No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RUDY ALVAREZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED

In *Missouri v. Seibert*, 542 U.S. 600 (2004), this Court issued a fractured decision regarding "midstream *Miranda* warnings"—warnings in which police question a suspect, elicit a confession, and then provide a *Miranda* warning and press the individual to repeat the confession. A plurality held that the admissibility of statements made after such warnings hinges on a five-factor test considering whether the warning remained objectively effective. Concurring, Justice Kennedy disagreed, opining that the admissibility of such statements hinges on the police's subjective intent—i.e., whether officers deliberately delayed giving the warning to elicit admissible statements.

In the two decades since *Seibert*, the courts of appeals have sharply diverged on whether the plurality's or Justice Kennedy's test controls. This Court should grant certiorari to resolve two important and frequently-arising questions:

1. When determining whether statements made after a midstream *Miranda* warning are admissible, do courts consider the warning's *objective* effectiveness or the officer's *subjective* intent in delaying it?

2. If courts consider the officer's subjective intent, which party bears the burden to show that the officer did or did not act deliberately?

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Rudy Alvarez and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Alvarez,* U.S. District Court for the Southern District of California, Order issued October 5, 2020.
- *United States v. Alvarez*, No. 20-50068, U.S. Court of Appeals for the Ninth Circuit. Memorandum disposition issued December 27, 2022.
- *United States v. Alvarez*, No. 20-50068, U.S. Court of Appeals for the Ninth Circuit. Order denying petition for panel rehearing and rehearing en banc. March 7, 2023.

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

Petitioner Rudy Alvarez respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on March 7, 2023.

INTRODUCTION

In the two decades since this Court issued its fractured decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), courts have increasingly disagreed on how to analyze the admissibility of a confession made after a "midstream *Miranda* warning." This type of warning occurs when police question a suspect, elicit a confession, give a *Miranda* warning, and then ask the individual to repeat the confession, thus ensuring its admissibility in court.

When determining whether to admit such statements, eight circuits apply the test from Justice Kennedy's concurrence, which considers whether an officer deliberately intended to circumvent *Miranda*. One circuit applies the *Seibert*

plurality's objective five-factor test, which focuses on whether a reasonable person would have understood their right to remain silent despite the earlier confession. Three courts have expressed uncertainty. Individual judges have disagreed with their circuit's approach. State courts are almost evenly divided. Even the circuits and states that have adopted Justice Kennedy's concurrence disagree about which party bears the burden to show that an officer did or did not deliberately circumvent *Miranda*. To resolve these gaping splits on a fundamental and frequently-arising Fifth Amendment issue, this Court should grant certiorari.

OPINION BELOW

A three-judge panel of the Ninth Circuit affirmed Mr. Alvarez's conviction in a memorandum disposition. *See United States v. Alvarez*, No. 21-50068, 2022 WL 17958625 (9th Cir. Dec. 27, 2022) (attached here as Appendix A). Mr. Alvarez then petitioned for panel rehearing and rehearing en banc. On March 7, 2023, the panel denied Mr. Alvarez's petition for panel rehearing, and the full court declined to hear the matter en banc (attached here as Appendix B).

JURISDICTION

On December 27, 2022, the Ninth Circuit denied Mr. Alvarez's appeal and affirmed his conviction. *See* Appendix A. Mr. Alvarez then filed a petition for panel rehearing and rehearing en banc, which the Ninth Circuit denied on March 7, 2023. *See* Appendix B. This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

In 2020, 23-year-old Rudy Alvarez attended a peaceful Black Lives Matter march in downtown San Diego. After the march, Mr. Alvarez began walking home. Suddenly, an unmarked van screeched to a stop next to him. Police officers dressed in SWAT gear and bullet-proof vests jumped out and yelled for him to get on the ground. Mr. Alvarez immediately complied. The officers handcuffed him, frisked him, and told him that he was under arrest for pointing a laser at a helicopter during the march.

