No. 24-883

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, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR BROOKE COLEMAN, SETH KATSUYA ENDO, STEVEN GOODE, HELEN HERSHKOFF AND NINE OTHER PROFESSORS OF CIVIL PROCEDURE AND EVIDENCE AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF AMICI CURIAE

This brief is filed by thirteen law professors who teach and write in the fields of civil procedure and evidence, including about the adverse-inference issues raised by this petition. The professors are Brooke Coleman, Seth Katsuya Endo, Steven Goode, Helen Hershkoff, Tamara Lave, Taurus Myhand, Dale Nance, Alexander Nunn, David Oppenheimer, Andrew Pollis, Cassandra Burke Robertson, Andrea Roth, and Adam Steinman.[1]

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1. This brief is filed more than ten days prior to the deadline and therefore suffices in itself to provide notice to counsel of record for all parties as required by Rule 37.2. No person other than amici and their counsel authored this brief or made a monetary contribution toward its preparation.

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McKenzie, *Civil Procedure: Cases and Materials* (13th ed. 2022). Amicus Professor Tamara Lave teaches evidence at the University of Miami Law School. Amicus Professor Taurus Myhand teaches evidence at Thomas Goode Jones School of Law. Amicus Professors Dale Nance, Andrew Pollis, and Cassandra Burke Robertson all teach at Case Western Reserve University School of Law, where Professors Nance and Pollis teach evidence and Professor Robertson teaches civil procedure. Professor Nance is the author of the casebook *Law and Justice: Cases and Readings on the American Legal System* (2d ed. 1999), and a coauthor of the hornbook Orenstein, Park & Nance, *Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials* (5th ed. 2020). Amicus Professors Alexander Nunn and Adam Steinman both teach at Texas A&M University School of Law, where Professor Nunn teaches evidence and Professor Steinman teaches civil procedure. Professor Steinman is another co-author of the casebook Friedenthal, Miller, Sexton, Hershkoff, Steinman & McKenzie, *Civil Procedure: Cases and Materials* (13th ed. 2022). Amicus Professors David Oppenheimer and Andrea Roth both teach evidence at the University of California, Berkeley, School of Law; Professor Oppenheimer also teaches civil procedure. Professor Roth is a co-author of the casebook, Sklansky & Roth, *Evidence: Cases Commentary, and Problems* (5th ed. 2020).

Amici are filing this brief to set forth the governing legal principles and to explain the importance of those principles. Amici believe that the adverse-inference sanction is time-tested and soundly grounded in both common and statutory law, and it has come to play a crucial role in American litigation. In this case, the Eighth

Circuit panel majority nonetheless affirmed a grant of summary judgment in favor of a party that, per the district court's unchallenged findings, had intentionally destroyed evidence in order to suppress it. In the view of amici, that ruling was not only erroneous, but marked a major departure from existing law, including as recognized in other circuits. Certiorari is necessary to avoid crippling one of the crucial rules ensuring the integrity of litigation (and litigants) in the courts of the United States.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns the application of an ancient principle of evidence law in the context of modern civil procedure. The principle is the adverse-inference sanction: when a party destroys evidence, the factfinder may presume that the destroyed evidence was unfavorable to that party. Courts have followed that rule since before the Founding, and it has always played a crucial role in ensuring fair and accurate judicial factfinding.

Modern legal practice has only made the adverse-inference sanction more important. Cases are increasingly resolved not at trial but at summary judgment, meaning that discovery increasingly determines the outcome of cases. And discovery requires parties and attorneys to preserve and produce evidence, generally without direct judicial oversight. When a party shirks those obligations and commits spoliation, it not only betrays a guilty conscience, but also compromises the integrity of the judicial process. A powerful sanction is necessary to prevent such misconduct.

