No. 21-5795

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent acknowledges the circuit conflict on the question presented. It does not maintain that the court of appeals correctly applied *Missouri v. Seibert*, 542 U.S. 600 (2004). And it does not defend the majority rule that Justice Kennedy's *Seibert* opinion represents the Court's holding.

The question presented warrants the Court's review. Respondent advances no sound reason for delay. It does not argue the court of appeals failed to fully analyze the legal issues or that the lower courts' further consideration would be beneficial. It does not dispute that the lower courts are unlikely to resolve their longstanding conflict on the correct application of *Seibert* without this Court's guidance. So long as the circuit conflict persists, determinations of the admissibility of statements in midstream *Miranda* cases will turn on geographical boundaries, rather than a uniform standard.

The question presented is exceptionally important. The lower courts' application of Justice Kennedy's *Seibert* test has undermined Fifth Amendment rights and the critical safeguards put in place in *Miranda v. Arizona*, 384 U.S. 436 (1966). The *Seibert* plurality correctly recognized that admission of post-*Miranda* statements should turn on the objective effectiveness of the warnings to a suspect rather than on the difficult-to-prove subjective intent of law enforcement officers. This case epitomizes the problems with the majority rule and presents the ideal vehicle for this Court's review.

ARGUMENT

I. Respondent acknowledges both the court of appeals' misinterpretation of *Seibert* and a circuit conflict on the issue without explaining how *Seibert* should be applied or justifying its position that the Court should allow the conflict to persist.

A. Respondent acknowledges the court of appeals misinterpreted *Seibert* and *Marks*.

The government recognizes that Justice Kennedy's opinion is not a logical subset of the plurality opinion, BIO 17, and does not defend the correctness of the court of appeals' contrary conclusion. *See* Pet.App. A at 34 ("[t]he cases governed by Justice Kennedy's approach [ ] form a logical subset of the cases governed by the plurality's approach."); *id.* at 35 ("Justice Kennedy's *Seibert* concurrence, then, is both a logical subset of the plurality opinion and the narrowest grounds for the Court's judgment."). Because Justice Kennedy's opinion is not "the narrowest grounds for" the *Seibert* decision, the analysis under *Marks v. United States*, 430 U.S. 188 (1977), does not apply.

Respondent does not indicate how the lower courts should correctly interpret *Seibert*. Does the plurality opinion control? Are the courts free to pick and choose factors from the various *Seibert* opinions? Although the government apparently agrees that *Marks* does not apply to *Seibert*, it does not suggest how courts should determine the governing law. These are extremely important questions. The government declines to weigh in on them and asks the Court to refuse any guidance.

B. The government advises the Court to disregard the acknowledged circuit conflict on the application of *Seibert*.

Like the court of appeals in this case, most circuits have wrongly relied on *Marks* and incorrectly concluded that Justice Kennedy's test controls the determination of admissibility of post-*Miranda* statements in midstream *Miranda* cases. *See* Pet. 14. As Respondent acknowledges, BIO 15-16, there is a circuit conflict on the governing *Seibert* test. *See* Pet 4, 14-15.

The government points out that there are few reported cases involving both proof of police subjective intent to undermine *Miranda* and a finding that a warned statement was admissible under the plurality test, but not Justice Kennedy's. BIO 18. That is not an argument for denial of review. The government has recognized that Justice Kennedy's opinion is not controlling under *Marks* and that the majority rule on analyzing the admissibility of post-*Miranda* statements in midstream *Miranda* cases is wrong. There is no sound justification for this Court to allow the persistence of a circuit conflict based on misinterpretation of this Court's jurisprudence. This case presents an excellent vehicle for the Court to provide sorely needed guidance on the correct application of both *Marks* and *Seibert*.

II. Fifth Amendment violations will continue to go unchecked if the Court does not resolve the circuit conflict.

A. If the circuit conflict persists, Fifth Amendment violations will persist and *Miranda* protections will be further eroded.

Respondent recognizes "it is rare that courts have found an impermissible intent under Justice Kennedy's opinion . . ." BIO 18. Officers' subjective intent is notoriously

difficult to prove. The application of Justice Kennedy's test undermines *Miranda* protections because it bypasses the analysis of facts showing whether a suspect was effectively apprised of his Fifth Amendment rights.

The *Seibert* dissenting opinion explained at length why Justice Kennedy's test is misguided. "Events . . . entirely unknown to [a suspect] surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." 542 U.S. at 625 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting)(quoting *Moran v. Burbine*, 475 U.S. 412, 422 (1986)). "[T]here is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive." *Id.* at 626 (quoting W. LaFave, *Search and Seizure* §1.4(e), p. 124 (3d ed. 1996)).

Constitutional violations are insulated from scrutiny where proof is required of officers' subjective intent. The analysis of Fifth Amendment and *Miranda* violations should turn on the impact of interrogation procedures on the suspect's ability to understand and exercise his rights.

