No. 17-425

IN THE
Supreme Court of the United States

SHAWN WILLIAM WASS,

Petitioner

v.

STATE OF IDAHO,

Respondent.

On Petition For A Writ Of Certiorari To
The Supreme Court of Idaho

REPLY BRIEF FOR PETITIONER

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1. Respondent does not dispute that Petitioner would have prevailed had the court below applied the objective, suspect-focused test articulated by the plurality in *Missouri v. Seibert*, 542 U.S. 600 (2004). *See* Pet. at 24-25. Respondent thus concedes that the question set forth in the petition—whether the present circumstances are "governed by the four-judge plurality's objective, suspect-focused test, or Justice Kennedy's subjective, officer-focused test," Pet. at i (citations omitted)—is outcome determinative and squarely presented. *See also* Sup. Ct. R. 15(2) (setting forth Respondent's obligation to raise such any such issue in its brief in opposition).

2. Even the most charitable reading of Respondent's account of lower court decisions describes a conflict of authority that involves 20-plus circuits and state high courts that has developed over the past 13-and-a-half years. And even under the most charitable reading, law enforcement and suspects in several states, such as Kentucky, Michigan, and Georgia, are accountable to two different constitutional rules at once. Petitioner is not aware of any instance in which this Court allowed a conflict of this magnitude and nature to persist in the face of a conceded opportunity to resolve it.

In his petition, Petitioner explained that 16 federal circuits/state high courts and the Supreme Court of Puerto Rico have concluded that the present circumstances are governed by the subjective, officer-focused test articulated by Justice Kennedy in *Seibert*. Pet. at 12-14. On the other hand, eight circuits/state high

courts and the D.C. Court of Appeals have concluded that the present circumstances are governed by the objective, suspect-focused test articulated by the plurality opinion. Courts in the latter category have reached that conclusion in one of two ways: (1) reasoning that *Seibert* has no binding opinion and making an independent determination as to the correct principles under the Fifth Amendment, Pet. at 15-17; or (2) treating the plurality opinion as controlling, Pet. at 16-17.

Respondent attempts to play with the margins of this deep, acknowledged conflict by artificially limiting the question presented. In particular, Respondent pretends that the relevant question is not which test governs the circumstances of this case (*i.e.*, the question that is concededly dispositive of Petitioner's criminal conviction), but instead whether the court below "err[ed] in holding that the plurality opinion . . . was not controlling." BIO at i. With that sleight of hand, Respondent reaches the rather remarkable conclusion that lower courts adopting the plurality test as governing under method (1) above (*i.e.*, those that have concluded they are free to conduct an independent analysis of Fifth Amendment principles and concluded that the plurality opinion articulates the correct test), as well as lower courts that have adopted the plurality test without "specific reference" to *Marks v. United States*, 430 U.S. 188 (1977), "agree" with the decision below. BIO at 13-14. That is nonsense. Respondent's account confirms that, in conflict with the decision below (and 16 other circuits or courts of last resort), these several lower courts apply the plurality's objective, suspect-focused

test and, as Respondent concedes, under that test Petitioner would have prevailed.

Respondent otherwise offers strained characterizations of some of the lower court decisions that have adopted the plurality's test, which contradict the express language of those decisions,[1] subsequent interpretation by courts in those jurisdictions,[2] and the positions of the attorneys general of those states.[3] In any case, Respondent's whole argument would, at best, relocate a few lower courts in a 20-plus jurisdiction split from one side of the split to the other.

3. Respondent begins and spends nearly half of its brief arguing the merits of which test should govern. BIO 5-12. Its heavy focus on the merits of the question

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[1] *See, e.g.*, *State v. Navy*, 688 S.E.2d 838, 842 (S.C. 2010) ("[D]eliberate practice was not determinative in *Seibert*."); *Kelly v. State*, 997 N.E.2d 1045, 1054 (Ind. 2013) (rejecting the state's argument that "*Elstad* should control" in the absence of deliberate practice and "consider[ing] this case in light of [the *Seibert* plurality's] five factors").

[2] *See, e.g.*, *State v. Williams*, 747 S.E.2d 194, 200 (S.C. Ct. App. 2013) ("Our supreme court held the evidence of a deliberate police practice, the 'question first' strategy, was not determinative in *Seibert*.").

[3] *See* Petition for Writ of Certiorari at 5, *South Carolina v. Navy*, No. 09-1459 (U.S. May 27, 2010), 2010 WL 2214870 (observing that the South Carolina Supreme Court's decision in *Navy* "applied the plurality test to exclude statements that would have clearly been admitted under Justice Kennedy's test"); Petition for Writ of Certiorari at 1, 7, *Ohio v. Farris*, No. 06-464 (U.S. Oct. 2, 2006), 2006 WL 2826269 (observing that the Supreme Court of Ohio "determined that under federal law" the plurality's "effective warning" test applies).

presented simply underscores that Petitioner's case is an excellent vehicle to resolve it. The Court should grant certiorari and allow full briefing on the merits (which would, of course, include not just argument pertaining to *Marks*, but also the appropriate Fifth Amendment principles).

Respondent appears to take great comfort in the fact that a large majority of lower courts apply the subjective, officer-focused test that was applied below. However, that only highlights that for over a decade, numerous jurisdictions have been applying a constitutional inquiry that was expressly rejected by at least seven other members of this Court. Pet. at 26; *Reyes v. Lewis*, 833 F.3d 1001, 1008 (9th Cir. 2016) (Callahan, J., dissenting from denial of rehearing en banc); *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1141 (9th Cir. 2005) (Berzon, J., dissenting).

4. Given the enormous magnitude of this conflict of authority, there is no realistic possibility that this Court's decision in *Hughes v. United States*, No. 17-155 (cert. granted Dec. 8, 2017) (revisiting the fractured decision in *Freeman v. United States*, 564 U.S. 522 (2011)), will resolve it. Indeed, Respondent has not even attempted to argue that further percolation would be beneficial. The Court should thus grant certiorari and restore uniformity.

In the event that the Court chooses not to resolve the conflict of authority, however, it should hold this case pending *Hughes* and then GVR, in accordance with customary practice. As Respondent acknowledges, the questions presented in *Hughes* concern the proper application of *Marks* to a fractured decision of

this Court, BIO 12, and the decision below turned upon the Supreme Court of Idaho's application of *Marks* to this Court's fractured decision in *Seibert*, BIO 4. While it is unreasonable to expect that *Hughes* will resolve the 20-plus lower court conflict over the question presented in this case, its resolution will likely bear on, and may be dispositive of, the analysis undertaken by the court below.

CONCLUSION

For the foregoing reasons and those stated in the petition, certiorari should be granted.

Respectfully submitted,

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