No. 24-_____

IN THE
Supreme Court of the United States

MOLLY VOGT, AS TRUSTEE FOR THE HEIRS AND NEXT-OF-KIN OF JOSHUA VOGT, DECEASED,
Petitioner,

v.

CO ROBERT ANDERSON; CO RAYNOR BLUM; AND CO RONALD J. IMGRUND,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 13, 2025

QUESTION PRESENTED

When a party destroys evidence "with the intent to deprive another party of the information's use in the litigation," Federal Rule of Civil Procedure 37(e)(2) empowers the district court to "instruct the jury that it may . . . presume the information was unfavorable to" the destroyer. The district court below awarded an adverse-inference sanction against respondents after finding that county jailers watched and then intentionally destroyed the only video showing inside the cells where an arrestee in their care sickened and died of a drug overdose. But a divided Eighth Circuit panel affirmed summary judgment for respondents by crediting their self-serving statements about the events the destroyed video could have captured. Judge Shepherd dissented, observing that the court had opened a circuit split, which includes at least the Second, Fifth, and D.C. Circuits. The Eighth Circuit denied rehearing en banc by a six-to-five vote.

The question presented is:

Whether a jury should decide the weight of an adverse inference from the intentional destruction of evidence that could have contradicted the spoliator's version of events.

PARTIES TO THE PROCEEDINGS

Petitioner Molly Vogt, as Trustee for the Heirs and Next-of-Kin of Joshua Vogt, deceased, was the plaintiff in the district court and the appellant in the court of appeals.

Respondents CO Robert Anderson, CO Raynor Blum, and CO Ronald J. Imgrund were defendants in the district court and appellees in the court of appeals.

Crow Wing County, Minnesota; Heath Fosteson, individually and in his capacity as Crow Wing County Jail Administrator; CO Cherokee DeLeon; CO Christine Ghinter; CO Lukasz Organista; and MEnD Correctional Care Inc. were defendants in the district court but did not participate in the court of appeals proceedings. They were dismissed from the case before the district court entered the summary judgment presented for review.

RELATED CASES

Decisions Under Review:

Vogt, etc. v. MEnD Corr. Care Inc., et al., 2023 WL 2414531 (D. Minn. Mar. 8, 2023) (No. 21-cv-1055 (WMW/TNL)) (adopting report and recommendation)

Vogt, etc. v. MEnD Corr. Care Inc., et al., 2023 WL 2414551 (D. Minn. Jan. 30, 2023) (No. 21-cv-1055 (WMW/TNL)) (report and recommendation)

Vogt, etc. v. MEnD Corr. Care Inc., et al., 2023 WL 7180168 (D. Minn. July 28, 2023) (No. 21-cv-1055 (WMW/TNL)) (report and recommendation)

Vogt, etc. v. MEnD Corr. Care Inc., et al., 2023 WL 7180169 (D. Minn. Sept 25, 2023) (No. 21-cv-1055 (WMW/TNL)) (adopting report and recommendation)

Vogt, etc. v. MEnD Corr. Care Inc., et al., 113 F.4th 793 (8th Cir. Aug. 16, 2024) (No. 23-3359)

Vogt, etc. v. MEnD Corr. Care Inc., et al., 2024 WL 4508478 (8th Cir. Oct. 16, 2024) (No. 23-3359) (denying rehearing)

Prior, Related Decisions:

Vogt, etc. v. Crow Wing Cnty., et al., 2021 WL 6275271 (D. Minn. Nov. 1, 2021) (No. 21-cv-1055 (WMW/TNL)) (report and recommendation)

Vogt, etc. v. Crow Wing Cnty., et al., 2022 WL 37512 (D. Minn. Jan. 4, 2022) (No. 21-cv-1055 (WMW/TNL)) (adopting report and recommendation)

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Petitioner Molly Vogt, as Trustee for the Heirs and Next-of-Kin of Joshua Vogt, deceased, petitions for a writ of certiorari to review the judgment of the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-13a) is reported at 113 F.4th 793. The reports and recommendations of the magistrate judge (App. 16a-56a, 59a-99a) are not reported but are available at 2023 WL 7180169 and 2023 WL 2414551. The orders of the district court judge adopting the magistrate's reports and recommendations (App. 14a-15a, 57a-58a) are not reported but are available at 2023 WL 7180168 and 2023 WL 2414531.

JURISDICTION

The court of appeals entered judgment on August 16, 2024. The en banc court, voting six to five, denied a petition for rehearing on October 16, 2024. App. 100a-101a. On January 3, 2025, Justice Kavanaugh extended the time for filing a petition for a writ of certiorari to and including February 13, 2025. Petitioner Vogt invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Section 1983 of Title 42 of the U.S. Code and Federal Rules of Civil Procedure 37(e) and 56 are reproduced at App. 102a-106a.

INTRODUCTION

For centuries, common-law courts have applied the rule that "the destruction" of evidence "is evidence from which alone its contents may be inferred to be unfavorable to the possessor." 2 John Henry Wigmore, *Evidence in Trials at Common Law* § 291, at 228 (James H. Chadbourn rev. 1979) ("Wigmore"). That

adverse-inference rule "packs a wallop" and "may be dispositive." *Alexander v. South Carolina State Conf. of the NAACP*, 602 U.S. 1, 35-36 (2024) (cleaned up). And it protects the integrity of the judicial process from those who act "with the intent to deprive another party" of relevant evidence. Fed. R. Civ. P. 37(e)(2).

The decision below deprived that rule of any effect. The court of appeals credited—at summary judgment, no less—respondents' self-serving statements, which a spoliated video could have contradicted had it been preserved. In other words, the panel permitted spoliators to evade trial by destroying evidence that could have hurt their case. That legal error drew a fierce dissent and five votes for rehearing en banc.

It also created a circuit split. The Second, Fifth, and D.C. Circuits have held that a court cannot grant summary judgment where an adverse inference could have contradicted a spoliator's proffered evidence in his own favor. Those circuits correctly reason that holding a victim of spoliation to any greater standard of proof would defeat the purposes of the adverse-inference sanction and reward parties who destroy relevant evidence. Courts have reached similar results across a wide variety of contexts.

In case after case, this Court has established that the factfinder's role includes determining the weight to be given a party's failure to present probative evidence. Those decisions build on a rich common-law tradition. Since at least 1722, Anglo-American courts have applied the maxim that "all things are presumed against the destroyer" of evidence (*omnia praesumuntur contra spoliatorem*). But the decision below abandoned that maxim. It concluded instead that respondents' statements about their own conduct overcame "any hypothesis" that a jury could draw from the intentional

destruction of a video that could have contradicted them.

