IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BART B. CHAMBERLAIN, JR., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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The Chamber of Commerce of the United States of America and the American Corporate Counsel Association file this brief as *amici curiae* in support of Petitioners and respectfully urge this Court to issue a writ of certiorari.[1]

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36.1. The parties' consent letters have been filed with the Clerk of this Court.

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("Chamber") is the nation's largest federation of businesses, representing more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. As a leading advocate of business, the Chamber is greatly and directly concerned when the corporation—the dominant and most productive form of economic enterprise in the United States—is threatened, as it is in this case. The opinion below endangers the very foundation of the corporate form: limited liability. Therefore, the Chamber has a vital interest in addressing the issue of limited liability presented in this case.[2]

The American Corporate Counsel Association ("ACCA") is composed of attorneys who are engaged in the active practice of law as employees of corporations, partnerships or other organizations in the private sector. ACCA has approximately 7,000 members who are employed as corporate counsel by some 3,000 organizations. As counsel to corporate management, the members of ACCA are also concerned when the corporate form is threatened. Furthermore, they are directly concerned when the capacity of legal counsel to advise their corporate clients and the efficacy of seeking out such advice is undermined, as it is by the decision below.

It is now, and has been for several decades, generally recognized that the corporation is the primary form of

[2] While a second issue is before the Court in this case, this brief is submitted solely on the issue of a corporate officer's personal liability for the corporation's regulatory violation.

The Chamber has previously voiced its concern on the issue of limited liability by filing an *amicus* brief in support of Petitioners in the proceeding below and in *Connors* v. *P & M Coal Co.*, 801 F.2d 1378 (D.C. Cir. 1986).

business enterprise and production in the United States.[3] In fact, the unparalleled growth of the American economic system has depended in large part upon the concurrent development of the modern corporation. Today there are approximately 2,711,000 corporations in the United States.[4] Essential to the corporation's preeminence as a form of economic enterprise is the feature of limited liability.[5]

The doctrine of limited liability provides that, with few exceptions, the corporation itself, rather than its individual shareholders, directors, officers or employees, is solely responsible for corporate liabilities. This Court, in recognizing the importance of the doctrine, has declared that "[l]imited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital are attracted." *First National City Bank* v. *Banco Para El Comercio De Cuba*, 462 U.S. 611, 626 (1983) (quoting *Anderson* v. *Kirkpatrick*, 321 U.S. 349, 362 (1943)).

By undermining the doctrine of limited liability, the decision below not only threatens the corporation's ability to function appropriately, but also impedes the ability of corporations to recruit and retain responsible managers and directors. Those persons who are willing to serve may choose not to do so because of the risk of ruinous personal liability. Those who do serve may become overly cautious to the detriment of business success and, thereby,

[3] H. Henn & J. Alexander, *Laws of Corporations and Other Business Enterprises* 2 (3d ed. 1983); A. Berle & G. Means, *The Modern Corporation and Private Property* XXV (rev. ed. 1968); H. Ballentine, *Ballentine On Corporations* 40 (1946).

[4] *Statistical Abstract of the United States 1987*, 513 (U.S. Dept. of Commerce).

[5] H. Henn, *supra* note 3, at 130; *see* L. Friedmann, *A History of American Law* 168, 178 (1985).

to the detriment of society at large. Further, by removing the protection from personal liability afforded by due diligence, this case blurs the distinction between corporate action undertaken with full deliberation and corporate action undertaken with little or no care. Because of the detrimental impact that the decision below will have on the corporate form and effective corporate operations, the Chamber and ACCA are compelled to voice their concerns.

STATEMENT OF THE CASE

This case arises out of the Department of Energy's ("DOE") action to (1) enforce its determination that sales of crude oil by Citronelle-Mobile Gathering Inc. and Citmoco Services, Inc. were not exempt from the price control regulations of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note ("ESA"), and the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq.* ("EPAA"), and (2) recover the difference between the price charged and the applicable ceiling price. The factual background is as follows: in 1974, Gathering and Services sold four shipments of crude oil to PETCO, a Bahamian corporation. Upon the advice of counsel, and after full disclosure to the appropriate government officials, Gathering and Services sold the oil as exempt from price control regulations. More than four years after the sales had occurred, however, DOE concluded that the sales were not exempt and that an overcharge had resulted.

