No. 21-____

IN THE

Supreme Court of the United States

ERICKSON MEKO CAMPBELL,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals violates the principle of party presentation announced in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), by *sua sponte* raising an issue that the government abandoned in its appellate briefing and granting relief on that basis.

RELATED PROCEEDINGS

U.S. District Court for the Middle District of Georgia

United States v. Campbell, No. 3:14-CR-46 (CAR), 2015 WL 13927094 (M.D. Ga. Aug. 20, 2015)

U.S. Court of Appeals for the Eleventh Circuit

United States v. Campbell, 912 F.3d 1340 (11th Cir. 2019)

United States v. Campbell, 970 F.3d 1342 (11th Cir. 2020)

United States v. Campbell, 26 F.4th 860 (11th Cir. 2022) (en banc)

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Petitioner Erickson Meko Campbell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The court of appeals' en banc opinion (App. 1a-130a) is reported at 26 F.4th 860. The original panel opinion (App. 172a-204a) is reported at 912 F.3d 1340, and the amended panel opinion (App. 131a-171a) is reported at 970 F.3d 1342. The district court's opinion (App. 205a-224a) is unreported but available at 2015 WL 13927094.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides, in relevant part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

INTRODUCTION

In *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), this Court reaffirmed an essential precept of the American adversary system: the principle of party presentation. Under that principle, absent extraordinary circumstances, courts decide the issues framed by the parties rather than operating as self-generating issue spotters. *Sineneng-Smith* then reversed the Ninth Circuit for raising an issue *sua sponte* and ruling for a criminal defendant on a ground the defendant had not raised. Here, however, the Eleventh Circuit abandoned the principle of party presentation by raising an issue for the *government* against a criminal defendant and ruling for the government on that basis. This stark departure from the norms of the adversary process drew a joint dissent by Judges Newsom and Jordan, joined by three other judges. Highlighting the conflict between the court's action and *Sineneng-Smith*, the dissenters wrote that the majority's decision "contravenes foundational

commitments of our adversarial system and its constituent party-presentation principle." App. 65a. "[T]he majority has offered no persuasive justification for insinuating itself into a criminal prosecution to save the United States—the quintessential sophisticated, repeat-player litigant— from what are, at best, its litigation failures." *Id.* at 99a.

The court of appeals' departure from basic appellate-process norms calls for this Court's intervention—just as the Court corrected the court of appeals in *Sineneng-Smith* itself. Here, the government argued before the district court that the good-faith exception to the exclusionary rule applied, but on appeal it made a conscious decision not to raise this argument. Nevertheless, a panel of the Eleventh Circuit—without prior notice to the parties—*sua sponte* raised, considered, and decided the good-faith issue in the government's favor. The en banc court then validated that assertion of judicial power, writing at length to justify its decision. But as the dissent explained, the court's assertion of power to assist the government by raising a defense that the government had foresworn cannot be reconciled with the party-presentation principle. The en banc court's gymnastics to justify its aberrant action speaks volumes. And the decision exacerbates disarray in the circuits on the critical question of when departures from the party-presentation principle can be justified. This issue has great practical and doctrinal significance for the administration of criminal justice in the appellate courts. To reaffirm its holding in *Sineneng-Smith*, clarify this unsettled area of the law for the courts of appeals, and correct the Eleventh Circuit's erroneous engagement

in *sua sponte* issue raising, this Court should grant certiorari and reverse.

STATEMENT

A. The Principle Of Party Presentation

The "principle of party presentation" is "basic to our adversarial system." *Sineneng-Smith*, 140 S. Ct. at 1579; App. 19a (quoting *Wood v. Milyard*, 566 U.S. 463, 472 (2012)). Under the party-presentation principle, courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiters of matters the parties present." *Sineneng-Smith*, 140 S. Ct. at 1579 (quotation omitted). This practice, which is older than the Constitution, promotes "core values of the Anglo-American judicial system," including "truth and accuracy," "separation of powers and judicial restraint," and "acceptance and settlement." App. 69a-74a (dissent).

Reliance on the parties to identify the issues for judicial resolution reflects the distinct roles of courts and litigants. "[A]s a general rule, our system 'is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Sineneng-Smith*, 140 S. Ct. at 1579 (alteration omitted) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment)). In our adversarial system, "courts are 'essentially passive instruments of government.' They 'do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions

presented by the parties." *Id.* (citations omitted) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of rehearing en banc)).

The party-presentation principle is "not ironclad," but this Court has excused departures from it only in "extraordinary circumstances." *Sineneng-Smith*, 140 S. Ct. at 1579, 1581. "In criminal cases, departures from the party presentation principle have usually occurred to protect a *pro se* litigant's rights." *Id.* at 1579 (internal quotation marks omitted); *see*, *e.g.*, *Castro*, 540 U.S. at 381-83 (endorsing judicial authority to reframe *pro se* litigants' motion for post-conviction relief to "avoid an unnecessary dismissal" or "inappropriately stringent application of formal labeling requirements").

