No. 24-1122

In the Supreme Court of the United States

ROBIN ROOT, PETITIONER

v.

JEREMY HOWARD, WARDEN

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court review a purported circuit split when the result—regardless of whether the majority or minority rule is adopted—would not affect either the outcome of the petitioner's case or the underlying analysis of her specific claim, and when the question as presented here was not fully exhausted in the state courts and was not raised below?

2. Should this Court review an entirely fact-based, error-correction argument involving the voluntariness of the petitioner's confession when that claim was not fully exhausted in the state courts and was not raised below?

3. Should this Court consider an exception to the rule prohibiting collateral review of Fourth Amendment claims, when that exception would necessarily violate this Court's retroactivity doctrine, and when the argument was not raised below?

PARTIES TO THE PROCEEDING

Petitioner Robin Root is a prisoner being held in custody by the Michigan Department of Corrections at the Women's Huron Valley Correctional Facility. Respondent Jeremy Howard is the warden of that facility.

RELATED CASES

- *People* v. *Root*, Michigan Court of Appeals, Docket No. 331123, Opinion issued August 31, 2017 (vacating and remanding for a new trial).

- *People* v. *Root*, Michigan Supreme Court, Docket No. 156658, Order issued May 11, 2018 (denying the State's application for leave to appeal).

- *People* v. *Root*, Michigan Court of Appeals, Docket No. 346164, Opinion issued April 9, 2020 (affirming conviction and sentence).

- *People* v. *Root*, Michigan Supreme Court, Docket No. 161304, Order issued September 8, 2020 (denying Root's application for leave to appeal).

- *Root* v. *Howard*, United States District Court for the Eastern District of Michigan, Opinion and Order issued July 9, 2024 (denying petition for writ of habeas corpus and denying certificate of appealability).

- *Root* v. *Howard*, United States Court of Appeals for the Sixth Circuit, Order issued February 10, 2025 (denying Root's application for a certificate of appealability).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit's order denying Root's application for a certificate of appealability, App. 1a–5a, is not reported but is available at 2025 WL 1260801. The district court's opinion and order denying Root's petition for a writ of habeas corpus, denying a certificate of appealability, and denying leave to proceed in forma pauperis on appeal, App. 8a–34a, is not reported.

The Michigan Supreme Court's order denying Root's application for leave to appeal is reported at 947 N.W.2d 818. The Michigan Court of Appeals' opinion affirming Root's conviction following her second trial is not reported but available at 2020 WL 1816009.

The Michigan Supreme Court's order denying the State's application for leave to appeal following Root's first trial is reported at 910 N.W.2d 664. The Michigan Court of Appeals' opinion vacating Root's conviction following her first trial and remanding for a new trial is not reported but available at 2017 WL 3798495.

JURISDICTION

The State agrees that this Court has jurisdiction to consider the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Fourth Amendment** to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The **Fifth Amendment** to the United States Constitution provides:

> No person shall be . . . compelled in any criminal case to be a witness against himself. . . .

And **28 U.S.C. § 2254(d)** provides, in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .
>
> * * *

INTRODUCTION

Robin Root owed money to her landlord, Janna Kelly. Instead of paying, Root killed Kelly. Once law enforcement connected Root to the killing and confronted her with the evidence against her—including DNA evidence, cell phone location data, and billing records—she confessed. That confession forms the basis of three independent claims that Root asks this Court to review. None are worth considering.

To understand why, start with the basics. Root's claims arise from a petition filed under 28 U.S.C. § 2254. That statute places strict limitations on a federal court's power to grant habeas relief. If a state court has adjudicated a claim on the merits, relief is barred unless the adjudication involved an error "beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). Nowhere in her petition does Root even cite, let alone discuss, this heightened standard. Yet those limitations fundamentally alter the foundations on which her questions presented rest. So even if the underlying questions were intriguing on their face, they have no relevance to *this* case because § 2254 precludes relief.

Now turn to the underlying questions, in which Root performs a bit of slight of hand. She first sets forth a circuit split regarding *Missouri* v. *Seibert*, 542 U.S. 600 (2004), in which the federal courts of appeals disagree about which of this Court's opinions from that case govern when law enforcement gives the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), during the middle of an interrogation. Yet Root does not contend that the state court in her case chose the wrong opinion to follow. She instead argues

only that it *misapplied* the correct *Seibert* opinion. Any circuit split does not match her claim of error.

