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)

BRIEF FOR THE UNITED STATES OF AMERICA

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SUMMARY OF THE CASE AND STATEMENT CONCERNING ORAL ARGUMENT (8th Cir. Rule 28A(i)(1))

Defendants are the owner and chief operating officer of an egg producer whose contaminated eggs sickened thousands of consumers in 2010. Defendants appeal their three-month jail sentences after pleading guilty to criminal charges of introducing adulterated food into interstate commerce in violation of 21 U.S.C. §§ 331(a), 333(a)(1), and 342(a)(1). Defendants assert that they did not knowingly or intentionally distribute adulterated eggs and were not personally involved in the eggs' distribution, and argue that their jail sentences are therefore unconstitutional. But the district court found that defendants both knew of, and were involved in, the circumstances underlying the contamination, and the court's findings are supported by the record. Defendants' sentences are expressly authorized by law and consistent with the U.S. Constitution. The court acted within its authority in sentencing defendants to short jail terms, and the three-month sentences it imposed are neither procedurally nor substantively unreasonable.

The United States believes that oral argument is warranted, and requests that it be allotted the same amount of time that is allotted to defendants-appellants.

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Add.	Addendum to Opening Brief for Defendants-Appellants (filed July 20, 2015)
Def. App'x	Appendix for Defendants-Appellants (filed July 20, 2015)
Def. Br.	Opening Brief for Defendants-Appellants (filed July 20, 2015)
DCD	District Court Docket Entry No.
FDA	Food and Drug Administration
FDCA	Federal Food, Drug, and Cosmetic Act
Gov't App'x	Appendix for United States of America (filed with this brief)
PSRs	Presentence Investigation Reports for Defendants Austin (Jack) DeCoster and Peter DeCoster (as further revised on Dec. 12, 2014)
SE	*Salmonella* enteritidis
USDA	United States Department of Agriculture

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BRIEF FOR THE UNITED STATES OF AMERICA

INTRODUCTION

In 2010, thousands of Americans fell ill after consuming eggs contaminated with *Salmonella* enteritidis. Public-health officials traced the outbreak to Quality Egg, an Iowa producer owned by defendant Austin (Jack) DeCoster and operated by him and his son, defendant Peter DeCoster. Federal investigators discovered that Quality Egg's facilities were rife with insanitary conditions, including widespread *Salmonella*

contamination, rodent infestations, and manure oozing from the barns. Investigators also learned that the DeCosters had long been aware of their facilities' *Salmonella* problem; knew how to address it; and failed to take the steps necessary to prevent contaminated eggs from entering the marketplace.

The DeCosters pled guilty to criminal charges for their role in causing the introduction of adulterated food into interstate commerce. The district court sentenced each individual to a fine plus three months' imprisonment, within the range authorized by statute and the applicable sentencing guidelines. The court found that these sentences were justified in light of the appalling disregard for public health and safety shown by the DeCosters and the company they controlled. The DeCosters now appeal on constitutional and procedural grounds.

The sentences should be affirmed. The DeCosters contend that it is unconstitutional to impose even a short jail sentence for an offense as to which a defendant has no relevant knowledge and in which he was uninvolved. But this case does not present those facts, for the district court found that the DeCosters were culpable in both mind and deed. Under these circumstances, the DeCosters' sentences are far from grossly disproportionate. Moreover, the Constitution does not preclude Congress from allowing jail sentences as punishment for misconduct affecting the health and safety of all Americans, and the district court's sentences were both procedurally and substantively reasonable.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The court entered judgments of conviction on April 15, 2015. *See* Add. 69-80. Defendants filed timely notices of appeal on April 27, 2015. *See* District Court Docket Entry No. ("DCD") 124, 125. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether defendants' three-month sentences constitute cruel-and-unusual punishment or, if applicable, a deprivation of liberty without due process.

> **Authorities**: *Ewing v. California*, 538 U.S. 11, 23 (2003); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *United States v. Park*, 421 U.S. 658 (1975); U.S. Const. amends. V, VIII; 21 U.S.C. §§ 331(a), 333(a)(1), 342(a)(1).

II. Whether the sentences are procedurally or substantively unreasonable.

> **Authorities**: *Gall v. United States*, 552 U.S. 38 (2007); *United States v. Feemster*, 572 F.3d 455 (8th Cir. 2009) (en banc); 18 U.S.C. § 3553(a).

STATEMENT OF THE CASE

I. Statement of Facts

A. Federal Food-Safety Regulation

1. This case arises from criminal violations of the Federal Food, Drug, and Cosmetic Act ("FDCA"), a comprehensive framework regulating the interstate distribution of food, drugs, medical devices, cosmetics, and other products. Congress enacted the FDCA in 1938 to "protect consumers from dangerous products," *United States v. Sullivan*, 332 U.S. 689, 696 (1948), and ensure "the health and safety of the public at large," *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2234 (2014).

Among other conduct, the FDCA prohibits the introduction or delivery for introduction into interstate commerce of adulterated food. 21 U.S.C. § 331(a). A food is adulterated if, among other things, it "bears or contains any poisonous or deleterious substance which may render it injurious to health." *Id.* § 342(a)(1). Persons who introduce or cause the introduction of adulterated food into interstate commerce are subject to criminal prosecution. *Id.* §§ 331(a), 333(a)(1). As relevant here, an individual who violates Section 331(a) may be imprisoned for up to one year, fined up to $100,000, or both. *Id.* § 333(a)(1); 18 U.S.C. § 3571(b)(5).

Recognizing the industrial scale and corporate structure of the modern economy, the FDCA imposes duties not merely on employees who physically produce and handle a covered product, but also on corporate officials who exercise control over its production and distribution. *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. The law thus holds accountable "'all who have a responsible share in the furtherance of the transaction which the statute outlaws.'" *Id.* at 669 (quoting *United States v. Dotterweich*, 320 U.S. 277 (1943)) (ellipses omitted).

The FDCA is also one of the "'now familiar type'" of statute "which 'dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing.'" *Park*, 421 U.S. at 668 (quoting *Dotterweich*, 320 U.S. at 280-81). Recognizing that the distribution of foods, drugs, and other articles "'touch[es] phases of the lives and health of the people which, in the circumstances of modern industrialism, are largely beyond self-protection,'" Congress decided to hold producers strictly accountable for compliance with the law. *Id.* at 668 (quotation marks omitted). This strict-liability standard reflects Congress's determination that "'[t]he 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 and no more exertion than it might reasonably exact from one who assumed his responsibilities.'" *Id.* at 671 (quoting *Morissette v. United States*, 342 U.S. 246, 255 (1952)).

2. Among the "poisonous or deleterious substance[s]" that may render a food adulterated is *Salmonella* enteritidis, a strain of *Salmonella* bacteria that may cause a moderate-to-severe illness in humans known as Salmonellosis. *See* PSRs ¶¶11-12.[1]

Most persons infected with *Salmonella* enteritidis (hereafter "*Salmonella*" or "SE") develop diarrhea, fever, and abdominal cramps within two days of infection, and the illness usually lasts four to seven days. Add. 8 n.6. Although most persons recover without medical treatment, in others, the effects become so severe that the patient must be hospitalized. *Id.* Infection may "'spread from the intestines to the blood stream, and then to other body sites, and can cause death unless the person is treated promptly with antibiotics.'" *Id.* An estimated four hundred Americans die each year from Salmonellosis. PSRs ¶13. Others suffer long-term complications, such as chronic joint pain or arthritis. *See* 74 Fed. Reg. 33,030, 33,031 (2009).

Salmonellosis may be contracted by eating eggs, or foods containing eggs, contaminated with *Salmonella*. PSRs ¶15. An egg may become contaminated in several ways. Vertical, or "transovarian," transmission occurs when a hen that has contracted *Salmonella*—through exposure to contaminated feed, water, air, or surfaces—develops a long-term infection that causes it to lay eggs containing

[1] Citations to "PSRs" are to the second revised versions of the presentence investigation reports for Jack DeCoster and Peter DeCoster, which are materially identical in most provisions. DCD 85, 86. Where the PSRs differ, citations are given to "Jack PSR" and "Peter PSR," respectively.

Salmonella. *Id.* Horizontal, or "trans-shell," transmission occurs when bacteria enter an egg by passing through defects in its shell. *Id.*

B. Offense Conduct

1. Defendants' Business.

This case arises from a massive outbreak of Salmonellosis caused by *Salmonella*-contaminated eggs distributed by defendant Quality Egg, LLC ("Quality Egg"). Quality Egg is a large-scale producer that conducted business in Iowa under various other names (including Wright County Egg) and through related entities. PSRs ¶6.

Defendant-appellant Austin (Jack) DeCoster was, at all relevant times, the owner and principal operator of these businesses. His son, defendant-appellant Peter DeCoster, served as chief operating officer and exercised substantial control over Quality Egg's day-to-day operations. Add. 3; PSRs ¶9. Jack DeCoster also operated several egg-production companies in Maine. PSRs ¶20.

Quality Egg operated a feed mill and six principal farm sites in Iowa. PSRs ¶¶6-7. Across these sites were 73 barns housing some five million layer hens, as well as 24 pullet barns and several processing plants where eggs were cleaned, packed, and shipped. *Id.*

2. 2010 Salmonellosis Outbreak And FDA Inspections.

a. During the spring and summer of 2010, thousands of people throughout the United States fell ill after eating food made with *Salmonella*-contaminated eggs. *See* Add. 3; PSRs ¶¶53-57. Although the precise number of victims remains unknown, it

is estimated that some 56,000 people may have been sickened. Add. 8 & n.7; PSRs ¶¶58-62, 72 & n.14.

In August 2010, federal and state officials determined that multiple "clusters" of Salmonellosis were traceable to bacteria in *Salmonella*-contaminated eggs produced and distributed by Quality Egg. PSRs ¶¶53-62. FDA presented Quality Egg with epidemiological evidence demonstrating that the outbreak had originated at its facilities. Add. 3-4; PSRs ¶¶62-64.