The district court held that the sales were not exempt and that Petitioner Bart B. Chamberlain, Jr., a corporate officer and shareholder of both companies at the time of the sales, was individually liable for the resulting overcharges, but only to the extent he received proceeds from the sales. In an interlocutory appeal on other grounds,

the Temporary Emergency Court of Appeals ("TECA") affirmed the finding of overcharges but remanded the case for determination of the amount of restitution to be awarded. The district court adhered to its determination that Petitioner was personally liable only to the extent of his personal enrichment, reiterating its findings that (1) the "defendants made a good faith effort to comply with extremely confusing regulations," (2) the sales were "made in reliance on the opinion of reputable counsel that the transactions were not subject to price controls," (3) whether the sales were subject to the regulations was "an open question of law which could only be determined after the fact," (4) the defendants were no more at fault than the DOE officials "who were inexperienced in administering new regulations," and (5) the overcharge was "a relatively minor violation." *Citronelle-Mobile* v. *Herrington*, 1986 Fed. Energy Guidelines (CCH) ¶ 26,555 at 26,551 (S.D. Ala. Dec. 30, 1985).

On appeal, TECA held Petitioner personally liable for the entire overcharge amount because he was the "central figure" responsible for arranging the sales. A petition for rehearing and suggestion for rehearing *en banc* was denied.

REASONS FOR GRANTING CERTIORARI

The court below wrongly and unfairly imposed personal liability on a corporate officer for the corporation's unintentional regulatory violation. The decision, unsupported by either the law or the facts, creates an unfortunate and dangerous precedent. It turns the concept of limited liability into a hollow mockery, effectively destroying the most essential foundation of the corporate form. Because it is in conflict with well-established and important principles of federal law, the decision should be reviewed by this Court.

A. The Decision Below Abrogates The Rule Of Limited Liability

The doctrine of limited liability provides that, with few exceptions, the individual is protected from the liabilities of the corporation.[6] The concept of limited liability for business transactions was recognized at least as far back as the period of the Roman Emperor Justinian.[7] Certainly, it was well known by the early years of this country.[8] That concept is reflected in modern jurisprudence with even greater vigor.[9] Limited liability is the rule, not the exception.[10] In order to preserve this important principle, courts have been reluctant to impose personal liability in all but the most egregious of circumstances.[11] Courts have traditionally imposed personal liability only when (1) a legislative mandate imposes personal liability, (2) the individual's conduct involves criminal or tortious acts, or (3) the circumstances justify piercing the corporate veil.

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[6] *See* H. Henn & J. Alexander, *supra* note 3, at 344-46.

[7] 3 *The Digest of Justinian* 97 (Book III § 4.7.1) (T. Mommsen, P. Krueger & A. Watson eds. 1985) ("A debt to a corporate body is not a debt to individuals and a debt of a corporate body is not a debt of individuals.").

[8] L. Friedmann, *supra* note 5, at 168.

[9] A. Conrad, *Corporations in Perspective* 424 (1976).

[10] *First National City Bank* v. *Banco Para El Comercio Exterior De Cuba*, 462 U.S. at 626 (1983).

[11] *See, e.g., American Bell Inc.* v. *Federation of Tel. Workers*, 736 F.2d 879, 885-87 (3d Cir. 1984) ("there must be 'specific, unusual circumstances' "); *In re County Green Ltd. Partnership* v. *Lawyers Title Ins. Corp.*, 604 F.2d 289, 292 (4th Cir. 1979) ("to expose those behind the corporation to liability is . . . to be taken reluctantly and cautiously"); *Quinn* v. *Butz*, 510 F.2d 743, 759 (D.C. Cir. 1975) ("penetration of the corporate veil is a step to be taken cautiously"); *Krivo Indus. Supply Co.* v. *National Distiller & Chemical Corp.*, 483 F.2d 1098, 1102 (5th Cir. 1973) ("[t]he corporate form, however, is not lightly disregarded").