The Eighth Circuit here severely weakened the adverse-inference sanction by, in effect, reading it out of the summary judgment analysis. The panel majority acknowledged that the sanction had been awarded, but it nonetheless affirmed summary judgment based on the existing record. That reasoning is erroneous because it ignores that the existing record results from spoliation, and that the adverse inference could have contradicted that tainted record. And it conflicts with the reasoning of the Second, Fifth, and District of Columbia Circuits, which have all held that in such circumstances, an adverse inference drawn from spoliation should defeat summary judgment. The adverse-inference sanction, properly applied, permits the factfinder to look beyond the record, including by considering that existing testimony is false or missing vital context. This Court should grant certiorari to resolve the circuit split and ensure the continued vitality of the adverse-inference sanction in the modern era of electronic discovery and summary judgment.

ARGUMENT

I. A Strong Adverse-Inference Sanction Is Crucial to the Integrity of the Judicial Process.

The adverse inference has been described as "the oldest and most venerable remedy" for spoliation. Jonathan Judge, *Reconsidering Spoliation*, 2001 Wis. L. Rev. 441, 444. This Court has likewise referred to "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. S.C. State Conference of the NAACP*, 602 U.S. 1, 36 (2024). That rule is firmly rooted in common

and statutory law, in large part because drawing adverse inferences from spoliation of evidence makes logical sense. But the doctrine also serves a functional purpose in ensuring that litigants comply with their duties to preserve and present relevant evidence. Both rationales—logical and functional—make the adverse-inference instruction crucial to the judiciary's purpose of "ascertaining the truth and securing a just determination." Fed. R. Evid. 102.

Courts have applied adverse-inference sanctions since before 1722. In that year, the Court of King's Bench decided *Armory v. Delamirie*, (1722) 1 Strange 505.[3] The defendant in that case, an action in trover, failed to present a jewel that was at the center of the dispute. *See Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982) (Breyer, J.) (summarizing *Armory*). The judge therefore instructed the jury to "presume" in its damages calculation that the jewel was one of the highest quality. *Id.* By 1774, Lord Mansfield noted that it was "certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." *Blatch v. Archer*, (1774) 1 Cowp. 63. Adverse inferences continued to be applied in the early United States, as both state and federal jurists debated the sanction's contours. *See* GORELICK, DESTRUCTION OF EVIDENCE § 1.3; *The Pizarro*, 15 U.S. (2 Wheat.) 227,

3. While *Armory* would prove to be the canonical application of the adverse-inference principle, it was in fact not the first. A 1617 case, *Rex v. Arundel*, (1617) 1 Hob. 109, awarded title to a disputed manor because the defendant had refused to produce the deeds at issue, JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 1.3 (2024 update).

241 (1817) (describing spoliation as "a very awakening circumstance, calculated to excite the vigilance, and justify the suspicions of the court" but nonetheless "a circumstance open to explanation"); *Hanson v. Lessee of Eustace*, 43 U.S. (2 How.) 653, 708–09 (1844) (noting that "in a case of spoliation or equivalent suppression," "the rule is that omnia praesum[u]ntur contra spoliatorem [all things are presumed against the wrongdoer]").

John Henry Wigmore provided a thorough treatment of the adverse-inference sanction as it existed in 1904. *See* JOHN HENRY WIGMORE, TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 278, 285–91 (1904). He stated the general rule thusly: "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party." *Id.* § 285. After cataloging and analyzing a long list of precedents, Wigmore concluded that that inference itself was sufficiently strong that it could, even with no further evidence, permit the conclusion that "the contents of the document (when desired by the opponent), are what he alleges them to be, or (when naturally a part of the possessor's case), are not what he alleges them to be." *Id.* § 291. In the century since Wigmore's treatise, courts, including this Court, have continued to apply that reasoning. *See, e.g.*, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("The failure under the circumstances to call as witnesses those officers . . . is itself persuasive that their testimony, if given, would have been unfavorable to appellants."); *Int'l*

Union, United Auto., etc. v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (noting the doctrine "has been utilized in scores of modern cases"); *Alexander*, 602 U.S. at 36.

