No. _____

In The
Supreme Court of the United States

IRINA TESORIERO,

Petitioner,

v.

CARNIVAL CORPORATION
d/b/a CARNIVAL CRUISE LINE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether federal courts may grant an adverse inference as a sanction for negligent spoliation of evidence, as the Second, Sixth, and D.C. Circuits have held, or whether "bad faith" is the standard, as held by the Eleventh Circuit below, as well as the Third, Fifth, Seventh, Eighth, and Tenth Circuits.

PARTIES AND RULE 29.6 STATEMENT

The parties to the proceedings in the court whose judgment is sought to be reviewed are as follows.

Petitioner, Irina Tesoriero ("Plaintiff" or "Mrs. Tesoriero"), was the plaintiff in the District Court and the appellant in the Court of Appeals.

Respondent, Carnival Corporation, d/b/a Carnival Cruise Line ("Defendant" or "Carnival"), was the defendant in the District Court and the appellee in the Court of Appeals.

With respect to Carnival's corporate ownership, the Corporate Disclosure Statement found in the Answer Brief that Carnival filed on October 1, 2018 in the Court of Appeals states: "Carnival discloses that there are no parent corporations or publicly-held corporations that hold ten percent or more of Carnival's stock."

RELATED CASES

- *Tesoriero v. Carnival Corporation*, No. 16-cv-21769, United States District Court for the Southern District of Florida. Judgment entered Apr. 4, 2018.
- *Tesoriero v. Carnival Corporation*, No. 18-11638-JJ, United States Court of Appeals for the Eleventh Circuit. Judgment entered July 14, 2020.

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The opinion of the Court of Appeals (Appendix ("App.") 1-57) is reported at 965 F.3d 1170 (11th Cir. 2020). The District Court's Order Adopting the Magistrate Judge's Report and Recommendation (App. 58-60) is unreported, but is publicly available at 2018 WL 1894717 (S.D. Fla. Mar. 23, 2018). The Magistrate Judge's Report and Recommendation (App. 63-131) also is unreported, but is publicly available at 2017 WL 8895347 (S.D. Fla. Sept. 22, 2017).

JURISDICTION

The Eleventh Circuit filed its opinion on July 14, 2020. (App. 1-31). The court denied Appellant's petition for panel rehearing and rehearing en banc by order dated September 11, 2020. (App. 132-33). This Court has jurisdiction to review the Eleventh Circuit's judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

There are no constitutional or statutory provisions relevant to this petition.

STATEMENT OF THE CASE AND FACTS

A. Facts pertinent to Mrs. Tesoriero's injury and the spoliation issue

Mrs. Tesoriero was injured during a cruise aboard a Carnival ship in June 2015 when a cabin chair collapsed beneath her as she sat down into it. (App. 3-4). While she initially believed she had broken her arm, Mrs. Tesoriero was ultimately diagnosed with nerve injuries known as "medial epicondylitis and ulnar neurapraxia." (App. 3, 5). Her injuries required her to undergo two surgeries and incur more than $120,000 in medical bills, and "cost her much of the use of her dominant right arm and hand." (App. 31). As the Court of Appeals acknowledged, "we have no doubt that her injury turned out to be serious." (App. 28 & n.9).

After the chair collapsed, Plaintiff's husband, Joseph Tesoriero, called the front desk and requested medical assistance. (App. 3). As the couple waited for help to arrive, Mr. Tesoriero briefly inspected and photographed the broken chair, noting there was evidence that the wooden pegs that were supposed to hold the chair together "had been unglued and loose for a long time." (App. 3-4).

Instead of sending medical help, Carnival dispatched a cabin steward, who removed the chair from the Tesorieros' cabin. (App. 4). The chair was never seen again. As the majority put it: "The chair was later disposed of by an unknown crew member because it could not be fixed." (App. 4).

The Tesorieros walked to the ship's medical center, where they completed a "passenger injury statement" providing a detailed account of the accident. (App. 4, 36-37). Mrs. Tesoriero immediately and repeatedly informed Carnival that the cause of her injury was the broken chair. (*See* App. 46-47 & n.6) ("Tesoriero reported her incident with the chair literally five different ways to Carnival while she was still onboard her cruise."). Given the severity of the injury, the ship's doctor x-rayed Mrs. Tesoriero's arm. (App. 2, 4). Because the ship's physician was unable to interpret the x-ray, it was sent to Miami for review, but the results were not known until after the Tesorieros had already disembarked the ship. (App. 4, 42-43 & n. 3).

