No. 22-7741

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IN THE SUPREME COURT OF THE UNITED STATES

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RUDY ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner's statements admitting that he had pointed a laser beam at a helicopter, given after he received Miranda warnings, were rendered inadmissible by earlier unwarned statements.

2. Whether the petitioner or the government bore the burden of demonstrating admissibility in this circumstance.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Cal.):

United States v. Alvarez, No. 3:20-cr-1809 (Mar. 24, 2021)

United States Court of Appeals (9th Cir.):

United States v. Alvarez, No. 21-50068 (Dec. 27, 2022), petition for reh'g denied (Mar. 7, 2023)

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not published in the Federal Reporter but is available at 2022 WL 17958625.

## JURISDICTION

The judgment of the court of appeals was entered on December 27, 2022. A petition for rehearing was denied on March 7, 2023 (Pet. App. B). The petition for a writ of certiorari was filed on June 5, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of aiming a laser pointer at an aircraft, in violation of 18 U.S.C. 39A. Judgment 1. He was sentenced to five years of probation. Judgment 2. The court of appeals affirmed. Pet. App. A1-A8.

1. In preparation for a protest march, petitioner bought a handheld laser to point at surveillance cameras. C.A. E.R. 313. At the march, petitioner repeatedly shined the laser at a San Diego police helicopter that was monitoring the crowd. Id. at 67, 79, 84-85. The laser illuminated the cockpit with a "bright * * * overwhelming" light, id. at 94, "mak[ing] it difficult [for the pilot] to see," id. at 93. The pilot recorded petitioner on video with the laser close to his chest, pointing it directly at the helicopter's camera. Id. at 362. The helicopter alerted officers on the ground, id. at 76–77, who subsequently observed petitioner pointing a laser skyward, at both a bridge overpass and a drone, id. at 110.

Officers arrested petitioner and transported him in a police van to a nearby stadium that was serving as a temporary processing station. C.A. E.R. 127-128, 132-133. During the van ride, a detective told petitioner that "obviously you're under arrest for pointing a laser at a helicopter, you can't do that, bro." Pet.

App. A2. Petitioner responded, "[y]eah, I figured that." Ibid. The detective then said, "You know they can crash, right?" Ibid. When petitioner said he did not, the detective explained the danger. Ibid. Later in the ride, after petitioner volunteered that his sister had a dream foreshadowing his arrest, another officer responded, "[B]ut you didn't have to [get arrested] man, everything was so good, you just pointed that stupid laser. You would have been fine." Ibid. Petitioner replied, "Figure." Ibid. (first set of brackets in original).

When they arrived at the stadium processing station, petitioner was searched, revealing a laser in his pocket. C.A. E.R. 134. The detective from the van then advised petitioner of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). C.A. E.R. 140, 311-312. Petitioner acknowledged that he understood his rights and proceeded to speak with the detective and an FBI agent. Id. at 312. The detective "g[ave] [petitioner] an opportunity to explain what happened." Ibid. The detective also stated that "you said you knew it was a stupid idea" and "can you tell us what happened?" Ibid. Petitioner responded that he "[p]ointed it at it. Pretty much it, I didn't try to do what you said maliciously, or anything." Ibid. Petitioner also added that he had obtained the laser for "pointing it like at a security camera." Id. at 313.

2. The government charged petitioner by information with one count of aiming a laser pointer at an aircraft, in violation of 18 U.S.C. 39A. C.A. E.R. 359. Petitioner moved to suppress the statements he made in the police van, as well as the statements that he made at the processing center after receiving Miranda warnings. Pet. App. A3.

The district court determined that most of the pre-warning statements were inadmissible, but declined to suppress the only one that the government sought to introduce: petitioner's "I figured" statement after the detective informed him that he had been arrested for pointing a laser at a helicopter. C.A. E.R. 5-7. The court observed that the officer's providing of that information did not rise to the level of "interrogation" subject to Miranda because it merely informed petitioner of his charge and was not "designed or reasonably likely to elicit an incriminating response." Id. at 5, 7.

