unknowingly shipped adulterated eggs, and holding that conviction did not violate due process)).

2. In seeking rehearing, defendants again mistakenly assert that the jail sentences in this case represent the application of "vicarious" liability, urging that defendants were "imputed" blame based solely upon "regulatory offense[s]" committed by others. Pet. 1, 12. As the panel explained, however, defendants' sentences were not premised on such reasoning. In sentencing defendants to three months in jail, the district court was not "locking up a supervisor" for a subordinate's mistakes, Pet. 1, but instead punishing defendants "for their own failures to exercise

reasonable care to prevent the introduction of adulterated food." Op. 18 (Gruender, J., concurring).

Defendants have never disputed that it was their responsibility to ensure that Quality Egg did not sell adulterated food to its customers. Defendants acknowledge they were responsible for the day-to-day management and implementation of "salmonella prevention," "environmental testing," "rodent control," and related food-safety efforts. *See* Op. 8. Defendants further do not dispute that they knew of the positive *Salmonella* test results between 2006 and 2010; that they thus were aware of increasing *Salmonella* contamination throughout their barns and other facilities; and that they understood that this environmental contamination would greatly increase the risk of contamination to their eggs. *See* Pet. 4 (admitting that "the DeCosters did know, prior to the outbreak," of "increasing signs of *salmonella* contamination in the hens' environment"). Defendants also have never disputed that they knew the steps needed to deal with this *Salmonella* contamination. Nonetheless, defendants "'failed to follow'" those steps for remedying the widespread *Salmonella* contamination at their facilities. Op. 13. Defendants also chose not to divert their eggs to pasteurization, despite policies requiring such diversion, or even to test the eggs' safety before selling them (except on one occasion). Defendants' appalling disregard for basic food-safety practices thus made possible an outbreak that sickened as many as 56,000 people.

That this case does not present the issue raised by defendants is well illustrated by Judge Gruender's concurrence. In his concurring opinion, Judge Gruender agreed

with defendants that "imprisonment based on vicarious liability"—which he defined as punishment "based solely on [defendants'] positions as responsible corporate officers"—"would raise serious due process concerns." Op. 14. But Judge Gruender explained that, here, "the district court found sufficient facts to support the conclusion that the DeCosters were negligent." *Id.* at 18. As a result, "because the DeCosters were negligent," their punishments are not "vicarious." *Id.*; *see also id.* at 14 ("[T]his case thus does not implicate these concerns.").

Defendants acknowledge this Court's understanding that "this case does not involve" vicarious punishment, Pet. 2, but they mischaracterize the basis for that conclusion. Defendants theorize that the panel premised its affirmance solely on the nature of defendants' underlying conviction, arguing that the panel "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." Pet. 2 (emphases added). But the panel's decision does not rest on a conclusion that the convictions were not "vicarious"; because defendants pled guilty, the elements of their offense were simply not at issue. *Cf. United States v. Broce*, 488 U.S. 563, 569-70 (1989). Rather, this Court accepted defendants' convictions as a given, then proceeded to review—and affirm—the district court's determination that three-month jail sentences were warranted here in light of the facts found at sentencing concerning defendants' personal knowledge and conduct. The district court unquestionably was empowered to compile, and to rely upon, those additional facts. *See United States v. Gant*, 663 F.3d

1023, 1029 (8th Cir. 2011) (district court may "'conduct an inquiry broad in scope'" and "consider any relevant information that may assist the court in determining a fair and just sentence"); 18 U.S.C. § 3553(a); Fed. R. Crim. P. 32(c)-(i); DE#116, at 31. And defendants no longer dispute the findings on which their sentences are based. The Court's affirmance thus in no way "flatly conflicts with established law." Pet. 2.[1]

The district court's detailed sentencing opinion similarly makes clear that this case is not analogous to "a tavern owner go[ing] to jail" because an "employee served an underage patron." Pet. 3. The district court expressly stated that it decided to impose jail sentences in this case because of the defendants' own conduct, not because of the actions of their subordinates. *See, e.g.*, DE#116, at 47 ("I refer to the above conduct to distinguish this case from a mere unaware corporate executive, and explain why a probationary sentence is inappropriate under the circumstances presented."); *see generally id.* at 40-41, 43-46 (summarizing defendants' conduct); Op. 6. Because the question whether "imprisonment is an unconstitutional punishment for a

---

[1] Defendants underscore their misunderstanding by citing cases holding that an employer's liberty "'cannot rest on so frail a reed as whether his employee will commit a mistake in judgment.'" *Davis v. City of Peachtree City*, 304 S.E.2d 701, 704 (Ga. 1983) (quoting *Commonwealth v. Koczwara*, 155 A.2d 825, 830 (Pa. 1959)); *see also Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367-68 (11th Cir. 1999) (disapproving imprisonment for "*respondeat superior*" liability). Here, as the panel recognized, it is defendants' *own* misconduct that underlies their jail sentences.

vicarious liability offense" (Pet. 2) is thus not presented by this case, rehearing to address that question is plainly unwarranted.[2]

3. Defendants also seek rehearing to challenge the proposition, advanced in Judge Gruender's concurrence, that a corporate officer's liability under *Park* requires proof of the officer's negligence. *Cf.* Pet. 7-10. Defendants argue that this is mistaken because, under *Park*, an officer is liable "without . . . proof of individual fault." Pet. 2.