Notably, Carnival admitted, in response to Plaintiff's Rule 36 request for admissions, that it "anticipated litigation immediately after the incident was reported." (App. 22).

B. Proceedings in the District Court

The complaint asserted a "single claim of negligence based on Carnival's alleged failure to inspect and maintain the cabin furniture and failure to warn passengers of the unsafe condition." (App. 5). Carnival moved for summary judgment based on the "familiar defense . . . that it was not responsible for Tesoriero's injury because it had neither actual nor constructive knowledge that the chair was unsafe prior to the incident." (App. 5). In the Eleventh Circuit, cruise ship passengers asserting negligence claims under federal

maritime law must show that the cruise line "had actual or constructive notice of the risk-creating condition." (App. 10) (quoting *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989)).

Plaintiff countered the notice defense by arguing, *inter alia*, that "Carnival should be sanctioned with an adverse inference that the cruise line had notice of the defect—an inference that would defeat its motion for summary judgment." (App. 22).[1] The District Court denied Plaintiff's request for an adverse inference based on its finding (contrary to Carnival's own admissions) that Carnival did not reasonably anticipate litigation at the time it disposed of the chair, which is a threshold requirement for granting an adverse inference based on spoliation of evidence. (App. 122-28) (Magistrate Judge's R&R). Accordingly, the Magistrate Judge recommended that the District Court grant Carnival's motion for summary judgment based on Plaintiff's inability to meet the notice requirement of her negligence claim. (App. 130). The District Court adopted in full the Magistrate Judge's Report and Recommendation (App. 58-60), and subsequently entered final judgment for Carnival. (App. 61-62).

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[1] Plaintiff also argued that summary judgment should be denied because: (1) there was sufficient evidence to create a genuine issue of material fact as to whether Carnival had constructive notice of the dangerous condition; and (2) the doctrine of *res ipsa loquitur* applies, which obviates the notice requirement. (App. 6). As this Petition concerns only the spoliation issue, Plaintiff does not discuss the lower courts' treatment of those other arguments.

C. Proceedings in the Eleventh Circuit

The Eleventh Circuit, in a 2-1 decision, affirmed the summary judgment and, more specifically, the District Court's denial of the adverse inference spoliation sanction. (App. 1-31). Although the majority found that "the district court erred in holding that Carnival did not anticipate litigation" (App. 22), it nevertheless affirmed the denial of the adverse inference because it concluded that Carnival's destruction of evidence was not done in "bad faith," as required by Eleventh Circuit precedent. (App. 26).

The majority explained that, in the Eleventh Circuit, "an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith." (App. 24) (quoting *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997)). The court added that "bad faith 'in the context of spoliation, generally means destruction for the purpose of hiding adverse evidence.' " (App. 24) (quoting *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015)). The court explained the rationale for its adherence to the bad faith standard as follows:

> The [spoliating] party's reasoning for destroying evidence is what justifies sanctions (or a lack thereof). "Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case." *Vick v. Tex. Emp't Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975).

(App. 24-25).

The majority concluded that "nothing in the record smacks of bad faith" (App. 28), noting that Mrs. Tesoriero never "requested that the chair be saved" and that, when Carnival staff determined that they "could not repair it, the chair was disposed of." (App. 27). The majority allowed, however, that Carnival's disposal of the chair could be deemed negligent. (App. 27, 28). The court affirmed the summary judgment, concluding that "because she has not shown that Carnival committed sanctionable spoliation of evidence, her case is not saved through an adverse inference sanction." (App. 31).

The dissenting judge exhaustively detailed the evidence and concluded that there was at least enough to create an issue of fact as to whether Carnival acted in bad faith. (*See* App. 33-34) ("In short, this record raises a genuine issue of material fact concerning whether Carnival destroyed the chair in bad faith, and that, in turn, necessarily means that it raises a genuine issue of material fact as to whether Carnival had notice of the defect in the chair that injured Tesoriero.").

Plaintiff filed a petition for panel rehearing and rehearing en banc, which was denied on September 11, 2020. (App. 132-33).