Meanwhile, the adverse-inference sanction has also been codified in statutory law. Congress first proscribed the obstruction of justice in 1831, and that statute is now read to make spoliation a crime. *See* Gorelick, *supra*, § 1.4. More recently, some jurisdictions have recognized the destruction of evidence as an independent tort. *See* Restatement (Third) of Torts, Tentative Draft No. 3 at 418 (Am. L. Inst. 2024). The Federal Rules of Civil Procedure also authorize adverse-inference sanctions. The original version of the rules provided that a party refusing to comply with a discovery order risks a determination that the matter "be established for purposes of the action in accordance with the claim of the party obtaining the order." 28 U.S.C. § 723c, Rule 32C (1940). The rule has since been renumbered and expanded, including, after 2007, to apply to failure to preserve electronically stored information even before any court order. *See* Fed. R. Civ. P. 37(e). In 2015, Rule 37(e) received a "further refinement": the consequences available if a party fails to adhere to its duties to preserve evidence were specified in greater detail. John G. Roberts, Jr., 2015 Year-End Report on the Federal Judiciary 8 (2015). Advisory committee notes to that revision of that section nonetheless clarify that Rule 37(e) "is based on th[e] common-law duty; it does not attempt to create a new duty to preserve."

The adverse-inference sanction has proven so durable because it simultaneously serves two important purposes. First, the sanction reflects 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 position who does not destroy the document." *Nation-Wide Check Corp.*, 692 F.2d at 218. That is, a party who went out of its way to destroy evidence likely had something to fear in that evidence. *See* WIGMORE, TREATISE ON THE SYSTEM OF EVIDENCE § 278 (describing the inference as "one of the simplest in human experience"). Second, the sanction serves a "prophylactic and punitive purpose" by disincentivizing litigants from destroying evidence that would have been necessary to the factfinding mission of the court. *Nation-Wide Check Corp.*, 692 F.2d at 218; *accord Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

Such disincentives are necessary because "[d]iscovery is run largely by attorneys, and the court and the judicial process depend upon honesty and fair dealing among attorneys." *In re September 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 125 (S.D.N.Y. 2007). And not only do courts not administer the discovery process, but they generally do not even see discovery demands and responses exchanged between parties. With so much happening behind the scenes, it is difficult for scholars to even study many aspects of discovery. Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 VAND. L. REV. 2037, 2052 (2018). A party's decision whether to destroy a document in its control, when the opposing party cannot be fully aware of its existence or contents, is subject to still less scrutiny. The frequency with which parties spoliate is unknowable, but it may be substantial.

In contrast, adverse-inference sanctions are known to be rare. One study found that in cases filed in federal

district courts in 2007 and 2008, spoliation sanctions were only sought in 0.15% of actions. Emery G. Lee III, Fed. Jud. Ctr., Motions for Sanctions Based upon Spoliation of Evidence in Civil Cases 4 (2011). Where those requests were ruled upon, sanctions were only granted 28% of the time, and even then, adverse inferences were granted only 44% of the time, with the remainder usually receiving less severe sanctions like costs or the reopening of discovery. *Id.* at 8–9. Those are extremely small numbers in the modern era of electronically stored information, where parties are routinely obligated to turn over thousands of documents.

For the system to work—for parties to comply with their discovery obligations despite the low chance of punishment—adverse-inference sanctions must be powerful. This Court has noted that the rule "pack[s] a wallop." *Alexander*, 602 U.S. at 36 (alteration in original) (agreeing with dissent). As the Court explained in reviewing a sanction of dismissal for withholding of evidence, "the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *NHL v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976). Even the Eighth Circuit, addressing adverse inferences in other contexts, has emphasized that they are "strong medicine," *Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018), and a "powerful tool in a jury trial," *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900 (8th Cir. 2004). The sanction's force is such that it authorizes the jury to "decid[e] a case based on hypothesized evidence." *Auer*, 896 F.3d at 858.

