Case No. 11-5028

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL FRIEDMAN, *et al.*
Plaintiffs/Appellants

v.

KATHLEEN SEBELIUS, *et al.*
Defendants/Appellees

On Appeal from the U.S. District Court for the District of Columbia
No. 09-2008 (Hon. Ellen Segal Huvelle)

BRIEF *AMICUS CURIAE* OF ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PLAINTIFFS/APPELLANTS

Susan J. Hackett
Amar D. Sarwal
ASSOCIATION OF CORPORATE
COUNSEL
1025 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036
(202) 293-4103
sarwal@acc.com

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

ARGUMENT 2

I. The Decision Below Misconstrues the Role of an In-house Lawyer By Permitting the Exclusion of the General Counsel on the Basis of the Corporate Client's Wrongdoing 3

II. The Decision Below Will Undermine Corporate Compliance Systems' Capacity to Address Misconduct 6

III. The Decision Below Impermissibly Accords the Secretary with Broad Power to Define, and then Exercise, Exclusion Authority 9

CERTIFICATE AS TO NEED FOR SEPARATE BRIEF

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES[1]

Cases

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 11

Friedman v. Sebelius, 755 F.Supp.2d 98, 111 (D.D.C. 2010) 3, 9, 11

McBoyle v. United States, 283 U.S. 25 (1931) 11

Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 381 (1988) 12

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)... 11

Skilling v. United States, __ U.S. __, 130 S.Ct. 2896, 2932 (2010) 11

United States v. Dotterweich, 320 U.S. 277 (1943)... 12

United States v. *Park*, 421 U.S. 658 (1975)... 12, 13

United States v. Santos, 553 U. S. 507, 514 (2008)... 11

Statutes

42 U.S.C. § 1320a–7(c)(3)(D) 9

42 U.S.C.A. § 1320a-7 10

Other Authorities

From Trusted Counselor to Vigilant Gatekeeper: The Evolving Liability Environment for Corporate Counsel, ACC REPORTS: IN-HOUSE COUNSEL IN THE LIABILITY CROSSHAIRS (2007) (available at http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=15927) 6

[1] Pursuant to Circuit Rule 28(c)(2), ACC represents that there are no authorities upon which this submission principally relies.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Fed.R.App.P. 26.1, and Circuit Rule 26.1, the undersigned counsel states that proposed *amicus curiae* Association of Corporate Counsel ("ACC") is a non-profit corporation; it has no parent corporations; and no publicly-held company has a 10% or greater ownership interest.

Pursuant to Circuit Rule 26.1(b), ACC's general nature and purpose is as follows: ACC is the bar association for attorneys employed in the legal departments of corporations and private-sector organizations worldwide. ACC has more than 27,000 members in over 75 countries, employed by over 10,000 organizations. Advocating on issues of special interest to its members is a core purpose of ACC.

/s/ Amar D. Sarwal
Amar D. Sarwal

STATEMENT OF INTEREST[2]

Association of Corporate Counsel ("ACC") is a bar association for attorneys employed in the legal departments of corporations and private-sector organizations worldwide. ACC has more than 27,000 members in over 75 countries, employed by over 10,000 organizations. It regularly files *amicus curiae* briefs[3] and provides testimony and commentary in matters of special interest to in-house counsel and corporate legal practice.

The application of the Secretary's exclusion authority to the Plaintiffs/Appellants is a matter of direct and immediate concern to ACC's members. Among other things, such application (i) materially interferes with the ability of counsel to obtain employment; (ii) substantially undermines the right and ability of a variety of entities to select legal counsel; and (iii) inappropriately shifts liability and punishment that the government cannot pin on the corporate entity to those who are obliged to provide legal counsel and advocate for their clients' positions.

---

[2] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), ACC represents the following: Neither the party nor party counsel authored the brief in whole or in part. Neither the party nor party counsel contributed money that was intended to fund the preparation or submission of the brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund the preparation or submission of the brief.

