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.

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

BRIEF OF *AMICI CURIAE* FORMER FEDERAL JUDGES SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are five former federal judges[2] who have devoted much of their professional lives to the application of the rules governing federal criminal and civil practice and who maintain a continuing interest in restoring a system of justice that is fair both in practice and procedure. Collectively, they served decades in the federal judiciary. Based on their experience as former federal judges, *Amici* submit this brief to emphasize the reasons that federal judges, specifically, would benefit from this Court's resolution of the question presented.

Amici are:

Judge Shira A. Sheindlin (Ret.)—District Judge (1994-2011), Senior Judge (2011-2016) for the U.S. District Court for the Southern District of New York; Magistrate Judge (1982-1986) for the U.S. District Court for the Eastern District of New York; Former Member, Advisory Committee on the Federal Rules of Civil Rules of the Judicial Conference of the United States (1996-2003); Chair of the Committee on Special Masters, and Member of the Discovery Committee.

Judge John M. Facciola (Ret.)—Magistrate Judge (1997-2015) for the U.S. District Court for the District of Columbia. Member of the Board of Directors of the Federal Judicial Center (2009-2013); Adjunct Professor of Law on Information Technology and Modern Litigation, Georgetown University Law Center (2015-2025).

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[1] No counsel for a party authored this brief in whole or in part. No person other than *Amici* or its counsel made a monetary contribution to its preparation or submission. The parties were given timely notice of *Amici's* intent to file this brief.

[2] The views in this brief are those of the *Amici Curiae* only and not necessarily of any institutions with which they are or have been affiliated.

Judge Paul W. Grimm (Ret.)—District Judge (2012-2022), Senior Judge (2022), Chief Magistrate Judge (2006-2012), Magistrate Judge (1997-2006) for the U.S. District Court for the District of Maryland; Member of the Advisory Committee for the Federal Rules of Civil Procedure (2009); Chair of the Civil Rules Committee's Discovery Subcommittee (2010-2015).

Judge Elizabeth D. Laporte (Ret.)—Magistrate Judge (1998-2019), Chief Magistrate Judge (2013-2015) for the U.S. District Court for the Northern District of California; Member of the Northern District of California Local Rules Committee and Patent Local Rules Committee; Chair of the Northern District of California Local Rules Committee Subcommittee on E-Discovery (2012).

Judge Thomas I. Vanaskie (Ret.)—Circuit Judge (2010-2018), Senior Judge (2018-2019) for the U.S. Court of Appeals for the Third Circuit; District Judge (1994-2010), Chief Judge (1999-2006) for the U.S. District Court for the Middle District of Pennsylvania.; Chair of the Third Circuit Judicial Council Committee on Information Technology (2002-2010); Member of the Judicial Conference Committee on Information Technology (2001-2008) (Chair, 2005-08); Adjunct Professor Law on Electronic Evidence, Penn State and Dickinson Schools of Law (2007-2021).

SUMMARY OF ARGUMENT

This case presents a question of critical importance to federal judges nationwide: how judges should weigh a spoliation inference at summary judgment.

Three circuits hold that if a defendant spoliates evidence that could have given rise to a dispute of material fact the case must go to trial so that a jury may decide what weight to give the adverse inference. *See Kronisch v. United States*, 150 F.3d 112, 128-30 (2d Cir. 1998); *Van Winkle v. Rogers*, 82 F.4th 370, 382 (5th Cir. 2023); *Talavera v. Shah*, 638 F.3d 303, 312 (D.C. Cir. 2011). In direct conflict, the Eighth Circuit holds that a court may grant summary judgment to a spoliating defendant if the judge thinks it is implausible that the spoliated evidence would have given rise to a dispute of material fact. *See* Pet. App. 8a.

This is an important question that warrants the Court's review. The circuit split opened by the Eighth Circuit's ruling has fundamentally altered the rights afforded to parties granted an adverse inference in a jury trial. The adverse inference instruction exists to rebalance the evidentiary scale where a party destroys or otherwise spoliates evidence that would have supported its adversary's claim or defense. Indeed sometimes, "a missing piece of evidence like a photograph or video [is] irreplaceable," and even an adverse inference instruction will not fully compensate the innocent party. *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 17 (Tex. 2014). This Court should clarify how judges should apply adverse inferences at summary judgment.