B. Factual Background

On December 12, 2013, Deputy McCannon stopped Mr. Campbell along I-20 in Greene County, Georgia, for failing to stay within the driving lane and failing to maintain signal lights in good working condition. Deputy McCannon decided to issue Mr. Campbell a warning and asked Mr. Campbell to step out of the car and accompany him to the patrol vehicle while he wrote the warning citation. As he wrote up the warning, Deputy McCannon requested that dispatch run Mr. Campbell's plates and also initiated a conversation with Mr. Campbell. He learned where Mr. Campbell worked, where he was going, that Mr. Campbell had been arrested nearly two decades ago for a DUI, and that Mr. Campbell was not traveling with a firearm. Then, Deputy McCannon spent about twenty-five seconds asking Mr. Campbell if he had

any counterfeit materials, controlled substances, or dead bodies in the car. Mr. Campbell answered in the negative to each inquiry. App. 3a-5a.

Deputy McCannon then asked if he could search Mr. Campbell's car for any of those items. Mr. Campbell consented. While Deputy McCannon continued working on the warning ticket, Sergeant Patrick Paquette—who had arrived a few minutes earlier—began searching Mr. Campbell's car. Deputy McCannon then finished the warning ticket and joined Sergeant Paquette in searching the car. The officers found several items: 9mm ammunition, a 9mm semi-automatic pistol, a black stocking cap, and a camouflage mask in a bag under the carpet of Mr. Campbell's car. When confronted, Mr. Campbell admitted that he lied about not having a firearm because he was a convicted felon. Mr. Campbell was then arrested and indicted on a felon-in-possession charge. App. 5a.

C. Procedural History

1. After he was indicted, Mr. Campbell filed a motion to suppress the evidence recovered in the search, arguing that Deputy McCannon had conducted an unreasonable seizure in violation of the Fourth Amendment and that the evidence was the fruit of that violation. Mr. Campbell asserted that Deputy McCannon had unlawfully prolonged the traffic stop by asking questions unrelated to the stop's purpose, in violation of this Court's then-recent decision in *Rodriguez v. United States*, 575 U.S. 348 (2015). After an evidentiary hearing, the district court sought and received supplemental briefing on whether Deputy McCannon had violated *Rodriguez* and whether, even

if the stop was unlawful, the evidence was nonetheless admissible under the good-faith exception to the exclusionary rule set out in *Davis v. United States*, 564 U.S. 229 (2011). App. 5a-11a.

The district court denied Mr. Campbell's motion to suppress. It held that the Eleventh Circuit's decision in *United States v. Griffin*, 696 F.3d 1354 (11th Cir. 2012), rather than this Court's decision in *Rodriguez*, governed the prolongation issue and that Deputy McCannon's seizure of Mr. Campbell was not unconstitutional under *Griffin* because the overall length of the stop was reasonable. Because the court held that the search did not violate the Fourth Amendment, it did not rule on the government's argument that the evidence was admissible under the good-faith exception. Mr. Campbell pleaded guilty but reserved the right to appeal the denial of his suppression motion. App. 11a-14a.

2. On appeal to the Eleventh Circuit, Mr. Campbell's opening brief argued that the traffic stop and detention were unlawful under *Rodriguez*. In its answering brief, the government responded *only* that the detention was lawful under the Fourth Amendment. For reasons unexplained at the time—but that the government later described as a "conscious" litigation decision—the government did *not* raise its separate argument that even if the detention was unlawful, the good-faith exception applied. App. 13a-14a; *see id.* at 62a-63a (dissenting opinion).

A three-judge panel then unanimously held that Mr. Campbell was correct on the merits—Deputy McCannon's detention of Mr. Campbell was unlawful

under *Rodriguez* and violated the Fourth Amendment. App. 197a, 200a. But then, without giving the parties any advance notice of its intent to do so, without requesting supplemental briefing, and without asking about the issue at argument, a divided panel held that the good-faith exception applied because Deputy McCannon had reasonably relied upon the pre-*Rodriguez* decision in *Griffin*. The panel majority recognized that a reviewing court typically will not consider a forfeited issue, but nonetheless considered the good-faith issue because "waiver is a prudential doctrine," the parties had briefed the issue before the district court, and a forfeiture exception applied to excuse the forfeiture. App. 199a. Judge Martin dissented on the good-faith issue, arguing that the panel should not have reached the issue because the government "never made that argument on appeal." *Id.* at 201a (Martin, J., dissenting). An appellate court, Judge Martin emphasized, should not be "in the business of resuscitating arguments the government was made aware of, then clearly abandoned." *Id.* at 204a.

