NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

ETHAN GUILLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The courts of appeals and the state courts are deeply divided over how to determine the admissibility of confessions made during "question-first" interrogations, where officers question a suspect without giving *Miranda* warnings and elicit a confession, then provide the warnings and press the suspect to repeat the confession. In *Missouri v. Seibert*, 542 U.S. 600 (2004), the four-justice plurality formulated a five-factor test focused on the impact of the question-first procedure on the defendant. Justice Kennedy, who concurred only in the judgment, propounded a test that turned on whether officers deliberately undermined *Miranda*'s purpose by delaying warnings until after a confession. The question presented is:

In determining the admissibility of post-warning confessions given during question-first interrogations, should courts apply the *Seibert* plurality's objective test focused on the effectiveness of the warnings provided to the suspect or Justice Kennedy's subjective test based on officer intent?

RELATED PROCEEDINGS

1. *United States v. Guillen*, United States Court of Appeals for the Tenth Circuit, No. 20-2004.

2. *United States v. Guillen*, United States District Court for the District of New Mexico, No. 17-CR-1723-WJ.

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Petitioner Ethan Guillen respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in his case.

OPINIONS AND ORDERS BELOW

1. The published opinion of the United States Court of Appeals for the Tenth Circuit in *United States v. Guillen*, 10th Cir. No. 20-2004, dated April 27, 2021, is reported at 995 F.3d 1095 (10th Cir. 2021), and attached as Pet.App. A.

2. The unpublished order of the United States District Court for the District of New Mexico Memorandum Opinion and Order Granting in Part and Denying in Part Defendant's Motion to Suppress Evidence and Statements in *United States v. Guillen* No. 17-CR-1723-WJ, dated May 3, 2018, is available at 2018 WL 2075457, and attached as Pet.App. B.

JURISDICTION

Petitioner Ethan Guillen (hereafter "Ethan") appealed from the district court's denial of his motion to suppress. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. Its decision affirming the district court judgment was issued April 27, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1). Pursuant to this Court's Order of July 19, 2021, the deadline for filing a petition for a writ of certiorari in cases in which the relevant lower court judgment was issued prior to that date is 150 days from the date of that judgment. Accordingly, this petition is timely filed.

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment of the United States Constitution provides, in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

INTRODUCTION

This case presents a particularly compelling example of the critical need for this Court to re-examine the admissibility of a post-*Miranda* confession that closely follows an unwarned confession elicited during a "question-first" interrogation. After 18-year-old Ethan consistently denied his guilt during fifty minutes of questioning, two agents paused their interrogation and conferred on a plan to induce his confession. They resumed questioning without advising him of his *Miranda* rights and, in one agent's words, "pushed him" to confess by confronting him with the evidence against him and their belief he was guilty. Ethan immediately confessed. The agent explained that "at that point, I advised him of the *Miranda* rights, and then just continued on with the interview." The agents did not inform Ethan that if he invoked his rights, his initial confession would not be admissible. He repeated his confession and supplied incriminating details. The court of appeals upheld the district court's denial of his motion to suppress his post-*Miranda* confession.

As the four-member plurality explained in *Missouri v. Seibert*, 542 U.S. 600 (2004), the delay of *Miranda* warnings until after a suspect confesses undermines their purpose because it renders them "ineffective in preparing the suspect for successive interrogation, close in time and similar in content." *Id.* at 613. Unlike most such cases, this case involved a continuous interrogation session interrupted only momentarily to read the *Miranda* warnings. There was no change of interrogators or location and no need for the agents to remind Ethan post-*Miranda* of the unwarned confession he had just made.

Under the *Seibert* plurality opinion, the admissibility of a post-warning confession turns on a five-factor test focused on "whether a reasonable person in the suspect's shoes" would have understood the delayed *Miranda* warnings "to convey a message that she retained a choice about continuing to talk." *Id.* at 617. Justice Kennedy, concurring only in the judgment, set forth a test based on whether the officers had a "deliberate two-step strategy." *Id.* at 622. Both the plurality and the four dissenting justices expressly disagreed that the test should turn on officer intent.

Federal and state courts are divided over which *Seibert* test controls. Eight courts of appeals apply Justice Kennedy's test; the Sixth Circuit has adopted the plurality test; the First, Seventh, and D.C. Circuits have expressed uncertainty about the controlling test without ruling definitively. While the district court applied the *Seibert* plurality test in this case, the court of appeals concluded after analyzing the circuit split that Justice Kennedy's test controlled under *Marks v. United States*, 430 U.S. 188 (1977).