The question presented is exceptionally important. Allowing spoliators to destroy crucial evidence and then win summary judgment harms victims of spoliation, undermines public confidence in the courts, and emboldens future defendants to destroy unfavorable evidence. Those ill effects will reverberate far beyond disputes over deaths in county jails. State and federal enforcers of all stripes rely on adverse inferences to fill evidentiary gaps created by unscrupulous parties. As the Department of Justice has recognized, weakening the adverse-inference sanction would enable wrongdoers to "undercut the truth-seeking function of the judicial process."[1]

This case is an ideal vehicle for clarifying how an adverse inference applies at summary judgment. The adverse-inference sanction and the findings supporting it were undisputed on appeal, and the decision below acknowledged the possibility that the destroyed video contradicted respondents' version of events.

This Court should grant review to resolve the circuit split and reinforce the traditional safeguards against destroying evidence to hide the truth.

STATEMENT

1. In January 2020, a police officer detained Joshua Vogt during a traffic stop. App. 18a. The officer brought Mr. Vogt to the Crow Wing County Jail, arriving around midnight. *Id.* Respondent Officer Anderson, who searched Mr. Vogt when he arrived, observed nothing unusual before placing him

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[1] Mem. of Law in Support of Pls.' Mot. for an Adverse Inference at 29, *United States v. Google LLC*, No. 1:23-cv-00108-LMB-JFA, ECF No. 1116 (E.D. Va. Aug. 2, 2024).

in Group Holding, a booking-area cell, at 12:11 a.m. App. 19a-20a.

Ten minutes later, Mr. Vogt emerged from Group Holding and approached respondent Officer Blum at the booking station. App. 20a. His condition was visibly deteriorating: Officer Blum suspected that Mr. Vogt had taken drugs. App. 20a-21a. Mr. Vogt was "sweating heavily," "shaking like a leaf," fidgeting, and speaking rapidly. App. 23a, 25a; *see also* App. 2a, 40a. While speaking with Mr. Vogt, Officer Blum wrote in the booking form that Mr. Vogt had said he was "[o]n something right now" but was "unsure what he took." App. 23a. Officer Blum then left the booking area to tell his superior, respondent Sergeant Imgrund, that Mr. Vogt was "high, really high." App. 24a-25a. Officer Blum later recounted that, in all his encounters with intoxicated people at the jail, Mr. Vogt's symptoms stood out as "more than I would consider normal for someone . . . under the influence." Dkt. 53-4, at 31.[2]

Mr. Vogt's symptoms worsened again. While having his booking photo taken at 12:34 a.m.—13 minutes after approaching the booking station—Mr. Vogt "was shaking so bad," *id.* at 32, that he "lost his balance and stumbled out of his shoes," staggering backward "six to eight feet" and breaking his fall against the wall outside the Group Holding cell, App. 25a. Officers Blum and Anderson saw Mr. Vogt stumble. App. 26a; Dkt. 90-5, at 19 (Tr. 74:12-14); Dkt. 90-3, at 16 (Tr. 61:3-5). Officer Anderson took Mr. Vogt to Group Holding. At the same time, Officer Blum returned to Sergeant Imgrund's office to reiterate that Mr. Vogt "was on something and needed help." App. 26a.

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[2] References to "Dkt." are to the district court docket entries. The cited page references are to the pages of the PDF.

Sergeant Imgrund then visited Mr. Vogt in the Group Holding cell at 12:41 a.m. *Id.*

Five minutes later, Sergeant Imgrund and Officer Anderson took Mr. Vogt to the adjacent booking-area holding cell. App. 28a. According to the sergeant, they moved Mr. Vogt "so that he wouldn't fall off of the chairs" in Group Holding. Dkt. 53-3, at 174-75. Just six seconds of video show the transfer. Mr. Vogt could no longer walk on his own; the officers held him up by the wrists and armpits because they thought he would fall. *See* App. 28a; Dkt. 90-5, at 23-24 (Tr. 92:18-93:11); Dkt. 90-2, at 28 (Tr. 109:22-110:20).

Inside the holding cell, Mr. Vogt deteriorated further. Respondents testified that they glanced inside while making rounds to verify that Mr. Vogt was "alive and not in distress." App. 29a. None entered the cell until more than 40 minutes later, at 1:29 a.m., when Sergeant Imgrund testified that he first noticed Mr. Vogt had signaled for help. *Id.*

Mr. Vogt stopped breathing by 1:32 a.m. App. 30a. Only around this time, more than an hour after he began exhibiting what Officer Blum had recognized as severe intoxication, did the officers seek medical help. But the paramedics arrived too late. They could not revive Mr. Vogt, who died of a methamphetamine overdose. App. 1a.

Hours after Mr. Vogt died, a county investigator met Mr. Vogt's family. He told them that they would "eventually" be able to see videos of Mr. Vogt at the jail. App. 63a. The investigator also assured the family that there was "not an inch" of the jail that was "not under constant surveillance." *Id.* The family informed the investigator that they might consult legal counsel. *Id.* Later, another investigator played footage from the jail for Mr. Vogt's family. App. 64a. The

family pressed for footage showing Mr. Vogt inside the cells. The investigator replied that no camera showed inside the cells, that he "would have that footage" if any did, and that the jail had "given [him] footage of everything" from "every camera angle." App. 64a-65a.

After retaining counsel, the family asked again for "all video" of Mr. Vogt. App. 65a. The county produced the videos it had shown the family before, from Cameras 3-8, 15-17, and 19—but nothing showing inside Mr. Vogt's cells. *See id.*; Dkt. 60-2. The family then asked specifically for "all video footage from Camera 18." App. 65a. The county answered that it had already provided an "appropriate data production." Dkt. 60-4, at 1.

2. Petitioner Molly Vogt, Joshua Vogt's daughter, brought this Section 1983 action. She alleged that respondents Imgrund, Anderson, and Blum deliberately disregarded her father's medical condition. App. 1a. She also alleged that the county had not disclosed all relevant footage of Mr. Vogt's detention. App. 3a.

Camera 18 is the only jail camera that shows inside both cells where Mr. Vogt was held the night he died. *Id.* During discovery in the district court, respondents repeatedly denied that any footage from Camera 18 had ever existed. *E.g.*, App. 66a (respondents' counsel telling the district court that "all of the video . . . was, in my understanding, stored"). But eventually, respondents admitted that county employees had watched Camera 18's footage and then deleted it: The jail administrator testified that he and another employee "watched all the video," including from Camera 18, and then relied on an unnamed sergeant to burn the videos to disks to preserve them. App. 72a, 77a-78a. The only system that could save (or not save) surveillance footage from the jail sat in the office of respondent Sergeant Imgrund, the officer in charge

when Mr. Vogt died. *See* Dkt. 90-2, at 40 (Tr. 158:5-21). Footage from 10 other cameras was preserved. Only Camera 18's was destroyed.