The police loaded Mr. Alvarez into the van and drove towards a local stadium they were using as a command center. They did not give Mr. Alvarez any *Miranda* warnings. Nevertheless, Detective Haughey, a veteran officer normally assigned to a fugitive apprehension unit, began talking to Mr. Alvarez in an overly friendly manner. He asked Mr. Alvarez leading questions during the ride about whether Mr. Alvarez understood the dangers of pointing a laser at a helicopter. In response, Mr. Alvarez—who had no criminal record and had never been arrested—said several incriminating things. Detective Haughey continued his stream of good-natured chatter throughout the drive. But he also made conclusory statements about Mr. Alvarez's guilt, admonishing him for having "pointed that stupid laser." C.A. E.R. 298–299.

At the stadium, Detective Haughey characterized the *Miranda* warning as a mere formality, telling Mr. Alvarez he would "read you your rights really quick" so they could "go over your paperwork," and talk about "what happened"—all of which

were "typical things." C.A. E.R. 310. Detective Haughey then read a *Miranda* advisal from a waiver form entitled "Federal Bureau of Investigation Advice of Rights." C.A. E.R. 311–12, 334. But Detective Haughey paraphrased some of the advisals, referring to Mr. Alvarez's Fifth Amendment right to silence and Sixth Amendment right to counsel as "all that stuff" and "[t]hat kind of stuff." C.A. E.R. 311. He also garbled one of the advisals by physically stretching in the middle of it, saying, "If anything you say can be used in the court. Argh! (stretches) Against you, do understand [sic] that?" C.A. E.R. 311.

After giving the *Miranda* advisal, Detective Haughey did not have Mr. Alvarez immediately sign the waiver form. Instead, he invited Mr. Alvarez to talk, saying that "I know when we contacted you, you said you knew it was a stupid idea kind of thing"—even though it was Detective Haughey, not Mr. Alvarez, who had said this. C.A. E.R. 312. Mr. Alvarez then explained that he had no idea pointing a laser could cause any harm or damage and made other incriminating statements.

At the end of the interrogation, the officers finally had Mr. Alvarez sign the *Miranda* waiver. As Mr. Alvarez was preparing to sign, Detective Haughey said as an aside to the other officer, "Yeah, Pro per it is, yeah"—indicating in terms Mr. Alvarez did not understand that he was agreeing to waive his right to a lawyer. C.A. E.R. 330. But to Mr. Alvarez, Detective Haughey said, "You'll see, you'll be fine." C.A. E.R. 330. Mr. Alvarez then signed the form, and the interrogation ended.

The government charged Mr. Alvarez with aiming a laser pointer at an aircraft under 18 U.S.C. § 39A. As the case proceeded to trial, Mr. Alvarez filed a motion to suppress his statements made during the stadium interrogation. In this motion, Mr. Alvarez argued that Detective Haughey had made the type of "midstream *Miranda* warning" described in *Missouri v. Seibert*, 542 U.S. 600 (2004). C.A. E.R. 354–58. He explained that Detective Haughey had elicited incriminating statements from him in the van during the ride to the stadium without *Miranda* warnings. He also argued that Detective Haughey had done so deliberately, pointing to the experienced detective's tactics of using overly friendly banter, minimizing the importance of the rights advisal, paraphrasing and garbling the *Miranda* warnings, delaying the signing of the waiver form, and making a coded reference to the other officer about Mr. Alvarez agreeing to proceed without a lawyer.

At trial, the government did not attempt to present most of Detective Haughey's pre-*Miranda* conversation with Mr. Alvarez in the van, implicitly conceding that it was inadmissible. The district court agreed, saying that most of the "questioning" in the van "should have been preceded by *Miranda* warnings." C.A. E.R. 5.

But the district court declined to suppress Mr. Alvarez's post-*Miranda* statements at the stadium under *Seibert*. The court agreed that some of Detective Haughey's questions "broach[ed] on subject matter that was covered during the drive over." C.A. E.R. 18. But the court concluded this was "just coincidental." C.A.

E.R. 18. The district court also appeared to place the burden on Mr. Alvarez to show that Detective Haughey intended to delay the *Miranda* warning, finding there was "no evidence that there was any prearranged plan, as in *Seibert*," to evade *Miranda*. C.A. E.R. 17, 18. A jury then convicted Mr. Alvarez of the single count.