The Court's grant of certiorari is necessary to address a fundamental constitutional issue that has divided federal and state courts since *Seibert* was decided. This case presents unusually straightforward facts that plainly show the *Miranda* warnings–given during a continuous interrogation session immediately after officers induced Ethan's confession–could not have effectively informed him of his Fifth Amendment rights. The outcome of his appeal was determined by the court of appeals' decision to apply the deliberate intent test endorsed only by Justice Kennedy. This Court should grant certiorari to resolve the lower courts' persistent confusion about a

critical question that has produced variable suppression outcomes and left law enforcement officers uncertain of the standards that apply to interrogation of suspects.

STATEMENT OF THE CASE

A. Factual Background.

Six law enforcement officers went to Ethan's home to question him about an unexploded pressure cooker bomb found under the bed of his former girlfriend. Ethan had just turned eighteen years old and was still in high school. Two highly experienced agents questioned him at the kitchen table while the other officers searched his home. Vol. III of the record on appeal, pages 706, 729, 904-06, 912. During the interrogation, five or six bomb squad officers joined the officers performing the search with two K-9s and other police personnel. *Id.* at 749, 793. They uncovered considerable physical evidence implicating Ethan.

During the initial fifty minutes of questioning, Ethan denied involvement. *Id.* at 843-44. The interrogating agents then paused to take stock of the amassed evidence and confer on a plan to elicit his confession by confronting him with the incriminating evidence and their belief he was guilty. *Id.* at 820, 844. Ethan confessed as they had planned without the benefit of *Miranda* advice. *Id.* at 844-45. As soon as he did, the agents read the *Miranda* warnings, then picked up their questioning where they had left off. *Id.* at 764. They did not secure a written *Miranda* waiver and did not tell Ethan his unwarned confession would not be admissible if he declined to talk further. He reiterated his confession and described how he had built the bomb. *Id.* at 856.

B. District Court Proceedings.

Ethan was charged with one count of possession of an unregistered destructive device, in violation of 26 U.S.C. § 5861(d), and one count of malicious attempt to destroy by fire or explosive a building used in interstate commerce or in any activity affecting interstate commerce, in violation of 18 U.S.C. § 844(i). He moved to suppress his pre- and post-*Miranda* confessions, arguing, *inter alia*, that the circumstances of the interrogation and delayed *Miranda* warnings were analogous to those in *Seibert* and that the court should apply the *Seibert* plurality test and determine that the warnings were ineffective to apprise him of his rights. Pet.App. B at 34.

The district court determined that Ethan was subjected to custodial interrogation when the agents elicited his initial confession without providing *Miranda* warnings. *Id.* at 29-30. They "continued to press [Ethan] despite his repeated denials, and then confronted him with the information and evidence that had been collected during the search. The purpose of the questioning at that point was to elicit incriminating responses–not simply to obtain information." *Id.* at 30. The court suppressed Ethan's initial confession, but ruled that his post-*Miranda* confession was admissible under the *Seibert* plurality's five-factor test. *Id.* at 34-36.

Ethan entered into a conditional plea agreement that reserved his right to appeal the district court's denial of his suppression motion. He was sentenced to concurrent terms of imprisonment of 120 and 150 months.

C. The Court of Appeals' Ruling.

Ethan argued on appeal that his post-*Miranda* confession was inadmissible under both the *Seibert* plurality five-factor test and Justice Kennedy's test. Appellant's Brief at 29-39, 45-51. He pointed out that the unwarned and warned confessions were made during a continuous interrogation session punctuated only by a brief pause to read *Miranda* warnings. *Id.* at 37. The agents conducted a skilled interrogation, working as a team to confront him with details, challenge his denials, and pressure him to admit his guilt. *Id.* at 34. The overlapping content of the pre-warning and post-warning interrogation was shown by one agent's testimony that after giving *Miranda* warnings, they picked right up where they had left off. *Id.* at 35.

The agents did not record either of Ethan's confessions or the twenty to thirty minutes of interrogation that followed them. Volume III of the record on appeal at 858, 867. By the time they resumed recording, he had already told "his whole story." *Id.* at 1006. Neither the agents nor the interrogation environment changed. Appellant's Brief at 36. Ethan argued that because the agents did not advise him that his initial confession would not be used against him if he invoked his rights, he reasonably would not have understood that he had "a real choice" about whether to continue to talk. *Id.* at 37 (quoting *Seibert*, 542 U.S. at 612).