On its own motion, the panel vacated its opinion and issued a replacement, which elaborated on the reasons for *sua sponte* raising, considering, and deciding the good-faith issue. The panel majority conceded that the government had "waived" the good-faith issue by failing to include it in its appellate brief. But even so, the majority—again reasoning that "[w]aiver is a prudential doctrine"—concluded that an appellate court could decide for itself "the degree to which [to] adhere to the doctrine and the conditions under which [to] excuse it." App. 160a-161a. The majority

declined to adopt a "bright-line rule," and instead concluded it could *sua sponte* consider the good-faith issue based on several case-specific "policy considerations"—in particular, that the good-faith issue presented a "pure question of law" that was "already resolved" by the court's analysis of the constitutionality of Deputy McCannon's search and that Mr. "Campbell had notice that the issue was potentially relevant" because the government had raised the good-faith exception before the district court. *Id.* at 161a-165a.

3. The Eleventh Circuit then reheard the case en banc to determine whether the good-faith exception could form the basis of affirmance "despite the government's failure to raise that alternative ground before the panel." App. 3a. In the majority's view, the answer was "yes." *Id.*

The Eleventh Circuit began by noting that "[t]ypically, issues not raised in the initial brief on appeal are deemed abandoned." App. 17a. The court explained that this rule reflects the adversary system's reliance on the parties to raise issues and "assign[s] to courts the role of neutral arbiter of matters the parties present." *Id.* at 18a (quoting *Sineneng-Smith*, 140 S. Ct. at 1579). The party-presentation principle, the court continued, is based on "the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 244 (2008)).

Nevertheless, the court went on to focus on the rare exceptions embodied in this Court's statement that "the 'party presentation principle is supple, not ironclad,' and there are 'no doubt circumstances in

which a modest initiating role for a court is appropriate.'" App. 18a (quoting *Sineneng-Smith*, 140 S. Ct. at 1579). Seizing on this Court's admonition that a forfeited issue may be considered *sua sponte* in "extraordinary circumstances," App. 19a (quoting *Wood v. Milyard*, 566 U.S. 463, 471 n.5 (2012)), the court asserted (citing a law review article for support) that ultimately "[t]he degree to which we adhere to the prudential practice of forfeiture and the conditions under which we will excuse it are up to us as an appellate court." *Id.* Then, canvassing a range of unvarnished policy considerations related to "the policy underpinnings of the exclusionary rule" and focusing on the circumstances in which the good-faith exception might apply in this case, *id.* at 30a, the majority determined that it was appropriate to relieve the United States of its litigation choices in the context here, in part because *Mr. Campbell* had raised the Fourth Amendment issue on which he was ultimately found to be correct. *Id.* at 30a-35a. The court did not acknowledge that *Sineneng-Smith*'s example of an appropriate departure from the party-presentation principle "[i]n criminal cases" was to "protect a *pro se* litigant's rights"—not to rescue the most powerful and well-represented of litigants, the United States. 140 S. Ct. at 1579 (quotation omitted).

Judge Newsom and Judge Jordan dissented, joined by Judges Wilson, Rosenbaum, and Jill Pryor. They began with first principles—emphasizing that "[i]n this country, we have an adversarial justice system" and that the party-presentation principle is one of its "central features." App. 65a-66a. This principle,

they explained, has "deep historical roots" and is "instrumental to—and protective of—other core values of the Anglo-American judicial tradition," including "truth and accuracy," "fundamental fairness," "separation of powers and judicial restraint," "impartiality and its appearance," and "acceptance and settlement." *Id.* at 66a, 69a-74a.

The dissent believed that the government had not merely forfeited, but had affirmatively waived the good-faith issue, placing it beyond the reach of the court to raise *sua sponte*. App. 84a-99a. But even if the government had only *forfeited* the good-faith issue, as the majority concluded, the dissent argued that *sua sponte* consideration of the good-faith issue conflicted with this Court's recognition of the party-presentation principle in *Sineneng-Smith*, which is subject to exceptions only in "extraordinary circumstances." *Id.* at 99a-100a, 107a-108a.

Here, the dissent argued, nothing remotely approaching "extraordinary circumstances" existed. App. 100a. Indeed, the dissent noted, "the majority has offered no persuasive justification for insinuating itself into a criminal prosecution to save the United States—the quintessential sophisticated, repeat-player litigant—from what are, at best, its litigation failures." *Id.* at 99a. Rather, "even while mouthing the words," the majority has "completely failed to come to grips with the 'extraordinary circumstances' standard that the Supreme Court has prescribed for forfeiture situations like the one that (on the majority's premise) this case presents." *Id.* at 118a-119a. The dissent noted the anomaly of the court's *sua*