In response, Quality Egg announced voluntary recalls of all eggs originating from five of its six farm sites between mid-May and mid-August 2010. PSRs ¶63. Quality Egg's business partner, Hillandale Farms, also announced a series of voluntary recalls, including all eggs produced at Quality Egg's sixth site as well as at a seventh site owned by Jack DeCoster. *Id.* ¶¶64-65. Some five hundred million eggs were ultimately subject to recall. *See Outbreak of Salmonella in Eggs*, *Hearing Before the House Committee on Oversight and Investigations of the Committee on Energy and Commerce*, 111th Cong. 86 (2010) ("*2010 House Hearing*").

b. From August 12-30, 2010, FDA undertook an extensive inspection of Quality Egg's operations in Iowa. Add. 18. Investigators discovered "egregious unsanitary conditions" at the company's facilities. PSRs ¶66. These included:

> [L]ive and dead rodents (mice) and frogs found in the laying areas, feed areas, conveyer belts, and outside of the buildings; skeletal remains of a chicken on a conveyer belt; numerous holes in walls and baseboards in the feed and laying buildings; missing vent covers; rodent traps were broken, did not have bait in them, and some traps

> still had dead rodents in them; manure piled to the rafters in one building, which was below the laying hens; a room was so filled with manure that it pushed the screen out of the door, allowing rodents access to the building; and live and dead beetles and flies throughout the chicken barns.

Id.; *see* Def. App'x 60 (noting that certain vermin, including flies and maggots, were "too numerous to count").

FDA also surveyed Quality Egg's food-safety policies. Although the company had developed written plans for biosecurity and *Salmonella* prevention, FDA found that Quality Egg had failed to comply with its plans in critical respects. For example, although the biosecurity plan required the elimination of water from manure pits, inspectors witnessed "dark liquid which appeared to be manure" seeping through several barns' concrete foundations. Def. App'x 55, 56. FDA also observed that employees were not wearing or changing protective clothing, nor cleaning or sanitizing their equipment, notwithstanding that Quality Egg's plans required such measures. PSRs ¶67. FDA further determined that Quality Egg had "'failed to adequately document the monitoring of rodents and other pest control measures'" and "'to adequately document compliance with biosecurity measures,'" as Quality Egg's plans required. Add. 19-20.

c. FDA also extensively tested Quality Egg's eggs, facilities, chicken feed, and wash water. Add. 20-23. The egg tests revealed that all of Quality Egg's farms were "producing SE positive eggs," at a rate of contamination "approximately 39 times higher than … the current national incidence rate." Add. 21. Quality Egg's own

testing "confirmed the presence of SE in some of the company's eggs." Def. Br. 14-15.

In addition, barn environments were pervasively contaminated; "63% … of house[s]" were contaminated with *Salmonella* enteritidis, including in "the wash water, feed mill, feed samples, feed ingredients, and a pullet house." Add. 20. FDA thus concluded that "widespread SE contamination … is not localized to any one part of [Quality Egg's] operation, but is instead spread throughout the entirety" of its facilities. Add. 20. FDA also found that Quality Egg's vaccination program had been ineffective; *Salmonella* was present in both the environment and the eggs themselves in numerous barns containing allegedly vaccinated hens. Add. 22-23.

The company purportedly undertook measures in response to these identified deficiencies. *Cf.* Def. Br. 15. Nonetheless, in October 2010, FDA concluded that, given the "conditions identified at Quality Egg's facilities" and the "extremely high level and pervasive nature of SE contamination," euthanization of every hen was necessary to address the risk of another outbreak. Add. 20-23. FDA also instructed Quality Egg to undertake other remedial measures, including removal of manure, repair of facilities, and thorough cleaning and disinfection of all barns. *Id.*

3. Knowledge Of *Salmonella* Contamination And Its Risks.

Following FDA's inspections, the government began a criminal investigation of Quality Egg's food-safety practices and the conduct of Jack DeCoster, the owner and operator of Quality Egg; Peter DeCoster, the company's chief operating officer; and

other Quality Egg employees. As relevant here, the investigation revealed that the DeCosters had long known their facilities were contaminated with *Salmonella* enteritidis, and that they had ample knowledge concerning the steps needed to prevent this contamination from spreading to their eggs.

a. The DeCosters had long known about *Salmonella* contamination at Quality Egg. Between at least 2006 and August 2010, Quality Egg conducted numerous environmental tests for *Salmonella* in its layer and pullet barns, as well as necropsies of hens. Add. 43-44; PSRs ¶¶16-19. Both defendants "'were generally aware of the positive SE test results as they were received.'" Add. 43; *see* Add. 85 ("The parties stipulate that Jack DeCoster and Peter DeCoster often received copies of, or were made aware of, positive SE environmental test results[.]").

As early as January 2006, necropsies confirmed the presence of *Salmonella* inside the organs of Quality Egg's hens. PSRs ¶16; Add. 27. As the government's expert explained, "SE organ-positive birds indicate that SE is present in the flock and [that] there is an increased likelihood of SE-contaminated eggs." Gov't App'x 80. As the DeCosters were aware, these positive necropsy results continued, and increased in frequency, throughout the following years. PSRs ¶17.

Between July 2008 and May 2010, Quality Egg conducted environmental testing for *Salmonella* on 144 days. Nearly half of those days returned positive results, with numerous parts of the facilities testing positive. PSRs ¶18. Such "SE in the environment is a risk factor for pullets and layers to become infected with SE, and to

lay SE-infected eggs or to contaminate eggs through their shells." PSRs ¶77; *see* Gov't App'x 74. Again, the DeCosters were generally aware of these positive results. Add. 43, 85.

b. The government's investigation also revealed that the DeCosters had considerable knowledge of, and experience with, handling *Salmonella* contamination.

Jack DeCoster had owned and operated several egg facilities in Maine since the 1980s, and Peter DeCoster had worked at those facilities since the mid-1990s. PSRs ¶¶20-21; Peter PSR ¶117. For decades, under state oversight, the DeCosters' Maine facilities had implemented a wide range of *Salmonella*-prevention measures, including "stringent rodent monitoring and control measures in the pullet and layer houses and surrounding areas, dry cleaning of the layer and pullet houses between flocks, and vaccinating flocks to help them avoid contracting SE." PSRs ¶20; *see also* Add. 41, 81.

In 2008, the DeCosters began experiencing *Salmonella*-positive environmental tests at their Maine facilities. Gov't App'x 301. At the request of state officials, Jack DeCoster hired Dr. Charles Hofacre, a poultry-disease specialist, to assist with *Salmonella*-prevention practices. Gov't App'x 301-02; PSRs ¶21. Jack DeCoster also hired Dr. Maxcy Nolan, a rodent-control expert, to advise on "controlling and eliminating the rodent populations" at the Maine facilities. PSRs¶21. By following the consultants' recommendations, the DeCosters succeeded in eliminating *Salmonella* enteritidis from their Maine facilities. Gov't App'x 302-03. They thus "knew that

the[se] measures [were] effective" in reducing, if not eradicating, *Salmonella* contamination at their facilities. PSRs ¶20.

The following year, Jack DeCoster hired Dr. Hofacre and Dr. Nolan to consult on the company's Iowa operations. PSRs ¶21; Add. 81; Gov't App'x 35, 37, 44, 47. Both consultants generally recommended implementing the same measures in Iowa as in Maine. Add. 27, 81-82. But neither consultant could confirm that Quality Egg had "fully and effectively implemented all of [their] recommendations." Add. 81. Indeed, the measures taken "were not effective" in preventing *Salmonella* contamination. *Id.*

c. Quality Egg's awareness of proper *Salmonella*-prevention practices was also reflected in various company documents, including "written plans for SE prevention and biosecurity" and a Hazard Analysis and Critical Control Points plan ("Hazard Plan"). Gov't App'x 65-66; PSRs ¶¶74-75. These documents show that "Quality Egg knew of the prevailing industry standards for preventing and controlling SE." PSRs ¶75.

In many respects, Quality Egg either failed to follow its own procedures or could not demonstrate that it had done so, even though its plans required recordkeeping. *See id.* (Quality Egg kept "few or no records indicating how [it] implemented these same plans"); Add. 10-11. For example, "Quality Egg's rodent control records indicated that Quality Egg did not hire a pest control company or implement a documented rodent control program for the layer barns until early in 2010." PSRs ¶75; *see also* PSRs ¶31. And despite the company's assertions that it had

instituted pest-control measures, in August 2010 FDA found large numbers of rodents and other vermin—"a primary source of SE contamination," Gov't App'x 58—inhabiting the company's facilities. PSRs ¶66,

4. Other Misconduct.

Not only did Jack and Peter DeCoster fail to employ effective *Salmonella*-prevention measures in Iowa, but as the owner and the chief operating officer of Quality Egg, they also presided over a corporate culture in which employees routinely disregarded food-safety practices and, at times, took affirmative steps to mislead regulators and customers. As further described below, the district court took account of this related misconduct in sentencing the DeCosters.

Sham Safety Plan; Falsified Records; Lies To Auditors. Between 2007 and 2010, as required by a major wholesale customer, Quality Egg's egg-processing facilities underwent annual food-safety audits. Add. 10-13. Throughout this period, Quality Egg engaged in a variety of misconduct intended to mislead its auditors and customers.

The wholesale customer required Quality Egg to develop and implement a Hazard Plan. Quality Egg created a plan, but it was replete with false and misleading statements. For example, the Hazard Plan stated that Quality Egg "performed flock testing to identify and control Salmonella," when "[i]n fact, no such 'flock testing' was ever done." Add. 12. Similarly, the Hazard Plan and related documents stated that Quality Egg "had a Salmonella program in place for the layer and pullet barns," yet

the company "did not take preventative measures or employ strategies to reduce or limit Salmonella in [its] table eggs," even where it knew of *Salmonella*-positive environmental test results. *Id.*

Quality Egg also created false records. The company's written plans required detailed recordkeeping concerning the performance of certain food-safety measures, including "preoperative sanitation reports, daily clean-up forms, pest control reports, daily maintenance reports, and visitor logs." Add. 10-11. Rather than perform these tasks and document their completion on a daily basis, a Quality Egg supervisor instructed employees "[o]n the days leading up to an audit" to manufacture and backdate false records. *Id.* Quality Egg also lied to its auditors about its pest-control measures, Add. 11-12, and falsely promised its customer that it would divert any eggs from barns in which the environment or hens tested positive for *Salmonella*, Add. 13. Quality Egg indisputably intended that its auditors and customers rely on these falsified documents and misrepresentations. Add. 11-12.