The decision below has misinterpreted, combined, and applied two of the exceptions to the principle of limited liability so broadly as to effectively nullify the rule. One of the exceptions to limited liability upon which the decision relies to impose personal liability is that pertaining to tortious acts: an individual, whether or not acting in his official capacity, who is the "central figure" responsible for causing a corporation's tortious conduct, is personally liable for the harm resulting from those tortious acts.[12] The second exception to the rule of limited liability on which the decision implicitly relies is that personal liability may be imposed upon an officer or director who causes a corporation's violation of a statute which expressly imposes absolute personal liability.[13] But neither of these exceptions was properly applicable in this case, either alone or in combination.

The cases which the decision cites in support of its holding involve either tortious conduct[14] or statutes that prescribe personal liability.[15] Neither of these two condi-

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[12] W. Fletcher, 8A *Cyclopedia of the Law of Private Corporations* § 1135 at 267-68 (rev. perm. ed. 1986).

[13] TECA explicitly stated that liability was not premised on the traditional "piercing of the corporate veil" doctrine, *i.e.*, that the corporation was inadequately capitalized, failed to comply with corporate formalities, was used to perpetrate a fraud, or was a mere alter ego of the corporate officer. *Citronelle-Mobile Gathering, Inc.* v. *Herrington*, Nos. 11-7 & 11-8, slip op. at 12 (TECA May 7, 1987).

[14] The tortious conduct in these cases involved either committing a common law tort or violating a statute which codified a preexisting common law tort. *LCL Theaters* v. *Columbia Pictures Industries*, 619 F.2d 455 (5th Cir. 1980) (fraud); *Donsco Inc.* v. *Casper Corp.*, 587 F.2d 602 (3d Cir. 1978) (unfair competition); *Tillman* v. *Wheaton-Haven Recreational Ass'n., Inc.*, 517 F.2d 1141, 1148 (4th Cir. 1975) ("An action brought under statutes forbidding racial discrimination is fundamentally for the redress of a tort.").

[15] *United States* v. *Pollution Abatement Services of Oswego, Inc.*, 763 F.2d 133, 135 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 605 (1985)

tions is present in the instant case. The free market sale of a lawful product does not constitute a tort. Neither does EPAA impose personal liability on corporate personnel for the corporation's unintentional EPAA violations. Absent tortious conduct or clear legislative intent to impose personal liability for the corporation's violation of a statute or regulation, the rule of limited liability should prevail.

The decision nonetheless creates a new theory of "central figure" liability for any "wrongful" corporate conduct. The case holds that whenever a corporation's conduct results in any statutory or regulatory violation, the conduct of the central figure who was responsible for the corporation's action is *ipso facto* "wrongful" from its inception, even in the absence of any wrongful or malicious intent, knowing or willful violation, or negligence or other lack of due care. Such "wrongful conduct," the decision implies, gives rise to personal liability even though (1) the conduct is not criminal or tortious and (2) the statute or regulation does not mandate personal liability for violations. This result dramatically and wrongly abrogates the rule of limited liability.

("In light of the clear congressional intent to hold 'person[s]' liable for violations [of the Rivers and Harbors Appropriations Act], we see no reason to shield from civil liability those corporate officers who are personally involved in or directly responsible for statutory proscribed activity."); *cf. United States* v. *Sexton Cove Estates, Inc.*, 525 F.2d 1298, 1300 (5th Cir. 1976) (the Fifth Circuit held that the Rivers and Harbors Appropriations Act did not authorize imposition of personal liability on corporate officers for the corporation's violation of the Act absent negation of the corporate form). These two cases are in conflict regarding Congress' intent as to the Rivers and Harbors Appropriations Act. However, they both affirm the general principle which requires legislative intent to impose absolute personal liability before such liability may be imposed on corporate officers and directors for the violation of statutes or regulations.

B. Imposition Of Personal Liability On Corporate Personnel For The Corporation's Unintentional Regulatory Violation Undermines The Purpose Of And Policies Embodied In American Corporate Law

The decision below establishes the proposition that corporate officers, directors, and employees are subject to personal liability for any violation of a regulatory mandate, however innocent and unintentional the violation is in fact or law. Under this standard, corporate decision makers may be subject to ruinous personal liability simply for carrying out their corporate duties in good faith. Such a standard has ominous implications for the corporate business community and its ability to conduct corporate affairs.