The district court found that the county had intentionally destroyed the video from Camera 18. So the court imposed an adverse-inference sanction against respondents under Federal Rule of Civil Procedure 37(e)(2). App. 99a. The court stressed the "selective preservation" of less relevant footage and respondents' failure to explain why county employees watched the footage but did not preserve it. App. 80a. It also found that deleting the footage prejudiced petitioner Vogt because Camera 18 "captured footage different from other cameras"; it could have shown, for example, "what was visible during the well-being checks conducted on Joshua Vogt and any deterioration (or lack thereof) in his condition." App. 79a, 84a. Concluding that "[n]either the Court nor Plaintiff can know what the footage from Camera 18 showed or how significant that footage was to this litigation," App. 84a, the court authorized the parties to present evidence about the spoliation at trial and stated that it would instruct jurors that they "may, but are not required to, infer that the footage from Camera 18 would have been favorable to Plaintiff," App. 97a.

Four months later, the magistrate judge recommended granting summary judgment to the officers. Sparing just two sentences for the adverse-inference sanction, the magistrate judge wrote that the intentional spoliation "does not alter the Court's analysis." App. 55a. After the district court adopted the report and recommendation in full, App. 14a-15a, petitioner Vogt appealed.

3. A divided Eighth Circuit panel affirmed. The panel majority accepted the magistrate judge's finding that the county "intentionally destroyed" the only foot-

age showing "Mr. Vogt's (about) eight-minute stay in Group Holding and an angle of his (about) hour in" the cell where he died. App. 3a. The panel also acknowledged the possibility that the destroyed video would have contradicted respondents' story, such as by showing Mr. Vogt with "more severe symptoms than the officers disclosed in their testimony." App. 8a.

Despite accepting those facts, the panel endorsed the magistrate judge's conclusion that the intentional spoliation "does not alter" the summary-judgment analysis. App. 7a. "Even if Camera 18 could capture some hypothesized footage," the panel explained, "it would not allow an inference" that the officers were liable given "the rest of the record"—the officers' own statements about what happened inside the cells that the destroyed footage would have captured. App. 8a. To support its conclusion, the panel credited respondents' assertions that Mr. Vogt told officers that "he was having an anxiety attack";[3] that respondents "performed exercises" in the cells with Mr. Vogt "to calm him down"; and that respondents "called for emergency medical help when" Mr. Vogt's "condition worsened." *Id.* Only the officers' own statements supported those claims.

The panel also credited additional facts based on evidence that respondents had selectively preserved. For example, it observed that the officers "repeatedly checked" on Mr. Vogt in the hour before he died. *Id.* The majority did not address the possibility that the destroyed video showed that the officers saw but ignored

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[3] Respondents' contention that Mr. Vogt attributed his symptoms to an anxiety attack was also contradicted by the booking form, where Officer Blum reported that Mr. Vogt said he was "[o]n something right now, but he's unsure what he took." App. 23a.

Mr. Vogt's obvious medical need during those checks. *See* App. 84a.

Having so constructed the record, the panel concluded that "any hypothesis" about Camera 18's footage "would not permit a reasonable jury to conclude that the officers' conduct reached the 'onerous standard' of deliberate indifference." App. 9a. It thus affirmed the summary judgment for the officers.

4. Judge Shepherd dissented. He observed that, before this case, the Eighth Circuit had "not directly addressed the interplay between entitlement to an adverse-inference instruction and the consideration of a summary judgment motion." App. 10a. "Other courts have addressed the issue directly, concluding that the existence of an adverse-inference instruction, coupled with other record evidence—even circumstantial—can defeat summary judgment." App. 11a (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998), and *Van Winkle v. Rogers*, 82 F.4th 370, 382 (5th Cir. 2023)). From those cases, Judge Shepherd concluded that summary judgment was inappropriate: A reasonable jury could combine the extensive evidence of Mr. Vogt's "deteriorating condition" with the evidence supplied by the adverse inference from the spoliation of Camera 18's footage to find the officers liable. App. 11a-12a (citing *Kronisch*, 150 F.3d at 128).

Judge Shepherd criticized the majority's conclusion that "no hypothesis . . . would allow a reasonable jury to conclude that the officers were deliberately indifferent." App. 12a. That "conclusion invades the province of the jury in considering the adverse-inference instruction" by substituting the majority's own "speculation about what the destroyed video does or does not show." App. 12a-13a. Granting summary judgment based on that speculation, Judge Shepherd concluded, "makes

the adverse-inference instruction meaningless" as a remedy for the "intentional destruction of evidence." App. 13a.

5. After the panel's ruling, petitioner Vogt sought en banc rehearing. The full Eighth Circuit denied the petition six votes to five. Judges Smith, Shepherd, Kelly, Erickson, and Grasz voted for rehearing. App. 100a.

REASONS FOR GRANTING THE PETITION

The decision below held that a jury could not weigh an adverse inference from the intentional destruction of evidence that could have contradicted respondents' version of events. That decision creates a circuit split. In the Second, Fifth, and D.C. Circuits, a party cannot use evidence he selectively preserved to overcome an adverse inference from his intentional spoliation of other evidence that could have contradicted it. Several other courts have endorsed that sensible rule.

The decision below also breaks from this Court's precedent and centuries of Anglo-American legal practice. Common-law courts have long presumed "all things . . . against the destroyer" to remediate and to punish the wrongful destruction of evidence. And historically, the jury, applying its members' common sense, must decide the weight that adverse presumption bears.

The question presented is exceptionally important. Spoliation hurts everyone: plaintiffs and defendants, individuals and companies, and state and federal enforcers alike. Weakening adverse-inference sanctions against spoliation hampers the administration of justice and rewards misconduct. This case is an ideal vehicle to clarify how an adverse inference affects the analysis at summary judgment. Respondents did not challenge the adverse-inference sanction on

appeal, and the decision below acknowledged that the spoliated evidence could have contradicted respondents' self-serving statements. The only question is whether a jury should decide the weight of that adverse inference. And the answer is yes.

This Court should grant the petition for certiorari.