Misrepresentations to Walmart. Peter DeCoster himself made related misrepresentations. Add. 45-46. In fall 2008, Peter DeCoster and others traveled to Arkansas to make a sales pitch to Walmart. As the district court found (*see* Add. 45-46; Gov't App'x 253-54), Peter DeCoster's presentation heralded Quality Egg's passage of annual audits; falsely claimed that the company conducted flock testing; and falsely claimed that it had a certified Safe Quality Food Institute program in place. *See* Add. 83-84 (stipulating that bound presentation produced by Quality Egg during

discovery "contained inaccurate statements related to Quality Egg's 'Flock Testing Policy', its [Hazard Plan] and SQF programs, and the existence and benefits of independent audits"); DCD 113-2 (presentation).

Violations of Federal Regulations; Bribery of USDA Official. Quality Egg also violated food-safety regulations governing the quality of shell eggs shipped and sold in interstate commerce.

Quality Egg produced both "USDA-shielded" and "non-USDA-shielded" eggs. By regulation, to be fit for human consumption, non-USDA-shielded eggs must meet a minimum consumer grade of "B." PSRs ¶42. This standard imposes limitations on the percentage of flawed eggs—those with microscopic cracks (known as "checks") or those that are leaking, dirty, or marred with blood—that can lawfully be included in a case of shell eggs. *Id.*[2]

To identify and divert defective eggs, Quality Egg purported to use electronic-detection machines. PSRs ¶42. On a routine basis, however, company personnel adjusted or turned off these machines so that the "checks" would not be diverted, and thus would continue to be sold as shell eggs. *Id.* One employee would testify that he did so pursuant to Jack DeCoster's instruction that "Quality Egg should be diverting no more than 1-2% of the eggs based upon 'checks.'" Add. 85. By taking these steps,

[2] Although excess defective eggs cannot lawfully be sold as shell eggs, they may—at lower profit—be processed and pasteurized for sale as liquid egg product. PSRs ¶42 n.9.

Quality Egg personnel "increase[d] the risk that consumers will receive contaminated eggs," as defective eggs are more susceptible to internal contamination. PSRs ¶80; *see also* Gov't App'x 107.

To enforce its regulations, USDA conducts random "surveillance" inspections. PSRs ¶42; Add. 86. Cases of eggs found to fall below minimum standards are "red-tagged." PSRs ¶45. Red-tagged cases cannot lawfully be sold until a sufficient number of defective eggs are removed and USDA approves the case for release. *Id.*

Quality Egg regularly took steps to frustrate these inspections. For example, "[o]n a routine basis, Quality Egg personnel … caused pallets of non-USDA-shielded eggs to be moved in order to avoid inspection by USDA inspectors." PSRs ¶44. One employee responsible for hiding these pallets would testify that, on one occasion, he was "reprimanded" by Jack DeCoster "for failing to move eggs in advance of a USDA inspection." Add. 86.

Quality Egg even went so far as to bribe a government official. On at least two occasions in 2010, company personnel bribed a USDA inspector to release red-tagged pallets of eggs. PSRs ¶¶45-48. Although there is no evidence that the DeCosters knew beforehand that the bribes would be made, they later learned of them, yet "the offending parties were never disciplined for their actions." Add. 45. There is also evidence that when a plant manager (Peter DeCoster's brother-in-law) made another bribe, Peter DeCoster simply warned him to "[b]e careful about what you are doing." Add. 86; Gov't App'x 214-15.

Falsely Labeled Eggs. Between at least 2006 and August 2010, Quality Egg mislabeled its eggs with false processing and expiration dates in an effort to "'mislead[] state regulators and retail egg customers regarding the age of [the company's] eggs.'" Add. 17; *see id.* at 14-18. Sometimes, Quality Egg itself mislabeled the eggs; on other occasions, it printed false labels and provided them to its wholesale customers to be applied at a later date. Add. 16-17. Although there is no evidence that the DeCosters specifically knew about this scheme, it was "a common practice" and "well known among several Quality Egg employees." Add. 17.

II. Conviction and Sentencing

A. Guilty Pleas

The United States filed a criminal information against Quality Egg, Jack DeCoster, and Peter DeCoster. *See* Gov't App'x 1-4. In accordance with a plea agreement, Quality Egg pled guilty to three counts: (1) a felony violation of 18 U.S.C. § 201(b)(1), based on bribery of the USDA inspector; (2) a felony violation of 21 U.S.C. § 331(a), based on introduction of misbranded eggs into interstate commerce with intent to defraud and mislead; and (3) a misdemeanor violation of 21 U.S.C. § 331(a), based on introduction of adulterated eggs into interstate commerce.[3] *See* DCD 15. The DeCosters also pled guilty, as responsible corporate officers, to

[3] Quality Egg has not appealed its conviction or sentence.

misdemeanor counts of introducing adulterated eggs into interstate commerce. *See* Gov't App'x 8-18, 22-32.

In pleading guilty, the DeCosters acknowledged that "[b]etween about the beginning of 2010 and in or about August 2010, Quality Egg introduced and caused to be introduced into interstate commerce food, that is shell eggs, that were adulterated" with *Salmonella* enteritidis. Gov't App'x 10, 24. The DeCosters further admitted that they were responsible for this conduct. Jack DeCoster, the owner of Quality Egg, attested that he "exercised substantial control over the operations of Quality Egg and related entities and assets in Iowa" and "was the person ultimately responsible for the[ir] operations," Gov't App'x 10, while Peter DeCoster, the "Chief Operating Officer," admitted that he "exercised some control over the production and distribution of shell eggs by Quality Egg and related entities and assets in Iowa" and "was one of the persons responsible for running the[ir] operations." Gov't App'x 24. The United States did not have evidence that the DeCosters knew specifically that the eggs themselves were contaminated at the time of shipment. Gov't App'x 10, 24. Nonetheless, each defendant stipulated that "he was in a position of sufficient authority at Quality Egg to detect, prevent, and correct the sale of the contaminated eggs." *Id.*; *see also* DCD 134, 139 (plea transcripts) (similar).

In the plea agreements, the DeCosters each agreed to be "sentenced based on facts to be found by the sentencing judge by a preponderance of the evidence," and agreed that "facts essential to the punishment need not be … charged in the

Indictment or Information" or "proven beyond a reasonable doubt." Gov't App'x 10-11, 24-25. The United States agreed to "leave to the Court's discretion whether to impose a sentence of incarceration, home confinement, or probation," but the plea agreements preserved the government's right to oppose any argument that a custodial sentence would be unconstitutional. Gov't App'x 12, 26.[4]

B. Pre-Sentencing Proceedings

1. The U.S. Probation Office prepared presentence investigation reports for each defendant. For the DeCosters, the respective PSRs assigned each individual a total offense level of 4, reflecting a base offense level of 6 and a two-level acceptance-of-responsibility adjustment. PSRs ¶¶85, 92; *cf.* U.S.S.G. § 2N2.1(a). The PSRs assigned Peter DeCoster a criminal-history score of 0, while Jack DeCoster received a score of 1, based on a 2003 federal conviction on two counts of employment of unauthorized aliens. Peter PSR ¶¶95-98; Jack PSR ¶¶96-97. For both defendants, these scores yielded a criminal-history category of I. PSRs ¶98. The resulting guideline imprisonment range for each defendant was 0 to 6 months. Jack PSR ¶¶121-22; Peter PSR ¶¶126-27.

Initially, the DeCosters filed extensive objections to the PSRs, contesting the accuracy or relevance of much of their contents. *See* DCD 51-56. To resolve these

[4] The assertions by amici curiae that the government sought a sentence of imprisonment in this case are therefore mistaken.

evidentiary disputes, the district court originally planned to hold a sentencing hearing over five days, *see* DCD 81; in March 2015, however, the DeCosters withdrew most of their objections. *See* DCD 89. The United States and the DeCosters filed a joint stipulation that narrowed the remaining disputes and reached agreement on various findings. *See* Add. 81-89.

2. After pleading guilty, Jack DeCoster filed a motion seeking a declaration that a sentence of incarceration or other confinement would be unconstitutional. DCD 64. He asserted that, in cases where a defendant has "no knowledge of the violation and no knowledge of the conduct underlying the offense," a custodial sentence would violate the Due Process Clause. DCD 67. Peter DeCoster joined in this motion, DCD 71, and the DeCosters filed a joint reply arguing that custodial sentences for an offense based on "strict vicarious liability" would violate both the Due Process Clause and the Eighth Amendment. DCD 78, at 4. The United States opposed the motion, explaining that defendants knew about the circumstances that led to the contamination of the eggs and that custodial sentences would not be unconstitutional. *See* DCD 74.

C. Sentencing

The district court imposed sentences against Jack and Peter DeCoster within the applicable sentencing guidelines, including a $100,000 fine, three months' imprisonment, and one year's supervised release for each individual. Add. 69-74, 75-

80. The court stated its reasons orally and in a subsequent written opinion. Gov't App'x 309-336; Add. 1-68.

1. The district court made various factual findings relevant to the DeCosters' offenses.[5] The court found that "[f]rom early 2006 to 2010," the DeCosters were generally aware of *Salmonella*-positive test results, and that these positive results continued and increased in frequency through the Salmonellosis outbreak in mid-2010. Add. 43. The court further found that despite the DeCosters' knowledge of these conditions and of the "increased risk that [the company's] shell eggs were contaminated with SE," Add. 31, they failed to take obvious, known steps to ensure that the company's eggs were not adulterated before shipping them to customers. Add. 45.

The district court also highlighted Quality Egg's business practices under the DeCosters' management and control. The court noted Quality Egg's repeated efforts to evade federal food-safety regulations (including bribery of a government official, interference with surveillance, and tampering with electronic "check" detectors); the company's intentional mislabeling of eggs with false processing or expiration dates; and its repeated misrepresentations to auditors and customers. It specifically found that Peter DeCoster misrepresented to Walmart the accreditations that Quality Egg purportedly possessed and the safety practices that it supposedly followed. Add. 45-

[5] The district court adopted as factual findings all portions of the PSRs to which defendants did not object. *See* Gov't App'x 263; Add. 9-10.

46; Gov't App'x 253-54; DCD 113-2 (misleading presentation). And though it acknowledged that the record did not show that the DeCosters themselves knew of all misconduct, the court nonetheless found that the record "support[ed] the inference that the individual defendants created a work environment where [Quality Egg] employees not only felt comfortable" engaging in misconduct, "but may have even felt pressure to do so." Add. 45.