On appeal, Mr. Alvarez renewed his argument that *Seibert* required suppression of Mr. Alvarez's post-*Miranda* statements. At the outset, Mr. Alvarez acknowledged that in *United States v. Williams*, 435 F.3d 1148, 1154–57 (9th Cir. 2006), the Ninth Circuit had adopted Justice Kennedy's subjective test. But he pointed out that the circuits were deeply divided on this question and reserved the right to argue that *Williams* had been wrongly decided. Mr. Alvarez also urged the panel to resolve the open question in the Ninth Circuit of which side bears the burden to show that an officer did or did not act deliberately under *Seibert*. He argued that this burden should rest on the government, noting that every other circuit to have expressly decided the issue had held as much.

In a memorandum disposition, a three-judge panel affirmed the conviction. *See* Pet. App. 1a–8a. Adhering to *Williams*, the panel stated that "Justice Kennedy's concurring opinion controls," thus requiring a finding of deliberateness. Pet. App. 5a. The panel also ignored Mr. Alvarez's request to expressly decide which party bore the burden to show deliberateness. Like the district court, the panel appeared to place the burden on Mr. Alvarez, agreeing with the district court that there was "no evidence" of deliberateness. Pet. App. 5a–7a.

Mr. Alvarez then filed a petition for panel and en banc rehearing. In this petition, he raised two arguments. First, he argued that the Ninth Circuit should reconsider en banc its conclusion that Justice Kennedy's *Seibert* concurrence controls. Alternatively, he argued that the Ninth Circuit should hold that the government bears the burden to show an officer did not deliberately delay the *Miranda* warning.

The three-judge panel denied Mr. Alvarez's petition for panel rehearing, and the full court declined to hear the matter en banc. Pet. App. 11a. This petition follows.

REASONS FOR GRANTING THE PETITION

I.

Both federal and state courts are baffled over whether to apply the *Seibert* plurality or Justice Kennedy's concurrence, as well as which party bears the burden of proof.

For the last two decades, federal and state courts have openly acknowledged their confusion and uncertainty over whether to apply the *Seibert* plurality's five-factor objective test or Justice Kennedy's subjective test. Even the courts that apply Justice Kennedy's test are split over which party bears the burden to show that a police officer did or did not act deliberately. These divergences lead to disparate results in cases with analogous facts, making the outcome of this important constitutional issue a matter of pure happenstance.

A. Federal and state courts are deeply divided over whether to apply the *Seibert* plurality's five-factor objective test or Justice Kennedy's subjective intent test.

In *Miranda v. Arizona,* 384 U.S. 436, 444 (1966), the Court prohibited the use of statements elicited during custodial interrogation absent "the use of procedural safeguards effective to secure the privilege against self-incrimination." Writing for a four-member plurality in *Missouri v. Seibert,* Justice Souter explained that interrogators undermine these Fifth Amendment safeguards when they delay warnings while pressing for confessions that suspects would not make if they understood their rights at the outset. 542 U.S. at 613. For instance, 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.* The plurality opined that courts should examine the warnings' effectiveness in light of five factors: (1) the completeness and detail of the pre-advisal questions and answers; (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 officers specifically explained to the suspect that their *pre-Miranda* confession would not be used against them if they invoked their 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. Under this test, post-warning confessions would only be inadmissible if officers *deliberately* used the two-step

interrogation to circumvent *Miranda*. *See id.* However, even if it were deliberate, the confession might still be admissible if officers took "curative measures" before the post-warning confession, such as (1) allowing a lapse of time and change of circumstances between the pre- and post-*Miranda* statements that would enable the accused to distinguish between the two contexts; and (2) providing an explanation of "the likely inadmissibility of the prewarning custodial statement[.]" *Id.*

But at least seven justices disagreed with Justice Kennedy that the officers' intent should control. According to the plurality, the test must focus on "facts apart from intent that show the question-first tactic at work," since officers will rarely admit to intentionally delaying *Miranda* warnings. *Id.* at 616 n.6.[1] And four justices in the dissent explained at length that the effect of interrogation on a suspect is unrelated to the officer's subjective intent. *See id.* at 624–27 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ.). The dissent emphasized 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)).