Indeed, in many cases adverse inferences may not be a powerful enough sanction. Rule 37(e) provides that a court may "dismiss the action or enter a default judgment" in response to a willful failure to preserve electronically stored information. Similar remedies have been issued in cases where, as here, a party failed to preserve crucial video evidence. *Fata v. Heskel's Riverdale, LLC*, 223 A.D.3d 520, 521 (N.Y. App. Div. 2024) (striking answer, equivalent to entering default); *see also Silvestri v. GMC*, 271 F.3d 583, 593 (4th Cir. 2001) (affirming dismissal of a products liability action where the plaintiff had, by repairing a vehicle, destroyed "the central piece of evidence in his case"). Some scholars have argued that even in cases that do not warrant dismissal, adverse inferences should be replaced by stronger remedies like issue preclusion. *See* Dale Nance, *Adverse Inferences About Adverse Inferences*, 90 B.U. L. Rev. 1089, 1097 (2010). But in the absence of such harsh remedies, the adverse inference must be relied upon to account for and deter spoliation.

This case does not present the issue of whether the spoliating party should have been subject to default judgment or issue preclusion. Rather, the question is whether an adverse inference, the sanction that actually was awarded, was strong enough to allow the plaintiff to survive summary judgment. The Eighth Circuit said no, and that answer is at odds with the adverse inference's pedigree and crucial role in American jurisprudence.

II. This Case Affords an Opportunity to Clarify the Role of Adverse Inferences at Summary Judgment.

Though the adverse inference rule predates many key features of the modern American legal system (and, indeed, predates the United States) the principles underpinning it are as vital as ever. Few lawsuits today are as simple as determining the value and ownership of a missing gem. Instead, litigation depends heavily on discovery, and it is often resolved not at trial, but through summary judgment. Those developments have, if anything, made the adverse inference sanction more important to the factfinding process.

To begin with, the scope of discovery has expanded dramatically since the adverse inference sanction's inception. *See* Alan K. Goldstein, *A Short History of Discovery*, 10 Anglo-Am. L. Rev. 257, 257 (1981) (noting many aspects of modern discovery emerged in the mid-nineteenth century). Today, discovery forms a decisive part of many cases, and it influences many actors even when no lawsuit is pending. *See* Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 Yale L.J. 2, 67 (2019) (noting that discovery, not trial, has become "the focal point of American civil litigation"). Many scholars conceive of discovery as "the American alternative to the administrative state." Paul D. Carrington, *Renovating Discovery*, 49 Ala. L. Rev. 51, 54 (1997). Many activities that might be policed by regulatory agencies are instead left to private plaintiffs to uncover through the discovery process. *Id.* And as with an administrative state, there is ample room to debate the precise amount of discovery that should be permitted so as to balance its benefits and burdens. That debate has informed many important

decisions of this Court, most notably those governing pleading standards. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558, (2007) (considering that "proceeding to antitrust discovery can be expensive"); *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (considering that qualified immunity permits "avoidance of disruptive discovery" (quotation omitted)).

But despite the importance of discovery and the debate surrounding it, this Court rarely addresses discovery issues. Only six discovery merits appeals have reached the Court since 2005, and all six dealt primarily with intertwined issues rather than the mechanics of discovery itself. Seth Katsuya Endo, *Discovery Dark Matter*, 101 Tex. L. Rev. 1021, 1053 (2023) (citing *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2083 (2022); *United States v. Zubaydah*, 142 S. Ct. 959, 971 (2022); *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1184 (2017); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 168–69 (2011); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 104–05 (2009); *Republic of Arg. v. NML Capital, Ltd.*, 573 U.S. 134, 139–40 (2014)). As for sanctions under Rule 37, the Court has not directly addressed them in more than forty years. *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 709 (1982) (holding that sanctions under Rule 37(b) may be used to establish personal jurisdiction). That omission has occurred even as changes have been made to Rule 37 and other discovery rules, including the 2015 amendments that the Chief Justice described as a "major stride toward a better federal court system." Roberts, 2015 Year-End Report 9; *cf.* Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 Emory L. J. 1, 44–52 (2016) (arguing

that the significance of the amendments will depend on judicial interpretation).