REASONS WHY CERTIORARI IS WARRANTED

The imposition of sanctions for spoliating evidence in federal courts concerns a District Court's authority to control the admission of evidence and, thus, presents

a procedural question governed squarely by federal law. In holding to that effect, the en banc Sixth Circuit explained:

> First, the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, from a court's inherent power to control the judicial process. Second, a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters.

Adkins v. Wolever, 554 F.3d 650, 652 (6th Cir. 2009) (en banc) (quotations and citations omitted). Other circuits agree that this is an issue of federal law. *See*, *e.g.*, *Sherman v. Rinchem Co., Inc.*, 687 F.3d 996, 1006 (8th Cir. 2012); *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191, 201 (5th Cir. 2005); *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); *Reilly v. Natwest Mkts. Group Inc.*, 181 F.3d 253, 267 (2d Cir. 1999); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993).

Accordingly, this case presents an ideal opportunity for this Court to resolve the circuit split discussed below and provide district judges with the flexibility they require to fashion appropriate remedies for the spoliation of evidence.

Petitioner also notes that the issue presented can affect all types of litigants—whether plaintiffs, defendants, corporations, individuals, or government—in

both civil, criminal, or administrative cases. For example, while the spoliating party in this case was a defendant cruise line, spoliation often arises in products liability actions where the injured plaintiff faces spoliation sanctions for losing or destroying the allegedly defective product prior to suit.

I. THERE IS A CLEAR CIRCUIT SPLIT OVER THE STATE OF MIND REQUIRED TO GRANT AN ADVERSE INFERENCE AS A SANCTION FOR SPOLIATION OF EVIDENCE

A. Circuit courts require varying states of mind ranging from "negligent," to "intentional, willful, or deliberate," to "bad faith"

Federal circuit courts are hopelessly split when it comes to the requisite state of mind for imposing an adverse inference sanction for the spoliation of evidence. Before discussing where the circuits diverge—*i.e.*, the necessary state of mind—Petitioner notes that the circuits generally agree on the remaining requirements for granting an adverse inference as a sanction for spoliating evidence. A 2013 law review article canvassed the case law and helpfully explained the general test for granting an adverse inference, including the points of general agreement, as follows:

> The most common test that courts apply in deciding whether to give an adverse inference instruction requires the party seeking the instruction to prove three elements. First, the

> party who destroyed the evidence must have had a duty to preserve that evidence at the time it was destroyed. Second, the evidence must have been relevant to the litigation. And third, the party must have destroyed the evidence with a culpable state of mind.

William Grayson Lambert, *Keeping the Inference in the Adverse Inference Instruction: Ensuring the Instruction is an Effective Sanction in Electronic Discovery Cases*, 64 S.C. L. REV. 681, 688 (Spring 2013) (footnotes and quotations omitted). The author acknowledged that "[n]ot all courts . . . formulate the test the exact same way," but observed that "[d]espite these different articulations, all of the tests focus on the same factors: whether the spoliator had a duty to preserve the evidence; whether the evidence was relevant; and whether the spoliator had a sufficient mental culpability." *Id.* at 689.

It is the third factor over which the circuit courts disagree starkly. That split is widely acknowledged by commentators and courts alike. *See*, *e.g.*, Jamie S. Gorelick, Stephen Marzen, Lawrence Solum, and Arthur Best, *Destruction of Evidence* § 2:8 (2020 Cumulative Supp.) ("Although many courts have indicated that the spoliation inference requires some form of intentionality, in most recent years a growing number of courts have indicated that an adverse inference may be drawn from the negligent destruction of evidence."); Jay E. Grenig and Jeffrey S. Kinsler, *Handbook of Fed. Civil Discovery & Disclosure* § 16:8 (4th ed. 2020 Update) ("Courts are split, however, as to whether an

intentional showing is necessary to merit the spoliation inference."); *United States v. Laurent*, 607 F.3d 895, 902 (1st Cir. 2010) (noting that "the case law is not uniform in the [mental] culpability" for giving an adverse inference instruction, and collecting cases illustrating the split); *Slattery v. United States*, 46 Fed. Cl. 402, 404-05 (2000) ("There is an acknowledged jurisdictional split on the necessity of bad faith.").