That argument is beside the point. Defendants admitted liability by pleading guilty and do not challenge their convictions, so this case does not raise the question whether negligence was an element of their offense. And as explained, the district court's decision to impose three-month jail sentences was not based solely on the content of defendants' guilty pleas, but instead on additional factual findings made by a preponderance of the evidence—findings that defendants expressly agreed could be made. *See* Op. 5; *id.* at 18 n.4 (Gruender, J., concurring); DE#116, at 31; *cf.* Pet. 9 n.2 (admitting that the district court "made findings *at sentencing*, under a preponderance standard, that the panel construed as sufficient to support a negligence finding"). Any

---

[2] Defendants' due-process arguments are also misconceived because their sentencing challenge is cognizable exclusively under the Eighth Amendment. "'[W]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'" Op. 7 (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994)). Defendants challenge only their punishment—not the fact that their conduct was made criminal—so their arguments are governed by the Constitution's prohibition against "cruel and unusual punishment[]." U.S. Const. amend. VIII. Defendants do not seek rehearing of this Court's rejection of their Eighth Amendment argument.

question this Court may have concerning the scope of *Park* liability may thus be left to another day and a case in which the question is actually presented.

4. Although not relied upon by defendants, the arguments contained in the panel dissent similarly fail to identify any basis for rehearing. The dissent rests principally upon an assumption that whenever a crime carries a possible term of imprisonment, the Due Process Clause requires that the statute be interpreted to carry "proof of mens rea" as an element of the offense. Op. 21-23 (Beam, J., dissenting). But the very case that the dissent invokes, *Staples v. United States*, 511 U.S. 600 (1994), confirms that public-welfare offenses need not carry a mens rea element where, as here, the possible jail term is "relatively small." *Id.* at 617-18; *see* Op. 9-10 (correctly applying *Staples* and noting errors in dissent).[3] Indeed, as to the FDCA, the Supreme Court has repeatedly interpreted the statute as "dispens[ing] with" any mens rea requirement, and in so interpreting the statute, has never held that application of its penalty provisions would raise any constitutional concern. *Park*, 421 U.S. at 669; *see*

---

[3] Defendants do not rely on the dissent's reasoning, and instead argue that the FDCA imposes "'strict liability.'" Pet. 7-8. And though defendants urge that imprisonment should be permitted only where the Model Penal Code's "gross deviation" standard is met (Pet. 14-15), as Judge Gruender explained, "[t]he law is clear that a defendant can be sentenced to imprisonment based on negligence—or, for that matter, based on strict liability stemming from his own conduct." Op. 18; *see Morissette v. United States*, 342 U.S. 246, 251 n.8 (1952); *Flum*, 518 F.2d at 43; *Holdridge v. United States*, 282 F.2d 302, 309-11 (8th Cir. 1960); *cf., e.g.*, *United States v. O'Keefe*, 426 F.3d 274, 277-79 (5th Cir. 2005) (adopting ordinary negligence standard for federal criminal statute and affirming sentence of imprisonment); *United States v. Hanousek*, 176 F.3d 1116, 1120-22 (9th Cir. 1999) (same).

United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 (1964); *Morissette v. United States*, 342 U.S. 246, 252-56 (1952); *United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943).[4]

The dissent also relies heavily upon a mistaken impression that defendants' conduct was "almost wholly nonculpable" and "[non]-negligen[t]," Op. 21, 25, perhaps based on the erroneous belief that defendants did not "ha[ve] knowledge of salmonella contamination at any relevant time." *Id.* at 25; *id.* at 20-21 n.2 (similar). As the panel explained, the sentencing record clearly shows otherwise, *see id.* at 3-4, and indeed defendants readily concede that they knew of widespread *Salmonella* contamination throughout their facilities. *See* Pet. 4. Moreover, the dissent's protestation that the guilty pleas "were obtained through benign factual stipulations" (Op. 20-21 n.2) overlooks that defendants simultaneously stipulated that additional "'facts essential to the[ir] punishment'" would be "'found . . . by a preponderance of the evidence.'" DE#116, at 31; *see also* Op. 5. The panel's decision thus rests not on "unfair" or "inequitable" assumptions (Op. 20-21 n.2 (Beam, J., dissenting)), but on properly developed—and now undisputed—findings of fact.

CONCLUSION

Defendants' petition for rehearing and rehearing en banc should be denied.

---

[4] The dissent notes that the sentence at issue in *Park* did not involve imprisonment. Op. 20 n.2, 23-24 (Beam, J., dissenting). But *Park* recognized that FDCA convictions may carry a prison term, *see* 421 U.S. at 666 n.10, and the dissenting justices understood that *Park*'s principles would apply equally to sentences of imprisonment. *See id.* at 682-83 (Stewart, J., dissenting) (recognizing that under the FDCA, "even a first conviction can result in imprisonment for a year").

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant
Attorney General

KEVIN W. TECHAU
United States Attorney

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
/s/ Jeffrey E. Sandberg
JEFFREY E. SANDBERG
Attorneys, Appellate Staff
Civil Division, Room 7214
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 532-4453

Counsel for the United States

PETER E. DEEGAN, JR.
Assistant United States Attorney
117 7th Avenue SE, Box 1
Cedar Rapids, IA 52401

LISA K. HSIAO
Trial Attorney
Consumer Protection Branch
U.S. Department of Justice
P.O. Box 386
Washington, DC 20044

SEPTEMBER 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2016, I electronically filed the foregoing response with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey E. Sandberg
Jeffrey E. Sandberg
Counsel for the United States