2. The district court explained that its determination to impose a three-month jail sentence against each individual—in the middle of the applicable guidelines range—was supported by the Section 3553(a) factors. The court stated that imposing jail time, and not merely a fine, would assist in "deterring other corporate officers from similar criminal conduct" in the future. Add. 47; *see also id.* (noting "general deterrence" interest in preventing "the marketing of unsafe foods and widespread harm to public health"). The court also found a need for specific deterrence, as "defendants' careless oversight and repeated violations of safety standards" demonstrated an "increased likelihood that th[eir] offenses" would recur. *Id.* Finally, the court concluded that the sentences "'reflect[ed] the seriousness of the offense,'" "serve[d] 'to promote respect for the law,'" and constituted "'just punishment'" under 18 U.S.C. § 3553(a)(2)(A). Add. 48.

3. The district court also rejected the DeCosters' argument that corporate officers who lack knowledge of a corporation's unlawful conduct and do not participate in that conduct cannot constitutionally be subjected to a custodial

sentence. The court rejected the factual premise of that argument, explaining that the record evidence—including the undisputed fact that the DeCosters knew of circumstances, including repeated *Salmonella*-positive environmental tests and necropsies, that demonstrated a heightened risk that the company's eggs were contaminated with *Salmonella* and thus adulterated—showed that this is not a case of "a mere unaware corporate executive." Add. 47.

The district court also rejected the constitutional arguments on their own terms. With respect to the Eighth Amendment challenge, the court noted that a sentence constitutes cruel-and-unusual punishment only where it is "'grossly disproportionate'" to the offense. Add 36-37. The court found that the DeCosters' conduct readily supported the sentence imposed, particularly given that "the DeCosters' contaminated eggs caused harm to thousands of consumers"; "[b]oth defendants were involved in the crimes committed"; and defendant Jack DeCoster had committed a prior federal offense. Add. 37-38 & n.20; *see also* Gov't App'x 320-22.

The court also rejected the DeCosters' argument that a custodial sentence would violate the Due Process Clause. The court noted that the Supreme Court has repeatedly interpreted the FDCA to extend liability to responsible corporate officers without ever suggesting that this interpretation presented any constitutional concern. Add. 57-59, 67 (discussing *Park* and *Dotterweich*). The court explained that the FDCA falls within the class of "public welfare offense[s]" that may constitutionally dispense

with scienter requirements, because the maximum punishment under 21 U.S.C. § 333(a) "is considered a 'relatively small' penalty as it is a 'short jail sentence[].'" Add. 60-61 (quoting *Holdridge v. United States*, 282 F.2d 302, 309 (8th Cir. 1960)). The court also noted that both the Supreme Court and this Court have construed statutes as providing for strict liability even when they permitted terms of imprisonment longer than the three-month sentence imposed here. Add. 62, 65-67.

SUMMARY OF ARGUMENT

After Quality Egg caused a massive outbreak of Salmonellosis that injured tens of thousands of people, the company's owner and its chief operating officer pled guilty as responsible corporate officers to the crime of introducing adulterated food into interstate commerce. The district court imposed within-guidelines sentences against each defendant that include, *inter alia*, three months in jail. Defendants' sentences should be affirmed.

This case does not present the questions regarding sentencing predicated on strict and vicarious liability that the DeCosters urge this Court to answer. As a factual matter, defendants are incorrect in suggesting that they have been sentenced for wrongful conduct about which they neither knew nor were involved. As the DeCosters themselves emphasize, they were aware for many years that their facilities—and the laying hens themselves—had tested positive for *Salmonella*, thus putting them on notice of the risk of egg contamination. Yet defendants, who were indisputably responsible for managing the business, did not take the steps necessary to

ensure that *Salmonella*-contaminated eggs were not shipped in interstate commerce. The DeCosters are not being held "vicariously" liable for the conduct of their employees; they are being held accountable for their own acts and omissions in causing a massive, nationwide outbreak of food-borne illness. *See United States v. Park*, 421 U.S. 658, 673-74 (1975) (liability attaches where responsible corporate officer has the "responsibility and authority" to prevent or correct a violation, yet "fail[s] to do so").

The DeCosters' constitutional arguments would lack merit even without regard to those facts. A sentence of imprisonment violates the Eighth Amendment only where it is "'grossly disproportionate'" to the defendant's offense. *Ewing v. California*, 538 U.S. 11, 23 (2003). Here, the DeCosters' sentences fall squarely within both the statutory range authorized by Congress and the applicable sentencing guidelines, and this Court has "never held a sentence within the statutory range to violate the Eighth Amendment." *United States v. Vanhorn*, 740 F.3d 1166, 1170 (8th Cir. 2014). The gravity of the DeCosters' offense, the harm caused to society by their conduct, the nature of their culpable knowledge and participation, and their history of other wrongdoing or mismanagement amply demonstrate that their modest jail sentences are not at all "disproportionate," much less "grossly" so.

The Due Process Clause does not provide an alternative basis for contesting the substance of defendants' sentences. The DeCosters challenge their punishment, not the fact that their conduct was made criminal. "Because the [Eighth Amendment]

provides an explicit textual source of constitutional protection against" cruel-and-unusual punishment, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing" defendants' arguments. *Graham v. Connor*, 490 U.S. 386, 395 (1989). In any event, the DeCosters' sentences would readily survive due-process review.

The district court's sentences were also procedurally and substantively reasonable. In imposing the sentences, the court identified a number of aggravating and mitigating considerations and expressly weighed the factors set forth at 18 U.S.C. § 3553(a). None of the court's findings were clearly erroneous, and its balancing of considerations is entitled to considerable deference by this Court.

ARGUMENT

I. Defendants' Sentences Fall Well Within Constitutional Bounds.

The DeCosters do not dispute that Quality Egg injured tens of thousands of people by shipping eggs in interstate commerce that were contaminated with *Salmonella* enteritidis. They also do not deny that that this conduct was a crime; that they are guilty of this crime; and that they are properly subject to punishment. Instead, the DeCosters argue that the United States Constitution categorically forbids the punishment expressly authorized by Congress—a jail sentence of up to one year, *see* 21 U.S.C. § 333(a)(1)—unless defendants "personally participated in the company's violation" and "intended to bring [it] about." Def. Br. 1.

The DeCosters' arguments are both legally incorrect and factually erroneous. As a factual matter, the district court found that defendants had both culpable knowledge and culpable participation relevant to their offenses. *See infra* Part I.A. But the court's sentences readily survive constitutional review in any event. *See infra* Parts I.B and I.C.

This Court reviews de novo whether a sentence is unconstitutional. *See United States v. Martin*, 677 F.3d 818, 821 (8th Cir. 2012); *United States v. Clemmons*, 461 F.3d 1057, 1061 (8th Cir. 2006). The district court's factual findings are reviewed only for clear error. *United States v. Rivera-Mendoza*, 682 F.3d 730, 733 (8th Cir. 2012).

A. The DeCosters Had Both Culpable Knowledge And Culpable Participation.

The DeCosters' constitutional challenge to their sentences rests on the factual premise that they had neither culpable knowledge of their company's violations of the FDCA nor any role in those violations. As the district court's sentencing findings demonstrate, that factual premise is incorrect, and without it, the DeCosters' claims fail at the outset.

1. The DeCosters are incorrect in suggesting that they did not have a culpable mental state. The district court made "factual finding[s] that the defendants had relevant knowledge of their strict liability crimes," Add. 30, which "distinguish this case from [that of] a mere unaware corporate executive." Add. 47.

First, the district court found that the DeCosters had "knowledge of the insanitary conditions at Quality Egg." Add. 30; *see also* Add. 31 n.17, 43. Defendants knew that—at least from early 2006, and continuing through the 2010 outbreak—Quality Egg's barns and hens had repeatedly tested positive for *Salmonella* and that these positive results had "'increased in frequency.'" Add. 43; *see* PSRs ¶¶17-19. Indeed, defendants themselves stipulate that they "often received copies of, or were made aware of, positive SE environmental test results" at their company. Add. 85. The court further found that, based on this knowledge, the DeCosters were aware of the risk that their eggs had become contaminated with *Salmonella*. *See* Add. 31 n.17 ("defendants had knowledge of … the increased risk that their shell eggs were contaminated with SE"); Add. 41 (similar). The DeCosters again essentially admit the same. *See* Def. Br. 65 (acknowledging the "increased risk of contamination revealed by the positive environmental SE tests").

The district court further found that the DeCosters not only were conscious of these risks, but understood what needed to be done to address them. In particular, the DeCosters knew from decades of experience in Maine that a rigorous program of testing, cleaning, vaccinations, manure removal, and rodent control could succeed in virtually eliminating *Salmonella* enteritidis from the environment. Add. 27, 41, 81; PSRs ¶¶20-21. Indeed, Quality Egg's own food-safety plans included written protocols that purportedly required just such testing, cleaning, and vaccination. PSRs ¶¶26, 36-39; *see also* PSRs ¶75 (undisputed expert opinion that "Quality Egg knew of

the prevailing industry standards for preventing and controlling SE" because its "[w]ritten documentation … met [industry] standards"); Gov't App'x 65-66.

Yet Quality Egg did not follow its own plans. *See, e.g.*, PSRs ¶¶35, 38 (Quality Egg did not follow key aspects of its biosecurity plans); *id.* ¶36 ("The SE Testing Protocols identified in the [Hazard] Plan also were not followed."); *id.* ¶37 (company had "lax pest control program" between 2006 and 2009); *id.* ¶39 (trucks were not cleaned and inspected, and customers "received egg shipments that were damaged by rodents and infested with flies"; Peter DeCoster was "aware of these problems but did not implement remedial measures"). The district court thus found that the DeCosters "did not minimize SE contamination in their plants, despite having knowledge of how to effectively deal with SE contamination." Add. 41.

Collectively, these findings demonstrate that the DeCosters knew of widespread *Salmonella* contamination at their facilities; understood the risks to the safety of the foods they produced; knew how to address these risks; and yet disregarded the risks by failing to take appropriate remedial and preventative measures. The district court correctly regarded this behavior as "culpable." *Cf.* Add. 25; Gov't App'x 276.