Following this splintered opinion, the courts of appeals have struggled to discern whether—or even if—*Seibert* contained a precedential test regarding mid-stream *Miranda* warnings.

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[1] Though Justice Breyer "join[ed] the plurality's opinion in full," *id.* at 618, he appeared to agree with Justice Kennedy's subjective intent test, stating that "[c]ourts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith." *Id.* at 617.

1. The federal courts are sharply split on whether to apply the *Seibert* plurality's five-factor test or Justice Kennedy's subjective intent test.

In the wake of *Seibert*, eight courts of appeals—the Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh—have held that Justice Kennedy's subjective test represents the governing rule. For instance, the Third Circuit explained that "Justice Kennedy's opinion provides the narrowest rationale for resolving the issues raised by two-step interrogations[.]" *United States v. Naranjo*, 426 F.3d 221, 231–32 (3d Cir. 2005). Similarly, the Eleventh Circuit held that "[b]ecause *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." *United States v. Street*, 472 F.3d 1298, 1313 (11th Cir. 2006). *See also United States v. Capers*, 627 F.3d 470, 476 (2d Cir. 2010) (same); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005) (same); *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006) (same); *United States v. Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006) (same); *United States v. Williams*, 435 F.3d 1148, 1158 (9th Cir. 2006) (same); *United States v. Guillen*, 995 F.3d 1095, 1114 (10th Cir. 2021) (same).

But some judges within these circuits have questioned this conclusion. One year after *Seibert* (and before the Ninth Circuit adopted Justice Kennedy's rule), Judge Berzon carefully analyzed "what rule, if any, the fractured Supreme Court handed down in *Missouri v. Seibert*." *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1133 (9th Cir. 2005) (Berzon, J., dissenting in part). Judge Berzon explained that "three of the four Justices in the plurality *and* the four dissenters decisively

rejected any subjective good faith consideration, based on deliberateness on the part of the police." *Id.* at 1139. So "while Justice Kennedy's was the crucial fifth vote for the result," his opinion "is *not* the narrowest opinion embodying a position supported by at least five Justices in the majority. It embodies a position supported by two Justices, at most." *Id.* at 1140. Because "*Seibert* leaves this court in a situation where there is no binding Supreme Court or Ninth Circuit precedent as to the governing standard," Judge Berzon recommended "adopting the *Seibert* plurality's standard as the law of the circuit," *id.* at 1141—a recommendation the Ninth Circuit later ignored in *Williams*.

The Sixth Circuit agreed with Judge Berzon. Adopting her dissent in *Rodriguez-Preciado*, it held 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, 271–72 (6th Cir. 2015). Determining that the plurality's approach was superior to Justice Kennedy's, the Sixth Circuit adopted its multi-factor test "as controlling precedent in this Circuit." *Id.* at 272.

Other judges have expressed skepticism that Justice Kennedy's concurrence "provided the crucial fifth vote for the majority." *United States v. Heron*, 564 F.3d 879, 884–85 (7th Cir. 2009). Rather, they have found 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." *Id.; see also United States v. Carrizales–Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (noting that the plurality's and Justice Kennedy's tests were

"mutually exclusive"); *Reyes v. Lewis*, 833 F.3d 1001, 1008 (9th Cir. 2016) (stating that Justice Kennedy's test was "expressly rejected by at least seven Justices" and "cannot be elevated to the status of controlling Supreme Court law") (Callahan, J., joined by O'Scannlain, Tallman, Bea, and Ikuta, JJ.) (dissenting from denial of rehearing en banc).