This case, to be clear, is not a direct appeal from a sanction under Rule 37. Rather, this is a case where an adverse inference has already been granted, and the only issue is the impact of that inference at the summary judgment stage. As explained above, the adverse-inference sanction is one of the few mechanisms ensuring that parties comply with their obligation to produce full and accurate information during discovery. The strength (or weakness) of the sanction will influence parties' conduct throughout the process. The question presented therefore concerns not the quantity of discovery that should be permitted, but its quality.

The question here is particularly important because of another distinctive feature of modern lawsuits: they are rarely resolved at trial. According to the most recent statistics, fewer than 1% of federal civil cases reach trial. *See* Table C-4, *Federal Judicial Caseload Statistics*, U.S. Courts (Mar. 31, 2024), https://www.uscourts.gov/report-names/federal-judicial-caseload-statistics. More than two thirds, in contrast, are resolved by court action before trial. *Id.*

The survey does not distinguish between cases resolved by summary judgment and those resolved at other stages, such as motions to dismiss. But older findings confirm that summary judgment has long been increasing in frequency as trials have decreased. Joe S. Cecil et al., Fed. Jud. Ctr., Trends in Summary Judgment Practice 3 (2001) (finding that by 2000, 12% of cases saw summary judgment granted in whole or in part). A 2009 ABA

survey found that about half of lawyers agreed with the statement: "Discovery is used more to develop evidence for summary judgment than to understand the other party's claims and defenses for trial." ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE 71 (2009).[4] Today, those numbers may well be even higher. With so many cases being resolved at summary judgment, it is critical to clarify the impact of adverse-inference sanctions at that stage.

To summarize, modern American litigation depends heavily on discovery, as often assessed at summary judgment. That system cannot work if parties do not cooperate honestly in the discovery process. And rational parties will not cooperate honestly if they are not punished at summary judgment when they fail to do so. The adverse-inference sanction has long been indispensable in ensuring the integrity of trials, and that function is no less important as trials become less frequent. For the sanction to serve its crucial functions, it must be strongly and consistently applied, including at summary judgment.

III. The Panel Decision Parted Ways with Other Circuits and Undermined the Adverse-Inference Sanction.

Left uncorrected, the panel decision will seriously undermine the adverse-inference sanction. This case presents a paradigmatic use of the sanction. Liability

4. In the same survey, 86.5% of lawyers agreed that "[s]anctions allowed by the discovery rules are seldom imposed." *Id.* at 67. That finding further underscores the rarity with which adverse inferences and related sanctions are imposed, and the need to accord them strong deterrent force when they are awarded.

turns on whether the defendants disregarded Mr. Vogt's objectively serious medical need during a roughly one-hour period. During that entire period, one security camera, Camera 18, showed inside Mr. Vogt's cells. After Mr. Vogt's death, jailers viewed Camera 18's footage, then deleted it. They produced inferior footage from other cameras that did not show inside the cells, telling Mr. Vogt's next of kin and their counsel that no other footage existed. The district court found that the defendants deleted Camera 18's footage "for the purpose of suppressing evidence," App.81a, and that an adverse-inference sanction was the appropriate remedy. None of those findings were challenged on appeal. Instead, the question before the Eighth Circuit panel was how to apply the adverse-inference sanction in the summary-judgment context.