2. The DeCosters also assert that it would be unconstitutional to sentence a person to jail unless the person "personally participated in the company's violation." Def. Br. 1. As explained below, no such limitation exists. In any event, the DeCosters' pervasive assumption that this case involves the application of purely

"supervisory" or "vicarious" liability is simply incorrect. Liability under the responsible-corporate-officer doctrine is not "based solely on the defendant's position in a company," Def. Br. 22, but rather rests on a demonstration that the defendant had the "responsibility and authority" to prevent or correct the corporate violation and yet "failed to do so." *United States v. Park*, 421 U.S. 658, 673-74 (1975). *See infra* p. 50. And here, the district court found that the DeCosters themselves engaged in wrongful acts and omissions, *see* Add. 37-38, and it was this conduct that resulted in the introduction of adulterated eggs into interstate commerce.

The DeCosters exercised decisionmaking responsibility and authority over food-safety matters. Jack DeCoster, the owner and operator of Quality Egg, was "'the person ultimately responsible for the operations of Quality Egg and the various egg facilities in Iowa associated with Quality Egg.'" Add. 37-38. Among other things, Jack decided "which barns would be subject to SE environmental testing," and decided when and whether to hire outside advisers. PSRs ¶¶21, 36. Peter DeCoster, as chief operating officer, "was 'one of the persons responsible for running the operations of Quality Egg and [its] various [associated] egg facilities.'" Add. 37-38. Among other things, Peter decided "when flocks should be moved into or out of pullet houses or layer barns," PSRs ¶36, and coordinated many of the company's *Salmonella*-prevention and rodent-control efforts, *see, e.g.*, Def. App'x 34, 59, 61. Moreover, as previously noted, both defendants were informed on a regular basis of "positive SE test results as they were received," PSRs ¶19, and had the authority to

decide how to respond. The DeCosters themselves assumed an operational duty to ensure the safety of the foods produced by their company.

The DeCosters failed to discharge that duty. They could have acted, as they did in Maine, to prevent the *Salmonella* contamination at their facilities from spreading to the eggs themselves. At a minimum, they could have acted to ensure that any contaminated (or potentially contaminated) eggs would not be distributed to consumers, but would instead be diverted or destroyed. But the DeCosters generally failed to take these steps, even though the company's own written plans required the "diversion of eggs in the event of a[n] SE[-]environmental positive." Def. App'x 40. Instead, the DeCosters caused the company to continue processing, packing, and shipping eggs as it always had done, thereby creating a public-health disaster that sickened tens of thousands of people. The DeCosters are accountable for their conduct, and it is for their own culpable acts and omissions that they are held responsible—not for the ministerial actions of line employees in packaging and shipping the eggs.

B. The Eighth Amendment Does Not Immunize The DeCosters From Custodial Sentences.

Particularly in light of the factual findings described above, the DeCosters' constitutional arguments are plainly without merit. The Constitution does not prohibit custodial sentences against persons who know that a business under their direction is creating a serious risk to public health and safety, yet fail to take the steps necessary to prevent this risk from manifesting itself in injuries to tens of thousands of people. Even absent the extensive proof of the DeCosters' own blameworthiness, however, the Eighth Amendment would not forbid the short jail sentences that Congress expressly authorized and that the district court imposed.

1. "[T]he Eighth Amendment contains a narrow proportionality principle" that "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Graham v. Florida*, 560 U.S. 48, 59-60 (2010) (some quotation marks omitted); *see also Ewing v. California*, 538 U.S. 11, 23 (2003). "To determine whether a sentence is grossly disproportionate," a court "examine[s] 'the gravity of the offense compared to the harshness of the penalty.'" *United States v. Lee*, 625 F.3d 1030, 1037 (8th Cir. 2010). The Court may consider "the harm caused or threatened to the victim or to society, and the culpability and degree of the defendant's involvement." *United States v. Wiest*, 596 F.3d 906, 911-12 (8th Cir. 2010). The Court may also consider a defendant's history of prior offenses, felony or otherwise. *See Lee*, 625 F.3d at 1037-38 (prior felony); *United States v. Weis*, 487 F.3d 1148, 1152-54 (8th Cir. 2007) (prior

aggravated misdemeanor); *Ramos v. Weber*, 303 F.3d 934, 938 (8th Cir. 2002) (prior misdemeanors).[6]

The Supreme Court has also considered whether certain sentencing practices are categorically disproportionate as applied to certain classes of offenders or offenses. *See, e.g.*, *Graham*, 560 U.S. at 61. In adjudicating a "categorical challenge," the Court "considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice,'" in order "to determine whether there is a national consensus against the sentencing practice at issue." *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005)). The Court also considers "the standards elaborated by controlling precedents"; the text, history, and purpose of the Eighth Amendment; and "whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 61, 67 (quotation marks omitted).

Whatever the method of analysis, it is "'exceedingly rare' for a noncapital sentence to violate the Eighth Amendment." *Lee*, 625 F.3d at 1037. This Court has "never held a sentence within the statutory range to violate the Eighth Amendment." *Vanhorn*, 740 F.3d at 1170. Indeed, this Court has repeatedly stated that "[a] sentence within the statutory range is generally not reviewable by an appellate court." *Id.* (quotation marks omitted); *accord Hutto v. Davis*, 454 U.S. 370, 374 (1982) (per curiam)

[6] Defendants mistakenly contend that only prior felonies may be considered in an Eighth Amendment proportionality analysis. Def. Br. 48. As shown by cases like *Weis* and *Ramos*, this Court has considered both felony and misdemeanor convictions in conducting this review.

("[F]ederal courts should be reluctant to review legislatively mandated terms of imprisonment," and "successful challenges to the proportionality of particular sentences should be exceedingly rare.") (brackets and quotation marks omitted).[7]

2. The DeCosters' short sentences do not rise to the level of cruel-and-unusual punishment. The gravity of their offense; the harm caused to society by their actions; the nature of their culpable knowledge and participation; and their other past misconduct amply justify the modest jail sentences that the district court imposed. As the court held, "even a sentence of the statutory maximum of one year in prison" would not be "'grossly disproportionate' to [defendants'] offense." Add. 36.

First, the harms caused by the DeCosters' actions were substantial. Their company's eggs likely sickened some 56,000 people. PSRs ¶72 n.14; Add. 8 n.7. Although most of those persons probably recovered with few complications, many others had to be hospitalized or suffered long-term injuries. The victim impact statements (attached to defendants' PSRs) attest to a wide variety of harms, including financial hardships and long-term health problems in some instances. Among them is a child who was hospitalized for eight days and nearly died, and whose teeth are now "capped in stainless steel" due to damage caused by life-saving antibiotics. Add. 37

[7] To the government's knowledge, it has been more than a century since the Supreme Court has invalidated a term-of-years sentence under the Eighth Amendment for an otherwise valid crime. *Cf. Weems v. United States*, 217 U.S. 349, 361 (1910) (invalidating fifteen-year, hard-labor sentence imposed for falsification of official document).

n.19.[8] The DeCosters' actions may also have harmed other, more responsible egg producers by reducing consumer confidence in the safety of their products. *Cf. 2010 House Hearing* at 15, 108.

Jack and Peter DeCoster indisputably were "'responsible for the operations of Quality Egg.'" Add. 37-38. Jack DeCoster owned and controlled the company, and Peter DeCoster was its chief operating officer. The DeCosters were uniquely positioned to undertake the necessary measures to ensure that contaminated eggs would not enter the marketplace *en masse*. Quality Egg's introduction of adulterated eggs into interstate commerce was not caused by some random or unauthorized act by another; it was instead caused by defendants' ongoing, systemic failure to ensure the safety of their products on a company-wide scale.

In imposing the DeCosters' sentences, the district court also properly took account of their participation in other wrongful behavior. As the court noted, it had previously sentenced Jack DeCoster for a distinct federal offense based upon violations of federal immigration law. Add. 38 & n.20. The court expressed serious doubt that Jack DeCoster was "somebody who actually learns from his mistakes and tries to correct everything, [when] the presentence report [reflected] just the

[8] The *Salmonella* outbreak that resulted from defendants' violations was so significant that a congressional committee convened a hearing to examine its causes. *See generally 2010 House Hearing*. During that hearing (at which the DeCosters testified under oath), the causes and dire effects of *Salmonella* contamination in eggs, including prior outbreaks that caused deaths, were fully and publicly explored. *See, e.g.*, *id.* at 79.

opposite." Gov't App'x 274. And although Peter DeCoster had no similar criminal history, the court found that he personally had made inaccurate representations to Walmart concerning the safety practices that Quality Egg purportedly employed—safety practices designed specifically to prevent the serious harms that manifested in this case. Add. 45-46.

The court also properly took account of the DeCosters' tacit acceptance or negligent disregard of a striking pattern of willful regulatory evasion by others subject to their oversight. Under the DeCosters' management, Quality Egg supervisors or employees bribed a federal official to release defective eggs into interstate commerce; hid eggs from federal inspectors; systematically mislabeled eggs with false processing or expiration dates; and tampered with electronic detectors designed to identify defective eggs. To the extent this misconduct caused a greater number of defective eggs to be introduced into interstate commerce, it "increase[d] the risk that consumers [would] receive contaminated eggs." PSRs ¶80. The court properly found from this widespread misconduct that the DeCosters "created a work environment where employees not only felt comfortable disregarding [food-safety] regulations and bribing USDA officials, but may have even felt pressure to do so." Add. 45.

3. Where, as here, a "term-of-years" sentence is imposed, the Eighth Amendment analysis is ordinarily undertaken on a case-by-case basis. *Graham*, 560 U.S. at 59-60; *cf. Pepper v. United States*, 562 U.S. 476, 487-88 (2011) ("'[T]he punishment should fit the offender and not merely the crime.'"). Based on the facts

discussed above, the DeCosters' three-month jail sentences are obviously not "grossly disproportionate" to their offenses.

To the extent this Court may approach the question more broadly, it should likewise conclude that the term of imprisonment authorized by Congress under Section 333(a)(1) is constitutional. Where, as here, "a person has been convicted of a crime in accordance with constitutional guarantees, determining the severity of his punishment is, in the first instance, a legislative task." *United States v. Meirick*, 674 F.3d 802, 805 (8th Cir. 2012); *see also Martin*, 677 F.3d at 821 (courts defer to Congress's "substantive penological judgment[s]").