The remaining circuits hang in limbo or have contradicting rulings. Though the Seventh Circuit initially noted that "Justice Kennedy's intent-based test was rejected by both the plurality opinion and the dissent," *Heron*, 564 F.3d at 884–85, a later panel referenced the "deliberate use" test, *United States v. Hernandez*, 751 F.3d 538, 540 n.3 (7th Cir. 2014). And the First and D.C. Circuits expressed skepticism that Justice Kennedy's test controls but have not definitively settled the issue. *See United States v. Faust,* 853 F.3d 39, 48 n.6 (1st Cir. 2017) (addressing both the *Seibert* plurality and Justice Kennedy tests and explaining "we have not settled on a definitive reading of *Seibert*"); *United States v. Straker*, 800 F.3d 570, 617 (D.C. Cir. 2015) (noting the circuit divide and reserving decision on the issue).

As these decisions show, federal judges across the country sharply disagree on whether *Seibert* requires them to follow the plurality's test, Justice Kennedy's test, or neither. Absent intervention, this deep-rooted rift will continue to produce geographically-based outcomes.

2. State courts are also hopelessly split on which test to apply.

Like the federal courts, state courts are sharply divided on whether and which *Seibert* test to apply. The highest courts of at least thirteen states and two

U.S. territories apply Justice Kennedy's test.[2] But the high courts of at least thirteen states and the District of Columbia apply the plurality opinion or both decisions.[3] In states with no high court decision, intermediate appellate courts have cast their lots with the plurality,[4] the concurrence,[5] or neither.[6] Thus, state courts also enjoy no semblance of consistency or uniformity.

These splits lead to an almost comical level of inconsistency. Not only will people in different circuits be subject to different tests, the *same* person might be subject to different tests based on the sovereign that chooses to prosecute them. For instance, a person given a mid-stream *Miranda* warning who is prosecuted in Kansas state court for being a felon in possession of a firearm would be subject to the plurality's objective test. *See Jones*, 151 P.3d at 35. But the same person who is

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[2] *See Jackson v. State*, 427 S.W.3d 607, 617 (Ark. 2013); *Verigan v. People*, 420 P.3d 247, 255 (Colo. 2018); *Ross v. State*, 45 So. 3d 403, 422 n.9 (Fla. 2010); *State v. Abbott*, 812 S.E.2d 225, 231 (Ga. 2018); *People v. Angoco*, 2007 Guam 1, 21 (2007); *State v. Wass*, 396 P.3d 1243, 1248 (Idaho 2017); *People v. Lopez*, 892 N.E.2d 1047, 1069 (Ill. 2008); *Jackson v. Commonwealth*, 187 S.W.3d 300, 309 (Ky. 2006); *State v. Nightingale*, 58 A.3d 1057, 1067 (Me. 2012); *Robinson v. State*, 19 A.3d 952, 964–65 (Md. 2011); *State v. Collings*, 450 S.W.3d 741, 755 (Mo. 2014); *State v. Ruiz*, 179 A.3d 333, 342 (N.H. 2018); *El Pueblo de Puerto Rico v. Millán Pacheco*, 182 D.P.R. 595, 634–35 (P.R. 2011); *Carter v. State*, 309 S.W.3d 31, 38 (Tex. Crim. App. 2010); *Secret v. Commonwealth*, 819 S.E.2d 234, 244 (Va. 2018).

[3] *See People v. Krebs*, 452 P.3d 609, 645–46 (Cal. 2019); *State v. Donald*, 157 A.3d 1134, 1143 n.8 (Conn. 2017); *Hairston v. United States*, 905 A.2d 765, 781–82 (D.C. 2006); *Sutherland v. State*, 913 A.2d 570 (Del. 2007); *Kelly v. State*, 997 N.E.2d 1045, 1054–55 (Ind. 2013); *State v. Jones*, 151 P.3d 22, 35 (Kan. 2007); *State v. Juranek*, 844 N.W.2d 791, 803–04 (Neb. 2014); *Carroll v. State*, 371 P.3d 1023, 1034–35 (Nev. 2016); *State v. Filemon V.*, 412 P.3d 1089, 1098–99 (N.M. 2018); *State v. Farris*, 849 N.E.2d 985, 994 (Ohio 2006); *State v. Sabourin*, 161 A.3d 1132, 1141 (R.I. 2017); *State v. Navy*, 688 S.E.2d 838, 842 (S.C. 2010); *State v. Dailey*, 273 S.W.3d 94, 107 (Tenn. 2009); *State v. Brooks*, 70 A.3d 1014, 1019-20 (Vt. 2013).