sponte raising an issue that "the richest, most powerful and best represented litigant to appear before [the courts]," *i.e.*, the United States, had abandoned, while *Sineneng-Smith* had rebuked the Ninth Circuit for raising an issue for the benefit of a criminal defendant. *Id.* at 123a (emphasis and quotation omitted). Considering the parties, the issue, and the procedure on appeal, the court determined that "[p]ut simply, no 'extraordinary'—*i.e.*, 'exceptional,' 'unusual,' or 'singular'—circumstances justify the [majority's] decision of [petitioner's] appeal on a ground that the government failed (or refused) to raise before the panel." *Id.* at 122a. The dissent further noted that the majority's action "implicate[d] separation-of-powers concerns" both by placing the "judiciary's neutrality at issue" and by "encroaching into the executive branch's prosecutorial prerogatives." *Id.* at 123a (internal quotation marks omitted). Accordingly, the dissent concluded, the majority "has impermissibly exercised what discretion it might have by acting in the absence of anything approaching 'extraordinary circumstances.'" *Id.* at 128a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision to consider an issue *sua sponte* that the government abandoned in its appellate briefing, and to grant relief on that basis, violated the party-presentation principle that this Court recently reaffirmed in *Sineneng-Smith*. As the five dissenting judges made clear, the majority's action contravenes fundamental precepts of the adversary system, rescues the government from its own litigation decisions, and implicates separation-of-powers concerns. This Court should grant certiorari and

reverse for three reasons. First, the Eleventh Circuit's decision is wrong. Second, the Eleventh Circuit's decision deepens disarray in the circuits in their approaches to raising and resolving issues *sua sponte*. And third, the Eleventh Circuit's decision implicates issues of systemic and practical importance to the administration of justice. Only this Court can reinforce consistent application of the party-presentation principle. Review should be granted to ensure that this basic principle in the adversary system remains vital.

A. The Eleventh Circuit's Decision Is Wrong

The Eleventh Circuit's decision departs from the party-presentation presentation principle that this Court recently reaffirmed in *Sineneng-Smith*. "In our adversarial system," this Court explained, "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Sineneng-Smith*, 140 S. Ct. at 1579 (quoting *Greenlaw*, 554 U.S. at 243). While the party-presentation principle is "not ironclad," and courts may consider forfeited issues in "extraordinary circumstances," courts remain "essentially passive instruments of government"—they "do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties." *Id.* at 1579, 1581 (alterations omitted) (quoting *Samuels*, 808 F.2d at 1301 (Arnold, J., concurring in the denial of rehearing en banc)).

By *sua sponte* considering an issue that the government abandoned on appeal, the court of appeals

violated the party-presentation principle. No "extraordinary circumstances" warranted *sua sponte* consideration of the good-faith exception here. And the en banc court's dilution of the party-presentation principle, as the dissenting judges recognized, runs counter to three fundamental features of our adversary system. First, it conflicts with this Court's decision in *Sineneng-Smith*. Second, it benefits the nation's most powerful, considered, and well-resourced litigant—not the *pro se* criminal defendant that the Court cited as the paradigmatic example of the beneficiary of *sua sponte* judicial issue raising. And third, it implicates profound separation-of-powers issues.

1. In *Sineneng-Smith*, this Court applied the party-presentation principle to reverse the Ninth Circuit *sua sponte* consideration of an issue that neither party had raised. In that case, the court of appeals bypassed the as-applied constitutional claim that the defendant raised to challenge her conviction and instead appointed several *amici curiae* to brief a far more sweeping facial overbreadth challenge to the statute of conviction that the court raised on its own. The court then ultimately adopted one of the *amici*'s contentions as the basis for its holding. *See* 140 S. Ct. at 1580-81. In reversing that "takeover" of a criminal appeal, this Court unequivocally held that "[n]o extraordinary circumstances justified" the Ninth Circuit's non-passive, non-modest assertion of judicial power. *Id.* at 1581. The Court explained that "[i]n criminal cases, departures from the party presentation principle have usually occurred 'to protect a *pro se* litigant's rights,'" *id.* at 1579 (quoting *Greenlaw*, 554 U.S. at 244). But neither that circumstance nor

any other extraordinary circumstances justified the Ninth Circuit's *sua sponte* action. Accordingly, the Court remanded for the appeal to be decided in a manner "bearing a fair resemblance to the case shaped by the parties." *Id.* at 1582.

The Eleventh Circuit's action cannot be reconciled with *Sineneng-Smith*. As the dissenting opinion explained, while the majority "briefly nod[ded]" to this Court's decision in *Sineneng-Smith*, it "never really grapple[d] with what [this] Court said or did there." App. 120a (dissenting opinion). That error breaches longstanding norms of appellate practice. *Sineneng-Smith* "and in particular its extraordinary-circumstances standard—follows closely from the Supreme Court's earlier decisions … in *Granberry*, *Day*, and *Wood*, which sharply circumscribed federal courts' authority in habeas cases to *sua sponte* consider alternative grounds for affirmance that a state has failed to properly present." App. 120a-121a; *see Granberry v. Greer*, 481 U.S. 129 (1987); *Day v. McDonough*, 547 U.S. 198 (2006); *Wood v. Milyard*, 566 U.S. 463 (2012). In these cases, this Court repeatedly instructed "that federal courts 'have discretion, in *exceptional cases*, to consider' arguments that the state has 'inadvertently overlooked,'" and "retain 'authority to consider a forfeited defense when extraordinary circumstances so warrant.'" App. 121a (dissenting opinion, with alterations) (quoting *Wood*, 566 U.S. at 471).

