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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CAUSE OF ACTION INSTITUTE, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of a crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files numerous *amici* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amici* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has an interest in ensuring the fair and just development of basic criminal law principles, including vicarious criminal liability. NACDL believes that this

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[1] In accordance with Supreme Court Rule 37, *amici curiae* state that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Following a timely request, the parties consented to this filing.

case presents an appropriate vehicle for the Court to clarify some of the limits that apply to the doctrine of vicarious liability in substantive criminal law.

The National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The Cause of Action Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law work together to protect liberty and economic opportunity. As part of this mission, the Cause of Action Institute represents individuals and businesses to challenge agency overreach and works to expose and prevent government and agency misuse of power by, inter alia, appearing as Amicus Curiae before this and other federal courts. *E.g.*, *McCutcheon* v. *Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

The Cause of Action Institute has a particular interest in challenging government overreach in the criminal justice system and in working to combat the

criminalization of conduct that can be addressed through existing civil law—i.e., the process of "overcriminalization." In order to fulfill this mission, the Cause of Action Institute has represented criminal defendants in federal court, *e.g.*, *United States* v. *Black*, No. CR 12-0002 (N.D. Cal.) (involving a Marine Mammal Protection Act regulation criminalizing "feeding" certain marine mammals without a permit), appeared as Amicus Curiae in *Yates* v. *United States*, 135 S. Ct. 1074 (2015), and appeared as Amicus Curiae in other criminal matters. See, *e.g.*, *United States* v. *Weed*, No. 16-CR-2120 (1st Cir. 2016) (arguing that the principle of lenity resolves ambiguity in a quasi-criminal/civil statute in favor of the defendant).

SUMMARY OF THE ARGUMENT

In *United States* v. *Park*, 421 U.S. 658 (1975), the Court held that under the Food, Drug, and Cosmetic Act (FDCA), criminal "liability of managerial officers [does] not depend on their knowledge of, or personal participation in, the act made criminal by the [FDCA]," *id.* at 670, but instead on an officer's "position in the corporation," *id.* at 673–74. Petitioners have argued that the time has come for this Court to reconsider this rule altogether or, at a minimum, to resolve the division among lower courts as to whether conviction for a vicarious liability offense alone permits a court to impose a sentence of imprisonment. They are right on both counts.

As petitioners explain, vicarious liability under the *Park* doctrine is an outlier, with no textual foundation in the FDCA. Pet. 27–31. Worse, it presents constitutional

difficulties under the Due Process Clause. That is because vicarious criminal liability, by its very nature, permits criminal convictions for those who lack both a guilty mind and did not engage in a wrongful act. The time has come for the Court to revisit this anomalous legal doctrine and, ultimately, to hold that vicarious liability has no place in criminal law.

The need for the Court's review is particularly acute in this case. The decision below breaks from a critical limit that has long existed on vicarious criminal liability. For decades, the rule has been that courts cannot sentence those convicted of *Park* offenses to terms of imprisonment. By affirming petitioners' prison sentences, the court below strayed into dangerous waters. The holding raises troubling questions about the potential reach of vicarious criminal liability that warrant this Court's immediate attention.

The petition for a writ of certiorari should be granted.

ARGUMENT

I. This Case Presents Important Questions Regarding The Fairness Of Vicarious Criminal Liability.

A. The *Park* Doctrine Violates The Due Process Clause.

Congress has a broad power to define federal crimes. But that power is not boundless. Under the Due Process Clause, Congress cannot impose criminal sanctions when doing so "offends some principle of justice so rooted in the traditions and conscience of our

people as to be ranked as fundamental." *Montana* v. *Egelhoff*, 518 U.S. 37, 58 (1996) (Ginsburg, J., concurring in the judgement) (quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977)).

