

# Food Safety News

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## **Still time for the 9th and 10th justice to weigh in on DeCoster appeal**

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Getting your case heard by the U.S. Supreme Court is a lot like winning an Academy Award for your latest movie. You need to take advantage of any time you have and then go about creating “a buzz” just ahead of the voting.

Whether Austin “Jack” DeCoster, son Peter DeCoster, and their prestigious legal team are doing that or just being lucky is not known. The Iowa egg producers, who were associated with a national salmonella outbreak in 2010, want to stay out of jail by persuading the Supreme Court to rule incarceration for vicarious liability offense violates the U.S. Constitution.

Their attorneys filed a writ of certiorari with the Supreme Court on Jan. 10, asking the Justices to review the Eighth Circuit decision that upheld jail terms for the DeCoster. That Eighth Circuit decision is now said to be in conflict with other appellate court rulings.

For a second time now, Justice Alito has put more time on the clock by extending the deadline for the government to respond to the Jan. 10 writ. The new deadline is April 12. The response will come from Noel Francisco, who President Trump has nominated as U.S. solicitor general.

Francisco has been acting solicitor general since Trump became President. The solicitor general represents the federal government before the Supreme Court, and whoever holds the office is often called “the 10th justice.”

The additional time to respond could mean both Francisco and Judge Neil Gorsuch, Trump’s nominee to become the 9th Justice of the Supreme Court, could be confirmed by April 12th or shortly thereafter to their permanent positions by the U.S. Senate. The 49-year old Gorsuch currently serves on the 10th Circuit Court of Appeals in Denver.

The “buzz” about the appeal comes from outside interest in the issues, including two more amicus curiae filings by major organizations—the Washington Legal Foundation and the National Association of Criminal Defense Lawyers—to the Supreme Court.

They join several more amicus filings from powerhouse organizations that are already included in the Eighth Circuit’s record, which Justices might opt to review. Those include: the Pharmaceutical Research and Manufacturers of America, Chamber of Commerce of the United States, National Association of Manufacturers, and the Cato Institute.

“This case presents important questions regarding the fairness of vicarious criminal liability,” the defense lawyers say. “The Park Doctrine violates the Due Process Clause. It is almost impossible for corporate officers to defend against vicarious criminal liability charges. Convictions for vicarious liability offenses carry serious collateral consequences. At a minimum, it is important for the Court to resolve whether an individual convicted under a vicarious liability theory can be sentenced to a term of imprisonment. Subjecting individuals to prison sentences for the acts and thoughts of others is improper. Imposing prison sentences for vicarious liability offenses is part of a broader over-criminalization trend.”

“Jack” DeCoster was reported to be the nation’s largest egg producer before the 2010 outbreak. Son Peter was chief operating officer of the family-owned Quality Egg LLC. The two men agreed to each accept \$100,000 fines and for the Quality Egg corporation to pay a \$6.8 million fine, but they’ve resisted doing any jail time.

U.S. District Court Judge Mark Bennett sentenced each to serve three months of federal confinement.

Quality Eggs recalled more than a half billion shell eggs during the outbreak –the largest table egg recall in history.

In filing the writ of certiorari, attorneys for the DeCosters argue the high court needs to review the issue because the Eighth Circuit decision conflicts with rulings from other circuits in similar cases. The Eighth Circuit decision “breaks a long tradition of American law,” they argue.