Root then suggests that her confession was altogether involuntary. Yet she cites no law, claims no split of authority, and merely details various facts that she says the state court should have weighed differently. It is a fact-based, error-correction argument. And it is without merit in any event.

Last, Root lobbies this Court to implement an exception to *Stone* v. *Powell*, 428 U.S. 465 (1976), which adopted the well-established rule that prohibits Fourth Amendment litigation on federal habeas review. She suggests that, because the law is slower to develop than the technology that law enforcement uses—such as the cell phone location data used here—a federal habeas court should be allowed to consider novel applications of the Fourth Amendment. Yet this proposed exception defies this Court's retroactivity law. A novel Fourth Amendment application *never* applies on collateral review, so the proposed exception would not alter the practical effects of *Stone*.

One last thing. Root has not presented these questions in the courts below. Not one of them. She maintained throughout her federal habeas litigation that Fourth Amendment law *already* required suppression of her confession. Any questions about the correct opinion from *Seibert* to adopt, the voluntariness of her confession, and whether to extend Fourth Amendment precedent were not raised or addressed in either the district court or the Sixth Circuit. And these claims were not fully exhausted in state court either. This Court should not be the first to review these claims. The petition should be denied.

STATEMENT OF THE CASE

Janna Kelly disappears and is later found dead.

On December 4, 2007, Janna Kelly went missing. App. 9a. The next day, police discovered Kelly's purse, wallet, and jacket at a local car wash; her car was found parked in a different location. App. 9a. Her jacket and car contained blood belonging to a then-unidentified female. App. 9a.

The night she disappeared, Kelly received a call from Root, who lived in a nearby duplex that Kelly owned. App. 10a. After she disappeared, Kelly's daughter found a note indicating that Kelly was arranging to get money from Root for unpaid rent and that she had evicted Root. App. 10a. In connection with Kelly's disappearance, Grand Rapids Police Department Detective Tim DeVries interviewed Root. App. 10a. Root admitted that Kelly had come to see her recently regarding the money she owed, and she described two phone calls she made to Kelly on the night she went missing. App. 10a–11a. She voluntarily provided a DNA sample. App. 11a. But that sample was not tested. App. 11a.

Trying to find Kelly, the police obtained the cell-site location information (CSLI) for Kelly's phone. App. 20a. A phone's CSLI is a time-stamped record showing each time the phone connects to a cell site. See *Carpenter* v. *United States*, 585 U.S. 296, 301 (2018). The CSLI from Kelly's phone indicated that it had connected with a site near her home in Grand Rapids, Michigan, on the morning she disappeared. App. 9a, 20a. But shortly after noon that day it connected with a site in West Olive, Michigan. App. 20a.

The next spring, Kelly's burned and decomposing body was discovered in a secluded area in Grand Haven Township, a community near West Olive. App. 11a–12a, 20a. Her mouth and limbs had been bound, and she was stripped naked. App. 11a–12a.

In September 2009, the police conducted a "tower dump," in which they obtained a list of all the phones that connected, at the relevant times, to the cell site near Kelly's home and the cell site near the location where her body was found. App. 20a–21a. But the police were not able to decipher the information at the time. App. 21a. The case went cold. App. 21a.

A cold-case investigation leads police to Root.

In 2014, cold-case detectives from the Ottawa County Sheriff's Office noticed that Root's DNA had never been compared to the DNA from the blood found on Kelly's jacket and in her car. App. 12a. After that comparison was finally conducted, it showed that Root was the source of the blood. App. 12a. Also, now with better equipment and expertise, the police interpreted the data from the tower dump—it showed Root's phone in the same area as Kelly's phone when she disappeared and that the two phones "traveled at the same time" to the location where Kelly's body was later discovered. App. 21a. With this information, the police obtained Root's billing records and discovered that she had called the hotline for famous evangelist Billy Graham a few days after Kelly disappeared. App. 22a.