I. The Decision Below Created a Circuit Split on the Legal Effect of an Adverse-Inference Sanction at Summary Judgment

A. The Second, Fifth, and D.C. Circuits Hold That a Victim of Spoliation Should Defeat Summary Judgment When the Destroyed Evidence Could Have Contradicted the Movant's Case

At summary judgment, the Second, Fifth, and D.C. Circuits refuse to weigh the evidence that a spoliator selectively preserved against the destroyed evidence that could have contradicted it. They leave that task to the jury and deny summary judgment.

1. In *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), the Second Circuit held that a federal official should explain to a jury his intentional destruction of "files" that "perhaps" could have "contradict[ed]" his "assertions." *Id.* at 129. The plaintiff had alleged that the official injured him by slipping a drug into his drink at a Paris café as part of a covert drug-testing program. *Id.* at 116-20. In a sworn deposition, the official had testified that he had never used the drug "in any overseas interrogations or operations." *Id.* at 118. But discovery showed that the official had intentionally destroyed files describing "the full range and extent" of the covert drug-testing program. *Id.*

The Second Circuit held that this spoliation precluded summary judgment because the destroyed files "may have contained documents supporting (or potentially

proving) [the plaintiff's] claim." *Id.* at 128. Although the plaintiff had no "direct proof" of his claim, the court observed that the official had destroyed "the most obvious source of such proof, if it were to exist at all." *Id.* at 129-30. "Under these circumstances," the court wrote, "requiring more direct proof than plaintiff has provided" to defeat summary judgment "would be at odds with the purposes of the adverse inference rule." *Id.* at 130. Relying on "the possibility that a jury would choose to draw" an adverse inference, the Second Circuit refused to accept the official's self-serving testimony and reversed the summary judgment in his favor. *Id.* at 128.

Kronisch traced its holding to the "well-established and long-standing principle of law that a party's intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction." *Id.* at 126 (citing *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982) (Breyer, J.), and 2 Wigmore § 291). The court identified "evidentiary, prophylactic, punitive, and remedial rationales" for that rule. *Id.*

"The evidentiary rationale," the court said, "derives from the common sense notion that a party's destruction of evidence which it has reason to believe may be used against it in litigation suggests that the evidence was harmful to the party responsible for its destruction." *Id.* "The prophylactic and punitive rationales" derive from "the equally commonsensical proposition" that drawing an adverse inference "against parties who destroy evidence will deter such destruction, and will properly 'place the risk of an erroneous judgment on the party that wrongfully created the risk.'" *Id.*

(quoting *Nation-Wide*, 692 F.2d at 218) (cleaned up). And the "remedial rationale" dictates that an adverse inference should "restor[e] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." *Id.*

Given those rationales, the Second Circuit cautioned against "holding the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence." *Id.* at 128. Doing that, the court warned, "would subvert the prophylactic and punitive purposes of the adverse inference, and would allow parties who have intentionally destroyed evidence to profit from that destruction." *Id.* In the court's view, the adverse inference would be "no benefit at all" if, "having been deprived of evidence that may have been crucial to making their case," victims of spoliation were "held to precisely the same standard of proof before they may present their case to a jury." *Id.*

2. At least two other circuits agree with *Kronisch*, reversing summary judgments where the spoliated evidence could have contradicted the movant's case.

a. The Fifth Circuit holds that an adverse-inference sanction from the destruction of such evidence makes summary judgment "impossible." *Van Winkle v. Rogers*, 82 F.4th 370, 382 (5th Cir. 2023). In *Van Winkle*, part of a tire flew off a truck and struck the plaintiff while he was driving. *Id.* at 373. The plaintiff sued, claiming that the tire was defective. Discovery showed that the defendants had destroyed the tire's remains after the accident, making it impossible to test. The truck driver, who was a defendant, testified that the tire blew when the truck hit a "pretty good sizable bump" in the road. *Id.* at 382; *see also* Br. of Appellees at 17-19, *Van Winkle v. Rogers*, No.

22-30638 (5th Cir. Feb. 7, 2023), 2023 WL 2035447 ("*Van Winkle* Appellees Br.") (so arguing). The district court accepted the driver's "bump" testimony, *see Van Winkle v. Rogers*, 2022 WL 4280552, at *5 (W.D. La. Sept. 15, 2022), found that the plaintiff had "introduced no evidence" that the tire was defective, and granted summary judgment. *Van Winkle*, 82 F.4th at 382. On appeal, the plaintiff argued that the defendants destroyed the tire in bad faith, warranting an adverse inference that would create a genuine issue of fact for a jury. The defendants resisted that argument, pointing again to the truck driver's testimony that the bump was "the most likely cause" of the accident. *Van Winkle* Appellees Br. 19.

The Fifth Circuit held that the district court erred by denying an adverse-inference sanction. *See* 82 F.4th at 379. "As a result of [that] holding," the Fifth Circuit also reversed the summary judgment. *Id.* It reasoned that a finding of bad faith would permit the jury to draw an adverse inference, creating "a different evidentiary dynamic on remand." *Id.* And because the destroyed tire could have supported the plaintiff's theory that a defect caused the accident, the Fifth Circuit rejected the defendants' effort to rely on their own testimony about the road "bump" to defeat causation. *Id.* at 382; *see also id.* at 381 (observing that "[i]ssues of causation will need to be addressed anew" given the Fifth Circuit's spoliation holding, which "potentially changes the evidentiary foundation for the claims"). "The possibility" that a jury would infer "that Defendants destroyed the tire because they knew it was unfavorable to them," the court explained, "makes it impossible to determine the validity of the . . . summary judgment" for the defendants. *Id.* at 382.

b. In *Talavera v. Shah*, 638 F.3d 303 (D.C. Cir. 2011), the D.C. Circuit adhered to the same principle.

The plaintiff, Talavera, alleged gender discrimination after being denied a promotion. *Id.* at 307. Her interviewer testified that he chose a man over Talavera because the man did better in his interview and was more qualified. *Id.* at 312. But soon after "conducting the interviews and making his selection decision," the interviewer "destroyed all of his interview notes," violating applicable preservation requirements. *Id.* at 311. The district court acknowledged the intentional spoliation but ruled that it warranted "only a 'weak adverse inference'" and granted summary judgment. *Id.* at 312 (citation omitted).

The D.C. Circuit reversed the summary judgment because the destroyed notes "might have undermined" the interviewer's "claim that the man he selected exhibited more knowledge of the job" than Talavera did. *Id.* "The notes represented Talavera's best chance" to prove that her interviewer's "proffered reason for the selection was pretextual." *Id.* So the district court "erred in finding that Talavera was entitled to only a 'weak adverse inference'"; "a reasonable jury could find" that the interviewer destroyed his notes to conceal that he had refused to promote Talavera because of unlawful animus, so the adverse inference defeated summary judgment. *Id.* at 312-13.