As Judge Shepherd recognized in dissent, other circuits have already addressed that question, and answered it differently than the Eighth Circuit did here. As the Second Circuit held in 1998, "the intentional destruction of relevant evidence by the opposing party may push a claim that might not otherwise survive summary judgment over the line." *Kronisch*, 150 F.3d at 128. Any contrary rule, the court continued, would "eviscerate[]" the "purposes of the adverse inference." *Id.* Since the Second Circuit decided *Kronisch*, other circuits have reached the same conclusion. The D.C. Circuit has adopted *Kronisch* explicitly, ruling that summary judgment was inappropriate given that "destruction of evidence ha[d] made it more difficult for the plaintiff to establish the relevance of that evidence to the disputed issue of material fact." *Gerlich v. DOJ*, 711 F.3d 161, 172 (D.C. Cir. 2013). It had previously applied the same reasoning in a case analogous to this one, reversing

the grant of summary judgment in an employment case given the hiring manager's "improper destruction of his interview notes on which he claimed to have based his promotion selection." *Talavera v. Shah*, 638 F.3d 303, 313 (D.C. Cir. 2011). Likewise, the Fifth Circuit reversed a grant of summary judgment because of the "possibility" that the jury would draw an adverse inference from the destruction of a key piece of evidence that the plaintiff needed to overcome summary judgment. *Van Winkle v. Rogers*, 82 F.4th 370, 382 (5th Cir. 2023).

Even in circuits that have not had occasion to reverse a grant of summary judgment on this ground, the reasoning of those decisions prevails. Confronting the issue of adverse inferences in a different procedural posture, the Ninth Circuit "adopt[ed] *Kronisch*'s careful and balanced approach for dealing with this difficult problem" and confirmed that a "district judge lacks the authority to resolve disputed issues of fact," such as an adverse inference, "[d]uring a jury trial." *Ritchie v. United States*, 451 F.3d 1019, 1023, 1025 (9th Cir. 2006). The Seventh Circuit, meanwhile, has affirmed in part a jury verdict based on an adverse inference, and would have reinstated another part of the verdict if the adverse inference were combined with some circumstantial evidence. *See Epic Sys. Corp. v. Tata Consultancy Servs.*, 980 F.3d 1117, 1136 (7th Cir. 2020) (quoting *Kronisch*, 150 F.3d at 128). Even the Eighth Circuit had previously reached the same conclusion in *dictum*. *See Auer*, 896 F.3d at 858 (8th Cir. 2018) ("After all, if Auer was entitled to the [adverse inference] presumption she sought, it was premature to grant summary judgment without evaluating whether the presumption itself could create a genuine dispute of material fact on at least some of Auer's claims.").

But in this decision, the Eighth Circuit departed from that reasoning and instead set forth into uncharted waters. To be sure, the panel majority did cite *Kronisch* in a footnote for the proposition that "[a]n adverse inference instruction 'standing alone' is insufficient to defeat summary judgment." Op. at 6 n.2 (quoting *Kronisch*, 150 F.3d at 128). But the Eighth Circuit did not purport to apply *Kronisch*'s test for when an adverse-inference instruction can defeat summary judgment, and it did not conclude that the instruction "st[ood] alone" in this case. *See id.* at 4 (acknowledging the plaintiff pointed to "the adverse inference, combined with the record evidence"). Nor could it have, given the substantial evidence put forward by the plaintiff. As summarized by the dissent, "Molly Vogt points to record evidence of Joshua Vogt's deteriorating condition, including that Vogt was observed acting strangely at the time he was booked; that officers suspected 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." *Id.* at 10 (Shepherd J., dissenting). In circuits following *Kronisch*, the adverse inference would have combined with that showing to defeat summary judgment.