In April 2015, the police interviewed Root again. App. 21a. She drove herself to the interview and spoke with detectives from the sheriff's office for 90 minutes

before leaving to pick up her granddaughters from school. App. 13a. Days later, Root again drove herself to the sheriff's office to resume the interview. App. 13a. Nearly three hours into this session, one of the detectives exited the room and DeVries, who had interviewed Root in 2007, entered and began questioning her. *People* v. *Root*, No. 331123, 2017 WL 3798495, at *5 (Mich. Ct. App. 2017). He confronted her with CSLI and phone-record evidence. App. 21a–22a. She eventually confessed that she killed Kelly. App. 22a. DeVries then informed Root that she was under arrest and advised her of her rights provided by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *Root*, 2017 WL 3798495, at *9–10. He continued to question Root, asking about additional details and attempting to obtain different incriminating statements than he had obtained before providing *Miranda* warnings. *Id*. at *10.

Root is convicted, but a state court reversed.

Root was charged with first-degree premeditated murder, Mich. Comp. Laws § 750.316(1)(a). Before trial, she moved to suppress her confession, but the trial court denied that motion. App. 13a. Following a jury trial, Root was convicted and sentenced to life in prison without eligibility for parole. *Root*, 2017 WL 3798495, at *1.

Root appealed. She contended that her statements should not have been admitted at trial because she had not been advised of her rights under *Miranda* while subject to custodial interrogation. *Id*. The Michigan Court of Appeals agreed in part. That court determined that Root was not in custody when her April 2015 interview began but that a few hours into that interview, when it became clear that she was going to

be arrested and charged, the interview turned custodial and *Miranda* warnings were required. *Id*. at *3–8. The confession and statements that she gave after that point, but before the detectives finally provided *Miranda* warnings, were inadmissible and should have been suppressed, the state appellate court ruled. *Id*. at *8.

The Michigan Court of Appeals went on to discuss the statements that Root made after the *Miranda* warnings. *Id*. at *8–10. It cited *Oregon* v. *Elstad*, 470 U.S. 298 (1985), which held that mid-stream *Miranda* warnings do not require suppressing the post-*Miranda* statements unless those statements were given involuntarily, and the plurality opinion from *Missouri* v. *Seibert*, 542 U.S. 600 (2004), which provided that post-*Miranda* statements may be inadmissible at trial if the warnings did not function effectively. *Root*, 2017 WL 3798495, at *8–9. Because the mid-stream *Miranda* warnings in this case were "more akin to the inadvertent mistake in *Elstad*, and w[ere] not part of an interrogation technique designed to evade the requirements of *Miranda* as found in *Seibert*," the court held that Root's post-*Miranda* statements were admissible so long as they were given voluntarily. *Id*. at *10. Ultimately, after reviewing the specific, relevant facts, the court concluded that the statements were voluntary. *Id*. at *10–11.

But because the earlier pre-*Miranda* statements should have been suppressed, and, finding that this error was not harmless, the Michigan Court of Appeals vacated Root's conviction and remanded for a new trial. *Id*. at *11. The State appealed, but the Michigan Supreme Court declined to review the case.

People v. *Root*, 910 N.W.2d 664 (Mich. 2018). Chief Justice Markman would have granted leave, however, because he was not convinced that the lower court properly determined that Root was in custody at the time she confessed. *Id*. at 664–65.

Root is convicted again.

The State tried Root again, and, this time, the post-custodial, pre-*Miranda* statements were suppressed. App. 14a. The statements obtained after she was provided *Miranda* warnings were admitted, though, and Root moved to suppress them, too, this time arguing that they were the product of an illegal search. App. 22a. According to Root, she provided the statements only after Detective DeVries confronted her with the CSLI evidence, and that the CSLI evidence was obtained without a warrant as required by this Court's decision in *Carpenter*. App. 22a. Therefore, Root argued, her statements should have been suppressed under the fruit-of-the-poisonous-tree doctrine. App. 22a. The trial court denied the motion. App. 22a. A jury ultimately found Root guilty of the lesser offense of second-degree murder, Mich. Comp. Laws § 750.317. App. 14a. She was sentenced to 25 to 50 years in prison. App. 14a.