[4] *See Crawford v. State*, 100 P.3d 440, 447–50 (Alaska Ct. App. 2004); *People v. Gamez*, 2016 WL 417497, at *11–12 (Mich. Ct. App. Feb. 2, 2016).

[5] *See White v. State*, 179 So. 3d 170, 191 (Ala. Crim. App. 2013); *State v. Zamora*, 202 P.3d 528, 534–35 & n.8 (Ariz. Ct. App. 2009); *State v. Bruce*, 169 So. 3d 671, 678 (La. Ct. App. 2015); *State v. Hickman*, 238 P.3d 1240, 1244 (Wash. Ct. App. 2010).

[6] *See State v. Gomez*, 820 N.W.2d 158 (Iowa Ct. App. 2012); *see also Commonwealth v. Charleston*, 16 A.3d 505, 525 (Pa. Super. Ct. 2011).

prosecuted for the same crime in federal court would be subject to Justice Kennedy's subjective test under Tenth Circuit precedent. *See Guillen*, 995 F.3d at 1114. To avoid perpetuating such unforced anomalies, this Court should grant certiorari.

B. The eight circuits that apply Justice Kennedy's subjective test are also split over which party bears the burden to prove or disprove an officer's intent.

Even assuming that the majority of circuits are correct to apply Justice Kennedy's subjective intent test, these courts are nevertheless doing so inconsistently. That is because some circuits place the burden on the government to show an officer was *not* acting deliberately, while others require the accused to show that the officer *was* acting deliberately.

The circuits that have expressly considered this issue have all held that "the burden rests on the prosecution to disprove deliberateness." *United States v. Capers*, 627 F.3d 470, 479 (2d Cir. 2010). *See also Ollie*, 442 F.3d at 1143 (reversing where the government "failed to meet that burden because it produced no evidence on the question at all"); *Guillen*, 995 F.3d at 1121 (agreeing that "we should follow the lead of our sister circuits" by requiring the government to bear the burden of proof); *United States v. Shaird*, 463 F. App'x 121, 123 (3d Cir. 2012) (noting, in considering whether police acted deliberately, that "[t]he Government bears the burden of showing that a confession is admissible"). These circuits base their decision largely on this Court's precedent "requiring the government to prove by a preponderance of the evidence that the defendant waived his *Miranda* rights and voluntarily

confessed before a confession may come into evidence." *Guillen*, 995 F.3d at 1121 (citing *Colorado v. Connelly*, 479 U.S. 157, 168–69 (1986)).

But the circuits that have not expressly decided this issue all appear to place the burden on the defendant. They do so by holding that, in the absence of any evidence regarding deliberateness, the statements are admissible. For example, in *United States v. Blevins*, 755 F.3d 312, 327 (5th Cir. 2014), the Fifth Circuit affirmed the admission of the defendant's post-*Miranda* statements, stating that the defendant "has not shown that her post-*Miranda* inculpatory statements were in any way the product of coercive tactics." Likewise, the Fourth Circuit admitted the defendant's statements where it "found no evidence that the agents' failure to convey *Miranda* warnings to Mashburn was deliberate or intentional." *Mashburn*, 406 F.3d at 309. *See also Street*, 472 F.3d at 1314 (concluding that the record did not show the police "set out to intentionally circumvent or undermine the protections the Miranda warnings provide"). While the Ninth Circuit has acknowledged that it has yet to decide "what party bears the burden of proof," *United States v. Phipps*, 290 F. App'x 38, 38–39 (9th Cir. 2008), it affirmed the admissibility of Mr. Alvarez's statements by agreeing with the district court that there was "no evidence" of any deliberate intent. Pet. App. 5a–7a.