It is settled that the definition of criminal conduct is a "compound concept," "constituted only from concurrence of an evil-meaning mind with an evil-doing hand." *Morissette* v. *United States*, 342 U.S. 246, 251 (1952). This foundational principle of American criminal law has its roots in the common law. See 4 William Blackstone, Commentaries *21 ("[T]o constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will."); see also *Morissette*, 342 U.S. at 250 (explaining that robust *mens rea* requirements took "deep and early root in American soil"). Accordingly, the bedrock tradition that a crime consists of a criminal act coupled with a criminal intent long has been "the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples* v. *United States*, 511 U.S. 600, 605 (1994) (citation omitted).

This case presents an important question regarding this building block of American criminal law. As petitioners have explained, the Eighth Circuit affirmed convictions and sentences under the *Park* vicarious liability doctrine, despite the fact that the government was not required to prove that petitioners had *either* "evil-meaning mind[s]" or "evil-doing hand[s]." See Pet. 2–3. That result is in tension with at least three of our core legal values.

First, criminal law must draw a clear line between the innocent and the guilty, and must not "criminalize[]

a broad range of apparently innocent conduct." See *Elonis* v. *United States*, 135 S. Ct. 2001, 2010 (2015) (internal quotation marks omitted) (describing *mens rea* as traditionally drawing that line, but noting "in some cases, a general requirement that a defendant *act* knowingly is *** an adequate safeguard"). This means that criminal sanctions and the associated opprobrium must be reserved for the truly blameworthy. An individual that lacks a guilty mind and did not commit a wrongful act simply is not blameworthy.

Second, a criminal statute must provide clear notice to the public of what the law prohibits. See, *e.g.*, *Screws* v. *United States*, 325 U.S. 91, 101–02 (1945) (plurality opinion). Without the adequate guideposts provided by clearly defined *mens rea* and *actus reus* requirements, individuals have no way to know how to avoid breaking the law. The law merely instructs them to exercise "the highest standard of foresight and vigilance," and then hope for the best. See *Park*, 421 U.S. at 673.

Third, it simply is unfair to punish someone as a criminal when that individual had no meaningful opportunity to avoid the consequences. As this Court has explained, a criminal statute defies basic principles of fairness if it permits criminal sanctions even when there is an "absence of an opportunity either to avoid the consequences of the law or to defend any prosecution brought under it." *Lambert* v. *California*, 355 U.S. 225, 229 (1957). Criminal liability grounded on the thoughts and actions of others creates that very risk.

To be sure, this Court has on rare occasion upheld criminal statutes that do not have an "evil-meaning mind" element, see *United States* v. *Balint*, 258 U.S. 250,

251–54 (1922), or an "evil-meaning hand" element, see *Pinkerton* v. *United States*, 328 U.S. 640, 646–47 (1946), although it has done so reluctantly, see *Staples*, 511 U.S. at 605–06. But the Due Process Clause cannot tolerate a scheme that does not require proof of *either* a guilty act *or* a guilty mind. See generally Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 717 (1930) ("Where the offense is in the nature of a true crime, that is, where it involves moral delinquency or is punishable by imprisonment or a serious penalty, it seems clear that the doctrine of *respondeat superior* must be repudiated as a foundation for criminal liability. For it is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual.").

At a minimum, a criminal conviction should demand proof of either the defendant's criminal action or the defendant's criminal intent. See *Lady J Lingerie, Inc.* v. *City of Jacksonville*, 176 F.3d 1358, 1368 (11th Cir. 1999). Because the decision below takes the radical step of permitting convictions when *neither* component is present, this Court's review is warranted.

B. It Is Almost Impossible For Corporate Officers To Defend Against Vicarious Criminal Liability Charges.

The Court in *Park* acknowledged that subjecting corporate officers to vicarious criminal liability for the actions of their subordinates requires corporate officers to exercise a degree of vigilance that is "beyond question demanding, and perhaps onerous." *Park*, 421 U.S. at 672 (observing that vicarious criminal liability requires corporate officers to exercise the "highest standard of

foresight and vigilance"). Yet experience has shown that avoiding vicarious criminal liability under *Park* is not only onerous because of the foresight it demands of corporate officers, but also because it exposes those officers to the risk of criminal charges that are all but impossible to rebut.