Root appealed again. Addressing her second suppression motion, the Michigan Court of Appeals noted that, like the government agents in *Carpenter*, the police here relied on the Stored Communications Act, 18 U.S.C. § 2703, when obtaining the CSLI through a warrantless tower dump. App. 26a–27a. Because the police acted in good faith according to a federal statute and then-applicable constitutional standards, suppression was not warranted. App. 28a. And more, the

court held, because the *Carpenter* decision only applied when police obtained CSLI related to a specific phone and not, as happened here, when police obtained information gathered from a tower dump, the decision did not apply to the facts of this case. App. 28a. Finally, the state court addressed Root's argument that her statements should have also been suppressed because the police used her billing records to confront her with her call to the Billy Graham hotline. App. 28a–29a. The court found that argument was unpreserved and, in any event, neither *Carpenter* nor any other precedent demonstrates that an unconstitutional search occurs when police obtain phone billing records. App. 29a. Root's conviction was ultimately affirmed, App. 14a, and the Michigan Supreme Court declined to review the case, *People* v. *Root*, 947 N.W.2d 818 (Mich. 2020).

Root applies for habeas corpus relief.

Root next filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. She raised only one claim, arguing that the Michigan Court of Appeals unreasonably applied *Carpenter* when it determined that the CSLI and the billing records that the police obtained and used in her interrogation did not require that her statements be suppressed. (5/17/21 Br. in Supp. of Pet., R. 2, Page ID # 19–37.) Root contended that this violated her Fourth and Fifth Amendment rights. (*Id.*) She also argued that the state court's finding that the good faith exception applied was an unreasonable application of *United States* v. *Leon*, 468 U.S. 879, 913 (1984) (adopting the good-faith exception to the exclusionary rule when officers reasonably rely on a warrant issued by a detached and neutral magistrate).

(*Id*. at 35–37.) The district court denied the petition. The court found that Root's claim fell exclusively under the Fourth Amendment and did not implicate the Fifth Amendment because she did not argue that her statement was involuntary. App. 31a–32a. And because she was given a full and fair opportunity to litigate her Fourth Amendment claim in state court, it was barred from review by *Stone* v. *Powell*, 428 U.S. 465 (1976). App. 30a–31a. The district court denied the petition and declined to issue a certificate of appealability. App. 33a–34a.

Root thereafter filed an application for a certificate of appealability in the United States Court of Appeals for the Sixth Circuit, raising the same arguments. (7/22/24 Mot. for Cert. of Appealability, Doc. 5, Pages 4–9.) The Sixth Circuit found that "[r]easonable jurists would not debate the district court's resolution of Root's claim." App. 4a. Because Michigan provided Root with an opportunity to litigate her Fourth Amendment claim, and she took advantage of that opportunity, the court ruled that her claim is barred by *Stone*. App. 4a–5a. And although she asserts that her claim should also be reviewed under the Fifth Amendment, the Sixth Circuit found that any Fifth Amendment claim was "inextricably interwoven" with her Fourth Amendment claim. App. 5a. Specifically, the court said that the claim that her statements should be suppressed involves an inquiry into whether the police unconstitutionally obtained CSLI and billing records, which "is a Fourth Amendment issue." App. 5a. The Sixth Circuit therefore denied Root's application for a certificate of appealability. App. 5a.

REASONS FOR DENYING THE PETITION

I. This case presents a poor vehicle to review the alleged *Seibert* circuit split.

In her first reason for granting the petition, Root identifies a split among the courts of appeals: seven circuits have held that the plurality opinion from *Seibert* is controlling, while two rely on Justice Kennedy's concurring opinion. Curiously, though, Root does not say which opinion she wants this Court to adopt. Looking to the substance of her claim, this omission makes sense—after all, the difference in the legal analyses in the dueling *Seibert* opinions is not implicated here. And even if it were implicated, procedural infirmities would cloud review here: the *Seibert* question was not fully exhausted in the state courts, nor was it raised or addressed below. Certiorari should be denied.

A. Resolving the *Seibert* question would not alter the reasoning or the result here.

This case presents a poor vehicle to review the alleged circuit split because Root does not argue that adopting either the majority or minority rule would have changed the outcome of her case.

Root identifies what she characterizes as a 9-2 circuit split.[1] Nine courts of appeals have held that

[1] Although technically correct, it is hard to characterize the holdings from the various courts of appeals on this issue as a "split." Of the two circuits that Root identifies as being in the minority, neither is firm on the issue. In *United States* v. *Heron*, the Seventh Circuit declined to resolve which rules from *Seibert* govern, 564 F.3d 879, 885 (7th Cir. 2009), and cases both before and after *Heron* from that circuit appear to have adopted the majority rule,

Justice Kennedy's concurring opinion is the law of their respective circuits; the remaining two have found that the plurality opinion controls.