3. No fewer than five other circuits have endorsed *Kronisch* or adopted similar reasoning, underscoring the wide acceptance of its principles.

a. The Seventh Circuit embraced *Kronisch* in *Epic Systems Corp. v. Tata Consultancy Services Ltd.*, 980 F.3d 1117 (7th Cir. 2020), affirming in part and reversing in part a jury verdict based on an adverse-inference instruction awarded after the defendant destroyed evidence. The Seventh Circuit reasoned that an adverse inference cannot "hold all the water" for a claim absent any other evidence but can

"plug evidentiary holes" in a plaintiff's case, pushing "'a claim that might not otherwise survive summary judgment over the line.'" *Id.* at 1136 (quoting *Kronisch*, 150 F.3d at 128); *cf.* App. 2a-3a, 12a (recounting record evidence of the officers' deliberate indifference to Mr. Vogt's overdose).

b. The Ninth Circuit endorsed *Kronisch*'s holding when reviewing a bench-trial verdict in *Ritchie v. United States*, 451 F.3d 1019 (9th Cir. 2006). *Ritchie* mirrored *Kronisch* factually. In both cases, the plaintiffs claimed injury from a covert drug-testing program and invoked an adverse inference from the destruction of documents about the program as evidence for their claims. But *Ritchie* proceeded beyond summary judgment to a bench trial, where the district judge found for the government. On appeal, the plaintiff argued that the district court should have drawn an adverse inference in his favor at trial.

The Ninth Circuit explained that, on a motion for judgment as a matter of law, the plaintiff's "proof at trial would have been sufficient to permit the district court to draw an adverse inference under the *Kronisch* standard." *Id.* at 1025 (citing *Kronisch*, 150 F.3d at 129). After all, a "district judge lacks the authority to resolve disputed issues of fact" on a motion for "judgment as a matter of law." *Id.* at 1023. But *Ritchie*'s plaintiff contested the court's findings after a bench trial, where the factfinder could exercise its discretion not "to draw an adverse inference against the government." *Id.* at 1025; *cf. Nation-Wide*, 692 F.2d at 219-20 (affirming bench-trial verdict against defendants where district court lent "significant weight" to defendants' destruction of relevant business records); *Kronisch*, 150 F.3d at 129 (although plaintiff could survive summary judgment, his evidence "may prove to be altogether vulnerable at trial").

c. The Fourth Circuit rejected correctional officers' reliance on their own description of what a deleted video would have shown "to bolster their case for summary judgment." *Goodman v. Diggs*, 986 F.3d 493, 497 n.6 (4th Cir. 2021). Advising that the video's deletion "may warrant an adverse inference," the court vacated the summary judgment, criticizing the defendants' "heads-I-win-tails-you-lose attempt to wield the video to exculpate [themselves] without making it available to" the plaintiff. *Id.*

d. The Third Circuit has stated that the failure to present relevant evidence, even when that evidence was not destroyed in bad faith, can defeat summary judgment. *Jutrowski v. Township of Riverdale*, 904 F.3d 280 (3d Cir. 2018). In *Jutrowski*, the Third Circuit agreed with the district court that the alleged spoliation of dashcam footage from a police cruiser did not warrant an adverse-inference sanction because the plaintiff had failed to prove that the footage ever existed at all. *Id.* at 296. But the Third Circuit still reversed the summary judgment for the defendants on the claim that they conspired to violate the plaintiff's civil rights because a reasonable jury "might infer evidence of a cover-up" from the "absence" of the dashcam footage and the officers' inconsistent accounts of the plaintiff's injuries. *Id.* at 296-97.

e. The Sixth Circuit has repeatedly held that, when the defendant's spoliation renders a plaintiff "'unable to prove an essential element of her case,'" the district court may "'create a rebuttable presumption that establishes the missing elements of the plaintiff's case that could only have been proved by the availability of the missing evidence.'" *Beaven v. DOJ*, 622 F.3d 540, 555 (6th Cir. 2010) (quoting *Rogers v. T.J. Samson Cmty. Hosp.*, 276 F.3d 228, 232

(6th Cir. 2002)); *see Welsh v. United States*, 844 F.2d 1239, 1243, 1246-47 (6th Cir. 1988) (holding that the factfinder properly inferred two required elements of plaintiff's claim from defendant's failure to preserve evidence, even though there was no "direct proof" of those elements).

* * *

All told, eight circuits accept the principle that a spoliator cannot eliminate a fact issue by destroying evidence that might have disproved his case. And at least three have squarely addressed the question here.

B. The Decision Below Created a Circuit Split by Holding That Beneficiaries of Spoliation Can Win Summary Judgment Based on Self-Serving Statements That the Destroyed Evidence Could Have Contradicted

The decision below rejected that broad consensus. Despite an unchallenged adverse-inference sanction, the court of appeals credited respondents' self-serving statements at summary judgment even though the destroyed evidence could have contradicted them.

1. The court below accepted the unchallenged adverse-inference sanction against the officers, including the district court's finding "that the county had intentionally destroyed Camera 18's footage." App. 3a. It agreed that the destroyed footage showed "Mr. Vogt's (about) eight-minute stay in Group Holding and an angle of his (about) hour in" the cell where he died. *Id.* And it acknowledged the possibility that defendants destroyed that footage because it contradicted their case—by showing, for example, "that Mr. Vogt experienced more severe symptoms than the officers disclosed in their testimony, such as cardiac distress . . . , delirium, or an inability to stay upright or conscious." App. 8a.

That possibility should have gone to a jury. To prevail, petitioner needed only to show that her father "had an objectively serious medical need that the defendants knew of and yet deliberately disregarded." App. 4a. By the majority's own account, the destroyed video could have proved that. Video evidence here was not just relevant, but crucial: the only direct, objective evidence of what the officers did and perceived inside Mr. Vogt's cells during the last hour of his life. *Cf. Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (holding that a videotape "so utterly discredited" a party's story that the other party deserved summary judgment). A reasonable jury could conclude that Mr. Vogt's jailers destroyed the video after watching it "because they knew it was unfavorable to them." *Van Winkle*, 82 F.4th at 382. That is, it could have shown that the officers knew Mr. Vogt's condition was serious and worsening but recklessly disregarded it until he had already stopped breathing. "The possibility" that a jury would draw that inference should have defeated summary judgment. *Id.*

2. By crediting the evidence that the destroyed video could have contradicted, the Eighth Circuit split from its sister circuits, as Judge Shepherd's dissent explained: The "critical inquiry" here is "how entitlement to an adverse-inference instruction intersects with consideration of a motion for summary judgment." App. 10a. Both the "district court and the majority conclude that the adverse-inference instruction does not alter the analysis" at summary judgment. *Id.* (cleaned up). But "[o]ther courts have addressed the issue directly," holding that an adverse-inference instruction *does* defeat summary judgment in these circumstances. App. 11a (citing *Kronisch*, 150 F.3d at 126, and *Van Winkle*, 82 F.4th at 382).