In *Park*, the CEO of a nationwide chain of grocery stores was charged with violating the FDCA after food in one of the company's warehouses was exposed to a rodent infestation. *Id.* at 660. The record showed that when the CEO learned of the problem, he instructed a subordinate to remedy the situation, but the issue was not resolved, and the CEO was convicted after admitting "he was responsible for any result which occurs in our company." *Id.* at 663–65 (internal quotation marks omitted). In upholding that conviction, this Court submitted that vicarious liability "does not require that which is objectively impossible" and that a criminal defendant can thus always claim he was "powerless to prevent or correct the violation." *Id.* at 673.

The key affirmative defense the Court envisioned in *Park*, however, has shown itself to be illusory. As a practical matter, the government always can show that a corporate officer could have done more. Virtually any officer can be said to be "responsible" for the operations, finances, or other workings of a business. So it is not surprising that in the forty years since *Park*, "no court, state or federal, has ever sided with a defendant raising [the objective impossibility] argument." Andrew C. Baird, *The New Park Doctrine: Missing the Mark*, 91 N.C. L. Rev. 949, 978 & n.179 (2013).

Because the impossibility defense the Court described in *Park* is not meaningfully available, a corporate officer can be found criminally liable under the FDCA for the acts of a subordinate without having had any personal involvement, knowledge, or intent. Consequently, when a corporation introduces an adulterated product into the market, the government has not only a *prima facie* case under the FDCA against all of the company's corporate officers, but a case that is ironclad. That burdens corporate officers with the impossible task of monitoring each and every act of each and every employee.

C. Convictions For Vicarious Liability Offenses Carry Serious Collateral Consequences.

A first vicarious liability conviction under the FDCA is classified as a misdemeanor, while subsequent offenses are felonies punishable by up to three years imprisonment. See 21 U.S.C. §§ 333(a)(1), 333(a)(2). Although this means most vicarious liability convictions under the FDCA result only in fines, rather than terms of imprisonment, that fact does not mean that these convictions should be viewed as quasi-civil in nature. See Pet. 25. That is because convictions under the FDCA can trigger significant collateral consequences that go far beyond traditional civil sanctions. See *Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003) (noting with respect to misdemeanors "it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. *** This underscores the consequential nature of the punishment

and the state-sponsored condemnation attendant to the criminal prohibition.").

There are over 48,000 laws and rules restricting opportunities and benefits based on criminal convictions. See Council of St. Gov'ts Just. Ctr., National Inventory of Collateral Consequences of Conviction, https://niccc.csgjusticecenter.org/search/. These collateral punishments affect "virtually every aspect of [the] human endeavor, including employment and licensing, housing, education, public benefits, credit and loans, immigration status, parental rights, interstate travel, and even volunteer opportunities." See NACDL, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime—A Roadmap to Restore Rights and Status After Arrest or Conviction*, at 12 (May 2014).

For example, collateral consequences can bar individuals with criminal records from holding "public positions, from teachers and law enforcement officers to school bus drivers and garbage collectors," and from working in professions "that require licenses—including not only doctors and lawyers, but also barbers, bartenders, plumbers, and beauticians." Joshua Kaiser, Comment, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to "Collateral" Punishment Policy*, 10 Harv. L. & Pol'y Rev. 123, 133–34 (2016). Or they can deprive people of their rights to vote, to serve on a jury, and to keep and bear arms, and render them ineligible to enlist in the armed forces. *Id.* at 137–38; see also Margaret Colgate Love & Susan M. Kuzma, Off. of the Pardon Att'y, U.S. Dep't of Just., *Civil Disabilities of Convicted Felons: A State-by-State*

Survey, at 6–7, 14 (1996), https://www.ncjrs.gov/pdffiles1/pr/195110.pdf. And while some collateral consequences may be temporary, most are permanent. Kaiser, *supra* at 148.