The circuits can be divided into two distinct categories—those that require "bad faith," and those that allow granting an adverse inference based on a lesser showing—with the latter category further subdivided based on the nuanced language of the tests adopted in those circuits. Petitioner discusses these two broader categories below, but first provides a very brief summary of the tests followed in the various circuits.

The following circuits have expressly embraced "***bad faith***" as the required state of mind for granting an adverse inference based on spoliation of evidence:

- *Bull v. United Parcel Service, Inc.*, 665 F.3d 68, 79 (3d Cir. 2012) ("Therefore, a finding of bad faith is pivotal to a spoliation determination.")
- *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) ("We permit an adverse inference against the spoliator or sanctions against the spoliator only upon a showing of 'bad faith' or 'bad conduct.' ")
- *Bracey v. Grondin*, 712 F.3d 1012, 1018-19 (7th Cir. 2013) ("In this circuit, when a

party intentionally destroys evidence in bad faith, the judge may instruct the jury to infer the evidence contained incriminatory content.")

- *White v. United States*, 959 F.3d 328, 331 (8th Cir. 2020) ("Severe spoliation sanctions . . . are only appropriate upon a showing of bad faith.")
- *Turner v. Pub. Serv. Co. of Colorado*, 563 F.3d 1136, 1149 (10th Cir. 2009) ("But if the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith.")
- *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1184 (11th Cir. 2020) ("Indeed, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith.")

The following circuits have expressly held that an adverse inference may be given for ***negligent*** spoliation of evidence.

- *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) ("[T]he 'culpable state of mind' factor is satisfied by a showing that the evidence was destroyed 'knowingly, even if without intent to [breach a duty to preserve it], or negligently.' ") (alteration in original)
- *Beavan v. United States Dept. of Justice*, 622 F.3d 540, 554 (6th Cir. 2010) ("The

'culpable state of mind' factor is satisfied by a showing that the evidence was destroyed 'knowingly, even if without intent to [breach a duty to preserve it], or negligently.' ") (alteration in original)

- *Grosdidier v. Broadcasting Bd. of Governors, Chairman*, 709 F.3d 19, 27 (D.C. Cir. 2013) (expressly rejecting the argument that bad faith is required and holding "the spoliation inference was appropriate in light of the duty of preservation notwithstanding the fact that the destruction was negligent")

Two other circuits have ***expressly rejected bad faith***, but stopped short of holding that negligent spoliation is enough to warrant an adverse inference.

- *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008) (noting that the court had previously rejected that "bad faith is an essential element of the spoliation rule" and that an adverse inference may be granted when the spoliator's conduct is "intentional, willful, or deliberate")
- *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) ("A finding of bad faith is not a prerequisite to this corrective procedure. Surely a finding of bad faith will suffice, but so will simple notice of potential relevance to the litigation.").[2]

[2] While the Ninth Circuit did not expressly hold to that effect, at least one commentator has interpreted *Glover* as allowing

Finally, the First Circuit does not appear to have taken a clear position on the required state of mind. *See*, *e.g.*, *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir. 1998) (stating that adverse inference may be given upon showing that spoliator knew about "the litigation or the potential for litigation" and the "potential relevance [of the evidence] to that claim," but without discussing any required state of mind).

B. The rationales for granting an adverse inference as a sanction for spoliation of evidence

To understand why the negligence-based approach is the better rule, one must know the rationales routinely cited to justify granting an adverse inference in the first place. The First Circuit cogently explained the rationales almost 40 years ago in an opinion authored by then-Judge Breyer:

> The adverse inference is based on two rationales, one evidentiary and one not. The ***evidentiary*** rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same

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an adverse inference based on negligent conduct. *See* Lambert, *supra*, at 694-95. Lambert also cites several district court opinions within the Ninth Circuit applying the negligence standard in their analyses. *Id.* at 695 & n.98.

> position who does not destroy the document . . .
>
> The other rationale for the inference has to do with its ***prophylactic*** and ***punitive*** effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. The inference also serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk. In McCormick's words, "the real underpinning of the rule of admissibility [may be] a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof." *McCormick on Evidence* § 273, at 661 (1972).

Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214, 218 (1st Cir. 1982) (brackets in original) (emphases added).