B. This Court has historically rejected subjective intent tests in the Fourth and Fifth Amendment contexts.

The *Seibert* dissenting opinion also pointed to the Court's longstanding avoidance of tests that turn on subjective intent in Fourth and Fifth Amendment cases. *See* 542 U.S. at 625-26 ("focusing constitutional analysis on a police officer's subjective intent [is] an unattractive proposition that we all but uniformly avoid"); *id.* at 626 (explaining the rejection of an inquiry into officers' subjective intent in *New York v.*

Quarles, 467 U.S. 649 (1984), with respect to the "public safety" exception to *Miranda* because "officers' motives will be 'largely unverifiable'" (quoting 467 U.S. at 656)); *id.* (the Court refused to consider subjective intent in Fourth Amendment challenges in *Whren v. United States*, 517 U.S. 806 (1996), due in part to "the evidentiary difficulty of establishing subjective intent" (quoting 517 U.S. at 813-14)).

There are numerous other such examples. *See, e.g., Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)("interrogation" under *Miranda* "focuses primarily upon the perceptions of the suspect, rather than the intent of the police" because "*Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices"); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) ("custody" under *Miranda* is measured objectively based on whether a reasonable person in the suspect's position would have understood the circumstances as the functional equivalent of formal arrest); *United States v. Mendenhall*, 446 U.S. 544, 554, and n.6 (1980)(officer's subjective intent to detain does not determine whether there was a "seizure" for Fourth Amendment purposes); *United States v. Robinson*, 414 U.S. 218, 236 and n.7 (1973)(necessity for the "search incident to arrest" exception to the Fourth Amendment warrant requirement does not turn on the officer's subjective fear).

The Court should resolve the circuit conflict at issue in this case in order to protect the Fifth Amendment privilege against self-incrimination that is "fundamental to our system of constitutional rule . . . " *Miranda*, 384 U.S. at 468.

III. This case presents the ideal vehicle to resolve the circuit conflict.

A. The court of appeals implicitly decided that Ethan's post-*Miranda* statements were inadmissible under the plurality test.

Respondent disputes that the court of appeals concluded Ethan would have prevailed under the *Seibert* plurality test. BIO 20 n.2. Although the court did not expressly state that its choice between the plurality test and Justice Kennedy's was outcome-determinative, that conclusion is implicit in what the court did say. *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 pointed to its conclusions in *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006), and *United States v. Crisp*, 371 F. App'x 925, 929 (10th Cir. 2010) (unpublished), that it was not required to choose between the two tests because the outcome would have been the same under both tests. *See* Pet. 19.[1]

B. The circumstances show that the *Miranda* warnings Ethan received were ineffective under the plurality test.

The factual circumstances underlying this case strongly show that Ethan did not receive effective *Miranda* warnings and that his post-*Miranda* statements should have been deemed inadmissible under the plurality test. See Pet. 20. The agents interrogated him for at least fifty minutes, then planned together to press him to

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[1] Respondent suggests that the court of appeals adopted Justice Kennedy's test merely "to provide guidance to litigants and courts in the Tenth Circuit facing [*Seibert*] claims." BIO 12 n.2. The court was empowered to decide which opinion represents this Court's *Seibert* holding only because the outcome of this case turned on that determination. "[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Preiser v. Newkirk*, 422 U.S. 395, 401 (1979) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam)).

confess, Pet.App. B at 26, before giving him *Miranda* warnings.[2] The pre- and post-*Miranda* sessions were separated by only a momentary pause to recite *Miranda* warnings, after which the agents resumed their interrogation where they had left off and prompted Ethan to elaborate on his confession. They treated the interrogation as one continuous session.[3] There was no change of setting or police interrogators. Ethan was not advised that if he invoked his rights, his unwarned confession would not be used against him. After he confessed and was given *Miranda* warnings, the agents continued to interrogate him for twenty to thirty minutes that they did not record, during which time they elicited "his whole story."[4]

This Court should grant review to resolve the lower courts' deep confusion about the proper interpretation of *Seibert*.

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[2] The record refutes the government's claims that prior to providing *Miranda* warnings, the agents questioned Ethan for "only a few moments" and asked only the single question whether he made the explosive device. BIO 21. *See* the combined Record on Appeal ("ROA"), page 101 (the government states in its Supplemental Brief on Defendant's Motion to Suppress that "[f]rom the time the interview began with defendant until the time he was advised of his rights was about an hour"); *id.* at 775 (when the lead agent was asked at the suppression hearing, "[s]o from the time that you began your interview with Mr. Guillen until the time that he was advised of his rights, what's the elapsed time?" he testified, "[j]ust about an hour."); Pet.App. A at 6 ("Agents Rominger and Greene questioned Ethan at the kitchen table for about 50 minutes, during which time he repeatedly denied any involvement with making the pressure cooker bomb."); Pet.App. B at 4 ("SA Rominger questioned Ethan at the kitchen table for about 50 minutes, during which time Ethan denied having any involvement with making the device."). In the Statement section of its brief, the government recognized that the agents questioned Ethan "for about 50 minutes" before they obtained his confession. BIO 4.

[3] The lead 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." ROA 863. *See also id.* at 854 ("I advised him of what his rights were, and he said he understood, and then I continued questioning.").

[4] ROA 856-58, 1006.

CONCLUSION

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

Respectfully submitted,

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