Briefly look at the facts of *Seibert*. An officer first questioned the defendant without providing *Miranda* warnings. 542 U.S. at 604–05. After the defendant provided an incriminating statement, the officer gave her a 20-minute break, after which he provided *Miranda* warnings, obtained a signed waiver, and continued the same line of questioning before obtaining a similar incriminating statement. *Id*. at 605. The defendant had fully confessed before the warnings were provided, and "the further questioning was a mere continuation of the earlier questions and responses," which included "references back to the confession already given." *Id*. at 616–17.

This Court held that the statements following the midstream warnings were inadmissible. *Id*. at 617. The plurality opinion opined that the "threshold issue" when evaluating an interrogation that includes midstream *Miranda* warnings is whether, considering the circumstances, "the warnings could function 'effectively' as *Miranda* requires." *Id*. at 611–12. The plurality listed "a series of relevant facts" to consider when determining whether midstream warnings are effective. *Id*. at 615.

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see *United States* v. *Stewart*, 388 F.3d 1079, 1091–92 (7th Cir. 2004); *United States* v. *Hernandez*, 751 F.3d 538, 539–40 (7th Cir. 2014). And the Sixth Circuit has expressly questioned whether it should continue to follow the minority rule. *United States* v. *Woolridge*, 64 F.4th 757, 762 (6th Cir. 2023) ("On another day, we should ask whether we must keep our side of this circuit split open.").

Justice Kennedy concurred in the judgment, but he indicated that the plurality's test was too broad because it focused on "the perspective of the suspect" and applied to "both intentional and unintentional two-stage interrogations." *Id*. at 622 (KENNEDY, J., concurring). He would have applied "a narrower test" in which suppression is warranted only if the "two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Id*. In other words, Justice Kennedy's approach focused on the subjective intent of the interrogating officer.[2]

Given the differing approaches by the two opinions and the split between the circuits as to which approach to adopt, Root initially proposes a question: which side of the split should this Court embrace? Yet, after analyzing the Michigan Court of Appeals' (first) opinion, Root maintains merely that the court *misapplied Seibert* generally, not that it adopted the wrong approach.

In its opinion, the Michigan Court of Appeals did not expressly state which of *Seibert*'s opinions it was relying on. It started off by citing the plurality opinion from *Seibert*. But then the court found that suppression was not warranted because "the evidence d[id] not suggest that the detectives engaged in a *deliberate* two-stage interrogation technique designed to evade the requirements of *Miranda*." *Root*, 2017 WL 3798495, at *9 (emphasis added). The court went on

[2] The dissenting opinion noted its specific disagreement with that subjective approach, calling it "ill advised" and instead agreeing with the plurality's decision to "focus [the] analysis on the way in which suspects experience interrogation." *Seibert*, 542 U.S. at 624–27 (O'CONNOR, J., dissenting.).

to explain why the detectives could have reasonably believed that *Miranda* warnings were not required until after Root confessed, demonstrating that they were not *intentionally* evading *Miranda*'s requirements. *Id*. at *10. In other words, the court employed Justice Kennedy's subjective approach.

Root does not contend that adopting the rule from Justice Kennedy's concurring opinion was wrong. Rather, she merely postulates that the state court's determination that the detective's interrogation technique was an inadvertent mistake and not deliberate was incorrect based on the facts of the case. Put differently, she argues the *misapplication* of Justice Kennedy's subjective approach, not that resolving the circuit split would change the outcome here. To this end, she does not even advocate which side of the split she favors. In other words, the circuit split does not match the purported error here.

Because "the misapplication of a properly stated rule of law" should "rarely" be a reason to grant a petition for a writ of certiorari, Supreme Court Rule 10, and because Root asserts only that the state court misapplied *Seibert*, her petition should be denied.

B. Section 2254's limitations render the *Seibert* question irrelevant to this case.

Even if resolving the circuit split could affect Root's underlying claim, a second reason this case presents a poor vehicle to review the issue is because the strict limitations on the availability for habeas relief in 28 U.S.C. § 2254(d)(1) alter the analysis.