The district court then denied petitioner's claim that his statements at the stadium, made after Miranda warnings, should be suppressed under Missouri v. Seibert, 542 U.S. 600 (2004), which addressed situations in which a suspect has been questioned by the police both before and after receiving Miranda warnings. C.A. E.R. 7-8. The court rejected petitioner's reliance on Seibert, finding "no evidence that there was any prearranged plan, as in Seibert, to [have a suspect] start talking about the offense, or

to mention certain things" before law enforcement issued Miranda warnings. Id. at 17. The court determined that the "operational plan" was instead for suspects arrested at the protests to be interrogated at the stadium, as "happened here." Id. at 16-17. The court explained that the officers' purpose during the van ride was "[n]ot to say things in front of [petitioner] that would soften him up and cause him to later waive Miranda rights," but rather to verify that the person they had arrested matched the description provided by the helicopter operators to ensure "there wasn't any false arrest." Id. at 17-18. The court therefore found that "looking at everything objectively, and taking into consideration all the circumstances," there was no "artifice" by the officers "to get [petitioner] to waive Miranda rights" at "the stadium." Id. at 18-19.

Petitioner proceeded to trial, where the jury found him guilty. C.A. E.R. 239. The district court sentenced him to five years of probation. Id. at 45.

3. The court of appeals affirmed in an unpublished per curiam memorandum decision. Pet. App. A1-A8.

The court of appeals agreed with the district court that the detective's communication during the van ride about why petitioner had been arrested was "not one that would be 'reasonably likely to elicit an incriminating response,'" such that the response would be subject to suppression. Pet. App. A4 (quoting Rhode Island v.

Innis, 446 U.S. 291, 301 (1980)). The court of appeals then reasoned that while this Court had not produced a majority opinion in Seibert, Justice Kennedy's concurrence in that case "control[led]" petitioner's Seibert claim. Id. at A5 (citing United States v. Williams, 435 F.3d 1148, 1154-1157 (9th Cir. 2006)). In his concurrence, Justice Kennedy adopted "a narrow[] test applicable only in the infrequent case * * * in which [a] two-step interrogation technique was used in a calculated way to undermine the Miranda warning." Seibert, 542 U.S. at 622. And the court of appeals found no clear error in the district court's determination "that the police did not conduct a deliberate two-step interrogation here," because "[t]he police conduct here * * * does not rise to the level of the calculated police tactics at play in Seibert." Pet. App. A7.

The court of appeals observed that "no 'systematic' or 'exhaustive' questioning of [petitioner]" had taken place "in the police van," noting that "[t]he police did not ask [petitioner] whether he aimed the laser pointer at the helicopter," that "[t]hey did not ask him the most obvious question about the location of the laser pointer, which they had not yet found," and that "there was limited overlap between the pre- and post-warning questioning." Pet. App. A6 (citation omitted). And the court also observed that, during the post-warning questioning at the stadium, "the detective did not 'confront [petitioner] with his

inadmissible prewarning statements and push him to acknowledge them' in a way that 'resembled a cross-examination,' as was the case in Seibert." Ibid. (quoting Seibert, 542 U.S. at 621 (Kennedy, J., concurring in the judgment)) (brackets omitted).

ARGUMENT

Petitioner principally contends (Pet. 7-23) that the statements he made after receiving and voluntarily waiving his rights under Miranda v. Arizona, 384 U.S. 436 (1966), should have been suppressed as the fruits of an initial pre-Miranda interrogation under Missouri v. Seibert, 542 U.S. 600 (2004). The lower courts, however, correctly admitted those statements. And while some disagreement exists in the courts of appeals concerning the controlling opinion in Seibert, petitioner overstates the extent and practical implications of that disagreement, and this case does not present a suitable vehicle for resolving it. This Court has repeatedly denied review in cases presenting similar issues. See, e.g., Guillen v. United States, 142 S. Ct. 785 (2022) (No. 21-5795); Wass v. Idaho, 138 S. Ct. 2706 (2018) (No. 17-425); Hill v. United States, 559 U.S. 1106 (2010) (No. 09-740). The Court should follow the same course here, and should likewise reject petitioner's request for review of a Seibert burden-of-proof issue that the unpublished memorandum decision below did not decide.

1. a. In Oregon v. Elstad, 470 U.S. 298 (1985), this Court addressed the admissibility of a warned statement given by a suspect after the police had already obtained an unwarned statement from him in violation of Miranda. This Court held that a "subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." Id. at 314. The Court explained that a defendant's incriminating statements before the Miranda warnings do not, in the absence of "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," in themselves result in such a degree of psychological coercion that any subsequent administration of the warnings will be ineffective. Id. at 309, 313. The Court therefore concluded that "absent deliberately coercive or improper tactics in obtaining the initial statement," an unwarned admission does not give rise to any presumption that subsequent, warned statements were involuntary. Id. at 314.