Confronting similar facts—spoliators seeking summary judgment based on evidence that the spoliated evidence could have contradicted—the Second, Fifth, and D.C. Circuits denied summary judgment and remanded for jury trials. In *Kronisch*, the destroyed files were "the most obvious source of . . . proof" available to "contradict" the defendant's testimony that he had not tested drugs on the plaintiff. 150 F.3d at 129-30. In *Van Winkle*, the destroyed tire could have created "a different evidentiary dynamic," enabling the jury to reject the truck driver's testimony that a "'pretty good sizable bump'" caused the accident that injured the plaintiff. 82 F.4th at 382 (citation omitted). And in *Talavera*, the destroyed interview notes were the plaintiff's "best chance" to prove that the interviewer's testimony was pretextual. 638 F.3d at 312. Had this case arisen in any of those circuits, it would have been decided differently under those precedents.

The panel majority cited *Kronisch* just once—for the proposition that an "adverse inference instruction 'standing alone' is insufficient to defeat summary judgment." App. 7a n.2. But it neither applied that standard to petitioner Vogt's claim nor described her claims as relying only on the adverse inference. Nor could it have done so: the majority itself recounted other record evidence supporting petitioner's claim, such as the rapid progression of Mr. Vogt's symptoms. App. 2a-3a. Judge Shepherd's dissent likewise discussed that evidence, explaining that

> [Mr.] Vogt was observed acting strangely at the time he was booked; that officers suspected that he was under the influence due to his fidgeting, sweating, and rapid speech; that he stumbled while having his booking photo taken; that he had

> to be helped into the holding cell; and that at some point, he signaled officers for help before becoming unresponsive.

App. 12a. And the dissent correctly observed that all that evidence, plus the adverse inference, should be "'enough' to entitle Molly Vogt to proceed to trial." *Id.* (quoting *Kronisch*, 150 F.3d at 126).

To affirm the summary judgment, the panel majority itself weighed the adverse inference against the other record evidence. It assessed "the officers' conduct throughout the detention," as the officers themselves described it, and decided that the spoliated footage thus could not support "any hypothesis" justifying a verdict against the officers. App. 9a. But as Judge Shepherd explained, that conclusion substituted "the majority's speculation about what the destroyed video does or does not show" for the jury's own judgment, nullifying the adverse-inference instruction. App. 12a-13a. That approach cannot be squared with the correct approach expressed in *Kronisch*, *Van Winkle*, and *Talavera*.

The en banc court of appeals narrowly denied rehearing despite Judge Shepherd's warning that the decision below created a circuit split. The court of appeals is unlikely to right itself. This Court should grant the petition to realign the federal circuits and clarify the effect of an adverse-inference instruction at summary judgment.

II. The Decision Below Departs from This Court's Cases and Centuries of Practice

The divided decision below also breaks with this Court's precedent and with centuries of Anglo-American legal practice. The common-law maxim that "all things are presumed against the destroyer" reflects long judicial experience with spoliation. So

does the principle that the civil jury, applying its members' common sense, should decide what weight to give that presumption in each case.

A. The Decision Below Conflicts with This Court's Cases Holding That Adverse Inferences Are a Powerful Tool for the Factfinder

1. This Court has long held that adverse inferences apply "in a case of spoliation or equivalent suppression." *Hanson v. Eustace's Lessee*, 43 U.S. (2 How.) 653, 708 (1844). "There the rule is that *omnia praesumuntur contra spoliatorem*": all things are presumed against the wrongdoer. *Id.* at 708-09.

Although that presumption "is not . . . irrebuttable," *The Olinde Rodrigues*, 174 U.S. 510, 528 (1899), the "spoliation of papers" or other evidence is, "undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and justify the suspicions of the court," *The Pizarro*, 15 U.S. (2 Wheat.) 227, 241 (1817) (Story, J.). Should "the spoliation be unexplained, or the explanation appear weak and futile; if the cause labour under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication," a court should rule against the spoliator. *Id.*

The adverse inference permits the factfinder to supply the proof that the spoliation destroyed. This Court applied that principle in *The Bermuda*, 70 U.S. (3 Wall.) 514 (1866). The United States had captured a ship suspected of running the Union's blockade. A key fact question was whether the ship belonged to the British or to the Confederacy. The answer would determine whether the ship could be "rightly condemned as enemy property." *Id.* at 550-51. The evidence showed that the British owned the ship, *see id.* at 542-43, but the crew had burned and thrown

many papers overboard, including the bills of lading and instructions, when the ship was captured, *see id.* at 549-50. This Court penalized that spoliation "of unusual aggravation" by drawing "the most unfavorable inferences as to ownership, employment, and destination." *Id.* at 550. Despite the record evidence of British ownership, the Court wrote that the "spoliation makes the conclusion of [Confederate] ownership . . . wellnigh irresistible." *Id.* Finding that the ship's British ownership "was a pretence," the Court determined that the ship was "rightly condemned." *Id.* at 550-51.

This Court has continued to endorse adverse inferences in other contexts. In *Clifton v. United States*, 45 U.S. (4 How.) 242 (1846), the trial court had instructed the jury that it could "presume" the claimant withheld relevant books and records because, "if produced, they would have operated unfavorably to his case." *Id.* at 246. This Court affirmed that jury instruction as "founded upon the well established rule and principles of evidence." *Id.* at 246-47; *see also id.* (describing adverse inference as "the obvious presumption"). Later, affirming a finding of liability against antitrust conspirators, this Court observed that the "production of weak evidence where strong is available can lead only to the conclusion that the strong would have been adverse." *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939); *see also TransUnion LLC v. Ramirez*, 594 U.S. 413, 439 (2021) (citing *Interstate Circuit* and holding that plaintiffs who relied on "weak" evidence of injury instead of "presumably" available stronger evidence lacked standing).

