No. 22-992

In the Supreme Court of the United States

CLAY MELTON DENTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion by declining to instruct the jury that it should draw an adverse inference from the government's alleged failure to preserve potentially exculpatory evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is unreported but is available at 2023 WL 143169. The orders of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2023. The petition for a writ of certiorari was filed on April 10, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted on one count of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) and (b)(1) (2012); one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) and (b)(1) (2012); and

one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Pet. App. 6. The district court sentenced petitioner to 240 months of imprisonment, to be followed by eight years of supervised release. *Id.* at 7-8; C.A. ROA 2025.[1] The court of appeals affirmed. *Id.* at 1-4.

1. In early 2018, law enforcement officers investigating the distribution of child pornography used a peer-to-peer network and software application to download hundreds of child pornography files from a unique IP address. Gov't C.A. Br. 2-4. That address belonged to an information-technology company owned by petitioner. *Id.* at 4-5. Petitioner's residence was the listed physical address for the business, but law-enforcement surveillance did not indicate that petitioner principally ran his business from that location. *Id.* at 4.

The Federal Bureau of Investigation (FBI) executed a search warrant on petitioner's residence and discovered an unexpectedly large number of electronic devices and media "consistent more with a business-type setting" than a residential one. C.A. ROA 875; see *id.* at 1041 (lead agent did not expect to "execut[e] a business search warrant"). Petitioner was not at home during this search; during a phone call with law enforcement, he declined to help officials in their efforts to collect his devices. Gov't C.A. Br. 6.

The officers executing the search warrant were familiar with digital equipment and assessed that it would take "days to go through all" the electronic devices,

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[1] The district court's written judgment states that petitioner will serve three concurrent five-year terms of supervised release. Pet. App. 8. The court's oral pronouncement at sentencing, however, stated that petitioner was sentenced to three concurrent eight-year terms of supervised release. C.A. ROA 2025.

software, and media that they had discovered. C.A. ROA 902. The officers followed the recommendation of forensic computer analysts to transport around 80 digital devices to a government laboratory, rather than analyzing those devices in petitioner's home. Gov't C.A. Br. 9; see C.A. ROA 1134-1135 (explaining that it took 14 months to image and process just one of petitioner's large-storage devices).

The officers implemented what they later described as "standard operating procedures" when seizing digital devices. C.A. ROA 554; accord *id.* at 1317-1318; 1324-1326. They first disconnected the Internet from petitioner's home and powered down his devices to prevent anyone, including petitioner, from having remote access to the network and deleting data on those devices from afar. Gov't C.A. Br. 8-9. And they narrowed the scope of their search to focus on devices "that were plugged in and accessed through the Internet recently." C.A. ROA 990; see *id.* at 987-988, 1037 (explaining how the search team made that decision).

The officers acknowledged that a limited category of data, known as "volatile data," could possibly be lost from the devices that law enforcement powered down. See, *e.g.*, C.A. ROA 1284, 1318.[2] But based on the need to secure and transport the devices and petitioner's unwillingness to assist in dismantling his system, law enforcement's risk analysis counseled in favor of the procedures officers employed. See *id.* at 926-927, 1284.

Child pornography was ultimately found on two of petitioner's devices. Gov't C.A. Br. 10-11. Specifically, forensic analysis revealed that a password-protected

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[2] Volatile data is data temporarily stored in a computer's random-access memory (RAM) and may be lost if a device is not properly powered down. C.A. ROA 1318, 1798.

laptop—a device that had already been turned off when the officers found and seized it, C.A. ROA 1320, and thus not at risk of losing volatile data, *id.* at 1318—had a user account only in petitioner's name and had been used to distribute and receive child pornography. Gov't C.A. Br. 10-11. And one of petitioner's large-capacity network storage devices also contained child pornography. *Id.* at 11.

2. A federal grand jury in the Eastern District of Texas charged petitioner with one count of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) and (b)(1) (2012); one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) and (b)(1) (2012); and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Pet. App. 30-34. Petitioner's overarching defense in his pretrial motions and at trial was that a sophisticated hacker had planted child pornography on his electronic devices, and that the FBI's seizure and handling of the digital devices in his home had resulted in the loss of data that would substantiate that claim. See, *e.g.*, C.A. ROA 88 (pretrial motion); 762 (opening statement), 1931 (closing argument).