The court of appeals examined the circuit split on the governing opinion in *Seibert*, Pet.App. A at 35-37, in light of *Marks* and adopted Justice Kennedy's opinion. *Id.* at 30-31. It concluded that "the agents did not engage in a deliberate two-step interrogation strategy to frustrate *Miranda*." *Id.* at 49.

REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari to Resolve the Fundamental Conflict between Circuits and States concerning how Courts Should Determine the Admissibility of a Warned Confession given during a Question-First Interrogation.

Since shortly after *Seibert* was decided, federal and state courts have been divided over its application, leading to disparate results in cases with analogous facts. This case presents a vitally important constitutional issue that this Court must decide.

I. Federal and State Courts are Deeply Divided over whether the *Seibert* Plurality Opinion or Justice Kennedy's Concurrence Governs Question-First Interrogations.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court prohibited the State's use of statements elicited during custodial interrogation absent "the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. Justice Souter, writing for a four-member plurality in *Seibert,* explained that interrogators undermine *Miranda*'s purpose by delaying warnings while pressing for confessions that suspects would not make if they understood their rights at the outset. *Id.* at 613. A suspect given *Miranda* advice shortly after making a confession "would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." *Id.* Courts should examine the warnings' effectiveness in light of five factors: (1) the completeness and detail of the questions and answers during the unwarned interrogation phase; (2) the overlapping content of the two statements; (3) the timing and setting of the first and second rounds; (4) the continuity of police personnel; and (5) the degree to which the

interrogator's questions treated the first and second rounds as continuous. *Id.* at 615. The plurality also weighed whether the officers specifically explained to the suspect that her pre-*Miranda* confession would not be used against her if she invoked her Fifth Amendment rights. *Id.* at 616 n.7.

Concurring only in the judgment, Justice Kennedy espoused what he characterized as "a narrower test." *Id.* at 622. Post-warning confessions would be inadmissible if officers deliberately used the two-step interrogation to undermine *Miranda* unless they took "curative measures" before the post-warning confession such as (1) allowing a lapse of time and change of circumstances between the pre-warning statement and the *Miranda* warnings that would enable the accused to distinguish between the two contexts and appreciate that the interrogation has taken a new turn; and (2) providing an explanation of "the likely inadmissibility of the prewarning custodial statement[.]" *Id.*

At least seven justices disagreed that admissibility of post-warning confessions should turn on officers' intent. According to the four-justice plurality, the test must focus "on facts apart from intent that show the question-first tactic at work" because officers will rarely admit to deliberate intent to delay *Miranda* warnings. *Id.* at 616 n.6. The dissent explained that the effect of interrogation on a suspect is unrelated to officers' subjective intent, *id.* at 625 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting), and that "focusing constitutional analysis on a police

officer's subjective intent [is] an unattractive proposition that we all but uniformly avoid." *Id.* at 626 (citing *United States v. Leon*, 468 U.S. 897, 922, n. 23 (1984)).[1]

In a separate concurrence, Justice Breyer "join[ed] the plurality's opinion in full," *id.* at 618, and concluded that "[c]ourts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith." *Id.* at 617.

In *Bobby v. Dixon*, 565 U.S. 23 (2011)(per curiam), this Court discussed the *Seibert* tests without addressing which is controlling. *Id.* at 31. Dixon had maintained his innocence during an unwarned interrogation, *id.*, and the case did not involve the blending of unwarned and warned interrogations into a single "continuum," the factor that had raised concern in *Seibert* about whether the *Miranda* warnings effectively informed the suspect that she retained "a real choice about giving an admissible statement." *Id.* at 31-32.

A. Eight courts of appeals apply Justice Kennedy's test as the governing rule.

As the court of appeals noted, Pet.App. A at 35, seven other federal circuits, including the Second, Third, Fourth, Fifth, Eighth, Ninth, and Eleventh, have held Justice Kennedy's opinion controlling. Pet.App. A at 35. It cited *United States v. Capers*, 627 F.3d 470, 476 (2nd Cir. 2010)("this Court joined the Eleventh, Fifth, Ninth,

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[1] Numerous cases bear out that contention, including *Torres v. Madrid*, __ U.S. __, 141 S.Ct. 989, 998 (2021)("we rarely probe the subjective motivations of police officers in the Fourth Amendment context."); *Kentucky v. King*, 563 U.S. 452, 464 (2011)("this Court has long taken the view that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.")(quoting *Horton v. California*, 496 U.S. 128, 138 (1990)); and *Whren v. United States*, 517 U.S. 806, 813 (1996)("we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers").