In addition to the evidentiary, prophylactic, and punitive rationales discussed in *Nation-Wide Check Corp.*, courts have articulated a fourth rationale. In *Kronisch v. United States*, the Second Circuit observed: "[C]ourts have recognized a ***remedial rationale*** for the adverse inference—namely, that an adverse inference should serve the function, insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." 150 F.3d 112, 126 (2d Cir. 1998) (emphasis added).

C. The negligence-based rule more effectively furthers the remedial, punitive, and prophylactic rationales for granting an adverse inference

The negligence-based standard advances both the punitive and remedial rationales underlying the adverse inference rule, as the Second Circuit explained in *Residential Funding Corp.*

The punitive rationale is better served because it properly places the consequences on the party whose failure to exercise reasonable care caused the destruction or loss of key evidence. *See Residential Funding Corp.*, 306 F.3d at 108 (stating that an adverse inference may be warranted for the "negligent destruction of evidence because each party should bear the risk of its own negligence"); *id.* ("The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.") (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991)). *Accord Welsh United States*, 844 F.2d 1239, 1249 (6th Cir. 1988) (justifying adverse presumption by stating that, between a negligent spoliator and an innocent party, the spoliator must "bear the onus of proving a fact whose existence or nonexistence was placed in greater doubt by the negligent party").

The negligence-based standard also better advances the remedial rationale. Quoting a district court opinion, the Second Circuit stated:

> The sanction of an adverse inference should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference. It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance.

Residential Funding Corp., 306 F.3d at 108 (quoting *Turner*, 142 F.R.D. at 75). *Accord Grosdidier v. Broadcasting Bd. of Governors, Chairman*, 709 F.3d 19, 28 (D.C. Cir. 2013) ("Where the evidence is relevant to a material issue, the need arises for an inference to remedy the damage spoliation has inflicted on a party's capacity to pursue a claim whether or not the spoliator acted in bad faith.").

Moreover, allowing courts to grant adverse inference sanctions for failing to use reasonable care also effectively advances the prophylactic (*i.e.*, deterrent) rationale. As a matter of logic, granting adverse inferences based on negligent spoliation will incentivize litigants to take greater precautions to prevent "losing" or otherwise hastily disposing of key evidence. *See United States Med. Supply Co., Inc. v. United States*, 77 Fed. Cl. 257, 269 (2007) (noting that granting spoliation sanctions only when there is "bad faith" undermines several rationales, including the need "to deter future misconduct"). Indeed, as discussed below, this is a particularly important consideration in cases involving repeat litigants like Carnival.

In light of the above, it is unsurprising that some courts and commentators have noted a modern trend toward courts embracing this negligence-based standard for granting adverse inferences. *See* Gorelick, Marzen, Solum, and Best, *supra*, at § 2:8 ("[A] growing number of courts have indicated that an adverse inference may be drawn from the negligent destruction of evidence."); Lambert, *supra*, at 690 ("Since the 1990s, however, some courts have lowered the required culpability and allowed negligent spoliation to provide a basis for giving the [adverse inference] instruction. This growing trend has created a split among the circuits. . . ."); *United Med. Supply Co.*, 77 Fed. Cl. at 268 (citing "logic and considerable and growing precedent" for conclusion that "an injured party need not demonstrate bad faith" to impose spoliation sanctions).

D. By focusing exclusively on the evidentiary rationale, circuits that follow the "bad faith" standard allow negligent spoliators to benefit from their unreasonable conduct to the detriment of innocent litigants

Circuits that require a showing of "bad faith" before imposing an adverse inference consistently cite the evidentiary rationale as the basis for doing so. *See*, *e.g.*, *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) ("Mere negligence in losing or destroying the records is not enough for an adverse inference, as it does not sustain an inference of consciousness of a weak case."); *Vick v. Tex. Emp't Comm'n*, 514 F.2d 734,

737 (5th Cir. 1975) (same); *Turner v. Pub. Serv. Co. of Colorado*, 563 F.3d 1136, 1149 (10th Cir. 2009) (same). Relatedly, the Seventh Circuit has held that the paramount consideration is the spoliator's motive. *See*, *e.g.*, *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7th Cir. 2013) ("The crucial element is not that the evidence was destroyed but rather the reason for that destruction.").