Just last year, this Court reaffirmed "the venerable rule that a factfinder may draw an adverse inference when a party fails to produce highly probative evidence that it could readily obtain if in fact such evidence

exists." *Alexander v. South Carolina State Conf. of the NAACP*, 602 U.S. 1, 36 (2024). In such cases, the Court explained, the adverse inference "packs a wallop" and "may be dispositive." *Id.* at 35-36 (cleaned up); *see also id.* at 75-76 (Kagan, J., dissenting) (agreeing that an adverse inference "pack[s] a wallop"). The Court then approvingly cited Wigmore for his statement of that "venerable" rule. *Id.* at 36 (majority). At the cited pages, Wigmore explained that the "failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor." 2 Wigmore § 291, at 228.

2. The Eighth Circuit panel majority broke with those precedents.

The adverse inference should have allowed a jury to find for petitioner Vogt. The loss of Camera 18's footage was neither innocent nor inadvertent. Nor was it a mere failure to produce probative evidence—a misdeed that yields a potentially "dispositive" adverse inference. *Alexander*, 602 U.S. at 35. Here, county employees watched and then intentionally destroyed Camera 18's footage "for the purpose of suppressing evidence of the facts surrounding Joshua Vogt's death at the jail." App. 72a, 81a (citation omitted). They then went further, attempting to deny, before and during discovery, that the video even existed at all. *See*, *e.g.*, App. 66a-67a. Under this Court's cases, that course of conduct is itself evidence that should "warrant[] the most unfavorable inferences" against the spoliation's beneficiaries. *The Bermuda*, 70 U.S. (3 Wall.) at 550; *see* 2 Wigmore § 291, at 228.

The court of appeals failed to consider that the spoliation here showed "heavy suspicions, or . . . a vehement presumption of bad faith, or gross prevarication." *The Pizarro*, 15 U.S. (2 Wheat.) at 241. It

instead relied on respondents' description of their own conduct to reject "*any* hypothesis" from the lost video that might have disfavored respondents' case and supported a verdict for petitioner Vogt. App. 9a (emphasis added). That reasoning turned a potentially "dispositive" inference, *Alexander*, 602 U.S. at 35, into an empty gesture.

B. The Decision Below Breaks from the Common-Law Tradition of Robust Adverse-Inference Sanctions

Spoliators have destroyed evidence for strategic gain for centuries. That problem required a solution that deters and remediates spoliators' misconduct to protect "the administration of justice." 2 Charles Frederic Chamberlayne, *A Treatise on the Modern Law of Evidence* § 1070e, at 1280 (1911).

The common law's solution was the adverse inference. *See* 2 Wigmore § 278, at 133-41. The adverse inference dates back at least to the seminal English case, *Armory v. Delamirie*, where a boy found a "jewel" (a piece of jewelry) and went to get it valued by a goldsmith. 93 Eng. Rep. 664, 664 (K.B. 1722). The goldsmith "took out the stones" to reduce the jewel's weight and, with it, the price he offered the boy. *Id.* After receiving the jewel without the stones, the boy sued to recover the lost value, but the goldsmith refused to produce the stones. *Id.* To protect the boy, the Chief Justice "directed the jury, that unless the defendant did produce the jewel, . . . they should presume the strongest against him, and make the value of the best jewels the measure of their damages." *Id.* The reporter indicates that the jury did just that.

American courts continued the English tradition, broadly adopting the adverse-inference rule to guard against spoliation. *See* 2 Wigmore § 291, at 221-22. As one state supreme court summarized, "the law . . .

baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidently employed to perpetrate the wrong." *Pomeroy v. Benton*, 77 Mo. 64, 86 (1882); *see also, e.g.*, *Henderson v. Hoke*, 21 N.C. 119, 148 (1835) ("Everything is to be presumed against a spoliator."); *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. 31, 34 (N.Y. Sup. Ct. 1831) (Sutherland, J.) (stating that "every intendment and presumption [would go] against" an intentional spoliator of evidence).

As Justice Breyer has explained, the adverse-inference sanction is not just remedial; it "also serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk" by spoliating evidence. *Nation-Wide*, 692 F.2d at 218; *see also, e.g.*, *Armory*, 93 Eng. Rep. at 664 (instructing the jury to "presume the strongest" against the spoliator).

By crediting the officers' own descriptions of their conduct over "any hypothesis" from the destroyed video, the majority shifted that risk onto petitioner Vogt, defeating the "prophylactic and punitive purpose" of the adverse-inference sanction and depriving her of any remedy for the intentional spoliation. *Nation-Wide*, 692 F.2d at 218. That result inverted the common-law rule that spoliators bear the risk of their wrongful destruction of evidence. *See* 2 Wigmore § 278, at 133-41.

C. The Eighth Circuit's Ruling Intrudes on the Jury's Role

1. An adverse inference from intentional spoliation is "evidence," 2 Wigmore § 291, at 228, and judges cannot weigh evidence at summary judgment. Deciding the weight and credibility of evidence is the jury's task at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *see also Isaack v. Clark*,

80 Eng. Rep. 1143, 1150 (K.B. 1614) (Coke, J.) (judges are "not to answer" questions of fact); *Tolan v. Cotton*, 572 U.S. 650, 660 (2014) (per curiam). Acknowledging the jury's unique responsibility, Rule 37(e)(2), which authorized the adverse-inference sanction here, presumes that "the jury" will apply an adverse inference from the intentional spoliation of evidence. At common law, too, "the jury" would "make the inference" from a party's spoliation. 2 Wigmore § 291, at 227.

2. The Eighth Circuit "invade[d] the province of the jury in considering the adverse-inference instruction." App. 12a (Shepherd, J., dissenting).

The spoliated video could have shown important evidence, as the panel itself acknowledged. App. 8a. It went to every element of petitioner Vogt's claim. *See* App. 4a; *see also*, *e.g.*, *Presson v. Reed*, 65 F.4th 357, 367 (8th Cir. 2023) ("the requisite knowledge of a substantial risk" to a detainee's health "may be inferred from circumstantial evidence or from the very fact that the risk was obvious"). Petitioner Vogt also proffered ample evidence besides the adverse inference to support her case. *E.g.*, App. 2a-3a, 12a.

The majority discounted "any hypothesis" about the destroyed footage that would permit a verdict for petitioner Vogt because of "the officers' conduct throughout the detention." App. 9a. That "speculation" by the majority ignored that the jury could have drawn the *opposite* inference from the intentional spoliation of the video. App. 12a (Shepherd, J., dissenting). It would not have been the first time that a video told a different story than a witness. *Cf. Scott*, 550 U.S. at 379. But the panel short-circuited the fact-finding process, deciding for itself what the destroyed evidence would have shown based on its own assessment of testimony it did not even hear.

III. This Case Presents an Exceptionally Important Question

A. Adverse Inferences Are Vitally Important for Litigants of All Types, from Civil Plaintiffs to Government Enforcers

"Discovery is designed to be, and remains, party driven."[4] It presumes parties will honor their obligations to a court and one another. When parties intentionally violate their obligations, meaningful consequences should follow.