Third, and Eighth Circuits in applying Justice Kennedy's approach in *Seibert*"); *United States v. Naranjo*, 426 F.3d 221, 231-32 (3rd Cir. 2005)("Justice Kennedy's opinion provides the narrowest rationale for resolving the issues raised by two-step interrogations[.]"); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005) (Justice Kennedy's opinion "represents the holding of the *Seibert* Court[.]"); *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006)("[W]e find *Seibert*'s holding in Justice Kennedy's opinion concurring in the judgment."); *United States v. Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006)(Justice Kennedy's concurring opinion provides the Court's holding and requires suppression where officers intentionally use a two-step interrogation technique "to render *Miranda* warnings ineffective" unless they take sufficient "curative measures"); *United States v. Williams*, 435 F.3d 1148, 1158 (9th Cir. 2006)(Justice Kennedy's "narrower test–that excludes confessions made after a deliberate, objectively ineffective mid-stream warning–represents *Seibert*'s holding."); *United States v. Street*, 472 F.3d 1298, 1313 (11th Cir. 2006)("Because *Seibert* is a plurality decision and Justice Kennedy concurred in the result on the narrowest grounds, it is his concurring opinion that provides the controlling law.").

B. In conflict with the above circuits, the Sixth Circuit has adopted the plurality test.

The Sixth Circuit disagreed with the above circuits' rulings that Justice Kennedy's subjective intent test controls and "conclude[d] that *Seibert* did not announce a binding rule of law with respect to the admissibility standard for statements given subsequent to midstream *Miranda* warnings." *United States v. Ray*,

803 F.3d 244, 272 (6th Cir. 2015). It agreed with Judge Berzon's dissent in *United States v. Rodriguez-Preciado*, 399 F.3d 1118 (9th Cir. 2005), that "Justice Kennedy's opinion is *not* the narrowest opinion embodying a position supported by at least five Justices in the majority" because "two Justices, at most" adopted Justice Kennedy's position. *Id.* at 271 (emphasis in original)(quoting *Rodriguez-Preciado*, 399 F.3d at 1138-40 (Berzon, J., dissenting)). The Sixth Circuit decided that the plurality approach was superior to Justice Kennedy's and adopted the *Seibert* plurality's multi-factor test "as controlling precedent in this Circuit." *Id.* at 272.

C. Three circuits have expressed skepticism about whether *Seibert* established a controlling rule, but have not definitively decided.

The First, Seventh, and D.C. Circuits have questioned whether Justice Kennedy's test is controlling, but have not definitively settled the issue. *See United States v. Heron*, 564 F.3d 879, 884-85 (7th Cir. 2009)(although it concluded "the *Marks* rule is not applicable to *Seibert*", given that "Justice Kennedy's intent-based test was rejected by both the plurality opinion and the dissent", the court declined "to resolve once and for all what rule or rules governing two-step interrogations can be distilled from *Seibert*."); *United States v. Straker*, 800 F.3d 570, 617 (D.C. Cir. 2015)(noting the circuit divide about the controlling *Seibert* opinion and the proper application of *Marks* and reserving decision on those issues); *United States v. Faust*, 853 F.3d 39, 48, n.6 (1st Cir. 2017)(addressing both *Seibert* tests and explaining "we have not settled on a definitive reading of *Seibert*.").

D. State courts, like the federal circuits, are split on the controlling *Seibert* test.

State courts are also divided on how to apply *Seibert*. Cases applying the plurality multi-factor test include *State v. Juranek*, 844 N.W.2d 791, 803-04 (Neb. 2014); *Kelly v. State*, 997 N.E.2d 1045, 1054-55 (Ind. 2013); *State v. Farris*, 849 N.E.2d 985, 994 (Ohio 2006); and *State v. Navy*, 688 S.E.2d 838, 842 (S.C. 2010). State courts applied Justice Kennedy's test in *State v. Wass*, 396 P.3d 1243, 1248 (Idaho 2017); *People v. Griffin*, 898 N.E.2d 704, 714-15 (Ill. 2008); *State v. Collings*, 450 S.W. 3d 741, 755 (Mo. 2014); *State v. Abbott*, 812 S.E.2d 225, 231 (Ga. 2018); and *Ross v. State*, 45 So.3d 403, 422-23 (Fla. 2010);[2]

E. The federal circuit courts and state courts are further divided over how the *Marks* rule governs analysis of the fractured opinions in *Seibert*.