This case does not approach the type of exceptional or extraordinary circumstances required under this Court's cases. Indeed, the Eleventh Circuit struck out on its own, stating that "[t]he degree to which we adhere to the prudential practice of forfeiture and the

conditions under which we will excuse it are *up to us as an appellate court*." App. 19a (emphasis added). And it excused the government's forfeiture "[i]n light of" two considerations: (1) the "policy underpinnings" of the exclusionary rule, and (2) "the specific circumstances of this case." *Id.* at 30a. But those rationales cannot justify reconfiguring petitioner's appeal to rescue the government from its own litigation decisions. A court should not use preferred policy-driven *outcomes* as a basis for relieving a party of its litigation choices. And the specific circumstances of this case cut against, not in favor of, *sua sponte* judicial decision making.

First, the majority's action began with an outcome-driven assessment of the policies of the exclusionary rule. App. 30a-32a. Noting the deterrent purpose of the exclusionary remedy, the majority found little value in excluding evidence based on the mistaken litigation choices of appellate prosecutors. *Id.* at 32a. But that rationale has no stopping point: it would seemingly justify an appellate court raising *any* forfeited argument against suppression that it perceived in the record, even where government appealed and declined to press the point. Perhaps for that reason, the court declined to rest on that rationale alone, but purported to rely as well on "case specific reasons" for finding extraordinary circumstances. *Id.* Those reasons, however, similarly rely on mistaken and overbroad premises.[1]

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[1] The first "case specific reason[]" the Eleventh Circuit invoked was the principle that an appellate court has "discretion to affirm on any ground supported by the law and the record that will

Second, the majority's approach overrides ordinary notions of fairness. In its appellate briefing, the government abandoned reliance on the good-faith exception, even though (at the district court's prompting) it had argued the issue below. App. 11a. That should have been the end of the matter. "The government bears the burden of demonstrating that the good faith exception applies." *United States v. Morales*, 987 F.3d 966, 974 (11th Cir. 2021). And it is axiomatic that when a party bearing the burden of proof says nothing about an issue, it loses on that issue. Petitioner was entitled to an adjudication on the case within the framework imposed by law. Yet the panel proceeded without notice or briefing to raise and adopt the good faith issue. App. 24a n.10.

This action cannot be justified by claiming that a defendant who raises a substantive Fourth Amendment claim has inadvertently raised the distinct exclusionary rule issue, as the en banc majority erroneously asserted. *Id.* at 35a. Far from being a logical corollary of the Fourth Amendment question that the

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not expand the relief granted below." App. 33a (quoting *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018)). But this rule is "overwhelmingly" applied not where an appellate court "seeks out" an issue; instead, it is ordinarily confined to appeals where the party that prevailed in the district court "presents" the issue as an alternative ground and urges the appellate court to adopt it. App. 111a (dissenting opinion). And the court's "case-specific" contention that the good-faith issue had somehow became a "pure question of law," *id.* at 33a (majority opinion), is not only wrong, *see id.* at 114a-116a (dissenting opinion), but if accepted as a justification for *sua sponte* decisionmaking, would cut a gaping hole out of the party-presentation principle.

court decided, the good-faith issue is doctrinally distinct. "The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois v. Gates*, 462 U.S. 213, 223 (1983); *see also id.* at 217-24 (declining to consider whether to modify the exclusionary rule to permit a good-faith exception in a case on review from a state court's finding of a Fourth Amendment violation, noting, *inter alia*, that "we do not believe that the State's repeated opposition to respondent's substantive Fourth Amendment claims suffices to have raised the question whether the exclusionary rule should be modified"). The unfairness in using petitioner's own arguments for *reversing* his conviction to justify judicial invention of an argument to *affirm* is palpable.

2. The Eleventh Circuit's decision is particularly anomalous because of the beneficiary of its action: the government in a criminal case. "The United States, which is represented in court by the U.S. Department of Justice, is the quintessential sophisticated, repeat-player litigant." App. 122a (dissenting opinion); *see also Greenlaw*, 554 U.S. at 244 ("Counsel must almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us."(quoting *Samuels*, 808 F.3d at 1301 (Arnold, J., concurring in the denial of rehearing en banc))). While *sua sponte* consideration is sometimes justified to "ameliorate

the imbalances" between the parties, here that justification has no purchase. App. 123a (dissenting opinion). Indeed, it cuts in the opposite direction. The United States has myriad reasons for winnowing the issues it presents on appeal. For example, the government may wish to focus on a case-dispositive legal issue to generate favorable precedent; it may be aware of a potential weakness lurking in the record that would be invisible to the appellate court; it may have broader concerns about defending an argument in this Court; or it may wish to conserve appellate or judicial resources. Just as the government considers a range of issues when deciding whether to prosecute an appeal at all, *see United States v. Mendoza*, 464 U.S. 154, 161 (1984), it considers a range of issues when deciding what questions to brief on appeal. Unlike a *pro se* litigant, the government has no need of a court to rethink its positions and provide strategic help.

