No. 22-7741

IN THE SUPREME COURT OF THE UNITED STATES

RUDY ALVAREZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO A WRIT OF CERTIORARI

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INTRODUCTION

Both federal and state courts are permanently divided on two issues relating to this Court's fractured decision in *Missouri v. Seibert*, 542 U.S. 600 (2004). When deciding whether to admit statements made after a "midstream *Miranda* warning," eight circuits apply the test from Justice Kennedy's concurrence, which considers whether a police officer deliberately intended to circumvent *Miranda*. One circuit applies the *Seibert* plurality's five-factor test, which focuses on whether a reasonable person would have understood their right to remain silent despite the earlier confession, while three courts have unclear or contradictory holdings. State courts are also evenly divided on this issue. And even the circuits and states that have adopted Justice Kennedy's concurrence are split on who bears the burden to show that an officer did or did not deliberately circumvent *Miranda*.

The government admits that a circuit split exists as to whether Justice Kennedy's or the plurality's test controls. It does not dispute that eight circuits are applying the wrong rule or that the government bears the burden to show deliberateness. Nor does it dispute that the issues were fully preserved in this case, or that the admission of Petitioner's statements affected the outcome at trial. Instead, it merely claims that "petitioner overstates both the level of disagreement in the lower courts and the practical implications of that disagreement." BIO 10.

Contrary to the government's claims, the disagreement over *Seibert* and its implications is significant. And this case provides the Court an optimal vehicle to resolve two circuit splits at both the federal and state levels and to clarify *Marks v.*

United States, 430 U.S. 188 (1977), an opinion responsible for sowing widespread confusion about the precedential effect of this Court's decisions that have no clear majority opinion. Because Petitioner's case presents an opportunity to resolve a critical issue and avoid future divisions in the lower courts, this Court should grant certiorari.

REASONS FOR GRANTING THE PETITION

I.

This case presents two circuit splits at both the federal and state levels and provides an opportunity to revisit the problematic "*Marks* rule."

The government admits that "some disagreement exists in the courts of appeals concerning the controlling opinion in Seibert." BIO 7. Nevertheless, it claims that Petitioner "overstates the extent" of that disagreement. BIO 7. It also downplays the state court split, denies that a conflict exists regarding which party bears the burden of proof, and ignores the problematic aspects of *Marks*—the oft-criticized precedent that created this split in the first place. This Court should not allow the government to lull it into complacency on such a broadly fractious issue.

A. The government admits the federal courts of appeals are split on whether to apply the plurality's five-factor objective test or Justice Kennedy's subjective intent test.

The government agrees with Petitioner on the specifics of the first circuit split—that eight circuit courts currently apply Justice Kennedy's subjective test, one circuit follows the plurality's objective test, and three circuits hang in limbo or have contradictory rulings. BIO 10–12. Despite this concession, the government clings to a faint hope that this disagreement will somehow go away, citing a single

sentence from a recent Sixth Circuit decision that it may want to revisit this issue "'[o]n another day.'" BIO 11–12 (quoting *United States v. Woolridge*, 64 F.4th 757, 762 (6th Cir. 2023)). But no petition for rehearing or certiorari was filed in that case, and the government identifies no pending Sixth Circuit case presenting this issue. Even if it did, the government never explains how such a case would cure the contradictory rulings in the Seventh Circuit or ensure that the First and the D.C. Circuits would follow Justice Kennedy's subjective test.

But more importantly, the government never disputes that eight circuits are currently following the *wrong rule*. In his petition, Mr. Alvarez explained that Justice Kennedy's intent test is not consistent with the Court's longstanding precedent declining to hinge constitutional protections on an officer's motives. Pet. 21–22 (citing *Torres v. Madrid*, 141 S. Ct. 989, 998 (2021); *Kentucky v. King*, 563 U.S. 452, 464 (2011); *Whren v. United States*, 517 U.S. 806 (1996)). At no point does the government disagree with this argument or attempt to defend Justice Kennedy's test. In other words, the government not only acknowledges the existence of a lopsided circuit split, it urges this Court to perpetuate the application of an erroneous legal holding in the majority of circuits.