The federal and state courts are also divided on the proper application of *Marks* in the *Seibert* context. In *Marks*, this Court directed that the holding of a fragmented decision should "'be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Although it granted certiorari on questions involving the application of *Marks* in *Hughes v. United States*, __ U.S. __, 138 S.Ct. 1765 (2018), this Court instead resolved the underlying sentencing issue and expressly declined "to reach questions regarding the proper application of *Marks*." *Id.* at 1768.

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[2] Additional state cases addressing this issue are catalogued in Lee S. Brett, *"No Earlier Confession to Repeat": Seibert, Dixon, and Question-First Interrogations*, 78 Wash. & Lee L.Rev. 451, 473-75 & n.179-82 (2021).

The *Marks* rule has long "baffled and divided" the lower courts and is "more easily stated than applied." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols v. United States*, 511 U.S. 738, 745-46 (1994)). Courts have concluded that *Marks* does not apply "when the reasoning underlying the decisive concurring opinion fails to fit within a broader logical circle drawn by the other opinions[.]" *Planned Parenthood of Indiana and Kentucky, Inc. v. Box,* 991 F.3d 740, 746 (7th Cir.)(citing *King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir.1991)(en banc) and *United States v. Alcan Aluminum*, 315 F.3d 179, 189 (2nd Cir. 2003)), *cert. petition filed* (3/29/21).[3]

A number of courts, like the court of appeals here, Pet.App. A at 40, have concluded that *Marks* compels the conclusion that Justice Kennedy's deliberate intent test is controlling because it is narrower than the plurality test. *See, e.g., United States v. Kiam*, 432 F.3d 524, 532 (3rd Cir. 2006)(applying "the *Seibert* plurality opinion as narrowed by Justice Kennedy"); *United States v. Briones*, 390 F.3d 610, 613-14 (8th Cir. 2004)(characterizing Justice Kennedy's test as the "narrower test"); *Williams*, 435 F.3d at 1158 ("This narrower test—that excludes confessions made after a deliberate, objectively ineffective mid-stream warning—represents *Seibert's* holding."); *United States v. Torres-Lona*, 491 F.3d 750, 758 (8th Cir. 2007)(Justice Kennedy's concurrence is controlling because it is "narrower"). *See also Reyes v. Lewis*, 833 F.3d 1001, 1009 & n.4 (9th Cir. 2016)(Callahan, J., dissenting from denial of rehearing en banc)(listing

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[3] Commentators have criticized the *Marks* rule as deeply flawed. *See, e.g.*, Richard Re, *Beyond the Marks Rule*, 132 Harv.L.Rev. 1943, 1945-46 (2019)("Instead of asking about the 'narrowest grounds,' courts should simply ask whether a single rule of decision has the express support of at least five Justices . . . [*Marks* is] a fundamentally broken test.").

cases in which courts have decided that *Marks* dictates that Justice Kennedy's *Seibert* test is controlling, but criticizing their analysis as superficial and "results-based").

Other courts have disagreed that Justice Kennedy's opinion is narrower than the plurality opinion and concluded that *Marks* does not apply to *Seibert*. *See, e.g., Ray*, 803 F.3d at 271 ("Justice Kennedy's opinion is *not* the narrowest opinion embodying a position supported by at least five Justices in the majority . . . [i]t embodies a position supported by two Justices, at most.")(emphasis in original)(quoting *Rodriguez-Preciado*, 399 F.3d at 1138-40 (Berzon, J., dissenting)); *Heron*, 564 F.3d at 884-85 ("Although Justice Kennedy provided the crucial fifth vote for the majority, we find it a strain at best to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree. . . . at least seven members of the Court rejected an intent-based approach ...."); *Edwards v. United States*, 923 A.2d 840, 848 n.10 (D.C. Ct.App. 2007)(Justice Kennedy's test is both broader and narrower than the plurality test–narrower in that it would apply only to deliberate use of a two-step procedure, but within that subset of cases, the test is broader "in that it would not allow admission of a suspect's statements unless curative steps were taken even if a court determined that the *Miranda* warnings could function effectively.").