3. Finally, "[i]ntervening to aid the government in the course of a criminal prosecution … implicates separation-of-powers concerns." App. 123a (dissenting opinion). The Article III courts function as neutral arbiters of disputes. That neutrality is indispensable to the sound adjudication of cases, the due process right of the parties to be heard, and public confidence in the judicial process. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888 (2009) (noting judicial reforms "to eliminate even the appearance of partiality"). The Executive Branch, for its part, has constitutionally grounded prosecutorial discretion, which extends to determining which arguments to raise or refrain from raising on appeal. *Cf. Greenlaw*, 554

U.S. at 246 (recognizing that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case" (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)), and reserving whether "comparable authority and discretion are lodged in the Executive Branch with respect to the pursuit of issues on appeal"); U.S. Br. in *Greenlaw*, No. 07-330, at 43 (citing *Nixon* and arguing that prosecutorial discretion equally applies "at the appellate stage").

As Judge Silberman has explained, if "the government refuses to argue" an alternative issue on appeal—even where its failure is "inexplicable" or "an obvious mistake"—*sua sponte* consideration "puts the judiciary's neutrality at issue" and risks "encroaching into the executive branch's prosecutorial prerogatives." *United States v. Pryce*, 938 F.2d 1343, 1352-54 (D.C. Cir. 1991) (Silberman, J., dissenting). Those dangers are at their apex in a criminal case, pitting the government's sovereign authority against a citizen's liberty. Especially in a criminal case, courts should do their utmost to maintain their role as neutral adjudicators rather than serving as adjunct prosecutors—seeing better than the government what arguments to pursue. And the government's litigation decisions should be respected as a reflection of executive decisionmaking. The separation of powers demands no less. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). After all, "[t]here is no liberty if the power of judging be not separated from the legislative and executive powers." *Bank Markazi v. Peterson*, 578 U.S. 212, 238 (2016) (Roberts, C.J., dissenting) (quot-

ing The Federalist No. 78 at 466 (Hamilton) (C. Rossiter ed. 1961)). And if the courts are to remain neutral adjudicators, "[i]n line with [their] duty to call balls and strikes," *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 (2020), they must remain umpires—rather than taking the mound to throw the pitch.

* * *

The Eleventh Circuit violated the principle of party presentation reaffirmed in *Sineneng-Smith* by *sua sponte* raising an issue the government abandoned in its appellate briefing and then affirming on that basis. The majority's policy desire to achieve a preferred outcome cannot justify its action, and fairness considerations cut against it. And far from involving "extraordinary circumstances" permitting *sua sponte* consideration of the good-faith exception here, this case involves the quintessential litigant not in need of a judicial assist. Finally, an array of separation-of-powers considerations counsel against the court's taking the initiative. For all of these reasons, the Eleventh Circuit's decision is a marked departure from "the accepted and usual course of judicial proceedings." S. Ct. Rule 10(a).[2]

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[2] The dissenting opinion expressed the view that the government made a "conscious decision" to abandon the good-faith issue on appeal and thus waived it. App. 84a-99a. Both of the opinions below recognized that the government's *waiver* of an issue, as opposed to *forfeiture*, precludes the court's *sua sponte* action. *Id.* at 20a (majority); *id.* at 84a (dissent). But even on the view that the government's failure to brief the good-faith issue was a forfeiture, the Eleventh Circuit violated the party-presentation principle recognized in *Sineneng-Smith* by *sua sponte* considering an argument that the government abandoned on appeal.

B. The Circuits Take Disparate Approaches To The Question Presented

Contrary to the Eleventh Circuit's approach, three circuits have expressly refused to apply the good-faith exception based on the government's failure to invoke it—and two circuits have done so even when reversing the denial of a suppression motion. Two other circuits have similarly declined to consider grounds for affirming the denial of motions to suppress that the government has not itself invoked in its appellate briefing. The decision below breaks from this longstanding trend. And the Eleventh Circuit appears to have joined only one other circuit in failing to apprehend the additional guidance on the party-presentation principle that this Court recently offered in *Sineneng-Smith*.[3]

1. The First and Sixth Circuits have refused to apply the good-faith exception to reject suppression when the government did not raise the issue on appeal. The Seventh Circuit has likewise declined to rely on an exclusionary-rule grounds that the government did not raise as a basis for affirmance. These decisions reflect a broader understanding that the