Petitioner moved before and during trial to dismiss the indictment on the theory that "government[] misconduct in preserving evidence" had violated his right to due process. Pet. App. 46; C.A. ROA 1329-1331, 1906-1908. In the alternative, petitioner requested an adverse-inference instruction at the close of trial, C.A. ROA 1910-1912, which would have directed the jury that:

> If you find, by a preponderance of the evidence, that the government or its agents destroyed or caused to be destroyed [electronically stored information] by

> acting negligently, recklessly, or by acting in bad faith, you may assume that such evidence would have been favorable to the defense.

Pet. App. 23-24.

After all of the evidence had been submitted, the district court determined that dismissal was unwarranted, and it declined to give petitioner's requested adverse-inference instruction. C.A. ROA 1907-1908, 1914-1916. The court observed that any lost data on petitioner's devices was at best only "possibl[y] exculpatory," *id.* at 1908, and reasoned that both petitioner's due process claim and adverse-inference instruction therefore required petitioner to show law enforcement's bad faith in failing to preserve such data, *ibid.*; *id.* at 1914, 1916. The court found no such bad faith; it in fact doubted that petitioner had even shown negligence on the part of the FBI agents who seized his digital devices. *Id.* at 1908, 1914-1915.

The jury found petitioner guilty on all counts. Pet. App. 21-22. The district court sentenced petitioner to 240 months of imprisonment, to be followed by eight years of supervised release. *Id.* at 7-8; C.A. ROA 2025.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-4.

The court of appeals explained that petitioner's motion to dismiss required him "to show that potentially useful evidence was lost or destroyed by the Government in bad faith," Pet. App. 2, and that his proposed adverse-inference instruction required him to show "[b]ad faith, in the context of spoliation, [which] generally means destruction for the purpose of hiding adverse evidence," *id.* at 3 (citation omitted). And reviewing the record, the court found "no evidence that law enforcement personnel intentionally lost or destroyed

any digital evidence in order to impede [petitioner's] defense," *id.* at 2, or to "hid[e] exculpatory evidence," *id.* at 3.

The court of appeals observed that "the record reflects that the search team followed what they believed to be standard procedures and conducted a risk analysis before powering down and seizing devices at [petitioner's] home." Pet. App. 2. It found that petitioner "therefore ha[d] failed to show that the district court clearly erred in determining there was no bad faith and denying his motion to dismiss." *Id.* at 2-3. It then noted that circuit precedent required bad faith as a prerequisite for an adverse-inference instruction of the sort that petitioner requested. *Id.* at 3. And it "f[ound] no abuse of discretion" in the denial of the requested instruction here because "[n]othing in the record * * * establishes that the agents intentionally failed to do [certain] things for the purpose of hiding exculpatory evidence." *Ibid.*

ARGUMENT

Petitioner renews (Pet. 14-16) his claim that the district court abused its discretion when it declined to give his requested adverse-inference instruction to the jury. That claim lacks merit, and the court of appeals' nonprecedential, factbound decision does not implicate any conflict that he identifies in the courts of appeals. This Court has denied review in other cases presenting similar questions, see, *e.g.*, *Wright* v. *United States*, 558 U.S. 948 (2009) (No. 09-269), and it should follow the same course here.

1. In *California* v. *Trombetta*, 467 U.S. 479 (1984), this Court held that law enforcement's failure to preserve evidence does not violate due process unless the evidence "both possess[es] an exculpatory value that was apparent before the evidence was destroyed" and

was "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489. Four years later, in *Arizona* v. *Youngblood*, 488 U.S. 51 (1988), the Court made clear that "[t]he possibility that [lost evidence] could have exculpated [a defendant] if preserved or tested is not enough to satisfy the standard of constitutional materiality in *Trombetta*." *Id.* at 56 n.*. The Court emphasized that it is not enough that the evidence was "an avenue of investigation," where that avenue "might have led in any number of directions"; instead, a due-process claim requires showing "bad faith by the police," which "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Ibid.*