The Court should take up this case for two reasons in addition to those presented by the petition for certiorari. *First*, the Court should grant this review in this case because the Eighth Circuit's rule allows judges to usurp the jury's constitutionally-prescribed role under the Seventh Amendment. *Second*, the Court should grant

certiorari in this case because deciding the plausibility of adverse inferences at summary judgment is at odds with the language, history, and purpose of Federal Rule of Civil Procedure 37.

ARGUMENT

I. REVIEW IS NECESSARY BECAUSE THE DECISION BELOW UNDERMINES THE JURY'S ROLE

Granting summary judgment to a spoliating party where an adverse inference has been granted in a jury trial undermines the jury's role as factfinder. The Seventh Amendment prescribes: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. The history of that right, and the actions that the Supreme Court has taken to preserve it, show the central role juries played at the Founding and should continue to play today. *See Hester v. United States*, 586 U.S. 1104, 1107 (2019) (Gorsuch, J., dissenting from the denial of certiorari) ("[I]t's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption.").

The right to a jury trial long pre-dates the Seventh Amendment's adoption in 1791. "Legal writers and political theorists who were widely read by the colonists were firmly of the opinion that trial by jury in civil cases was an important right of freemen." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 653-54 (1973). William Blackstone said the jury trial was "the glory of the English law." 3 W. Blackstone, Commentaries on the Laws of England 379 (8th ed. 1778) (Blackstone).

The Framers understood the importance of this right, and were united in their demand for a civil jury trial guarantee. Thomas Jefferson described the right to a civil jury trial as "the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution." Letter from Thomas Jefferson to Thomas Paine (July 11, 1789). In introducing the Bill of Rights to Congress, James Madison described the "[t]rial by jury … as essential to secure the liberty of the people as any one of the preexistent rights of nature." 1 Annals of Congress 454 (1789) (Joseph Gales ed., 1834) (statement of James Madison).

The lack of that right in the original Constitution galvanized Antifederalists and nearly derailed ratification by the States. *See* Wolfram, *supra*, at 660 n.59 & 667; *see also Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) ("One of the strongest objections originally taken against the [C]onstitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases."). For Antifederalists, the right to a civil jury trial meant "the protection of debtor defendants; the frustration of unwise legislation; the overturning of the practices of courts of vice-admiralty … and the protection of litigants against overbearing and oppressive judges." Wolfram, *supra*, at 670-71. A writer for the *Pennsylvania Packet* warned that, without such a right, "it was quite predictable that a 'lordly court of justice' sitting without a jury in the federal courts would likely be 'ready to protect the officers of government against the weak and helpless citizens[.]'" *Id.* at 671.

The Seventh Amendment was designed precisely to assuage that concern, and this Court's precedents have continued to recognize the importance of civil jury trials. Justice Story wrote that the Seventh Amendment is "most important and valuable" and "places upon the high ground of constitutional right the inestimable privilege of

a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." 3 Joseph Story, *Commentaries on the Constitution of the United States* 633 (1833). Justice Rehnquist noted how the Founders "considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of … the judiciary." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting). And just last year, Justice Gorsuch emphasized that despite "its weaknesses and the potential for misuse, we continue to insist that [the jury trial] be jealously preserved." *Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109, 159 (2024) (Gorsuch, J., concurring) (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *Patton v. United States*, 281 U.S. 276, 312 (1930)) (internal quotation marks omitted). These pronouncements embody but a fraction of this Court's steadfast commitment to safeguarding the Seventh Amendment.

Further, the Supreme Court has long held that juries, not judges, are constitutional factfinders. "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Id.* A jury is well-equipped to find facts that are borne out of an adverse inference, such as the contents of destroyed evidence and the motives behind its destruction. It is improper for a judge to resolve these factual issues on summary judgment.

Finally, the right to a jury trial is most urgent in cases like this one, where government officials have been accused of violating a citizen's civil rights. "The essence of that right lies in its insistence that a body of laymen not permanently attached to the sovereign participate along with the judge in the factfinding necessitated by a lawsuit." *Parklane Hosiery Co.*, 439 U.S. at 348-49 (Rehnquist, J., dissenting). The importance of unaffiliated factfinders is no less important in civil cases pitting citizens against government than in criminal cases governed by the Sixth Amendment's corresponding guarantee. *Id.* at 349.

Granting summary judgment in favor of a spoliator in a case where an adverse inference has been granted improperly intrudes on the province of the jury. Allowing such a judicial practice to continue contravenes the intention of the Founders that undergirded the Seventh Amendment and that which has motivated subsequent action by this Court: that parties to litigation be afforded a jury of their peers as factfinders.