Rule 37(e)(2) of the Federal Rules of Civil Procedure arms courts with "very severe measures" against the intentional spoliation of electronically stored information. Fed. R. Civ. P. 37 advisory committee's note (2015 amendment). This harsh suite of sanctions, including the permissive adverse inference awarded here, protects victims of spoliation in every federal civil case. Weakening those sanctions threatens consequences far beyond any one case.

Victims of spoliation include all types of litigants: plaintiffs and defendants, individuals and businesses. A 2011 study of spoliation sanctions found that the moving party was a plaintiff in 64% of the cases studied and a defendant in 32%. *See* Emery G. Lee III, *Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases* 7 (Fed. Jud. Ctr. 2011), *available at* https://www.uscourts.gov/sites/default/files/federal_judicial_center.pdf. The same study found that, in about a third of cases where plaintiffs sought

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[4] The Sedona Conference, *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary* 2 (3d ed. June 2020); *see also* Ronen Avraham & William H.J. Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. Chi. L. Rev. 883, 902 (2020) (noting that "the Rules on the whole reflect a commitment to party-driven procedure").

sanctions, the plaintiff was a business entity. *Id.* When the defendant sought sanctions, it was a business entity 89% of the time. *Id.* So although there are many cases where "the individual plaintiff charges that the information-rich business entity has spoliated evidence," in many cases defendants seek (and win) sanctions against individual plaintiffs who destroy relevant evidence. *Id.*; *see also*, *e.g.*, *Silvestri v. General Motors Corp.*, 271 F.3d 583, 585 (4th Cir. 2001) (Niemeyer, J.) (affirming sanction of dismissal for plaintiff's destruction of "the sole piece of evidence in th[e] case").

The Eighth Circuit's ruling also threatens the ability of state and federal litigants to enforce the law. The federal government has sought adverse-inference sanctions in cases ranging from civil RICO and securities law to consumer protection and antitrust.[5]

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[5] *See*, *e.g.*, *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 25 (D.D.C. 2004) (civil Racketeer Influenced and Corrupt Organizations Act; seeking adverse inference based on defendant's failure to preserve emails); *SEC v. Musella*, 578 F. Supp. 425, 429 (S.D.N.Y. 1984) (insider trading; seeking adverse inference based on defendants' failure to testify and produce trading records); *United States v. Dish Network, L.L.C.*, 292 F.R.D. 593, 605 (C.D. Ill. 2013) (Telephone Consumer Protection Act of 1991; winning adverse inference based on defendant's intentional failure to retain telemarketing lead lists); Pls.' Mot. *In Limine* for an Adverse Inference, *FTC v. Kroger Co.*, No. 3:24-cv-00347-AN, ECF No. 268 (D. Or. Aug. 16, 2024) (merger challenge; seeking adverse inference based on defendant's failure to preserve relevant text messages); Order, *FTC v. Noland*, No. CV-20-00047-PHX-DWL, ECF No. 401 (D. Ariz. Aug. 30, 2021) (alleged pyramid scheme; seeking adverse inference based on defendants' use of "auto-delete" function in messaging app and other spoliation). State enforcers likewise rely on them. *See*, *e.g.*, *State ex rel. Jennings v. Concrete Tech. Resurfacing & Design, Inc.,* 2022 WL 6609883, at *2 (Del. Super. Ct. Oct. 10, 2022) (granting Delaware Attorney General's request for "adverse inference

It also commonly relies on adverse inferences in criminal trials, to remediate defendants' spoliation of incriminating evidence. *See*, *e.g., United States v. Zayyad*, 741 F.3d 452, 462-63 (4th Cir. 2014) (affirming conviction for selling counterfeit pills based on evidence that defendant "hid the pills in his van and evidently had help in destroying additional pill evidence at his home").[6] In two recent civil antitrust trials, the Department of Justice sought adverse-inference sanctions against Google for its intentional deletion of chat messages.[7] As the Department explained: "When . . . a litigant violates [its] obligations in ways that compromise or undercut the truth-seeking function of the judicial process, [it] must be held accountable."[8] This accountability serves "not only to ameliorate prejudice to Plaintiffs, but also to restore the public's faith in the integrity of the judicial process, and deter [defendant's] and others conduct in this and future litigations."[9]

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instructions to the jury" because defendants "spoliated evidence" in an action alleging violations of Delaware's Consumer Fraud Act and Uniform Deceptive Trade Practices Act).

[6] *See also*, *e.g.*, *United States v. Jackson*, 858 F. App'x 802, 805 (6th Cir. 2021) (holding that sufficient evidence supported convictions for mail fraud and mail theft because "a rational jury could infer from Jackson's destruction of evidence that [defendant] was conscious of his guilt").

[7] *See* Pls.' Mot. for Adverse Inference, *United States v. Google LLC*, No. 1:23-cv-00108-LMB-JFA, ECF No. 1115 (E.D. Va. Aug. 2, 2024); United States' Mot. for Sanctions, *United States v. Google LLC*, No. 1:20-cv-03010-APM, ECF No. 512 (D.D.C. Feb. 23, 2023).

[8] Mem. of Law in Support of Pls.' Mot. for an Adverse Inference at 29*, United States v. Google LLC*, No. 1:23-cv-00108-LMB-JFA, ECF No. 1116 (E.D. Va. Aug. 2, 2024).

[9] *Id.* at 29-30.

The decision below undermines each rationale identified by the Department: It fails to cure the prejudice to the victim of spoliation, weakens public confidence in the courts, and rewards bad conduct going forward. Without this Court's intervention, the decision below will stymie honest litigants, whose less scrupulous opponents will soon realize that destroying unfavorable evidence is worth the gamble to avoid a jury trial if it carries no evidentiary consequences at summary judgment. The government, litigants, the courts, and the public will suffer if the decision below stands.

B. This Case Is an Ideal Vehicle

This case is an ideal vehicle to clarify the proper application of an adverse inference at summary judgment. There is no question that an adverse-inference sanction applies: The Eighth Circuit assumed that a permissive adverse-inference jury instruction was appropriate; respondents did not contest that sanction on appeal. And the Eighth Circuit acknowledged that the footage could have contradicted the officers' statements about Mr. Vogt's condition and their knowledge of it. *See supra* p. 8.

So this case squarely presents the pure legal question: Should a jury decide the weight of an adverse inference from the destruction of evidence that could have contradicted the spoliator's version of events? This Court should grant the petition and say yes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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