[3] On June 8th, 2011, Association of Corporate Counsel filed an unopposed motion for leave for participate as *amicus curiae*.

There is no doubt that individual liability for ***personal*** misconduct is a powerful and useful weapon to deter individuals from threatening the common good. ACC supports appropriate treatment of those who have intentionally violated the law. Our members, and the corporate clients they represent, deserve to work in industries unpolluted by fraudulent and other misconduct. However, excluding corporate officers from careers they have spent lifetimes to develop solely, because they fell on the corporate sword and pled guilty to a strict-liability status misdemeanor based exclusively on the misconduct of others, violates traditional principles of fairness and justice.

ARGUMENT

Without any suggestion of personal misconduct, the Secretary, affirmed by the court below, excluded three senior executives of Purdue Pharma L.P. from participating in the health care industry.[4] To do so, the Secretary relied on impermissibly broad constructions of the relevant statutory provisions. These broad constructions[5] ignore the reality of

---

[4] While ACC supports the vacatur of the Secretary's decision as to all three senior officials, its submission specifically addresses the exclusion of the general counsel, Howard Udell, against the context of the larger in-house legal landscape.

[5] The Appellants' brief effectively explains why the Secretary's interpretation of the relevant statutory provisions finds no home in the text or history of the statute. Brief of Appellants, at 22 to 41.

modern in-house legal practice and the sophistication of internal compliance regimes, while allowing the Secretary to assume largely unreviewable power to both define the scope of her authority and to execute that authority.

I. The Decision Below Misconstrues the Role of an In-house Lawyer By Permitting the Exclusion of the General Counsel on the Basis of the Corporate Client's Wrongdoing

There is absolutely no dispute that, in the underlying criminal case, neither the prosecution nor the Court even suggested that Udell himself engaged in any actual misconduct. Instead, because he fell within the very narrow strict liability standards permitted for misdemeanor violations of the Food and Drug Act, Udell pleaded guilty and admitted that he failed to exercise his "responsibility and authority either to prevent in the first instance or to promptly correct certain [corporate mis]conduct." *Friedman v. Sebelius*, 755 F.Supp.2d 98, 111 (D.D.C. 2010) (quoting plea agreement). In the instant case challenging the Secretary's exclusion of Udell based on this plea, the district court acknowledged the absence of proof or even allegation of personal misconduct, but nonetheless affirmed the Secretary's exclusion decision. This imputation of liability on an in-house attorney for a client's misconduct ignores the traditional boundaries of the attorney-client relationship, threatens to undermine the ability of in-house lawyers to deliver

unvarnished advice to their clients and raises significant due process concerns.

Over the past three decades, the role of in-house lawyers has evolved to respond to the complex regulatory environment in which their corporate clients operate. From increasing demands for sophisticated compliance and reporting systems to rapid internal investigations to address the possibility of corporate wrongdoing to the multiple, overlapping regulators and outside stakeholders requiring immediate attention and resources, in-house counsel now occupy a more prominent role in directing their clients' legal and compliance functions. While these new responsibilities have carried significant burdens, the attendant benefits derived by their corporate clients have been enormous. For instance, no longer must business leaders rely on outside counsel constrained by a limited understanding of the operational issues faced by their firms; instead, senior executives can go down the hall and speak with in-house counsel who retain a deep intimacy with the non-legal side of the house, insight gained from day-to-day collaborations with executives and employees throughout the enterprise.

At the end of the day, however, whether styled as a Chief Legal Officer, General Counsel or otherwise, corporate counsel is a lawyer rendering advice and representing his or her client. Imposition of liability on

such legal advisor based not on personal misconduct but on the wrongdoing of the corporate client ignores that traditional, and critical, distinction. A lawyer is charged by well-established ethical rules to represent his or her client without personal conflict of interest. This is essential to their ability to provide objective legal advice. If, however, such a lawyer is haunted by the specter of the loss of his or her career because of the actions of the client, that lawyer, however well-intentioned, can no longer provide untainted advice. Instead, personal concerns might varnish the advice and counsel provided to the client. Even if the lawyer avoids such bias, the corporate client – recognizing the potential for such self-interest – might rely less on that lawyer's advice regarding its most significant internal issues.