The lower courts accordingly did not err in finding that petitioner was not entitled to have the jury instructed that upon a finding "by a preponderance of the evidence, that the government or its agents destroyed or caused to be destroyed [electronically stored information] by acting negligently, recklessly, or by acting in bad faith, you may assume that such evidence would have been favorable to the defense," Pet. App. 23-24. To the extent that petitioner views a "may assume" instruction like the one he requested as necessary to enable an exculpatory inference, that is incorrect. Instead, as noted above, petitioner's principal line of defense—as emphasized in his opening and closing statements—was that he was the victim of hacking and that government misconduct had deprived him of valuable evidence to that effect. See C.A. ROA 88 (pretrial motion); 762 (opening statement), 1931 (closing argument). Had the jury agreed, it could (and presumably would) have acquitted him.

To the extent that petitioner instead views a "may assume" instruction like the one he requested as mandating an exculpatory inference, then his request for one was the functional equivalent of his request for a judgment of dismissal—and unwarranted under *Trombetta* and *Youngblood*. If the jury was required to assume that the evidence would have shown hacking of the sort that he alleged, then it would have been unable to find beyond a reasonable doubt that he committed the crimes with which he had been charged. As just discussed, the factual claim of hacking was the basis for the principal defense that he was allowed to raise, and did raise, but the jury rejected. The only possible premise for effectively directing acquittal based on the spoilation of evidence, however, would be a due-process violation—for which *Trombetta* and *Youngblood* require a showing of bad faith. And petitioner does not meaningfully refute the lower courts' determination that the record shows no bad faith here.

In any event, the lower courts' granular determinations as to the reasons for, or culpability of, law enforcement officials' actions are highly factbound and do not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a [writ of] certiorari to review evidence and discuss specific facts."); see also *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Accordingly, no further review is warranted here.

2. Petitioner asserts (Pet. 11-14) that some circuits have declined to require a showing of bad faith as a prerequisite to an adverse-inference instruction. But petitioner has not shown that any court of appeals, in either the civil or criminal context, would have found an adverse inference (either permissive or mandatory) warranted where, as here, the record indicated that law enforcement did not act recklessly or knowingly in failing to preserve any missing data.

Several of the circuits that petitioner cites as supporting his claim do not in fact authorize an adverse-inference instruction based only on a showing of negligent spoilation of evidence. See *United States* v. *Laurent*, 607 F.3d 895, 902-903 (1st Cir. 2010) (stating that a "may assume" adverse-inference instruction "usually makes sense only where the evidence permits a finding of bad faith destruction," or else in "unusual circumstances"), cert. denied, 562 U.S. 1182 (2011); *Stocker* v. *United States*, 705 F.3d 225, 236 (6th Cir.) (stating that, while negligence can support spoilation sanctions, plaintiffs' requested adverse-inference instruction was unwarranted without "a degree of culpability beyond mere negligence"), cert. denied, 571 U.S. 110 (2013); *Hodge* v. *Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004) (stating that adverse inference "cannot be drawn merely from [a party's] negligent loss or destruction of evidence; the inference requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction") (quoting *Vodusek* v. *Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995)).

Other circuit decisions cited by petitioner concern permissive (rather than mandatory) adverse-inference instructions of the sort that (as previously discussed)

would not matter here, see *Mali* v. *Federal Ins. Co.*, 720 F.3d 387, 391-394 (2d Cir. 2013); focus on the particularized context of claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, see *Grosdidier* v. *Broadcasting Bd. of Governors, Chairman*, 709 F.3d 19, 27-28 (D.C. Cir. 2013), cert. denied, 571 U.S. 1125 (2014); or were superseded by Amendments to the Federal Rules of Civil Procedure, see Fed. R. Civ. P. 37 advisory committee's note (2015 amendment) (revised Rule 37(e)(2) "rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence"); see also *In re Bridge Constr. Servs. of Fla., Inc.*, 185 F. Supp. 3d 459, 473 (S.D.N.Y. 2016) (recognizing that amendments to Rule 37 "overruled" *Residential Funding Corp.* v. *DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2022)).

Moreover, the district court in this case was skeptical that law enforcement officials were even negligent in their collection of petitioner's devices. See C.A. ROA 1908, 1914-1915. And that fact-specific determination (which the court of appeals did not need to address), would render the asserted circuit disagreement immaterial to the proper disposition of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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