The Eighth Amendment does not preclude Congress from concluding that certain offenses—such as the introduction of adulterated foods into interstate commerce—are so serious as to warrant the possibility of a short term of imprisonment even for unknowing violations. "'[O]bjective indicia of society's standards, as expressed in legislative enactments and state practice,'" reinforce the constitutionality of such punishment. *Graham*, 560 U.S. at 61. "[L]egislatures, especially in the 20th and 21st centuries, have often undertaken to impose criminal liability for conduct unaccompanied by fault," and on occasion have imposed "quite severe" punishments. Wayne R. LaFave, *Criminal Law* 288-89, 293 & n.19 (5th ed. 2010). Courts, in turn, have recognized that it is within the legislature's prerogative to authorize a short term of imprisonment for public-welfare offenses, even where the

statute incorporates no *mens rea* element. *See, e.g.*, *United States v. Ayo-Gonzalez*, 536 F.2d 652, 661 (5th Cir. 1976).

The existence of imprisonment as a possible sanction for violations of the FDCA also plainly "serves legitimate penological goals." *Graham*, 560 U.S. at 67. If corporate officers know that jail time is possible, they will be far less likely to treat the prospect of liability as a mere cost of doing business. Indeed, Congress authorized imprisonment under the FDCA in an effort to counteract this problem. *See United States v. Dotterweich*, 320 U.S. 277, 283 n.2 (1943) (Congress "'increase[d] substantially the criminal penalties'" so that sanctions are not merely "'a license fee for the conduct of an illegitimate business'") (quoting H.R. Rep. No. 75-2139, at 4 (1938)); S. Rep. No. 73-493, at 20 (1934) (under old food-and-drug law, businesses had "regard[ed] an occasional small fine as an inexpensive license to carry on their illicit operations").

Ensuring a strong deterrent effect is particularly important for laws like the FDCA, which regulates products that are "largely beyond self-protection" for consumers. *Dotterweich*, 320 U.S. at 280. Consumption of an adulterated food or drug may have serious, even fatal, consequences, yet is often difficult or impossible for the public to identify or avoid. Aware of this problem, Congress decided that "'the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors.'" *Park*, 421 U.S. at 671 (quoting *Smith v. California*, 361 U.S. 147, 152 (1959)). Echoing this concern, the Supreme Court has explained that, although "[t]he requirements of foresight and vigilance imposed on responsible

corporate agents [by the FDCA] are beyond question demanding," these requirements "are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public." *Id.* at 672; *see also Dotterweich*, 320 U.S. at 285 ("Balancing relative hardships, Congress has preferred to place [the burden] upon those who have at least the opportunity of informing themselves" of the problem, "rather than to throw the hazard on the innocent public who are wholly helpless.").

The arguments that the DeCosters and their amici advance in seeking reversal of their sentences only underscore the wisdom of Congress's judgment. The DeCosters protest that they did not know that their eggs were contaminated with *Salmonella*, and thus lacked either an "intent or motive" to ship contaminated eggs in commerce. Def. Br. 46-48. But the DeCosters lacked that knowledge only because, with one exception, they never attempted to acquire it.[9] Food-borne illness remains a major threat to public health and safety in part because the presence of microbiological contaminants is often not readily apparent. If this Court adopted defendants' argument, corporate executives would have an incentive to insulate themselves from knowledge concerning the integrity of their products, thereby

[9] In 2009, FDA advised of a *Salmonella* outbreak at a restaurant to which Quality Egg supplied eggs. DCD 98, at 2. Peter DeCoster ordered egg testing, which came back negative. *E.g.*, Gov't App'x 235. The DeCosters otherwise conducted no egg testing prior to July 2010. Add. 9.

ensuring that, if ever prosecuted, they would at most be required to pay a fine. Congress avoided this problem by giving corporate officers a robust incentive to seek out information concerning the safety of their products, and to ensure that any products that prove to be adulterated or misbranded will not be distributed to consumers. *See Park*, 421 U.S. at 672 (FDCA imposes "positive dut[ies] to seek out and remedy violations" and "to implement measures that will insure that violations will not occur"). And the prospect of imprisonment can often provide a more effective deterrent where lesser sanctions will not suffice. Congress's decision to allow jail time under Section 333(a)(1) is entirely reasonable and merits utmost deference. *See, e.g.*, *Ewing*, 538 U.S. at 28; *Martin*, 677 F.3d at 821.

4. The consistency of the DeCosters' sentences with the Eighth Amendment is also underscored by historical practice. Contrary to defendants' representations (Def. Br. 38-39), there is a significant history of responsible corporate officers and other defendants serving jail time for FDCA violations.

The district court addressed several recent instances in its sentencing opinion. For example, in 2011, four corporate executives received jail sentences ranging from five to nine months for FDCA misdemeanors, notwithstanding the executives' assertions that they lacked knowledge of relevant wrongdoing. *See United States v. Bohner*, No. 2:09-cr-403 (E.D. Pa. Dec. 13, 2011) (eight-month sentence); *United States v. Higgins*, No. 2:09-cr-403, 2011 WL 6088576, at *13-14 (E.D. Pa. Dec. 7, 2011) (nine months); *United States v. Huggins*, No. 2:09-cr-403 (E.D. Pa. Nov. 21, 2011) (nine

months); *United States v. Walsh*, No. 2:09-cr-403 (E.D. Pa. Nov. 22, 2011) (five months). And in *United States v. Hermelin*, No. 4:11-cr-85 (E.D. Mo. Mar. 11, 2011), a corporate executive received a thirty-day sentence—later reduced to seventeen days—for his company's sale of misbranded drugs, notwithstanding his lack of knowledge.

The prospect of jail time is not new. Since the enactment of the FDCA, a great number of defendants—many of them responsible corporate officers—have received custodial sentences for strict-liability violations. *See, e.g.*, *United States v. Shapiro*, 491 F.2d 335, 336-37 (6th Cir. 1974) (per curiam) (upholding probation revocation and six-month sentence against company president who failed to remedy "unsanitary conditions in a vermin infested plant"); *Rich v. United States*, 389 F.2d 334, 335 (8th Cir. 1968) (affirming strict-liability conviction and one-year sentence against person who sold unlawful drugs); *United States v. Siler Drug Store Co.*, 376 F.2d 89, 89 (6th Cir. 1967) (per curiam) (affirming one-year sentence against company president and employee for selling misbranded drugs); *Lelles v. United States*, 241 F.2d 21, 23 (9th Cir. 1957) (affirming eighteen-month sentence against owner of company that distributed adulterated food; defendant had committed prior misdemeanor); *United States v. Kocmond*, 200 F.2d 370, 374 (7th Cir. 1952) (affirming nine-month sentences against individuals for selling misbranded horse meat); *United States v. Greenbaum*, 138 F.2d 437, 438 (3d Cir. 1943) (noting three-month sentence against corporate president for

misdemeanor of selling rotten eggs).[10]

Nor are custodial sentences for strict-liability offenses limited to violations of the FDCA. *See, e.g.*, *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991) (upholding, against constitutional challenge, jail sentence for strict-liability offense of unloading fish without a permit); *McQuoid v. Smith*, 556 F.2d 595, 597-99 (1st Cir. 1977) (upholding one-year sentence for strict-liability offense of possession of unregistered firearm); *Rogers v. United States*, 367 F.2d 998 (8th Cir. 1966) (upholding conviction, with ninety-day sentence, for strict-liability violation of Migratory Bird Treaty Act).

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[10] *See also, e.g.*, *United States v. Haga*, 821 F.2d 1036 (5th Cir. 1987) (ninety-day sentence for misdemeanor distribution of misbranded drugs); *United States v. Cohen*, FDA Notices of Judgment—Food ("F.N.J.") No. 26,766 (D.N.J. 1959) (three-month sentence, upon revocation of suspended sentence, for shipping adulterated eggs); *United States v. Hohensee*, 243 F.2d 367 (3d Cir. 1957) (year-and-a-day sentence for strict-liability felony distribution of misbranded drugs; *cf.* FDA Notices of Judgment—Drugs and Devices ("D.D.N.J.") No. 5385 (M.D. Pa. 1955)); *V.E. Irons, Inc. v. United States*, 244 F.2d 34 (1st Cir. 1957) (one-year sentence for distributing misbranded food and drugs); *United States v. H. Wool & Sons, Inc.*, 215 F.2d 95 (2d Cir. 1954) (six-month sentence against corporate manager for selling underweight butter; *cf.* F.N.J. No. 22,310 (S.D.N.Y. 1953)); *United States v. Kaadt*, 171 F.2d 600 (7th Cir. 1948) (one-year sentences against responsible corporate officers for distributing misbranded drugs; *cf.* D.D.N.J. No. 2578 (N.D. Ind. 1948)); *United States v. Catania Importing Co.*, F.N.J. No. 7876 (D. Mass. 1945) (three-month sentence against treasurer/manager of corporation for adulteration and misbranding of oil); *United States v. Robinson*, F.N.J. No. 9695 (N.D. Ohio 1946) (six-month sentence for adulteration and misbranding of cocoa); *United States v. New Essential Cheese Cake Co.*, F.N.J. No. 4919 (E.D.N.Y. 1943) (three-month sentences against corporate officers for shipment of adulterated cheesecake); *United States v. Maltese*, F.N.J. No. 4480 (E.D.N.Y. 1942) (three-month sentence for adulteration and misbranding of oil). FDA Notices of Judgment are available at https://ceb.nlm.nih.gov/fdanj/.

5. The DeCosters argue that their sentences violate the Eighth Amendment because their offenses "were not characterized by any degree of intent or motive." Def. Br. 46 (emphasis omitted). But "intent" or "motive" is obviously not a constitutional prerequisite to imprisonment. Legislatures can, and routinely do, provide for imprisonment as to crimes that require a lesser showing of *mens rea*—such as knowledge, recklessness, or negligence—without implicating any constitutional concern. Indeed, the Supreme Court and this Court have repeatedly construed criminal statutes to impose strict liability even in instances where violators could be subject to terms of imprisonment. *See, e.g.*, *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563-65 (1971); *United States v. Freed*, 401 U.S. 601, 607-10 (1971); *United States v. Balint*, 258 U.S. 250, 252-54 (1922); *Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960). In any event, where, as here, defendants were not free from personal fault—as the DeCosters themselves all but acknowledge, *cf.* Def. Br. 48 (conceding at least "*de minimis*" culpability)—the alleged lack of an even higher degree of *mens rea* can hardly serve to preclude the modest sentence imposed here.