Consistent with that principle—*i.e.*, the belief that an adverse inference is proper only when a party has discarded or destroyed evidence with a malicious purpose—these circuits have imposed an exceptionally high bar for showing "bad faith."[3] In the case below, the Court of Appeals observed that "bad faith 'in the context of spoliation generally means destruction of evidence for the purpose of hiding adverse evidence.'"

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[3] The objective data shows just how high of a bar the bad faith standard presents. A recently-published study of spoliation decisions issued during the five-year period ending in November 2020 showed that the Eleventh Circuit found spoliation in only 1 of 12 cases, or 8%. Robert Owen, Kamryn Deegan and Katherine Simms, *A Look at Spoliation Risk in the 11th Circ., By the Numbers*, LAW360 (Dec. 15, 2020), https://www.law360.com/florida/articles/1337571/a-look-at-spoliation-risk-in-the-11th-circ-by-the-numbers?nl_pk=0f030fd8-cb97-461a-b56b-be36b64c1b40&utm_source=newsletter&utm_medium=email&utm_campaign=florida.

The extreme difficulty of obtaining spoliation sanctions was not lost on the authors of that study. *See id.* ("[B]ased on the available data, litigators should not lose too much sleep about having to defend an appeal of a spoliation claim before the Eleventh Circuit. The most likely result appears to be a ruling affirming the lower court's finding that there was no spoliation."); *id.* ("Accordingly, spoliation risk in the Eleventh Circuit appears low and likely does not require too much headache, investment or resources.").

(App. 24) (quoting *Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015)).

The Seventh Circuit, likewise, has held that "[a] party destroys a document in bad faith when it does so for the purpose of hiding adverse information." *Bracey*, 712 F.3d at 1019. *See also Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004) (discussing bad faith and holding it requires "intentional destruction indicating a desire to suppress the truth"); *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) ("Such a presumption or inference arises, however, only when the spoliation or destruction [of evidence] was intentional, and indicates fraud and a desire to suppress the truth. . . .") (quoting 31 C.J.S. Evidence § 156(2)) (brackets in original).

By focusing exclusively on the spoliator's bad intent or "consciousness of a weak case," these circuits ignore the other compelling rationales for granting an adverse inference. In an opinion reviewing the various culpability standards, the Court of Federal Claims rejected the "bad faith" standard on policy grounds, observing:

> Requiring a showing of bad faith as a precondition to the imposition of spoliation sanctions means that evidence may be destroyed willfully, or through gross negligence or even reckless disregard, without any true consequences . . . [T]his approach is tantamount to suggesting that the "duty" to preserve evidence is not much of a duty at all. Second, imposing sanctions only when a spoliator can be

> proven to have acted in bad faith defenestrates three of the four purposes underlying such sanctions—to protect the integrity of the fact-finding process, to restore the adversarial balance between the spoliator and the prejudiced party, and to deter future misconduct—and severely frustrates the last, to punish.

United Med. Supply Co., 77 Fed. Cl. at 268-69.

II. THE MAJORITY OPINION IS WRONG

A. This case illustrates why this Court should adopt the negligence-based standard and reject bad faith

Because bad faith is the standard in the Eleventh Circuit, the Court of Appeals held that Plaintiff was not entitled to an adverse inference for Carnival's disposal of the cabin chair. Accordingly, Plaintiff was unable to establish the notice element of her federal maritime negligence claim and so the Court of Appeals affirmed the summary judgment in Carnival's favor. In short, Carnival was rewarded for discarding evidence that (1) Carnival admitted it had a duty to preserve, and (2) was critical to Plaintiff's prima facie case.

Applying the bad faith standard in this case failed to effectuate the policy rationales for granting an adverse inference instruction. Plaintiff dutifully reported to Carnival that she had been injured by the cabin chair "at least five different ways . . . while she was still onboard her cruise." (App. 46-47 & n.6) (detailing the multiple instances that Plaintiff notified Carnival).

Indeed, Carnival admitted that it anticipated litigation "immediately after the incident was reported" (App. 22), but nevertheless threw away the chair, despite there being no urgency to do so. Between Plaintiff and Carnival (which was, at a minimum, negligent), it is Carnival that should bear the consequences of discarding the chair. The punitive rationale was not served in this case.