In Seibert, the Court considered a police protocol for custodial interrogation under which the police would deliberately delay giving Miranda warnings until after custodial interrogation had produced a confession, and then would lead the suspect to cover the same ground in a warned statement. 542 U.S. at 604 (plurality opinion). A plurality of the Court concluded that post-Miranda

statements made in the context of successive unwarned and warned questioning are admissible only when "it would be reasonable to find that in th[e] circumstances the warnings could function 'effectively' as Miranda requires." Id. at 611-612.

The plurality identified several facts present in Seibert that indicated that the "midstream" Miranda warnings in that case could not have functioned effectively: (1) the unwarned interrogation was "systematic, exhaustive, and managed with psychological skill"; (2) the warned questioning promptly followed the unwarned questioning; (3) the warned questioning took place in the same location as the unwarned questioning; (4) the same officer conducted both interrogations; and (5) the officer did nothing to dispel the defendant's probable misimpression that the warned interrogation was merely a continuation of the unwarned interrogation and that her unwarned inculpatory statements could be used against her. 542 U.S. at 615-616. The plurality reasoned that, in light of those factors, the Miranda warnings were ineffective, because "[i]t would have been reasonable [for the defendant] to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." Id. at 616-617.

Concurring in the judgment, Justice Kennedy provided the fifth vote for holding the postwarning statements to be inadmissible. In Justice Kennedy's view, the plurality's

objective test would "cut[] too broadly" because it would apply to both intentional and unintentional two-stage interrogations. Seibert, 542 U.S. at 621-622. Justice Kennedy therefore endorsed "a narrower test applicable only in the infrequent case * * * in which the two-step interrogation technique was used in a calculated way to undermine the Miranda warning." Id. at 622. In Justice Kennedy's view, in the absence of a "deliberate two-step strategy," the admissibility of post-warning statements should be governed by Elstad. Ibid. And Justice Kennedy took the view that if a "deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." Ibid.

2. Petitioner contends (Pet. 8-14, 20-22) that this Court should grant certiorari because the "[f]ederal and state courts are deeply divided over whether to apply the Seibert plurality five-factor objective test or Justice Kennedy's subjective test." Pet. 8 (emphasis omitted). But petitioner overstates both the level of disagreement in the lower courts and the practical implications of that disagreement. The two approaches almost always produce the same outcome. And they do in this case.

a. Nearly every circuit to have decided the issue, including the court of appeals below, has determined that Justice Kennedy's concurring opinion represents the holding of Seibert

under Marks v. United States, 430 U.S. 188 (1977). See United States v. Guillen, 995 F.3d 1095, 1114 (10th Cir. 2021), cert. denied, 142 S. Ct. 785 (2022); United States v. Carter, 489 F.3d 528, 535-536 (2d Cir. 2007), cert. denied, 552 U.S. 1144 (2008); United States v. Kiam, 432 F.3d 524, 532-533 (3d Cir.), cert. denied, 546 U.S. 1223 (2006); United States v. Mashburn, 406 F.3d 303, 308-309 (4th Cir. 2005); United States v. Courtney, 463 F.3d 333, 338 (5th Cir. 2006); United States v. Briones, 390 F.3d 610, 613 (8th Cir. 2004), cert. denied, 545 U.S. 1122 (2005); United States v. Williams, 435 F.3d 1148, 1157-1158 (9th Cir. 2006); United States v. Street, 472 F.3d 1298, 1313 (11th Cir. 2006), cert. denied, 551 U.S. 1138 (2007).

Only the Sixth Circuit has taken the view that Seibert failed to produce a binding holding under Marks, and accordingly adopted the Seibert plurality opinion as its controlling circuit law. See United States v. Ray, 803 F.3d 244, 270-272 (2015).[1] But that court has more recently suggested that it may revisit that position in a future case. See United States v. Wooldridge, 64 F.4th 757,

[1] In United States v. Rogers, 659 F.3d 74 (2011), the First Circuit -- in an opinion by Justice Souter, who also authored the Seibert plurality opinion -- identified Justice Kennedy's Seibert opinion as "controlling," id. at 79, but subsequent panels have not viewed Rogers as definitively resolving the question. See, e.g., United States v. Faust, 853 F.3d 39, 48 n.6 (1st Cir. 2017). The Seventh and D.C. Circuits have declined to decide the issue. See United States v. Straker, 800 F.3d 570, 617 (D.C. Cir. 2015) (per curiam), cert. denied, 577 U.S. 1147 (2016); United States v. Heron, 564 F.3d 879, 884-885 (7th Cir. 2009).

762 (6th Cir. 2023) ("On another day, we should ask whether we must keep our side of this circuit split open.").