Furthermore, the government never mentions the contentious disagreement among judges within the eight circuits that apply Justice Kennedy's test. In the Ninth Circuit alone, no fewer than six judges in multiple cases have sharply criticized the application of Justice Kennedy's test. *See United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1133 (9th Cir. 2005) (Berzon, J., dissenting in part); *Reyes*

v. Lewis, 833 F.3d 1001, 1008 (9th Cir. 2016) (Callahan, J., joined by O'Scannlain, Tallman, Bea, and Ikuta, JJ.) (dissenting from denial of rehearing en banc). Thus, it is just as likely that a court of appeals may take this issue en banc and deepen the circuit split, rather than resolve it.

Next, the government denies the existence of a split among state courts. Petitioner pointed out that the highest courts of at least thirteen states and two U.S. territories apply Justice Kennedy's test, while the highest courts of at least thirteen states and the District of Columbia apply the plurality opinion or both decisions. Pet. 12–13. In response, the government complains that nine of these state court decisions do not engage in "any discussion of Justice Kennedy's concurrence, or analysis of why it does not constitute the controlling opinion." BIO 12. But a lack of analysis does not change the reality that courts in Arkansas, Maine, or Texas will apply Justice Kennedy's test, while courts in Delaware, Indiana, or Nebraska will apply the plurality test, leading to divergent outcomes.

Most importantly, the government props up the oft-criticized precedent that created this split in the first place. As the government correctly notes, "'[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.'" BIO 13 (quoting *Marks*, 430 U.S. at 193) (citation and internal quotation marks omitted). But as Chief Justice Rehnquist explained, the *Marks* rule is "more easily stated than applied" because there is often "no lowest common denominator

or 'narrowest grounds' that represents the Court's holding." *Nichols v. United States*, 511 U.S. 738, 745 (1994). When this happens, it is "not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Id.* at 745–46.

This case provides the Court an opportunity to not only resolve an entrenched circuit split but to clarify the problematic case that created it in the first place. As one recent scholar explained, the *Marks* rule "shifts costly interpretive burdens to later courts, privileges outlier views among the Justices, and discourages desirable compromises." Richard M. Re, *Beyond the Marks Rule*, 132 Harv. L. Rev. 1942, 1943 (2019). To avoid this burden, "[c]ourt precedent should form only when a single rule of decision has the express support of at least five Justices," which would "promote decisional efficiency by placing the burden of precedent formation on the cheapest precedent creators--namely, the Justices themselves at the time of decision." *Id.* (quotations omitted).

Judges frequently admit that the *Marks* rule is more hindrance than help. In *Grutter v. Bollinger*, Chief Justice Rehnquist observed that "[i]n the wake of our fractured decision in [*Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978)], courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks*." 539 U.S. 306, 325 (2003). Other judges have expressed similar sentiments, stating that the *Marks* rule "has proven troublesome in application for the Supreme Court itself and for the lower courts." *United States v.*

Johnson, 467 F.3d 56, 62 (1st Cir. 2006)). Only several months ago, the D.C. Circuit declined to apply *Marks* because it "so obviously baffled and divided the lower courts.'" *United States v. Fischer*, 64 F.4th 329, 341 n.5 (D.C. Cir. 2023) (quoting *Nichols*, 511 U.S. at 746). "Because it applies precisely when there is no majority view of the law," the court opined that "*Marks* creates precedents that are unlikely to be either legally correct or practically desirable." *Id.* (quotations omitted).

Indeed, this Court need look no further than *Seibert* itself to understand why the *Marks* rule distorts and subverts this Court's holdings. Three justices in the *Seibert* plurality believed that the inquiry must focus on "facts apart from [police] intent." 542 U.S. at 616 n.6. Four dissenting justices agreed. *See id.* at 626 (O'Connor, J. dissenting, joined by Rehnquist, C.J., Scalia, J., and Thomas, J.) (rejecting an "inquiry into the subjective intent of the police officer"). Yet the majority of circuit courts now apply the *Marks* rule to enforce a holding that only two justices approved and seven justices expressly opposed. This case thus presents an opportunity to resolve, not only an existing circuit split, but a problematic precedent that undermines the will of a majority of justices, has caused numerous divisions in the past, and will continue to sow confusion absent this Court's intervention.

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

Petitioner also identified a separate but related circuit split—that some of the eight circuits applying Justice Kennedy's subjective test place the burden to show

whether a police officer deliberately delayed giving *Miranda* warnings on the government, while some circuits place this burden on the accused. Pet.14–16. The government admits that "[f]ive circuits have reasoned that the burden rests on the prosecution to disprove deliberateness under Justice Kennedy's Seibert concurrence." BIO 17 (quotations omitted). But the government denies that the remaining three circuits place the burden on the accused, claiming that these courts have "expressly declined to reach the question." BIO 18.