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[3] Although the majority claimed that it was "not alone in holding that appellate courts may *sua sponte* address issues not raised in the initial briefs," App. 21a n.8, it did not cite any criminal case excusing the government's forfeiture. In fact, the majority cited only one criminal case, *United States v. Hoyt*, 888 F.2d 1257 (9th Cir. 1989), in which the court *sua sponte* vacated an unconstitutional special assessment to avoid an "unduly harsh" result for the *defendant*. *Id.* at 1258. Nor did the majority cite any case decided with the benefit of the guidance this Court offered in *Sineneng-Smith*—or, for that matter, in *Greenlaw*, *Castro*, *Wood*, or any other case decided in this millennium.

party-presentation principle requires holding both individuals and the government to their litigation choices.

a. The First Circuit held the government to its choice not to invoke the good-faith exception in *United States v. Ramirez-Rivera*, 800 F.3d 1 (1st Cir. 2015). There, the district court denied a defendant's motion to suppress evidence recovered in a warrantless search of his home. The district court reasoned that exigent circumstances and an informant's tip supplying probable cause rendered the search lawful. *Id.* at 26. The First Circuit reversed, holding that the informant's tip was too unreliable to establish probable cause. *Id.* at 28. The court of appeals noted the possibility that the good-faith exception could nonetheless bar suppression but stressed as one reason for rejecting it that "the government did not … invoke the exception" and had made "no argument concerning" it, "even though it bears the heavy burden of proving that the good-faith exception applies." *Id.* at 32 (internal quotation marks omitted); *see also id.* at 32-33 (concluding in the alternative that "the good-faith exception would not help the government in this case"). And the First Circuit's refusal to invent arguments for the government applies across a range of issues. In *United States v. Baptiste*, 8 F.4th 30 (1st Cir. 2021), for example, the court noted that "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Id.* at 43 (quoting *NASA v. Nelson*, 562 U.S. 134, 147 n.10 (2011)). Accordingly, in affirming the grant of a new

trial to a defendant, the court of appeals noted that "[m]aybe there is a better argument for why a new trial would not serve 'the interest of justice,'" but instead of wandering down that path, the "court in doing what judges are paid to do, [had] taken—and, it turns out, rejected—the government's arguments as [it] found them." *Id.*

b. The Sixth Circuit took the same tack in *United States v. Archibald*, 589 F.3d 289 (6th Cir. 2009). There, the district court denied the defendant's motion to suppress evidence found in a warrantless search of his home, which the court found constitutionally permissible as a protective sweep justified by officers' reasonable suspicion that a dangerous individual was present in the home. *Id.* at 293. The Sixth Circuit disagreed and reversed, holding that the officers lacked the reasonable suspicion the Fourth Amendment required. *Id.* at 301-02. And the Sixth Circuit declined to even "address" the good-faith exception, simply noting that the government had not "raised, preserved, or argued" the issue. *Id.* at 301 n.12. Again, the Sixth Circuit adheres to this position across a range of issues. *See United States v. Perkins*, 887 F.3d 272, 277 (6th Cir. 2018) (rejecting the government's argument that a warrant lawfully authorized a search, and refusing to consider alternative grounds for upholding the search that "the government did not pursue" on appeal (citing *Archibald*, 589 F.3d at 301 n.12)).

c. The Seventh Circuit has likewise adhered to the party-presentation principle, even when reversing denials of motions to suppress. In *United States v. Leo*, 792 F.3d 742 (7th Cir. 2015), when a defendant moved

to suppress evidence officers found in a warrantless search of his backpack, the district court denied the motion, concluding that the search was constitutionally permissible as part of an investigatory detention. *Id.* at 747. The court of appeals reversed, finding that the backpack search fell beyond the scope of the relevant Fourth Amendment exception. *Id.* at 749. In doing so, the Seventh Circuit noted that it would not consider grounds for affirmance that the government had not developed on appeal, emphasizing, "[a]s we often warn litigants, it is not our responsibility to make the parties' arguments for them." *Id.*; *see also United States v. Withers*, 960 F.3d 922, 934 (7th Cir. 2020) (Easterbrook, J., concurring) ("question[ing] whether 'constructive amendment' is a useful doctrine," but joining the court's opinion finding that no constructive amendment had occurred and thereby "resolv[ing] that debate as the parties ha[d] framed it" (citing *Sineneng-Smith*, 140 S. Ct. 1575)).