The DeCosters' assertions that *Salmonella* bacteria are "ubiquitous," Def. Br. 6, 46, 64, similarly fail to advance their argument. The fact that it may be difficult to ensure that every egg is free from bacterial contamination cannot excuse the DeCosters' failures to take even basic steps to mitigate serious risks to public health

and safety.[11] Tellingly, the DeCosters do not argue that they were "'powerless'" to prevent their company's violations of the FDCA, nor do they argue that it would have been "objectively impossible" to do so. *Park*, 421 U.S. at 673. Indeed, the DeCosters' success in minimizing *Salmonella* at their Maine facilities underscores the seriousness of their lapses in Iowa.

C. Defendants' Sentences Do Not Violate The Due Process Clause.

In their opening brief, the DeCosters argue that their sentences violate principles of substantive due process. Def. Br. 26-43. This challenge is both misconceived and meritless.

1. As an initial matter, the DeCosters' argument looks to the wrong constitutional provision. Defendants do not deny that their conduct was properly made criminal or that Section 331(a) is constitutional. Nor do they argue that the procedures used to convict them were constitutionally defective. They instead challenge only the nature and degree of the punishment imposed against them.

"Where 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." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (quotation marks omitted); *see also Graham*, 490 U.S. at 395. Here, the

[11] Congress has provided that "minor violations" of the FDCA need not be referred for prosecution where a written notice or warning would suffice. 21 U.S.C. § 336.

DeCosters' assertion that their punishment is disproportionate to their offense implicates the safeguards of the Eighth Amendment, which prohibits "cruel and unusual punishment[]." Accordingly, their constitutional arguments are governed by the Eighth Amendment. If they cannot prevail under that framework, they cannot turn to the Due Process Clause for a second bite at the constitutional apple.

The Supreme Court has already rejected the notion that the deprivation of liberty attendant to criminal sentencing necessarily implicates substantive-due-process principles. In *Chapman v. United States*, 500 U.S. 453, 464-65 (1991), the Supreme Court rejected a due-process challenge to the length of a custodial sentence, explaining that a court may constitutionally "impose[] whatever punishment is authorized by statute," provided that the penalty is "not cruel and unusual" and "not based on an arbitrary distinction that would violate the Due Process Clause." Other courts have squarely rejected efforts to challenge the nature or length of sentences under a substantive-due-process framework. *See Holman v. Page*, 95 F.3d 481, 485 (7th Cir. 1996) (rejecting due-process and equal-protection challenges because "[t]he Eighth Amendment explicitly addresses the constitutionality of punishments"), *overruled on other grounds by Owens v. United States*, 387 F.3d 607 (7th Cir. 2004); *United States v. Marshall*, 908 F.2d 1312, 1320 (7th Cir. 1990) (en banc), *aff'd sub nom. Chapman v. United States*, *supra* (similar); *Wymer v. Workman*, 311 F. App'x 106, 109 n.3 (10th Cir. 2009) (unpublished) (similar); *United States v. Strong*, 40 F. App'x 214, 218 (7th Cir. 2002) (unpublished) (similar).

2. Even if the DeCosters' challenge were governed by due-process principles, their argument cannot succeed. The necessary predicate for a substantive-due-process claim is the deprivation of a "fundamental" right that is "objectively, 'deeply rooted in this Nation's history and tradition,'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), or an "executive abuse of power … which shocks the conscience," *County of Sacramento*, 523 U.S. at 846-47.

The DeCosters cannot make that showing. As noted, the FDCA and other strict-liability statutes have long been punishable with prison sentences. For the same reasons that the DeCosters' sentences do not fall below the "'objective indicia of society's standards,'" *Graham*, 560 U.S. at 61, they similarly do not shock the conscience or violate a purported fundamental right not to be imprisoned for conduct that Congress has properly criminalized. *Cf. McQuoid*, 556 F.2d at 599 ("If, as already determined, the severity and inflexibility of the penalty are not such as to render it cruel and unusual, these qualities do not render it any the more violative of the due process clause.").

3. The DeCosters and amici emphasize the general principle that "crime is 'generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand.'" Def. Br. 26 (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952)). But *Morissette* recognizes an exception to that principle in the class of "public welfare offenses," which "'dispense[] with the conventional requirement for criminal conduct—awareness of some wrongdoing.'" 342 U.S. at 259-60 (quoting *Dotterweich*,

320 U.S. at 280-81). The Supreme Court has often reaffirmed the existence of this class, *see, e.g.*, *Staples v. United States*, 511 U.S. 600, 606-07 (1994) and it has repeatedly interpreted the FDCA to impose strict liability without ever suggesting that, so interpreted, the statute's penalty provisions raise any constitutional concern. *See, e.g.*, *Park*, *supra*; *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91 (1964); *Dotterweich*, *supra*; *cf. Morissette*, 342 U.S. at 254 (recognizing the "wide distribution of harm when those who disperse[] food … d[o] not comply with reasonable standards of quality, integrity, disclosure and care").

Indeed, case law from the statutory-interpretation context underscores the absence of any constitutional problem here. In deciding whether a federal statute contains a scienter element, one factor that courts consider is the maximum penalty for its violation. Where a penalty is "'relatively small, and conviction does no grave damage to an offender's reputation,'" courts generally do not imply a scienter requirement. *Staples*, 511 U.S. at 617-18 (quoting *Morissette*, 342 U.S. at 256). And "short jail sentences" qualify as "relatively small" penalties. *See id.* at 616 ("[T]he cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for *only light penalties* such as fines or *short jail sentences*, not imprisonment in the state penitentiary.") (emphasis added).

This Court has squarely held that jail sentences of one year or less—the range traditionally applicable to misdemeanor offenses—qualify as "relatively small" penalties. *See, e.g.*, *United States v. Flum*, 518 F.2d 39, 43 (8th Cir. 1975) (en banc)

(crime of carrying weapon onto aircraft was strict-liability offense; maximum one-year prison term was "relatively small" penalty); *Holdridge*, 282 F.2d at 310 (statute providing for up to six months' imprisonment was a strict-liability offense and, so construed, "[was] not violative of the due process clause"). As the district court correctly held (Add. 61), the misdemeanor provisions of the FDCA, which provide for a maximum term of imprisonment of "not more than one year," 21 U.S.C. § 333(a)(1), fall within the same category. *See also, e.g.*, *United States v. Unser*, 165 F.3d 755, 763-64 (10th Cir. 1999) (unauthorized use of motor vehicle in wilderness area was strict-liability offense; six months' imprisonment is "relatively small"); *United States v. Erne*, 576 F.2d 212, 215 (9th Cir. 1978) (failure to comply with IRS requirements was strict-liability offense; one-year imprisonment was "not vastly greater than penalties normally associated with other regulatory or public welfare offenses").

Finally, "the proposition that no statute carrying a sanction of up to one year imprisonment could constitutionally rest upon a strict liability theory" is also "amply refute[d]" by longstanding precedent upholding the constitutionality of strict-liability statutes imposing much greater penalties. *Ayo-Gonzalez*, 536 F.2d at 661 & n.22 (citing, *inter alia*, *Freed*, 401 U.S. 601 (possession of unregistered hand grenades; up to ten years); *Balint*, 258 U.S. at 250 (unlawful drug sale; five years)). *See also, e.g.*, *United States v. Wilcox*, 487 F.3d 1163, 1168-69 (8th Cir. 2007) (upholding nine-year sentence for strict-liability sexual-abuse crime against due-process challenge); *United States v.*

Ransom, 942 F.2d 775, 776-77 (10th Cir. 1991) (upholding eleven-year sentence for statutory rape).

4. The DeCosters fare no better in arguing that their convictions rest on a form of "vicarious" liability as to which the Due Process Clause purportedly precludes imprisonment. As already explained above, the district court found that the DeCosters themselves engaged in wrongful acts and omissions.

More generally, the DeCosters are incorrect in asserting that liability under the responsible-corporate-officer doctrine "imposes individual criminal liability based solely on the defendant's position in a company." Def. Br. 22. A corporate agent is not liable based on his position or title. Rather, liability attaches where a defendant, "by reason of his position in the corporation," possesses the "responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of," and yet "fail[s] to do so." *Park*, 421 U.S. at 673-74. It is this "failure … to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute" that "furnishes a sufficient causal link" to hold the defendant personally liable. *Id.* In other words, the responsible-corporate-officer doctrine does not "impute" liability to one who is otherwise blameless (*cf.* Def. Br. 25), but rather punishes "neglect" or "inaction" where "the law requires care … [or] imposes a duty." *Park*, 421 U.S. at 671; *see also, e.g.*, *United States v. Gel Spice Co.*, 601 F. Supp. 1205, 1211-12 (E.D.N.Y. 1984), *aff'd*, 773 F.2d 427 (2d Cir. 1985).

This principle differentiates this context from the authorities on which the DeCosters rely. Defendants place principal weight on *Lady J. Lingerie v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), which stated that "due process *at least* requires individualized proof of intent *or* act" when imprisonment is at stake. *Id.* at 1368. But that case concerned an ordinance that "ma[de] owners of adult entertainment establishments criminally liable for acts committed by their servants, agents and employees" by "imput[ing]" the acts to the owners, *id.* at 1367—an instance of true vicarious liability.

To the extent that the Eleventh Circuit purported to address broader questions, its decision lacks persuasive force. As that court recognized, both strict-liability and vicarious-liability offenses may carry prison terms in some instances. *See id.* Yet the court summarily, and categorically, concluded that the coexistence of both doctrines automatically renders unconstitutional any sentence of imprisonment, but not other forms of punishment. *Id.* at 1367-68. No precedent supports this conclusion.

The DeCosters' reliance on certain state constitutional decisions is also misplaced. The principal cases invoked by defendants—*State v. Guminga*, 395 N.W.2d 344 (Minn. 1986); *Davis v. City of Peachtree City*, 304 S.E.2d 701 (Ga. 1983); and *Commonwealth v. Koczwara*, 155 A.2d 825 (Pa. 1959)—involved statutes imputing criminal liability to the operators of retail establishments based on an employee's sale of alcohol to minors. As with *Lady J. Lingerie*, those statutes are not analogous here. The district court did not "impute" liability to the DeCosters for a "mistake in

judgment" by line-level employees; it held them accountable for the DeCosters' own disturbing acts and omissions. And the fourth case invoked by defendants, *People v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474 (N.Y. 1918), did not decide the constitutionality of imprisonment, but instead expressly "le[ft] that question open." *Id.* at 477; *see* Add. 64-65 & n.40.