In a recent fractured decision, this Court questioned the appropriateness of enforcing as the Court's holding the opinion of one justice that was rejected by other justices. In *Ramos v. Louisiana*, __ U.S. __, 140 S.Ct. 1390 (2020), Justice Gorsuch, writing some sections of his opinion for a majority and others for a plurality, concluded that *Marks* did not identify the narrowest opinion in the split decision in *Apodaca v.*

Oregon, 406 U.S. 404 (1972)(plurality opinion), that upheld the constitutionality of nonunanimous verdicts. *Id.* at 1403. He characterized it as "a new and dubious" notion "that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected." *Id.* at 1402. This Court overruled *Apodaca* in *Ramos* and ruled that unanimous verdicts are constitutionally required in trials for serious offenses. *See also King v. Palmer*, 950 F.2d at 782 ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.").

II. This Case Presents a Fundamental and Recurring Constitutional Issue.

A. Rules of interrogation and criminal convictions should not turn on geography.

Defendants' Fifth Amendment rights should be uniformly enforced. In cases in which the defendant reasonably would not have understood he retained an effective right to refuse to incriminate himself after an unwarned confession, yet the evidence did not show officers' deliberate intent to subvert *Miranda*, the results will many times be different under the plurality test than under Justice Kennedy's test.[4] "[T]here is a nontrivial subset of cases in which the outcome rests on determining which test is the law . . . . in cases in which the police were not acting in bad faith–as the applying court understands the concept–yet the suspect was confused nonetheless about the freedom to stay mum after the *Miranda* warnings finally were delivered, the suspect will win under Justice Souter's test and lose under Justice Kennedy's." Barry Friedman, *The*

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[4] *See, e.g., United States v. Sanchez-Gallegos*, 412 F.App'x 58, 73 n.2 (10th Cir. 2011)(unpublished)(Ebel, J., concurring)(acknowledging that the outcome may have been different under the plurality test than under Justice Kennedy's test).

Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona), 99 Geo.L.J. 1, 48 (2010)(listing cases). *See also* Joshua I Rodriguez, *Interrogation First, Miranda Warnings Afterward: A Critical Analysis of the Supreme Court's Approach to Delayed Miranda Warnings*, 40 Fordham Urb.L.J. 1091, 1110 (2013)("Significantly, circuit cases have demonstrated that the choice between the plurality and Justice Kennedy's approach can yield opposite results." (listing cases)).

B. The issue presented by this case arises frequently.

The considerable number of federal and state cases parsing the *Seibert* opinions and their proper application attests to the persistence of question-first interrogations and the substantial number of defendants impacted by this issue.

C. Persistence of the circuit split on how to apply *Seibert* will adversely affect federal and state law enforcement, as well as defendants.

Two state attorneys general have sought and been denied certiorari on the question presented.[5] Unless this Court intervenes, law enforcement will continue to be hampered by inability to ascertain the standard that will determine the lawfulness of officers' conduct, prosecutors will have difficulty in determining the admissibility of confessions, and courts will struggle to decide whether defendants' Fifth Amendment rights have been violated. Since Justice Kennedy highlighted the significance of "*Miranda*'s clarity" in his *Seibert* concurrence, 542 U.S. at 622, confusion about enforcement of *Miranda* rights has only grown. This Court underscored the import of

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[5] *See* Petitions for Writ of Certiorari in *Ohio v. Farris*, No. 060464 (U.S. Oct. 2, 2006), 2006 WL 2826269, and *South Carolina v. Navy*, No. 09-1459 (U.S. May 27, 2010), 2010 WL 2214870.

that clarity more than forty years ago in *Fare v. Michael C.*, 442 U.S. 707 (1979), stating that "*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Id.* at 718. This Court should grant certiorari to ensure uniform enforcement of the crucial rights *Miranda* protects.

D. Only this Court can resolve the split between circuits and states on proper application of *Seibert.*

Despite appreciable efforts and comprehensive analysis of the *Seibert* opinions and the circuit split they have produced, the federal circuits and state courts have been unable to resolve the conflict. *See, e.g.*, Pet.App. A at 35-37; *Ray*, 803 F.3d at 270; *Capers*, 627 F.3d at 476. Only this Court can provide the needed guidance to resolve the widespread confusion *Seibert* has generated.