By imposing personal liability, the decision contravenes the well-established rule that "directors and officers of a corporation will not be held liable for errors or mistakes in judgment, pertaining to law or fact, when they have acted on a matter calling for the exercise of their judgment or discretion, when they have acted in *good faith.*" *Financial Industrial Fund, Inc.* v. *McDonnell Douglas*, 474 F.2d 514, 518 (10th Cir. 1973), *cert. denied*, 414 U.S. 874 (1974) (emphasis added). The rule is founded on the idea that "in order to make the corporation function effectively, those having management responsibility must have the freedom to make in good faith the many necessary decisions quickly and finally without the impairment of having to be liable for an honest error in judgment." *Id.*

The decision below imperils that freedom to effectively manage corporate affairs. Many corporate officers, by definition of their position, will always be central figures responsible for their corporation's compliance with regulatory statutes. And, other corporate managers will be central figures in particular transactions. Under the standard set forth by the decision below, a corporate officer who acts in good faith and with due care, and

who makes full disclosure to the appropriate administering agency, would still have no means of limiting his personal liability resulting from a subsequent finding that the corporation had, however unintentionally, committed a regulatory or statutory violation.

Such a standard stifles the ability of corporations to effectively participate in today's creative, dynamic, and highly competitive economic system. The loss of protection from liability forces corporate decision makers to be guarantors of each and every action they authorize. As a result, corporate managers may become overly cautious and conservative in their business decisions.

The price for this over-caution will be borne by the corporation, the shareholders, and ultimately the consuming public. Business activity will be especially inhibited when relevant statutes or regulations are new or untested at law, or susceptible of diverse interpretations. Shareholders will be deprived of profits from business opportunities left untaken. And, the availability of goods and services to consumers will be reduced.

Companies will find it difficult to recruit and retain responsible individuals to serve as managers and directors if such persons are to personally bear the full risk of regulatory noncompliance. The risk of financial ruin would be greater than the benefit of financial reward. This result would be especially true in the case of outside directors who bring greater independence to the exercise of their oversight functions but receive fewer financial rewards from the corporation. If American business is to succeed, it cannot be hobbled by an ill-considered rule of personal liability which destroys a fundamental basis of the corporate form, itself a fundamental basis of American prosperity.

Furthermore, under the standard enunciated by the decision below, corporate decision makers who exercise due care by diligently seeking expert legal opinion to insure that the corporation's conduct conforms to the law,

but which conduct nonetheless inadvertently violates a statute or regulation, are in no better position than the corporate managers who exercise little or no care. The decision below irrelevantly states that counsel's opinion need not be adopted as the law of the case. It is the seeking out of such advice which is relevant when considering a manager's or director's culpability. The law should encourage and reward due diligence. However, by abrogating the efficacy of such action, the decision below contravenes such sound public policy and should be reviewed.

C. The Decision Below Is Wrong As A Matter Of Law And Therefore Should Be Reviewed

As noted earlier, the actions that gave rise to this case were undertaken only upon advice of counsel. Further, full disclosures were made to appropriate government officials. In fact, it took DOE more than four years after the sales to conclude that they were not exempt from EPAA regulations. In view of these and other facts, the district court below twice found that there was no knowing or willful violation. *Citronelle-Mobile Gathering* v. *Herrington*, 1986 Fed. Energy Guidelines (CCH) ¶ 26,555 at 26,551 (S.D. Ala. Dec. 30, 1985). Nevertheless, TECA subjected the individual officer to personal liability for the full amount of the corporations' overcharges. This result cannot be supported by either the controlling statute or the general principles of liability established by the case law.

Section (5)(a)(4) of EPAA provides only that corporate officers and directors may be subjected to discrete penalties, far less in amount than personal liability for overcharges when the corporation commits knowing or willful violations. The very fact that EPAA includes specific sanctions for such violations indicates that Congress did not intend to subject officers and directors to unrestricted personal liability for non-willful corporate

violations.[16] That conclusion is also supported by this Court's decision in *Slodov* v. *United States*, 436 U.S. 238 (1978).