It must be clear that if this outcome were driven by active wrongdoing by the in-house lawyer himself, ACC would not quarrel with that decision and would support it in the same way that outside counsel would face consequences if he or she engaged in active wrongdoing. However, the government's new emphasis in targeting only in-house lawyers for the wrongdoing of their clients is counterproductive and could be seen by some as targeting lawyers to the detriment of their clients. *See generally From Trusted Counselor to Vigilant Gatekeeper: The Evolving Liability Environment for Corporate Counsel*, ACC REPORTS: IN-HOUSE COUNSEL IN

THE LIABILITY CROSSHAIRS (2007) (available at http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=15927). The lawyer-client relationship is at the center of the American conception of the rule of law and the adversarial model, because it allows a client access to undiluted advice from professionals charged by the highest ethical standards. Exclusion due to a status-based crime threatens that access and should be resisted.

II. The Decision Below Will Undermine Corporate Compliance Systems' Capacity to Address Misconduct

Treating the in-house lawyer as yet another target in enforcement efforts, without any proof of individual wrongdoing, will undermine the very corporate compliance systems that in-house counsel have developed in partnership and collaboration with other stakeholders for the past three decades. By excluding corporate counsel who pleaded guilty to a strict-liability status crime based on the misconduct of others, the government will discourage qualified, careful, and circumspect persons from serving as compliance officers, as those persons know that factors beyond their control might prematurely end their careers. Indeed, the specter of exclusion could encourage compliance officers to focus on their own professional survival rather than implementing robust and effective compliance programs.

As the laws governing their clients' enterprises have become more complex, in-house counsel have developed more sophisticated internal compliance, reporting and investigative systems. These systems are designed to expose corporate misconduct and other failures, so that they can be redressed before the underlying matters fester and mushroom into material issues for the company. Common hallmarks of these systems include anonymous reporting hotlines for fraud and other wrongdoing; anti-retaliation protections for whistleblowers; routine compliance training programs for employees across the company, so that they understand relevant regulatory requirements; and regular reports to the board of directors. This is not a complete list and these systems are constantly undergoing significant change in light of new regulatory developments. However, it is clear that these compliance systems have served the needs of corporate executives, regulators and other stakeholders far better than the ad hoc approaches that preceded them.

Naturally, these systems are not turn-key. More than pressing a button, these systems require that their managers carefully and assiduously address the tips derived from internal reporting channels by conducting appropriate internal investigations and then reporting the results to senior executives and the board of directors. The government's effort to target the

managers of these compliance and reporting systems undermines these valuable efforts.

First, lawyers who treasure their careers would refuse to work in industries governed by complex regulatory requirements, any one of which might lead to a status-based misdemeanor charge for a compliance official. Assuming such a career-threatening risk for manning an array of systems designed to uncover fraud and other misconduct would seem perverse to many prospective compliance lawyers. Finding, and then exposing, fraud committed by others would not be an undiluted good, as it should be; instead, it could be the beginning of the end of a career.

Second, senior executives would understand that robust compliance and reporting systems that uncover instances of fraud or other misconduct would place them in a situation where the government could argue that they knew of the underlying problem, but did not do enough to stop it from happening in the first place or did not react as promptly as the government, in hindsight, would prefer. In-house lawyers' decades-long effort to convince senior executives that it is better to learn about an issue before it festers will be devastated. Instead, senior officials will channel reports of wrongdoing elsewhere, hoping that other corporate representatives will feel the sting of the Secretary's exclusion authority.