II. THE LANGUAGE, HISTORY, AND PURPOSE OF RULE 37 REQUIRE THAT JUDGES PERMIT JURIES TO DECIDE ADVERSE INFERENCES

The Court should grant the petition for another reason: the decision below is at odds with the language, history, and purpose of Rule 37. Rule 37 requires that once an adverse inference *could* be drawn from spoliated evidence in a jury trial, any conclusion about what that evidence could have shown must be left to the jury to decide. That follows directly from the text of Rule 37. That is further established by the Rule's purpose and history, and by the practical impossibility of weighing adverse inferences at summary judgment.

Start with the text of Rule 37 which permits district courts to issue adverse inference sanctions based on inadvertent or intentional destruction of evidence. *See*

Fed. R. Civ. P. 37(e)(1)-(2). The Rule contemplates only one sanction in jury cases where, as relevant here, a party engages in intentional spoliation and an adverse inference is granted.[3] Specifically, it provides that where a court finds that a party "acted with the intent to deprive another party of the information's use in the litigation," the court may "*instruct the jury* that it may or must presume the information was unfavorable to the party." Fed. R. Civ. P. 37(e)(2)(B) (emphasis added). In revising Rule 37, the Advisory Committee was of the view that the rule needed to spell out the misconduct essential to warrant such a potentially game changing sanction, namely conduct intended to prevent the adverse party from accessing the evidence. It follows that it would contradict the entire function of a *permissive* adverse inference instruction for the trial judge to make the threshold finding of intentional spoliation, but then deprive the jury of the opportunity to determine the effect of it in connection with its fact finding role.[4]

Rule 37(e)(2)(B) sanctions thus cannot be enforced unless the case reaches the jury because the sanction requires a *jury instruction*. Rule 37(e)(2)(B) assumes juries will apply the inference, which makes the result here highly anomalous. The Court must refrain at summary judgment from making its own assessment of the reasonable adverse inferences a jury might draw.

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[3] The rule authorizes two other sanctions for intentional spoliation, but neither is relevant where the chosen sanction is an adverse inference and the case involves a jury. Rule 37(e)(2)(A) permits an adverse inference, but only applies where the judge is sitting as the factfinder in a bench trial. Rule 37(e)(2)(C) authorizes the judge to end the case in favor of the non-spoliating party, but that sanction goes far beyond a mere adverse inference.

[4] *Amici* Judge Grimm served on the Committee and recalls well the motivations and intentions behind integrating an adverse inference instruction into Rule 37.

Next consider Rule 37's history and purpose. Rule 37 has always been centered around the jury. Rule 37 was drafted to codify the common law rule that an adverse inference instruction could be given to a jury and did not contemplate a role for the judge in factfinding in a jury trial. That is because Rule 37, which codified the longstanding common law rules for drawing adverse inferences, was promulgated at the same time as the then-new and then-untested summary judgment rule. The two rules were promulgated in parallel and how exactly the two rules would intersect was not contemplated.

The origins of the adverse inference instruction trace to the common law in England before the founding of the United States. Indeed, the adverse inference instruction is "the oldest and most venerable remedy" for spoliation. *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 263 (2007). It serves the important remedial purpose, "insofar as possible, of restoring the prejudiced party to the same position [it] would have been in absent the wrongful destruction of evidence by the opposing party." *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). At common law, an adverse inference instruction to the jury was the *only* method by which a spoliator could be punished short of default or nonsuit because judges had no role in factfinding.

The earliest example of its use is in *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722). There, a chimney sweep found an abandoned jewel and brought it to a jeweler to have it appraised. The jeweler refused to return the jewel to the chimney sweep and claimed it had disappeared, and the chimney sweep sued for the value of the stone. Following the Latin maxim *omnia praesumuntur contra spoliatorem* ("All things are presumed against a despoiler"), the Court in *Armory* instructed the jury to presume that the jewel had the highest possible value for one of its type. This was the

first, but far from the last, instance where English courts instructed the jurors that they may infer that the destruction of the evidence signifies its value to the spoliator where a party has intentionally lost or damaged evidence. Jonathan Judge, *Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort*, 2001 Wis. L. Rev. 441, 445 (2001).