In *Slodov*, this Court refused to hold a corporate owner and operator personally liable under the tax code for failing to use the corporation's funds to satisfy its prior delinquent taxes. This Court reasoned that "[t]he fact that the provision [§ 6672 of the tax code] imposes a 'penalty' and is violated only by a 'willful failure' is itself strong evidence that it was not intended to impose liability without personal fault. Congress, moreover, has not made corporate officers personally liable for the corporation's tax obligations generally and § 6672 therefore should be construed in a way which respects that policy choice." *Id.* at 254. Similarly, personal liability under EPAA arises only from intentional violations. That EPAA was not intended to impose personal liability without personal fault is unambiguously demonstrated by its legislative history. That history indicates Congress did not intend to change the existing law or corporate director and officer liability:

[16] To imply liability where none is expressly provided would be inconsistent with numerous federal court holdings construing other federal regulatory statutes. *See, e.g., Connors* v. *P & M Coal Co.*, 801 F.2d 1378 (D.C. Cir. 1986) (Employee Retirement Income Security Act); *Auditor of Public Accounts of Illinois* v. *Izatt*, 205 F.2d 785 (7th Cir. 1953) (Defense Production Act). The expression in a statute of certain powers implies the exclusion of others. *See, e.g., Marshall* v. *Western Union Tel. Co.*, 621 F.2d 1246, 1251 (3d Cir. 1980) ("Under the usual canons of statutory construction, where Congress, or in this case an administrative agency, has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."); *Marshall* v. *Gibson's Products, Inc.*, 584 F.2d 668, 675 (5th Cir. 1978) (natural inference to be drawn from omission of any grant of power is that no grant was intended); *Alcoa Steamship Co.* v. *Federal Maritime Comm'n*, 348 F.2d 756, 758 (D.C. Cir. 1965) ("Where Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power.").

> With [one] exception [not relevant here], nothing in this section is intended to change existing case law relating to the individual responsibility of corporate directors, officers or agents for violations of those corporations.[17]

Further, even TECA has made clear that the petroleum price control regulations promulgated pursuant to EPAA impose no greater liability for non-willful violation than is provided under general corporate law. In *Johnson Oil Co.* v. *DOE*, 690 F.2d 191, 202 (TECA 1982), TECA declared that "EPAA and the regulations promulgated thereunder were not passed in a vacuum [and] . . . in no way derogate the general rule that stockholders are immune from corporate obligations." Accordingly, TECA in that case refused to hold principal shareholders and corporate officers personally liable for the corporation's overcharges in violation of petroleum price control regulations because the violations were not knowing, willful or malicious. *Id.* at 201-03.[18] TECA's earlier decision in *Johnson Oil* further demonstrates that the imposition of personal liability in the instant case for a non-willful regulatory violation was both erroneous and grossly unfair. Because the decision below is contrary to well-established principles of law enunciated by this Court and other courts of appeals, the decision should be reviewed.

[17] S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 200, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1762, 1956, 2042. Section 5(a)(4) was added to EPAA by the Energy Policy and Conservation Act of 1975, 42 U.S.C. §§ 620 *et seq.*

[18] In *Johnson Oil*, a third party complainant had sought to hold the corporate officers and shareholders personally liable. TECA held that complainant's reliance on *United States* v. *Arizona Fuels Corp.*, 688 F.2d 239 (TECA 1980), *cert. denied*, 451 U.S. 985 (1981), was misplaced because, in that case, the individual's flagrant misuse of the corporate assets for his personal gain had justified holding him personally liable. The holding in *Arizona Fuels* was thus found by TECA to be consistent with the case law regarding piercing the corporate veil.

CONCLUSION

Ignoring the fundamental legal and policy principles of corporate law, the decision below has created an unreasonably expansive standard for determining a corporate officer's personal liability for corporate acts. That standard, by unfairly subjecting officers and directors to personal liability for the corporation's unintentional regulatory violations, would destroy one of the fundamental bases of the corporate form. For these reasons, the Chamber of Commerce of the United States of America and the American Corporate Counsel Association urge this Court to grant certiorari.

Respectfully submitted,

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