Simply put, the government's position ignores the reality of the modern workplace, especially of large organizations. Holding senior officials, including in-house lawyers, accountable for the wrongdoing of others might sound good on a government drawing board, but in practice, it will encourage good officials to work in regulatory environments more conducive to long careers. The compliance systems designed by in-house counsel will then be manned by lawyers who will worry daily that they will find something that will lead to their exclusion from the industry. That outcome is unwarranted and unnecessary.

III. The Decision Below Impermissibly Accords the Secretary with Broad Power to Define, and then Exercise, Exclusion Authority.

The district court yielded to the Secretary's broad construction of her power to exclude individuals without any proof of misconduct by the individuals themselves. That deference as to scope of her power, coupled with the broad deference the Secretary retains when exercising her exclusion authority, *see* 42 U.S.C. § 1320a–7(c)(3)(D) and *Friedman*, 755 F.Supp.2d at 117 (noting that statute "leaves the length of exclusion largely to the [Secretary's] discretion"), allows the Secretary to unilaterally increase the scope of her effectively unreviewable authority to exclude. Individuals who find themselves caught in the crosshairs, even though they themselves did

not engage in the underlying misconduct, will have little recourse but to find another career or another industry.

While the plaintiffs-appellants' brief addresses the statutory construction issue more particularly, see Brief of Appellants, at 22-41, an analysis the ACC adopts by reference, it is important to underscore why the Secretary should be denied any expansion of her authority. *First*, interpreting "relating to" in either of the relevant statutory provisions to incorporate what are little more than status-based crimes provides a wide boundary to the types of circumstances that give rise to the Secretary's permissive exclusion authority. Given the harshness of the exclusion penalty, especially to senior corporate officials, who might not have viable options at the end of the exclusion period, the district court's interpretation will expose a greater array of officials to the largely-unreviewable regulatory whims of the government. That outcome could not have been contemplated by Congress, which specifically delineated a long list of applicable grounds for exclusions, without once mentioning anything like status-based crimes. *See* 42 U.S.C.A. § 1320a-7 (listing various grounds for mandatory or permissive exclusion by the Secretary).

Second, while the plain meaning of the relevant statutory terms, aided by traditional canons of statutory interpretation, would deny the Secretary

her hoped-for expansion of exclusion authority, see Brief of Appellants, at 22-41, that reading is confirmed by reference to the traditional rule of lenity. In criminal law, the well-established rule of lenity requires the court to adopt the narrower of the permissible constructions available, due to concerns about fair notice and due process. *See McBoyle v. United States*, 283 U.S. 25 (1931) (Holmes, J.) (noting that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed"); *see also Skilling v. United States*, __ U.S. __, 130 S.Ct. 2896, 2932 (2010); *United States v. Santos*, 553 U. S. 507, 514 (2008). The Secretary's exclusion authority not only arises out of a criminal conviction, but it imposes a harsh penalty on its subjects, no less severe than a criminal fine. Simply put, the loss of a career, developed over a lifetime, cannot be understated in terms of the impact it imposes. The Secretary's exclusion authority should therefore not be read in light of cases interpreting express preemption language, *e.g.* the district court's reliance on *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), *see Friedman*, 755 F.Supp.2d at 107-8, but rather in light of the quasi-criminal nature of the authority itself.

Third, the Secretary should not receive deference pursuant to *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), as to the

scope of her exclusion authority. Not only is it an open question in the Supreme Court as to whether an agency should even receive deference when its scope of power is at issue, *compare Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment) (indicating that "the rule of deference applies even to an agency's interpretation of its own statutory authorization or jurisdiction") *with id.* at (Brennan, J., dissenting) (noting "agency's institutional interests in expanding its own power"), but the Secretary in this case should decidedly not get deference where a quasi-criminal penalty is at stake and the statutory regime permits so much deference as to the actual penalty itself. To do otherwise would make the Secretary the judge, the jury and the executioner with an individual's career in her hands.