E. Uniform rules should apply to lower courts' application of plurality decisions.

This Court's guidance on application of the *Marks* rule is also critically important to resolve the difference from one jurisdiction to another in application of this Court's fractured decisions. "Some of the most significant and divisive Supreme Court cases in recent history–involving such issues as abortion, gun control, voting rights, affirmative action, capital punishment, and the scope of congressional authority under the Commerce Clause–have been decided by plurality decision." Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69

Stan.L.Rev. 795, 800 (2017). In both the civil and criminal arenas, this Court's clarification of how courts should interpret basic decisional rules is sorely needed.

III. This Case is an Ideal Vehicle for Resolving the Split between Circuits and States because the Choice of Test Determined the Outcome and the Facts are Cleanly Presented.

A. The result of this case would have been different under the plurality test.

While the court of appeals did not expressly acknowledge that Ethan's post-warning confession would have been inadmissible under the plurality test, that conclusion is apparent from its recognition that this case required it to decide between the plurality test and Justice Kennedy's test. *See* Pet.App. A at 30 ("In the past, we declined to pick a side in the debate and instead applied both tests to the facts of the case before us."). The court had not previously decided between the two tests because it had concluded in prior cases that the defendant's confession was admissible under both tests. *See, e.g., United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006); *United States v. Crisp*, 371 F. App'x 925, 929 (10th Cir. 2010)(unpublished).

In *Carrizales-Toledo,* the court emphasized the singular importance of "the degree to which the interrogator's questions treated the second round as continuous with the first." 454 F.3d at 1152. That factor overwhelmingly supported the inadmissibility of Ethan's post-*Miranda* confession, given the continuous pre-warning and post-warning interrogations and the agents' treatment of them as a single session. The remaining plurality test factors were well-established in this case as well, particularly the complete overlap in timing, content, setting, and interrogators between the unwarned and warned confessions.

B. The undisputed facts present an ideal vehicle for addressing which test applies under *Seibert*.

The circumstances here cleanly present the constitutional issue of how courts should analyze the admissibility of a warned confession given after officers' interrogation has already elicited a suspect's unwarned confession. Exceptionally strong facts demonstrate the commingling of unwarned and warned interrogations into a single continuum. The agents acknowledged that after fifty minutes of questioning Ethan, they planned together to pressure him to confess before providing *Miranda* warnings, squarely confronting him with the evidence against him and their belief he was guilty. Pet.App. B at 26. They were aware their questioning amounted to interrogation. Vol. III, p. 845. One agent testified that after their plan worked to induce Ethan's immediate confession, "I advised him of the *Miranda* rights, and then just continued on with the interview." Vol. III, p. 863. There was no change in the interrogation setting or the interrogators. Ethan was a high school student, barely eighteen years old, who was not told that if he invoked his rights, the confession he had just given would not be used against him. As prompted by the agents, Ethan repeated his confession post-*Miranda* and provided additional incriminating information. The five factors of the plurality test are well-established in this case.

Several years ago, this Court denied certiorari on a *Seibert* issue in *Wass v. Idaho*, 138 S.Ct. 2706 (2018), but *Wass* presented a far less characteristic interrogation setting than this case and a much clearer case for admissibility of the confession under both Justice Kennedy's test and the plurality's. In *Wass*, a single officer spontaneously

encountered a motorist in a parking lot who had two outstanding warrants. *State v. Wass*, 396 P.3d 1243, 1248 (Idaho 2017). The officer, after arresting and restraining Wass, asked him whether there was anything illegal in his vehicle. *Id.* at 1244. That single question, unaccompanied by circumstances suggesting that the officer was seeking a confession, produced a single statement that Wass had syringes in the car. *Id.* The officer checked the car for syringes, found none, then returned to Wass to administer *Miranda* warnings. *Id.* at 1245. Wass then made incriminating statements about the syringes. *Id.*

While the Idaho Supreme Court affirmed the admission of the warned statements under Justice Kennedy's test, *id.* at 1249, application of the plurality's test almost certainly would have produced the identical outcome. Here, as discussed above, the court of appeals' reliance on Justice Kennedy's subjective-intent-based test was decisive to the outcome. This case thus presents the Court with the ideal opportunity to resolve the longstanding conflict over which *Seibert* test governs question-first encounters in a prototypical setting: a planned in-home interrogation of a suspect targeted for a particular crime.

C. Grant of this petition will afford the Court a sorely needed vehicle to clarify *Seibert* without procedural impediments.