Granting an adverse inference to allow Plaintiff to avoid summary judgment would have been consistent with the remedial rationale. That is to say, Plaintiff should have had the opportunity to present her case to a jury, with an adverse inference instruction concerning Carnival's disposal of the chair, and then let the jury decide whether she had proven the notice element of her claim.[4] Instead, because Plaintiff was unable to establish that Carnival discarded the chair "for the purpose of hiding adverse evidence" (App. 24), Plaintiff was stripped of any ability to overcome the evidentiary handicap that Carnival had thrust upon her. Carnival threw away the chair that Plaintiff needed and, as a result, was rewarded with a summary judgment. The remedial rationale was not served in this case.

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[4] Recall that the adverse inference typically is permissive, allowing a jury to accept or reject that the spoliated evidence would have been unfavorable to the spoliator. *See*, *e.g.*, *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir. 1998) ("[E]ven if these foundational requirements have been met, the trier nonetheless may refuse to draw the negative inference. In other words, the inference is permissive, not mandatory.").

Finally, this case presents powerful evidence that the bad faith standard does not deter spoliation of evidence. As the dissenting opinion discussed at length, Carnival has been a frequent target of motions for spoliation sanctions in cases within the Eleventh Circuit brought by its passengers. (App. 44-45 & n.5; App. 49 & n.8) (discussing five district court cases in recent years).

In one of those cases, the district court labeled Carnival's destruction of evidence "a matter of keen concern," and expressly "caution[ed] Carnival against establishing a pattern or practice of discarding such objects because such actions could potentially provide a basis for spoliation sanctions or liability in the future." (App. 44-45) (quoting *Morhardt v. Carnival Corp.*, 304 F. Supp. 3d 1290, 1297 n.6 (S.D. Fla. 2017)).

The dissent expressed frustration that these warnings had gone unheeded and that Carnival remained undeterred in destroying evidence. (App. 49). The dissenting judge quoted from a recent case in which a magistrate judge deciding a motion for sanctions described Carnival's attitude as "C'est la vie" and "stuff happens." (App. 49). Noting the lack of a deterrent effect, the dissenting judge concluded: "No wonder Carnival has that attitude. Carnival keeps discarding material evidence, and that keeps working to its advantage." (App. 49-50). The prophylactic rationale was not served in this case.

B. District Courts already possess ample tools to ensure that an adverse inference does not tilt the balance too far in favor of a non-spoliating party

This case also illustrates why concerns about the effect of granting an adverse inference—or relaxing the standard for doing so—are overstated.

Some courts take the view that "the adverse inference instruction is an extreme sanction and should not be given lightly." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 & n.39 (S.D.N.Y. 2003) (collecting cases). Under that view, an adverse inference can be "too difficult a hurdle for the spoliator to overcome," and "the party suffering this instruction will be hard-pressed to prevail on the merits." *Id.* at 219-20.

On the other hand, other courts have concluded that "adverse inference instructions are one of the ***least severe*** sanctions which the court can impose." *Mosel Vitelic Corp. v. Micron Tech., Inc.*, 162 F. Supp. 2d 307, 315 (D. Del. 2000) (emphasis added) (citing Kristin Adamski, *A Funny Thing Happened on the Way to the Courthouse: Spoliation in Illinois*, 32 J. MARSHALL L. REV. 325, 341-421 (1999), and Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 794-95 (1991)).

To the extent this Court is concerned that relaxing the standard for granting an adverse inference could tip the scales too heavily against the spoliating party, that fear is unwarranted. Even in the circuits that

follow a negligence standard, courts already have adequate safeguards to ensure that an adverse inference does not unfairly cripple the spoliator's case.

First, as discussed above, the "culpable state of mind" is only one of the three factors in the test applied across the circuits. *See* Lambert, *supra*, at 689 ("Despite these different articulations, all of the tests focus on the same factors: whether the spoliator had a duty to preserve the evidence; whether the evidence was relevant; and whether the spoliator had a sufficient mental culpability."). With respect to the "relevance" factor, courts typically require an elevated showing to prevent granting an adverse inference when the spoliated evidence is relevant, but of minor importance to a claim or defense. (*See* App. 23 ("And even if bad faith were shown, the court's decision not to impose sanctions would be appropriate if the practical importance of the evidence was minimal.")). *See also Handbook of Fed. Civ. Discovery & Disclosure*, *supra*, § 16:8 ("If the allegedly spoliated evidence is only slightly relevant, a spoliation inference is not appropriate.").