II. Defendants' Sentences Are Both Procedurally And Substantively Reasonable.

The DeCosters also urge that the district court committed procedural or substantive error. Defendants are wrong on both counts.

The Court "'first ensure[s] that the district court committed no significant procedural error.'" *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)). "'Procedural error' includes 'failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence[.]'" *Id.* The Court then "'consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.'" *Id.* The Court "'take[s] into account the totality of the circumstances,'" *id.*, but affords the sentencing court wide latitude in weighing the relevant considerations. *United States v. Borromeo*, 657 F.3d 754, 757 (8th Cir. 2011). A sentence is not unreasonable merely because a

different judge might weigh the factors differently. *United States v. Scott*, 732 F.3d 910, 918-19 (8th Cir. 2013).

A. The district court's sentence was procedurally reasonable. The court correctly calculated the guidelines range; expressly considered the § 3553(a) factors; and provided a thorough explanation for its sentence. The DeCosters argue only that two of the court's factual findings were clearly erroneous. They are incorrect.

1. First, the DeCosters seize upon the district court's passing reference to "Quality Egg's decisions to ignore the SE test results." Add. 44. They assert that this statement is inaccurate to the extent that it implies that the DeCosters "'ignore[d]' the uptick in positive environmental SE tests in 2010." Def. Br. 55. They assert that, at least during 2010, Quality Egg "responded" to these test results by "thoroughly cleaning its barns," "administering a second *Salmonella* vaccine to its chickens," "implement[ing] a comprehensive pest control regime," and "stepp[ing] up its SE testing," among other alleged actions. Def. Br. 56-57.

The DeCosters fail to show any error, much less clear error, in the district court's discussion of the record. Although defendants' criticism focuses solely on events in 2010, the court's statement was not so limited. The paragraph containing the challenged statement began by emphasizing that the DeCosters had been "'generally aware of … positive SE test results" from "early 2006 to 2010," Add. 43, and then noted that Quality Egg "did not test or divert eggs from the market" during

that time, Add. 44. The DeCosters do not contend that the court's statement is inaccurate as to their pre-2010 conduct.

In any event, the district court could have fairly concluded that the DeCosters effectively "ignore[d]" the *Salmonella* problem even during 2010. For example, the grossly insanitary conditions observed by FDA officials in August 2010 belie defendants' assertions that they had engaged in "thorough[] cleaning" of their facilities or had "implemented a comprehensive pest control regime." *Cf.* Def. Br. 56-57.

Aside from defendants' own assertions, *see* Def. Br. 11-12, 14 (citing DCD 99 (Jack DeCoster sentencing memorandum)), their evidence about alleged remedial actions taken in 2010 largely comes from written declarations signed in 2014 by Quality Egg's outside consultants. *See* Def. Br. 11-14, 57-58 (citing DCD 100). In these declarations, Dr. Hofacre and Dr. Nolan declared that Quality Egg followed "all" their recommendations. *See* Gov't App'x 37, 48, 50. Yet the DeCosters later disavowed these declarations, stipulating that "neither Dr. Charles Hofacre nor Dr. Maxcy Nolan has a basis to testify that Quality Egg fully and effectively implemented all of [their respective] recommendations." Add. 81. The district court did not clearly err in finding that this contradiction seriously undermined the credibility of the consultants' written declarations. Gov't App'x 218-19.[12]

[12] Dr. Hofacre's declarations contain other incorrect or dubious statements. For instance, he avowed that "there was no evidence that the SE was in the birds or was in the environment" and that "Quality Egg did not start receiving positive

Continued on next page.

Little else in the record supports the DeCosters' assertions concerning remedial efforts prior to August 2010. For example, Quality Egg was unable to furnish any documentation "indicating what was specifically done in response to the [*Salmonella*-positive] necropsies," Gov't App'x 80; PSRs ¶75, or demonstrating that *Salmonella*-positive environments were cleaned and re-tested before placement of new flocks, Gov't App'x 74. There is also no reliable evidence that Quality Egg administered a second vaccine to hens in *Salmonella*-positive barns, *id.* at 73-74, or that they implemented a "comprehensive" pest-control regime, *cf. id.* at 87-90. The court's inference that the DeCosters "ignore[d]" the *Salmonella* problem is thus readily supported by the record. *Cf. United States v. Byas*, 581 F.3d 723, 725 (8th Cir. 2009) (""A district court's choice between two permissible views of the evidence is not clearly erroneous."").

2. The DeCosters fare no better in challenging the court's statement that "[they] failed to follow the methods used at their Maine plants" to resolve the *Salmonella* problems in Iowa, "such as depopulating, cleaning, and retesting the barns." Add. 41. As already discussed, there is scant evidence that the DeCosters implemented in Iowa any—much less all—of the *Salmonella*-prevention measures that they had successfully employed in Maine. *See* PSRs ¶20. At most, the DeCosters

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environmental results until the Spring of 2010," Gov't App'x 36, 38, but it is undisputed that positive tests in both hens and the environment had begun years earlier.

sought to implement only "a number" of their consultants' recommendations, and they concede that neither consultant could fairly testify that Quality Egg "fully and effectively implemented all of" their recommendations. Add. 81. The district court's decision not to credit defendants' assertions about the extent of their remedial efforts in Iowa was correct, and in any event not clearly erroneous.

B. Nor did the district court abuse its discretion in its weighing of the Section 3553(a) factors. The court based its sentences on the seriousness of the offenses, the history and characteristics of the DeCosters, and the need to deter them and other corporate officers from engaging in similar misconduct. Add. 47-48. And the sentences imposed against each defendant—three months in jail, a fine, and one year of supervised release—fall squarely within the guidelines. The sentences may be upheld as "presumptively reasonable" on that basis alone. *United States v. Boneshirt*, 662 F.3d 509, 518 (8th Cir. 2011).

1. The DeCosters complain that the district court faulted them for "fail[ing] to meet a standard of care more stringent than federal regulations required." Def. Br. 2. They assert that "prior to the Egg Safety Rule's effective date, Quality Egg was not required to conduct *any* environmental tests, let alone take any specific measures in response to a positive test." Def. Br. 60.

This argument is insubstantial. It is true that, until 2010, no federal regulations specifically required egg producers to test their barns or eggs for *Salmonella* enteritidis. But the district court did not fault the DeCosters for failing to comply with specific

testing regulations. Rather, they were held liable for their role in causing the introduction of adulterated eggs into interstate commerce. Food producers remain accountable for compliance with Section 331(a) regardless whether FDA has promulgated specific testing requirements with respect to specific contaminants in their specific industry. Indeed, they must take whatever steps may be necessary to ensure that they do not introduce adulterated foods into interstate commerce. The court thus appropriately found it blameworthy that the DeCosters failed to test or divert their eggs when they had every reason to suspect that those eggs could be contaminated with a poisonous substance.

In any event, the DeCosters are wrong to imply that their practices were illustrative of best practice. To the contrary, Quality Egg failed to "comport with industry standards" in many respects, including by failing to test eggs for *Salmonella* where environmental tests came back positive; failing to undertake adequate rodent control; and failing to implement basic biosecurity measures. Gov't App'x 66, 76, 87-88, 96, 102-03; *see, e.g.*, *id.* at 102-03 ("The industry standard for many years has been [to conduct] egg testing if the environment was SE-positive[,] and diversion and further testing if the eggs were SE[-]culture-positive.").

2. Finally, the DeCosters assert that the district court erred in placing weight on "unrelated regulatory violations[] or crimes[] committed by Quality Egg employees." Def. Br. 2. They posit that absent definitive proof that the DeCosters had contemporaneous knowledge of the bribery, mislabeling, and circumvention

schemes engaged in by their subordinates, the court should not have considered this misconduct.

As an initial matter, the district court found that defendants had not properly objected to consideration of these allegedly "unrelated" factors. The DeCosters withdrew almost all of their specific objections to the portions of their PSRs discussing this misconduct. Although they purported to reserve a general right to "object to the relevance of the factual assertions contained in the PSRs," DCD 89, at 1 n.10, the court correctly ruled that such a blanket objection is insufficient. *See* Gov't App'x 200-03. The court similarly found that defendants' sentencing memoranda failed to make objections with the requisite degree of particularity. *See id.* at 202 (finding that the DeCosters "[didn't] actually object to anything specific"); *cf. United States v. Pepper*, 747 F.3d 520, 523 (8th Cir. 2014) (holding that "[a] defendant must object to facts contained in the PSR 'with specificity and clarity'").

In any case, the district court acted well within its discretion. "In sentencing, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Gant*, 663 F.3d 1023, 1029 (8th Cir. 2011) (quotation marks omitted). "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661; *see also, e.g.*, *United States v. Rogers*, 423 F.3d 823, 828 (8th

Cir. 2005) (district court is not limited to considering "relevant conduct" under U.S.S.G. § 1B1.3, but generally may consider "'any information concerning the background, character and conduct of the defendant'").

The district court gave these matters an appropriate amount of weight. The court made clear that it did not view the record as establishing that the DeCosters had contemporaneous knowledge of their employees' wrongdoing, and stated that it would give them "the benefit of the doubt" in this respect. Gov't App'x 322. At the same time, the court properly found that it was irresponsible for the DeCosters to have allowed such "massive circumventi[on] of food safety regulations" to occur under their oversight. *Id.* And in the absence of any evidence that "the offending parties were [ever] disciplined for their actions," it was particularly reasonable for the court to conclude that the DeCosters had "created a work environment" in which employees felt free to engage in misconduct. Add. 45. Defendants thus have failed to carry their heavy burden of showing that the district court abused its discretion in any respect.

CONCLUSION

For the foregoing reasons, the judgments of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 32(a)(5)-(6))

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,995 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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This brief has been scanned for viruses and found to be virus free.

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I hereby certify that on September 18, 2015, I electronically filed the foregoing brief 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.

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STATUTORY ADDENDUM

21 U.S.C. § 331—Prohibited acts.

The following acts and the causing thereof are prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.

. . . .

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21 U.S.C. § 333—Penalties.

(a) Violation of section 331 of this title; second violation; intent to defraud or mislead

(1) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

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21 U.S.C. § 342—Adulterated food.

A food shall be deemed to be adulterated—

(a) Poisonous, insanitary, etc., ingredients

(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health.

. . .

. . . .