2. The Second and Tenth Circuits have also held the government to its litigation choices under the party-presentation principle, even declining to consider arguments the government raised *belatedly*.

a. The Second Circuit affirmed the denial of a suppression motion in *United States v. Santillan*, 902 F.3d 49 (2d Cir. 2018), expressly limiting its review to the arguments the government developed in its appellate briefing. The court acknowledged that the government had argued in a letter submitted under Rule 28(j) "that the good-faith exception provides a further basis to affirm." *Id.* at 58 n.4. But the court "decline[d] to consider this argument" because the government had not raised it sooner and gave no reason

for its untimely reliance on the doctrine. *Id.*; *see also United States v. Black*, 918 F.3d 243, 256 (2d Cir. 2019) (considering an argument the government had failed to raise but expressly for the sole purpose of responding to the dissent, and stressing that "[b]ut for the dissent, we would decline to save [the government] from its own choices").

b. The Tenth Circuit, for its part, has typically refused to consider arguments that the government has first raised at oral argument. In *United States v. Woodard*, 5 F.4th 1148 (10th Cir. 2021), the Tenth Circuit reversed the denial of a suppression motion and refused to consider arguments the government had not presented on appeal, relying on "the doctrine of party presentation, long considered a fundamental premise of our adversary system." *Id.* at 1154 (citing *Sineneng-Smith*, 140 S. Ct. at 1579). The court rejected the dissent's reliance on the doctrine that a court "may affirm on any basis that the record adequately supports," rejoining "[n]ot at the expense of the doctrine of party presentation." *Id.* (internal quotation marks omitted). The court also declined to consider whether any error was harmless—a point the government *had* eventually raised—because "the government didn't argue harmlessness in its response brief, and oral argument was too late." *Id.* at 1160; *see also United States v. Gaines*, 918 F.3d 793, 800-01 (10th Cir. 2019) (declining to consider issue raised at oral argument when vacating and remanding order denying suppression motion); *United States v. Frazier*, 30 F.4th 1165, 1178 n.3 (10th Cir. 2022) (reversing denial of suppression motion, and refusing to con-

sider affirming under the independent-source doctrine because government had raised the issue "too late," at argument).

3. While the First, Second, Sixth, Seventh, and Tenth Circuits have thus enforced the party-presentation principle this Court reiterated in *Sineneng-Smith*, the Ninth Circuit appears to have misapprehended that guidance, much like the Eleventh Circuit did here. In *United States v. Yates*, 16 F.4th 256 (9th Cir. 2021), the Ninth Circuit declined to consider the government's argument that any error was harmless, explaining that "as neutral arbiters of legal contentions," federal courts "decide only the issues presented … by the parties." *Id.* at 270-71 (citing *Sineneng-Smith*, 140 S. Ct. at 1579). But the court added that it retained "discretion to consider harmless error sua sponte" and elected not to do so only because "it would be inappropriate" under the facts of the particular case. *Id.* at 271. Thus, even while gesturing toward "the potential for prejudice to parties who might otherwise find themselves losing a case on the basis of an argument to which they had no chance to respond," *id.*, the Ninth Circuit apparently considered itself free to inject issues into a case on the government's behalf.

Thus, although five circuits have properly recognized and applied the party-presentation principle even before this Court reaffirmed it in *Sineneng-Smith*, the Ninth Circuit—whose decision *Sineneng-Smith* itself reversed—seemingly joins the Eleventh in misapprehending *Sineneng-Smith*. The disparate approaches in the circuits call for this Court's inter-

vention. "[*T*]*his* Court has squarely asserted supervisory power to regulate procedure in lower federal courts." *United States v. Tsarnaev*, 142 S. Ct. 1024, 1042 (2022) (Barrett, J., concurring). And the Court's repeated intervention on party-presentation issues—in *Granberry*, *Day*, *Green*, *Wood*, and *Sineneng-Smith* itself—attests the Court's supervisory role in enforcing uniform practices in the courts of appeals on *sua sponte* action. Intervention is warranted here once again.

C. This Case Presents A Recurring Issue Of Nationwide Importance

The Eleventh Circuit's wrong turn and the disparity of approaches in the circuits implicate an issue of broad significance that warrants this Court's review. The Eleventh Circuit self-consciously set a circuit-wide standard for *sua sponte* action through the en banc process. The decision is therefore not a case-specific holding but announcement of a rule of law that will govern future cases. And that rule represents a stark departure from deeply rooted principles in the adversarial justice system. This system has been the hallmark of this country's judiciary since its creation, embodies constitutional values, and is necessary to maintaining fairness in the eyes of litigants and the public.

The key feature of the adversarial principle—the principle of party presentation—underscores the appropriate role of judges as "neutral arbiter[s] of matters the parties present." *Sineneng-Smith,* 140 S. Ct. at 1579 (quotation omitted). Without the principle of party presentation—adhered as a rule and excused only for rare exceptions—the adversarial system

would suffer. And especially in a criminal case, when courts take up the issue-generating role to aid the government, *sua sponte* action erodes public confidence and the separation of powers. Values of judicial restraint, neutrality, and fundamental fairness are key elements to the justice system. When courts succumb to the temptation to improve the arguments for litigants—particularly the United States—all of those elements are threatened. This Court is the only institution that can reinforce these precepts nationwide. Accordingly, the Court's intervention to protect the integrity of these bedrock procedures is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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