Finally, exercise of such broad, unfettered power by the Secretary calls into question the very reasoning underlying *United States* v. *Park*, 421 U.S. 658 (1975) and *United States v. Dotterweich*, 320 U.S. 277 (1943). The Supreme Court permitted such strict liability based, in significant part, on the fact that the conviction was a misdemeanor, leading to relatively limited consequences. It has never broadened that *mens rea* exception to include felony convictions of individuals. The Secretary's decision fundamentally transforms the consequences of such a conviction to a

dimension never considered by the Supreme Court. Accordingly, there is still a substantial and open due process question whether the *Park* doctrine would still apply when the collateral consequences become Draconian.

* * *

ACC and its members strongly support the government's efforts to root out fraud and abuse from federal programs by excluding wrongdoers from participating. Bad actors who take advantage of the public trust should not be permitted a second bite of the apple. Treating those whose primary role is to advise and represent as if they had engaged in the misconduct or were direct supervisors of those engaging in the misconduct violates traditional principles of fair play and justice and seriously distorts the critical attorney/client relationship central to the justice system.

For this and the other foregoing reasons, the decision below should be reversed and the case remanded with instructions to vacate the Secretary's decision to exclude the plaintiffs-appellants.

/s/ Amar D. Sarwal
Susan J. Hackett
Amar D. Sarwal
ASSOCIATION OF CORPORATE COUNSEL
1025 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036
(202) 293-4103
sarwal@acc.com

Dated: June 28, 2011

CERTIFICATE AS TO NEED FOR SEPARATE BRIEF

Pursuant to Circuit Rule 29(d), the undersigned counsel believes that a separate brief is necessary for the following reasons:

First, the application of the Secretary's exclusion authority to the Plaintiffs/Appellants is a matter of direct and immediate concern to ACC's members. Among other things, such application (i) materially interferes with the ability of counsel to obtain employment; (ii) substantially undermines the right and ability of a variety of entities to select legal counsel; and (iii) inappropriately shifts liability and punishment that the government cannot pin on the corporate entity to those who are obliged to provide legal counsel and advocate for their clients' positions. No other party nor any other organization can appropriately advance these concerns.

Second, ACC's submission uniquely tackles the real world impact of the Secretary's overly broad conception of her own exclusion authority. That approach will aid the Court in understanding that, not only is her statutory interpretation groundless as a matter of text and history, but it also flies in the face of how regulated entities and individuals engage in their day-to-day practice.

/s/ Amar D. Sarwal

Amar D. Sarwal

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties and *Amici*. All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellants.

Rulings Under Review. References to the rulings at issue appear in the Brief for Appellants.

Related Cases. Counsel is aware of no other related cases.

/s/ Amar D. Sarwal
Amar D. Sarwal

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because the brief contains 2,744 words, excluding the parts exempted by operation of the rules.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2011 version of Microsoft Word in 14-point Times font.

/s/ Amar D. Sarwal
Amar D. Sarwal

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 28th day of June, 2011, I caused true and correct copies of the foregoing BRIEF *AMICUS CURIAE* OF ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PLAINTIFFS/APPELLANTS to be served via electronic mail upon all counsel of record, by operation of the Court's ECF system, except the following attorneys, upon whom a paper copy of the foregoing brief was served by operation of First Class Mail:

Mr. Jonathan L. Abram
Hogan Lovells US LLP
555 13th Street, N.W.
Washington, DC 20004-1109

Mr. Daniel J. Popeo
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, DC 20036-0000

I further certify that on this 28th day of June, 2011, I caused five copies of the foregoing BRIEF *AMICUS CURIAE* OF ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PLAINTIFFS/APPELLANTS to be sent, via First Class Mail, to the Clerk of the United States Court of Appeals for the District of Columbia Circuit.

/s/ Amar D. Sarwal
Amar D. Sarwal