Petitioner also cites (Pet. 13 & n.3) 13 state supreme court decisions that apply the test adopted by the Seibert plurality in evaluating a defendant's Miranda claim. But nine of the cited decisions resolve the defendant's suppression claim without any discussion of Justice Kennedy's concurrence, or analysis of why it does not constitute the controlling opinion.[2] In three of the other decisions, the court declined to decide which of the Seibert opinions controls on the ground that the outcome would be the same under either the plurality's or Justice Kennedy's approach.[3] And

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[2] See State v. Filemon V., 412 P.3d 1089, 1097-1099 (N.M. 2018); State v. Sabourin, 161 A.3d 1132, 1141-1142 (R.I. 2017); State v. Donald, 157 A.3d 1134, 1144 (Conn. 2017); Carroll v. State, 371 P.3d 1023, 1034-1035 (Nev. 2016); State v. Juranek, 844 N.W.2d 791, 803-804 (Neb. 2014); Kelly v. State, 997 N.E.2d 1045, 1054-1055 (Ind. 2013); State v. Brooks, 70 A.3d 1014, 1029-1020 (Vt. 2013); State v. Jones, 151 P.3d 22, 34-35 (Kan. 2007); Sutherland v. State, 913 A.2d 570, ¶¶ 6-7 (Del. 2007); Hairston v. United States, 905 A.2d 765, 779-781 (D.C. 2006).

[3] See People v. Krebs, 452 P.3d 609, 645-646 (Cal. 2019) (acknowledging "a debate over whether it is the plurality's opinion or Justice Kennedy's concurrence that provides the controlling standard," but declining to "decide the matter * * * as the result in this case would be the same under either approach"); State v. Navy, 688 S.E.2d 838, 842 (S.C.) ("[T]he four elements outlined in Seibert were met here. Moreover, none of the curative measures suggested by Justice Kennedy * * * occurred here."), cert. denied, 562 U.S. 834 (2010); State v. Dailey, 273 S.W.3d 94, 107 (Tenn. 2009) ("[I]t is unnecessary to predict the eventual outcome of the competing Seibert approaches because we find that the [d]efendant's postwarning confession is inadmissible under either the plurality's or Justice Kennedy's test.").

in the final decision, the court did not perform a Marks inquiry at all.[4]

b. It may be that the Marks analysis in this context is not as straightforward as in some other contexts where multiple opinions combine to produce this Court's disposition. In Marks, this Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193 (citation and internal quotation marks omitted). See, e.g., Williams, 435 F.3d at 1157-1158; Mashburn, 406 F.3d at 308-309. In most circumstances, Justice Kennedy's Seibert opinion does provide a narrower ground for decision than the plurality opinion for determining the admissibility of postwarning statements, because his rule of exclusion applies only when "the two-step interrogation technique was used in a calculated way to undermine the Miranda warning," Seibert, 542 U.S. at 622, whereas the plurality's rule would require an objective inquiry into the effectiveness of the warnings in all cases involving two successive interrogations, id. at 611.

In cases in which an impermissible intent is actually present, however, Justice Kennedy's opinion arguably may provide a broader

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[4] State v. Farris, 849 N.E.2d 985, 994 (Ohio 2006), cert. denied, 549 U.S. 1252 (2007).

ground for exclusion, as Justice Kennedy would have excluded a second related statement "unless curative measures are taken before the postwarning statement is made," Seibert, 542 U.S. at 622, whereas the plurality would have permitted the introduction of the second statement even in the absence of curative measures, so long as the Miranda warnings "could function 'effectively' as Miranda requires," id. at 611-612. Nevertheless, it is difficult to identify actual litigated fact patterns in which the police harbor a subjective intent to undermine Miranda, as Justice Kennedy would have required, and where the second warned statement would be admissible under the plurality's "effective warnings" approach but not Justice Kennedy's "curative measures" approach. Any uncertainty about the application of Marks in this context accordingly does not warrant this Court's intervention.

c. In any event, even if this question presented otherwise warranted this Court's review, this case would be a poor vehicle to decide whether Justice Kennedy's or the plurality's opinion controls because -- as in most, if not all, real-world cases -- petitioner's postwarning statements were admissible under both Justice Kennedy's and the plurality's approaches.