American practice at the founding carried forward the English rule. The origins of Rule 37 trace to § 15 of the Judiciary Act of 1789. The statute, "practically coeval with the Constitution," "confer[ed] upon courts of law of the United States the authority to require parties to produce books and writings in their possession or under their control which contain evidence pertinent to the issue." *Hammond Packing Co. v. State of Ark.*, 212 U.S. 322, 351-352 (1909). The original drafters of Rule 37 noted that "[t]he provisions of [the] rule … are in accord with *Hammond Packing Co.* …." Fed. R. Civ. P. 37 advisory committee note to 1937 adoption.

In contrast to Rule 37, the modern summary judgment rule—now codified as Rule 56—has no roots in the common law. Summary judgment was introduced into American law long after the adverse inference instruction and the two do not fit together neatly. Summary judgment is a "modern device." *Parklane Hosiery Co.*, 439 U.S. at 349 (Rehnquist, J., dissenting). Summary judgments were first pioneered in England in 1855 and incorporated into the law of several states by the turn of the 20th century. *See* Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 Yale L.J. 423, 423-24 (1929); *see* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L.J. 522, 566-67 (2012); *see also* John A. Bauman, *The Evolution of Summary Judgment Procedure*, 31 Ind. L.J. 329, 342-44 (1956). Over time, summary judgment grew increasingly popular and was eventually introduced into federal practice

through the Federal Rules of Civil Procedure. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 3-5 (2010); Langbein, *supra*, at 566-67, 569-70.

These histories together show that Rule 37's adverse inference instruction was and is a targeted sanction that can only be implemented by a jury. Rule 37 does not make any provision for implementing the adverse inference instruction at the pretrial stage, and Rule 56, likewise, does not provide guidance to judges as to how to factor adverse inference instructions at summary judgment.

Finally, consider the practical challenges to a judge weighing an adverse inference instruction at summary judgment. As this case well-illustrates, it is virtually impossible to determine how a judge should implement an adverse inference at summary judgment in a jury trial without essentially transforming the case into a bench trial.

Implementing summary judgment under the *Liberty Lobby* rule is already difficult, but at least there is guidance: the question is whether any reasonable jury could return a verdict for the non-moving party based on the facts adduced. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). But judges act outside of the rules when, as in the case below, they engage in a speculative effort requiring the following steps. First, they make a finding about what a reasonable jury could deduce about what the spoliated evidence *could* have shown. Then, they try to determine if a reasonable jury could reach a verdict for the non-moving party based on what they think the spoliated evidence could have shown. This makes no sense.

Hypotheticals bear this out. For example, imagine in an antitrust case a defendant intentionally deletes all the company's internal emails. Then, the defendant-spoliator argues those emails could not possibly show a price-fixing

agreement because these were internal company emails. Could a reasonable jury conclude that the now-missing emails might have shown that an agreement was made with someone outside of the company? Would that then be enough for a reasonable jury to find liability?

Or consider a civil rights case against a local municipality alleging the police department has a pattern or practice of engaging in racial profiling where the police department has deleted all records of traffic stops with the intent to deprive the plaintiff of that evidence. All the other evidence produced by the department—records of arrests, Terry stops, and use of force incidents—fail to support a pattern of racial profiling. Could a reasonable jury nonetheless conclude that the department engaged in unlawful racial profiling in just the traffic stops when all the other evidence is inconsistent with that theory? Could a reasonable jury then use that finding to determine that the police department is liable?

Or consider a case more like this case, perhaps an officer-involved shooting with an alleged excessive use of force. Then assume that all of the involved officers deleted the footage of the incident from their bodycams with the intent to deprive the plaintiff of that evidence. Then further assume that the contemporaneous police reports of the incident written by multiple officers, including officers who were at the scene but not involved in the use of force, all corroborate the defendant officers' account that the force was necessary to protect officer safety. Could a reasonable jury nonetheless conclude that the bodycam footage would have contradicted all the contemporaneous accounts of the incident? Could that jury, with the right to draw an adverse inference against the spoliating defendant, together with all the other evidence before them, then find the Defendant Officers liable for the excessive use of force?

These questions cannot be answered at summary judgment. They require judges to assess witness credibility, and the weight that non-existent evidence could have carried (not to mention the weight of the circumstances and intent through which that evidence was destroyed), in an effort to determine whether there is a material disputed issue of fact. This cannot be done. Moreover, it cannot be what Rule 37's drafters intended.

At bottom, once an adverse inference *could* be drawn from spoliated evidence, any conclusion about what that evidence could have shown must be left to the jury to decide. The decision below flouted that basic rule. The Court should grant certiorari to clarify the application of Rule 37's adverse inference rule in this important context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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