Like the federal courts, the state courts that apply Justice Kennedy's subjective test are inconsistent on which party bears the burden of proof. Some conclude that the prosecution must "prove[ ] by a preponderance of the evidence that the police did not deliberately use a two-step interrogation procedure to obtain

a confession." *Verigan*, 420 P.3d at 254. *See also Ross v. State*, 45 So. 3d at 426–27; *Nightingale*, 58 A.3d at 1067–68. But other states implicitly conclude that the defendant bears the burden by holding that an absence of evidence on deliberateness renders the statements admissible. *See, e.g., Jackson*, 427 S.W.3d at 617; *Wass*, 396 P.3d at 1249; *Lopez*, 892 N.E.2d at 1069; *Collings*, 450 S.W.3d at 755; *Ruiz*, 179 A.3d at 341; *Carter v. State*, 309 S.W.3d at 41. So even in the jurisdictions where federal and state courts apply Justice Kennedy's intent test, this Court's intervention is necessary to resolve which party bears the burden of proof.

II.

This case presents a fundamental and recurring constitutional issue.

Rules of interrogation and statement admissibility should not turn on geography or the sovereign that elects to prosecute an offense. Yet in *Seibert* cases, "there is a nontrivial subset of cases in which the outcome rests on determining which test is the law." Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 Geo.L.J. 1, 48 (2010) (listing cases). For instance, "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." *Id.* Another scholar has listed circuit cases showing that "the choice between the plurality and Justice Kennedy's approach can yield opposite results." 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).

Persistence of this circuit split also hurts federal and state law enforcement. Without intervention, police cannot ascertain the standard that will determine the lawfulness of an officer's conduct. Prosecutors cannot determine the admissibility of confessions. Forty years ago, this Court explained why such clarity is important for law enforcement, 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." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). For the sake of police, prosecutors, judges, and defendants alike, this Court should grant certiorari to ensure consistent application of the *Seibert* principle.

III.

Mr. Alvarez's case is an excellent vehicle to decide one or both of the questions presented.

Mr. Alvarez's case is an ideal vehicle for resolving these questions presented, for at least three reasons.

First, these issues were thoroughly raised and preserved below. At the trial level, the district court applied Justice Kennedy's subjective test, finding "no evidence that there was any prearranged plan, as in *Seibert*, to start talking about the offense, or to mention certain things that would evoke from the defendant a response." C.A. E.R. 17. On appeal, Mr. Alvarez acknowledged that Ninth Circuit

precedent required the three-judge panel to apply Justice Kennedy's subjective test but pointed out the circuit split and preserved his argument that "the [*Seibert*] plurality controls such that it is unnecessary to show a police officer acted deliberately." Appellant's Opening Brief at 31. The panel then affirmed the trial court's conclusion that "no evidence" existed of a deliberate intent to circumvent *Miranda*. Pet. App. 5a–7a. In a petition for panel and en banc rehearing, Mr. Alvarez raised the two questions presented here. Thus, these issues have been raised and preserved at every stage of the proceedings.

Second, application of the plurality's five-factor test, rather than Justice Kennedy's subjective test, would have led to a different result in Mr. Alvarez's case. Under the five-factor test, the Court would have considered, *inter alia*, the overlapping content of the pre- and post-*Miranda* questioning, the continuity of police personnel, and the degree to which the interrogator treated the first and second interrogations as continuous. 542 U.S. at 615. Here, Detective Haughey was the primary interrogator in the van and at the stadium. At the stadium, Detective Haughey reminded Mr. Alvarez that he had already confessed, saying, "I know when we contacted you, you said you knew it was a stupid idea kind of thing." C.A. E.R. 312. And the trial court admitted that "some of the questions [at the stadium] broach on subject matter that was covered during the drive over." C.A. E.R. 18. Thus, the statements would not have been admissible under the plurality's test.

Even if Justice Kennedy's test applied, the trial court's placement of the burden of proof affected the outcome. Detective Haughey was an experienced officer

who worked on a fugitive apprehension unit. He played "good cop" with Mr. Alvarez; downplayed, paraphrased, and garbed the *Miranda* warnings; delayed the signing of the waiver form; and gloated to the other officer that they had secured an uncounseled confession. Had the burden been on the government to show that Detective Haughey did *not* deliberately circumvent *Miranda*, it would have been hard pressed to do so. Instead, the motion was denied and affirmed because the burden was placed on Mr. Alvarez. Thus, the questions presented in this petition likely affected the outcome of this case.