But the Eighth Circuit did not follow that approach. Instead, the panel majority proceeded to read the adverse inference out of the summary-judgment analysis. The court concluded that "[e]ven if Camera 18 could capture some hypothesized footage," it would not be enough "when considering the rest of the record." Op. at 7. Specifically, the majority stated that Camera 18 could not have changed the analysis because "individual officers repeatedly

checked on Mr. Vogt, questioned him about his condition (he replied he was having an anxiety attack), moved him to a private holding cell, reported his behavior to superiors, performed exercises with him to calm him down, and called for emergency medical help when his condition worsened." *Id.*

That reasoning dispenses with the adverse inference. The majority drew the crucial facts about what the officers heard, saw, and did when Mr. Vogt was inside the holding cells from the officers' own statements. *See* Pet. at 8. But if Camera 18's footage existed, it could have made summary judgment impossible under the relevant Eighth Circuit precedents. The footage might have shown that the defendants did not act as they said they did. *Cf. United States v. 3234 Wash. Ave. N.*, 480 F.3d 841, 845 (8th Cir. 2007) (summary judgment improper if facts "call the credibility of the moving party's witness into doubt" (quotation omitted)). Or it might have shown that Mr. Vogt was in obvious distress, in which case the defendants' repeated "checks" on him would serve only to demonstrate their deliberate indifference. *Cf. Thompson v. King*, 730 F.3d 742, 749 (8th Cir. 2013) (denying summary judgment where "a reasonable jury could find [the jailer] had subjective knowledge of a serious medical need and deliberately disregarded that need").

The existing record, to be clear, did not definitively show that the defendants acted with deliberate indifference. It may not even have made that conclusion likely. But by focusing on the existing record, the majority neglected the adverse-inference instruction. Had the defendants not engaged in spoliation, the record would be *different*. And "common sense" dictates that the difference would not

have been favorable, or neutral, to the defendants. *Nation-Wide Check Corp.*, 692 F.2d at 218. If Camera 18's footage was consistent with the majority's view of the facts—if it showed the defendants providing Mr. Vogt with adequate care, if it showed Mr. Vogt in apparent good health, if it did not capture Mr. Vogt at all—the defendants would not have deleted it. That is the permitted inference, and it would have carried the day in at least the Second, Fifth, and District of Columbia Circuits. But the Eighth Circuit majority skipped past it and effectively discounted the defendants' spoliation, rendering the adverse inference "meaningless." Op. at 8 (Shepherd, J., dissenting).

In addition to neglecting the evidentiary justification for the adverse-inference sanction, the majority's reasoning also conflicts with its practical justification. As the district court found, the defendants acted in bad faith, deliberately deleting the footage in question (even as they preserved footage from other cameras), and insisting that no other relevant footage existed. The defendants thus "disclos[ed] unwillingness to let the tribunal use" all materials "relevant to the shaping of courtroom truth." John McArthur McGuire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 Yale L.J. 226, 238 (1935). That sort of misconduct undermines the judiciary's core factfinding function, and the adverse-inference sanction demands "placing the risk of an erroneous judgment on the party that wrongfully created the risk." *Nation-Wide Check Corp.*, 692 F.2d at 218. Not placing that risk on the defendants here, despite the egregiousness of their spoliation, dangerously weakens a core mechanism ensuring integrity of the judicial process throughout the Eighth Circuit. It also throws into doubt the correct approach in circuits that have not directly addressed this issue.

Disregarding the adverse inference was also inconsistent with the process of summary judgment, which requires that there be no genuine dispute as to any material fact. *See* Fed. R. Civ. P. 56(a). While the adverse inference in this case was permissive rather than mandatory, summary judgment requires that courts "view the facts and draw reasonable inferences in the light most favorable to the party opposing" the motion. *Scott v. Harris*, 550 U.S. 372, 378 (2007) (quotation omitted).

Given the unchallenged finding that an adverse inference regarding Camera 18 *could* reasonably be drawn by a jury, the court was required to draw the inference in this case. *See Francis v. Franklin*, 471 U.S. 307, 314 (1985) (explaining permissive inferences). But by reaching its conclusion based solely on the existing evidence, the panel majority failed to infer anything about the content of the deleted footage. That is an error of law, and it creates an inimical precedent for the integrity of the adverse-inference sanction, and all that it protects.

CONCLUSION

Amici respectfully request that the Court grant the petition for certiorari.

Respectfully submitted,

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