Moreover, approximately sixty-percent of these collateral consequences categorically sanction all those convicted of a prior criminal offense without regard to the conduct or personal culpability underlying the conviction. See, *e.g.*, *id.* at 150–60; see also NACDL, *supra* at 34–35 ("Under federal law and the laws of most states, a felony conviction results in the mandatory loss of an individual's right to possess a firearm and ammunition."); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 15, 35 (Marc Mauer & Meda Chesney-Lind eds., 2002) ("A felon convicted of the lowest felony loses his right to vote, as does a serial murderer.").

This is particularly worrisome given the decentralized nature of modern corporations. Under the decision below, a prosecutor could target almost every corporate officer in a long chain of supervisory positions for a criminal conviction. As a result of the unlucky officer's near-certain "guilt," the officer would then experience an array of indeterminate, unrelated, and wholly unnecessary collateral punishments. To punish persons based solely on their corporate position, without requiring any finding of *mens rea* or individual participation, strains the limits of criminal law.

II. At A Minimum, It Is Important For The Court To Resolve Whether An Individual Convicted Under A Vicarious Liability Theory Can Be Sentenced To A Term Of Imprisonment.

A. Subjecting Individuals To Prison Sentences For The Acts And Thoughts Of Others Is Improper.

"The combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 98 n.2 (1986) (Stevens, J., dissenting) (quoting Herbert L. Packer, *Mens Rea* and the Supreme Court, 1962 Sup. Ct. Rev. 107, 150). Because vicarious criminal liability under *Park* uniquely permits a finding of guilt without a traditional finding of individual culpability, it has long been understood that the harsh sanction of imprisonment should be off the table. See generally 18 U.S.C. § 3553(a)(2) (identifying traditional purposes of sentencing). The decision below defies that longstanding principle.

Yet imprisoning those found guilty of vicarious liability offenses will not meaningfully deter future misconduct. To the extent deterrence is achievable at all in the context of vicarious liability, civil proceedings, with related civil ramifications, will adequately serve that purpose. *State* v. *Guminga*, 395 N.W.2d 344, 346–47 (Minn. 1986) (barring prosecution, in part, because even if defendant "received only a fine, his liberty could be affected by a longer presumptive sentence in a possible future felony conviction"); *Davis* v. *City of Peachtree City*, 304 S.E.2d 701, 703–04 (Ga. 1983)

(invalidating vicarious and strict liability ordinance, because "there are other, less onerous alternatives which sufficiently promote these interests," such as resort to civil penalties); see also 2 Wayne R. LaFave, Substantive Criminal Law § 13.4(c) (2d ed. 2003). Indeed, corporate executives who are targets of criminal liability under *Park* generally operate with a focus on profits—not only for their companies, but often for themselves. The threat of civil fines and disgorgement of profits alone should deter inadequate monitoring of subordinates.

Additionally, incarcerating corporate officers for vicarious liability offenses does nothing to protect the public from further criminal conduct. There is no need to imprison individuals who have done nothing more than fail to exercise "the highest standard of foresight and vigilance." See *Park*, 421 U.S. at 673; see also *Lady J. Lingerie*, 176 F.3d at 1367 ("[D]ue process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a 'responsible relation.'"); *Commonwealth* v. *Koczwara*, 155 A.2d 825, 830 (Pa. 1959) ("It would be unthinkable to impose vicarious criminal responsibility in cases involving true crimes. Although to hold a principal criminally liable might possibly be an effective means of enforcing law and order, it would do violence to our more sophisticated modern-day concepts of justice. *** A man's liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment.").

Lastly, "[t]o the extent that vicarious liability can be justified in the criminal law, it should not be utilized to bring about the type of moral condemnation which is

implicit when a sentence of imprisonment is imposed." 2 LaFave, *supra* § 13.4(c). As a result, it should not be surprising that nearly every court to consider the issue has held that the sanction of imprisonment cannot validly be applied to vicarious liability offenses. *E.g.*, *Lady J. Lingerie*, 176 F.3d at 1367; *Koczwara*, 155 A.2d at 830. Because the decision below calls that long-established principle into question, this Court's review is appropriate.