Thus, if either of these other two factors is not met, an adverse inference will not be appropriate, regardless of the spoliator's mental culpability. Indeed, courts often decline to grant an adverse inference based on the absence of one of those two factors. *See*, *e.g.*, *Zubulake*, 220 F.R.D. at 222 (finding defendant had a duty to preserve evidence at issue and destroyed evidence with the "requisite culpability," but denying adverse inference because Plaintiff "has not sufficiently demonstrated that the lost tapes contained relevant

information"); *Bashir v. Amtrak*, 119 F.3d 929, 932 (11th Cir. 1997) (declining to grant adverse inference based on defendant's loss of train's speed tape, in part, because three witnesses were available to testify about train's speed at time of fatal accident); *Millenkamp v. Davisco Foods Int'l, Inc.*, 562 F.3d 971, 981 (9th Cir. 2009) (affirming denial of adverse inference because "there is no evidence in the record to indicate that the Millenkamps knew that litigation would be forthcoming when they allowed the evidence to spoil").

Second, the negligence standard merely sets the baseline state of mind required for granting an adverse inference instruction. That does not affect District Courts' broad discretion to tailor an adverse inference to the facts of a given case. One district court listed the most common menu of options as follows:

> [C]ourts have crafted various levels of adverse inference jury instructions: The court may instruct the jury that "certain facts are deemed admitted and must be accepted as true"; impose a mandatory, yet rebuttable, presumption; or "permit (but . . . not require) a jury to presume that the lost evidence is both relevant and favorable to the innocent party."

Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 535 (D. Md. 2010).

Thus, judges should be empowered to grant a less severe permissive adverse inference based on negligent spoliation, while still leaving them the discretion to impose a harsher version—*e.g.*, a mandatory

rebuttable presumption or requiring the jury to deem certain facts admitted—in cases involving more egregious conduct. *See* 2 *McCormick on Evid.* § 265 (8th ed. Jan. 2020 update) ("Although sanctions are imposed by courts on the basis of negligence and knowledge of the consequences of evidentiary destruction, a showing of bad faith or willful destruction will usually be required for more extreme remedies."); *Adkins v. Wolever*, 554 F.3d 650, 652-53 (6th Cir. 2009) (en banc) ("Because failures to produce relevant evidence fall along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality, the severity of a sanction may, depending on the circumstances, correspond to the party's fault.") (internal quotation marks and citation omitted).

Applying these principles to this case, the District Court could have granted an adverse inference without the feared effect of eliminating any chance of Carnival ultimately prevailing before a jury.

There is no dispute that Carnival anticipated litigation immediately upon learning of Plaintiff's injury and, therefore, had a duty to preserve the chair, for it admitted as much in the District Court. (App. 22). Moreover, the chair was not just relevant, but vital to Plaintiff's ability to establish the notice element of her claim. As the dissent recognized, "it is clear that the missing chair could have provided Tesoriero with critical evidence that Carnival knew or should have known that its chair was defective." (App. 50; *see also id.* at 52 ("Because showing notice is an element of her claim for negligence, and because inspecting the chair

may well have provided the necessary evidence that Carnival knew or should have known of the chair's defective condition, the chair qualifies as crucial evidence.")). And even the majority opinion allowed that Carnival's hasty disposal of the chair—which occurred even as Plaintiff immediately and repeatedly identified the chair as the cause of her serious arm injury—could be deemed negligent. (App. 27, 28). An adverse inference would be appropriate in this case under the proposed negligence standard.

Finally, granting an adverse inference here would not be the death knell for Carnival's case. Rather, Plaintiff merely moved the District Court to apply the adverse inference to preclude entry of summary judgment for Carnival. In other words, the inference would prevent Carnival from profiting from its destruction of evidence. Carnival would remain free to urge a jury to reject the inference that it discarded the chair because it would have been favorable to Plaintiff. *See Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir. 1998) ("[T]he trier nonetheless may refuse to draw the negative inference. In other words, the inference is permissive, not mandatory."). In short, the adverse inference would do nothing more than level the playing field and allow the jury to make a decision.

CONCLUSION

For all the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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