The Fifth Amendment issue has been fully developed in this case. It was preserved in the district court and comprehensively analyzed by the court of appeals in a published opinion. The pertinent facts are well-established. Because no procedural

issues would cloud this Court's consideration of the issue left open in *Seibert*, it presents a consummate vehicle for resolving it.

IV. The Tenth Circuit Decision is Wrong because it is based on the Surmise about Officers' Motives that Leads to Inconsistent Outcomes.

The court of appeals pointed to officers' "difficulty in pinpointing the moment when Ethan's interview became custodial" as a "plausible explanation here for the agents' failure to administer *Miranda* warnings in a timely fashion." Pet.App. A at 48. *Miranda* enforcement cannot fairly turn on whether courts can plausibly explain officers' failure to provide required warnings or whether interrogating officers were properly trained on what constitutes "custody."

As this Court recognized in *Kentucky v. King*, standards of conduct based on officers' intent do not foster evenhanded enforcement of constitutional rights. 563 U.S. at 464. The factors used by lower courts to apply Justice Kennedy's deliberate intent test have been highly inconsistent. Some courts use the plurality test factors as a framework for analyzing whether officers acted with deliberate intent, concluding that those factors "often serve as helpful indicia for whether an alleged two-step interrogation was intended to circumvent *Miranda*." *United States v. Moore*, 670 F.3d 222, 230 (2nd Cir. 2012). In *Capers*, for example, the court found that the interrogating officers' deliberate intent was shown by "circumstances surrounding the two sessions of the interrogation, including the nature of the respective environs in which the interrogation took place and the continuity of the cast of interrogating officers . . . " and

"the temporal proximity of the pre- and post-warning interrogations" in light of the mere "90 minutes [that] separated the two interrogation sessions." 627 F.3d at 483-84.

Other courts have upheld admission of post-warning confessions under Justice Kennedy's *Seibert* test so long as no direct evidence shows officers subjectively intended to subvert *Miranda* warnings. In *United States v. Naranjo*, 223 Fed.App'x. 167 (3rd Cir. 2007)(unpublished), the court concluded that agents' deliberate intent to delay *Miranda* warnings was not shown by their lengthy interrogation of Naranjo while handcuffed, eliciting numerous incriminating statements, in light of agents' testimony that they did not deliberately withhold *Miranda* warnings and believed they were not required to give warnings prior to arrest. *Id.* at 168-69.

The lower courts' disparate approaches to divining the subjective intent of officers are inevitable. No good methods exist to plumb the intent of officers on the scene in after-the-fact suppression hearings. The subjective test thus inherently fosters unpredictability, uncertainty, and inconsistency. It also places courts in the difficult position of being unable to protect a suspect's Fifth Amendment rights without effectively finding that officers acted in bad faith. But that inquiry is not germane to the central purpose of *Miranda*'s safeguards: to ensure that the *suspect* is aware of his rights in deciding whether to speak to officers or remain silent. Officers' good or bad intentions have no bearing on whether the critical protections afforded by *Miranda* can function as intended.

More than two decades ago, this Court reaffirmed *Miranda*, noting that "*Miranda* has become embedded in routine police practice to the point where the

warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (Rehnquist, C.J., writing for seven Justices). But the effectiveness of *Miranda* depends on a workable test that ensures that the warnings actually protect suspects' voluntary decisions. The divided decisions that followed *Seibert*'s fractured holding undermine that goal. This Court should grant certiorari to restore consistency in question-first cases. And it should do so by abandoning the effort to apply Justice Kennedy's subjective intent test and instead directing lower courts to apply an objective test focused on the effectiveness of the warnings. Only that test can fulfill *Miranda*'s core purpose.

CONCLUSION

For the reasons stated, Petitioner Ethan Guillen respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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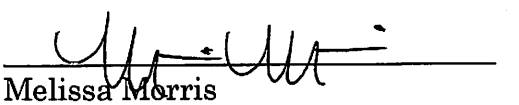

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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

ETHAN GUILLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Melissa Morris, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and, as counsel for Ethan Guillen, I caused to be mailed an original and ten copies of the motion to proceed in forma pauperis and the petition for writ of certiorari by first class mail to this Court, postage prepaid, and mailed a copy, postage prepaid, to the Solicitor General, Department of Justice, 950 Pennsylvania Ave. NW, Room 5616, Washington, DC 20530-0001, and to be sent an electronic copy of the foregoing by e-mail at supremectbriefs@usdoj.gov on this 23rd day of September 2021.

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