But in practice, the language of decisions in these circuits shows that courts are placing the burden on the defendant, rather than the government. For instance, the Fifth Circuit summed up the absence of evidence regarding police office coercion by concluding that "[the defendant] *has not shown*" that her circumstances resembled those in *Seibert*. *United States v. Blevins*, 755 F.3d 312, 327 (5th Cir. 2014) (emphasis added). Similarly, the Fourth Circuit denied a *Seibert* claim when it "found no evidence" of an officer's deliberate intent. *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005). And district courts in the Eleventh Circuit frequently deny *Seibert* claims where there is "insufficient evidence of a deliberate two-step process," *United States v. Shine*, 306 F. Supp. 3d 1322, 1333 (M.D. Ala. 2018), or "no evidence of a 'deliberate plan'" to circumvent *Miranda, United States v. Chaidez-Reyes*, 996 F. Supp. 2d 1321, 1351 (N.D. Ga. 2014). This is precisely what happened here, where the circuit court denied the *Seibert* claim because there was "no evidence" of deliberate intent. Pet. App. 5a–7a.

When "no evidence" exists about a police officer's motive and the court of appeals rules for the government, the court has—by definition—placed the burden on the defendant. The government claims that where a court decides an issue "'by applying a preponderance of evidence standard'" rather than "'rely[ing] on an absence of evidence from a party bearing the burden of proof,'" it has not decided which party bears the burden of proof. BIO 16 (quoting *United States v. Phipps*, 290 F. App'x 38, 39 (9th Cir. 2008)). But here, none of the courts that found "no evidence" of a deliberate intent applied a preponderance of the evidence standard. Thus, the only possible conclusion is that they placed the burden on the defendant to show officer deliberateness, creating a second circuit split.

Even if a circuit split on the burden-placement issue did not exist at the federal level, the government does not deny that it exists at the state level. *See* Pet. 15–16 (discussing circuit split among states). To resolve two circuit splits that infect nearly all federal and state courts on an important constitutional issue, this Court should grant certiorari.

II.

Because Justice Kennedy's and the plurality's tests produce different outcomes, this issue presents an urgent and recurring constitutional issue.

Though the government acknowledges the first circuit split, it claims the Court need not resolve it because Justice Kennedy's subjective test and the plurality's objective test "almost always produce the same outcome." BIO 10. Yet it cites no quantum of federal or state cases showing this to be true. Instead, it merely asserts that it would be rare to identify a case 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." BIO 14.

But judges have noted that such cases are not rare. As five Ninth Circuit judges explained in dissenting from the denial of rehearing en banc, "there are likely to be cases where relief would be granted under Justice Kennedy's test but not the plurality's test." *Reyes*, 833 F.3d at 1008 (Callahan, J., joined by O'Scannlain, Tallman, Bea, and Ikuta). For instance, there may be "cases involving deliberate *Miranda* violations where most of the plurality's 'effectiveness factors' are met but, because no explanation of the prewarning statement's inadmissibility or other 'specific, curative step' was taken, Justice Kennedy's curative measures requirement isn't." *Id.* at 1008–09. Conversely, other cases may involve "deliberate violations where Justice Kennedy's curative-measures requirement is met because 'specific, curative steps' were taken, such as a warning that the pre-*Miranda* confession could not be used against the suspect, but the plurality's effectiveness requirement isn't." *Id.* at 1009.

This actually happens in practice. For instance, a Tenth Circuit judge who found no evidence of deliberateness under Justice Kennedy's test noted that the result "might be different under the plurality's test in *Seibert*." *United States v. Sanchez-Gallegos*, 412 F. App'x 58, 73 (10th Cir. 2011) (Ebel, J., concurring). In another case, a district court found that "although the facts here would not satisfy

the five factor test set forth by the *Seibert* plurality, when analyzed under Justice Kennedy's rubric, [the defendant's] actions were not 'calculated' to undermine the effectiveness of the *Miranda* warning." *United States v. Zubiate*, No. 08-CR-507 (JG), 2009 WL 483199, at *9 (E.D.N.Y. Feb. 25, 2009).. Contrary to the government's arguments, this issue has real-world consequences for defendants, prosecutors, and courts and requires resolution.