B. Imposing Prison Sentences For Vicarious Liability Offenses Is Part Of A Broader Over-Criminalization Trend.

Imprisoning those found guilty of vicarious liability offenses is but the latest example of imposing criminal punishment even where an individual's involvement is either largely attenuated or altogether absent. See, *e.g.*, *Whitfield* v. *United States*, 543 U.S. 209 (2005) (construing 18 U.S.C. § 1956(h)) (noting broad reach of certain conspiracy statutes, which may result in imprisonment, even absent overt act); see also *Pinkerton*, 328 U.S. 640 (holding conspirator criminally liable for foreseeable crimes of co-conspirator, even if conspirator played no part in and did not intend co-conspirator's offense). That departure from traditional criminal law principles is important for this Court to address now, and in this case.

Under the decision below, a prosecutor can seek prison sentences for every person in a long chain of supervisory positions simply by identifying a company engaged in wrongdoing and obtaining its organizational chart. See *Friedman* v. *Sebelius*, 686 F.3d 813 (D.C. Cir. 2012); Memorandum from Deputy Att'y Gen. Sally

Quillian Yates, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download. In fact, the government announced in 2010 that it would chart just such an aggressive course by pursuing more *Park* vicarious liability convictions for corporate officers. See Letter from Margaret A. Hamburg, Comm'r of Food & Drugs, Dep't of Health & Human Servs., to Hon. Charles E. Grassley, Ranking Member, Sen. Comm. on Fin. (Mar. 4, 2010), http://www.grassley.senate.gov/sites/default/files/about/upload/FDA-3-4-10-Hamburg-letter-to-Grassley-re-GAO-report-on-OCI.pdf. This renewed focus on *Park* prosecutions, as exemplified by this case, grants prosecutors wide latitude in determining whether certain conduct should be addressed civilly or criminally. These *Park* actions, once subject only to civil liability, now raise the specter of imprisonment.

Furthermore, *Park* may only be the beginning of a pattern of vicarious liability in other areas of business, such as financial services, mining, or national transportation. Under the Eighth Circuit's decision, such an expansion would carry with it the real possibility that prison sentences for corporate officers premised merely upon the acts of their subordinates could become commonplace. See Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, 568–69 (2012) (recognizing that requiring proof of scienter acts as essential safeguard against unwarranted punishment); see also *Voisine* v. *United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) ("[W]hile it may be true that such incidents are rarely prosecuted, this decision leaves the right to keep and bear arms up

to the discretion of federal, state, and local prosecutors. We treat no other constitutional right so cavalierly.").

Moreover, prosecutors can go beyond seeking prison sentences for directly responsible corporate officers. They can seek to impose criminal sanctions on non-officers as well. For example, in affirming the conviction of an individual who "avoided any formal association" with the involved company and "was not identified as an officer of the company," the Fourth Circuit held that "[t]he gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable." *United States* v. *Ming Hong*, 242 F.3d 528, 529, 531 (4th Cir. 2001).

"Emotional overreaction and criminal justice are a combustible mix." *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of 2013 of the H. Comm. on the Judiciary*, 113th Cong. 35 (2013) (statement of Norman L. Reimer, Exec. Dir., Nat'l Assoc. of Criminal Def. Lawyers). It can overextend statutes to reach innocent behavior not intended to be criminalized. See, *e.g.*, *Yates*, 135 S. Ct. at 1079 (explaining that imposing criminal liability on fisherman for tossing red grouper overboard by interpreting statutory definition of "tangible object" to "encompass[] any and all objects, whatever their size or significance" would cut definition "loose from its financial-fraud mooring"); *United States* v. *Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202 (D.N.D. 2012)

(dismissing charges under Migratory Bird Treaty Act for dead birds found in oil reserve pits because conduct not intended to be criminalized by Act). To avoid such consequences, courts are responsible for ensuring that laws enacted are not abused by the executive branch to criminalize conduct not contemplated by Congress. See Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 Hofstra L. Rev. 745 (2014). The Court should exercise that responsibility here and grant the petition.

CONCLUSION

For the foregoing reasons, *amici curiae* the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, and the Cause of Action Institute request that the petition for a writ of certiorari be granted.

February 10, 2017

Respectfully submitted,

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