Finally, the admission of Mr. Alvarez's post-*Miranda* statements affected the outcome of the trial. "A defendant's confession is probably the most probative and damaging evidence that can be admitted against him," *Arizona v. Fulminante*, 499 U.S. 279, 292 (1991) (quotations omitted), and this case was no exception. Mr. Alvarez went to trial on a single count of aiming a laser pointer at a helicopter. At trial, the evidence showed that multiple people at the protest were using laser pointers. Although a police officer saw Mr. Alvarez aim a laser pointer at drones and a highway overpass, she testified that she never saw him aim it at the helicopter. And apart from Mr. Alvarez's statements, the government's only other evidence was visuals from the helicopter that it claimed showed Mr. Alvarez pointing the laser:

C.A. E.R. 362. As defense counsel pointed out, it was nearly impossible to identify anyone in this photo, much less determine whether they were actually pointing a laser. Thus, the admission of Mr. Alvarez's post-*Miranda* statements was critical to the jury's determination of his guilt.

IV.

This Court should clarify that the *Seibert* plurality's objective test controls, or at least that the government bears the burden under Justice Kennedy's subjective test.

The Court should also grant certiorari to correct the faulty view of eight circuits and numerous states that Justice Kennedy's subjective test controls, both as a procedural and a legal matter.

First, Justice Kennedy's concurrence was not the "narrowest" grounds of agreement among the *Seibert* justices because seven justices *disagreed* with it. In *Marks v. United States*, 430 U.S. 188, 193 (1977), this Court established the

cardinal rule that in a case where no opinion garners support from a majority of the justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." But here, at least three justices in the plurality believed that the inquiry must focus on "facts apart from [police] intent." *Seibert,* 542 U.S. at 616 n.6. And Justice O'Connor's dissent—joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—explained at length why an officer's subjective intent should not control. *Id.* at 624–27. So Justice Kennedy's subjective intent test did not represent the "narrowest grounds" on which a majority of justices agreed—it represented a "distinct approach[ ]" that seven justices *rejected. Carrizales-Toledo*, 454 F.3d at 1151. As a result, eight federal circuits and dozens of states currently enforce a constitutional rule that only two justices approved.

Furthermore, Justice Kennedy's intent test is not consistent with the Court's longstanding precedent declining to hinge constitutional protections on an officer's motives. Recently, in *Torres v. Madrid,* the Court explained that "we rarely probe the subjective motivations of police officers in the Fourth Amendment context." 141 S. Ct. 989, 998 (2021). In *Kentucky v. King,* the Court confirmed that it "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." 563 U.S. 452, 464 (2011) (quotations omitted). And in *Whren v. United States,* the Court recognized that "we have been

unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." 517 U.S. 806, 813 (1996).

Even if the Court were to make an exception to this rule in the context of midstream *Miranda* warnings, it should nevertheless place the burden on the government to show that an officer did not intend to circumvent the Fifth Amendment. As the Eighth Circuit explained, "[p]lacing that burden on the prosecution is consistent with prior Supreme Court decisions that require the government to prove the admissibility of a confession before it may come into evidence." *Ollie*, 442 F.3d at 1143 (citing *Brown v. Illinois,* 422 U.S. 590, 603–04 (1975)). Doing so also helps "ensure that probative evidence is brought to the court's attention." *Id.* While the Eighth Circuit acknowledged that "the law generally frowns on requiring a party to prove a negative," it explained that when "one side typically possesses all or most of the pertinent evidence, it is appropriate to burden it with proving the relevant matter." *Id.*

CONCLUSION

This Court should grant Mr. Alvarez's petition for a writ of certiorari to clarify whether the *Seibert* plurality's objective test or Justice Kennedy's subjective

test controls, or at least to determine which party bears the burden of proof under Justice Kennedy's test.

Respectfully submitted,

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