III.

Mr. Alvarez's case presents an excellent vehicle to decide the questions presented.

The government does not deny that Mr. Alvarez raised and preserved this issue at every stage of the litigation. Nor does it deny that the admission of Mr. Alvarez's post-*Miranda* admissions affected the outcome of the trial, thus causing him prejudice. Instead, the government claims that this case is a "poor vehicle to decide whether Justice Kennedy's or the plurality's opinion controls" because Mr. Alvarez's statements were "admissible under both Justice Kennedy's and the plurality's approaches." BIO 14.

Yet the government never gives an independent explanation of *why* the statements were "admissible under both Justice Kennedy's and the plurality's approaches." Instead, it simply repeats the rationale of the district court and the Ninth Circuit, both of which applied Justice Kennedy's subjective-intent test. BIO 15–16; Pet. App. 5; C.A. E.R. 16–19.

Furthermore, the government claims that Petitioner's statements were admissible under the plurality's five-factor test without applying four of those

factors. Specifically, it asserts that "there was no systematic or exhaustive questioning of petitioner in the police van," BIO 16 (alterations and quotations omitted), which goes to the first factor of "the completeness and detail of the questions and answers in the first round of interrogation." *Seibert*, 542 U.S. at 615. But the government never applies the remaining four factors: "the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id*.

As explained in the petition, Pet. 18, application of these four factors would have led to a different outcome. For instance, the "continuity of police personnel" weighed in Petitioner's favor, since Detective Haughey was the primary interrogator in both the van and at the stadium. C.A. E.R. 298–330. The "degree to which the interrogator's questions treated the second round as continuous with the first" also weighed in Petitioner's favor, since the detective reminded Petitioner at the stadium 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. The "timing and setting" of the two interrogations also favored Petitioner, since he was unquestionably in custody both places, and the ride to the stadium took only 16 minutes, creating no meaningful separation between the two interrogations. C.A. E.R. 274. And the "overlapping content of the two statements" was acknowledged by the trial court itself, which 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.

Furthermore, the government makes no effort to argue that the placement of the burden of proof did not affect the outcome. Instead, it continues to deny that the court placed the burden on Petitioner. BIO 16–17. But the government agrees that the district court denied the *Seibert* claim after finding "*an absence* of a deliberate law-enforcement plan," and the court of appeals relied on this finding. BIO 17 (emphasis added). Again, when a court relies on an "absence" of evidence about an officer's intent to rule for the government without applying a preponderance-of-the evidence test, it has—by definition—placed the burden on the defendant.

Nor does the government address or even attempt to rebut the affirmative evidence showing deliberate intent here. As Petitioner explained, Pet. 3–4, Detective Haughey was an experienced officer who normally worked on a fugitive apprehension unit. C.A. E.R. 123. During both interrogations, he was overly friendly, adopting a "good cop" strategy. C.A. E.R. 294–331. But he then downplayed, paraphrased, and garbled the *Miranda* warnings. C.A. E.R. 310–12. He delayed the signing of the *Miranda* waiver form and subtly gloated to another officer that they had secured an uncounseled confession. C.A. E.R. 330. Because the government could not have overcome this affirmative evidence of deliberateness if the burden were flipped, its placement changed the outcome of the case. Accordingly, Petitioner's case presents an excellent vehicle to resolve both circuit splits.

IV.

The government does not dispute that the *Seibert* plurality's test represents the correct legal rule or that the government bears the burden under Justice Kennedy's subjective test.

Finally, Petitioner argued that the plurality's five-factor objective test represents the correct rule because Justice Kennedy's subjective intent test is not consistent with this Court's longstanding precedent declining to hinge constitutional protections on an officer's motives. Pet. 20–22. And even if the Court were to uphold Justice Kennedy's test, Petitioner argued that this Court should nevertheless place the burden on the government to show deliberateness, since this is consistent with this Court's precedent requiring the government to prove the admissibility of a confession before it may come into evidence. *See, e.g.,* B*rown v. Illinois,* 422 U.S. 590, 603–04 (1975)). The government does not dispute that both of these arguments represent the correct legal rule. At a minimum, then, this Court should grant certiorari to ensure that the proper holdings are applied nationwide.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Date: August 21, 2023

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