As the lower courts correctly recognized, petitioner's post-Miranda statements were admissible under Justice Kennedy's approach because there is no indication that the police intended to engage in a two-step interrogation strategy calculated to

frustrate Miranda. Pet. App. A5-A7; see also C.A. E.R. 16-19. To the contrary, the district court found that the evidence demonstrated an "operational plan" to initiate interrogation at the stadium. C.A. E.R. 16-17. And the court found that the van exchange that produced petitioner's statement, "I figured," came in response to the detective's explanation of the basis for his arrest, rather than as the product of an attempt to elicit information. Id. at 5-7.

Petitioner's post-Miranda statements were also admissible under the Seibert plurality's multi-factor approach. Petitioner asserts (Pet. 18) that his statements would have been suppressed under the plurality's approach because the same officer performed the pre- and post-Miranda questioning and because the officer seemingly referenced petitioner's pre-Miranda statements during the post-Miranda interrogation when the officer said, "I know when we contacted you, you said you knew it was a stupid idea kind of thing." But the court of appeals considered that statement by the officer and found that, even "assuming that any conversation in the van could be characterized as interrogation," the Seibert plurality's observation that the unwarned interrogation there left "'little, if anything, or criminal potential left unsaid'" could not be applied to the facts here. Pet. App. A6-A7 (quoting Seibert, 542 U.S. at 616) (plurality opinion)). And the court of appeals also cited the plurality opinion to support its finding

that "[t]here was no 'systematic' or 'exhaustive' questioning of [petitioner] in the police van." Ibid. (citing Seibert, 542 U.S. at 616); see C.A. E.R. 16-17. Petitioner therefore lacks support for his assertion that the application of the plurality's approach would have led to a different result in his case.

3. Petitioner also contends (Pet. 18) that the Court should grant certiorari to clarify "which party bears the burden to prove or disprove an officer's intent" under Justice Kennedy's Seibert concurrence. Pet. 14 (emphasis omitted). That contention lacks merit.

The court of appeals' decision does not address which party bears the burden, and the Ninth Circuit has previously declined to decide that issue. See United States v. Phipps, 290 Fed. Appx. 38, 39 (2008) ("We need not decide what party bears the burden of proof" under Justice Kennedy's Seibert concurrence.), cert. denied, 555 U.S. 1202 (2009). This Court does not generally review a question that was not passed upon by the court below, and no sound reason exists to depart from that practice here. See Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) (explaining that this Court is one "of review, not of first view").

Petitioner asserts (Pet. 15) that review is warranted because the court of appeals "appear[ed] to place the burden on [him]." That is incorrect. Before the district court, the government lodged a law-enforcement affidavit, a transcript of petitioner's

conversation with the detective during the van transport, a video and transcript of petitioner's post-arrest interview, and the Miranda advice-of-rights form that petitioner signed during the post-arrest interview. C.A. E.R. 288-334. The district court credited that evidence in finding an absence of a deliberate law-enforcement plan to evade Miranda, id. at 16-19, and the court of appeals found no clear error in that determination, Pet. App. A7. "Because the district court made the finding by applying a preponderance of evidence standard and did not rely on an absence of evidence from a party bearing the burden of proof," Phipps, 290 Fed. Appx. at 39, the court of appeals had no occasion to address the question of which party shouldered the burden.

Petitioner also errs in asserting (Pet. 14-15) that review is warranted because of a disagreement in the circuits regarding who bears the burden in this context. Five circuits have reasoned that "the burden rests on the prosecution to disprove deliberateness" under Justice Kennedy's Seibert concurrence. United States v. Capers, 627 F.3d 470, 479 (2d Cir. 2010); see also Guillen, 995 F.3d at 1121 (10th Cir.); United States v. Shaird, 463 Fed. Appx. 121, 123 (3d Cir. 2012); United States v. Stewart, 536 F.3d 714, 719 (7th Cir.), cert. denied, 555 U.S. 1071 (2008) (same); United States v. Ollie, 442 F.3d 1135, 1142-1143 (8th Cir. 2006) (same). No circuit has placed the burden on the defendant to prove deliberateness.

Petitioner suggests (Pet. 15) that the circuits that have not addressed the issue should be viewed as implicitly placing the burden on the defendant. But three of those circuits (including the court below here) have expressly declined to reach the question. See United States v. Taing, No. 21-50408, 2022 WL 3131809, at *4 (5th Cir. Aug. 4, 2022) (per curiam) ("We have not addressed the burden issue."); Mashburn, 406 F.3d at 309 n.5 ("[W]e need not reach the issue of which party bears the burden of proving whether the strategy was deliberately employed."); Phipps, 290 Fed. Appx. at 39. And petitioner offers no meaningful support for the view that any circuit would be foreclosed from expressly considering the issue in the future and deciding to align with the current consensus approach.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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