Under § 2254(d)(1), if a state court has adjudicated a claim on the merits, habeas relief is unavailable unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law."[3] "[T]he phrase 'clearly established Federal law, as determined by the Supreme Court of the United States,' . . . refers to the *holdings*, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) (emphasis added).

To succeed on her *Seibert* claim, then, Root would have to show that the Michigan Court of Appeals' decision was "contrary to, or an unreasonable application of," the *holding* from *Seibert*. § 2254(d)(1). But none of the opinions from that case garnered a majority of the Justices' votes. So, identifying a holding is not easy. This Court has provided some guidance in cases involving plurality opinions: the holding is whichever position offers the "narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977). Sometimes, though, it may be difficult to determine which, if any, of the opinions in a case is "narrow[er]" than another. See, e.g., *Hughes* v. *United States*, 584 U.S. 675, 679 (2018) (noting that differing interpretations of *Marks* led to a circuit split as to which of the plurality or concurring opinions in *Freeman* v. *United States*, 564 U.S. 522 (2011), controlled).

[3] Another exception occurs when the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts." § 2254(d)(2). Root does not allege any unreasonable factual determinations.

As for this case, the premise of Root's question suggests that there was no "holding" from *Seibert* which can be "clearly established." As she points out, even in direct review cases, there is a circuit split as to which opinion controls. To answer her question—and to possibly afford her relief on her claim—this Court would not only have to determine which opinion controls, but also whether the controlling opinion amounted to "clearly established" law at the time the state court rejected her claim. This additional analytical step, posing a jurisprudentially significant statutory-interpretation question, at the very least complicates the underlying issue. This case therefore presents a poor vehicle to review the *Seibert* circuit split.

C. The *Seibert* question has not been properly exhausted.

A third reason this case presents a poor vehicle to consider the question is because the *Seibert* issue has not been fully exhausted in the state courts.

The underlying factual allegations here involve the effectiveness of mid-interrogation *Miranda* warnings, an issue that *Seibert* addressed. After her first trial, Root argued in the Michigan Court of Appeals, the state's first-line intermediate appellate court, that her statements should have been suppressed. *Root*, 2017 WL 3798495, at *1. The Michigan Court of Appeals agreed that any of the statements she made before *Miranda* warnings were given should have been suppressed. *Id*. at *8. But, looking to *Elstad* and *Seibert*, it determined that the mid-interrogation warnings were effective considering the facts of this case and held that Root's post-*Miranda* statements were admissible. *Id*. at *9–10. And, after determining

that admitting the pre-*Miranda* statements was reversible error, the Michigan Court of Appeals remanded the case for a new trial. *Id*. at *11. The State appealed that decision—Root did not.

In other words, Root did not appeal the Michigan Court of Appeals' determination that her post-*Miranda* statements were admissible. And although Root tried to suppress the post-*Miranda* statements again at her second trial, she did so only by arguing that they were barred by *Carpenter*, not by *Seibert*. App. 23a. She then raised the *Carpenter* argument through her direct appeal following her second trial. App. 23a. Quite simply, the *Seibert* question was never presented to the Michigan Supreme Court.

That's a problem. Federal law *prohibits* habeas relief unless "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A).[4] And so long as an applicant still has the right under state law to raise a particular claim, it cannot be considered exhausted. § 2254(c). Root has a right under Michigan law to raise her claim through a postconviction motion for relief from judgment. See Mich. Ct. R. 6.500 *et*. *seq*.[5] Thus, her claim is not exhausted, and a federal court cannot grant habeas relief.

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[4] There are two exceptions: (1) if "there is an absence of available State corrective process," or (2) if "circumstances exist that render such process ineffective to protect the rights of the applicant." § 2254(b)(1)(B). Neither exception applies here.

[5] Although the *Seibert* claim was "decided against" Root "in a prior appeal," which normally precludes state postconviction relief in Michigan, Mich. Ct. R. 6.508(D)(2), it bears repeating that she never raised the claim in the Michigan Supreme Court. So even if the state trial and intermediate appellate courts cannot

Because Root cannot obtain habeas relief even if her *Seibert* claim had merit, this case presents a poor vehicle to review the issue.

D. The *Seibert* question has not been litigated in the lower courts.

Yet another reason why this case presents a poor vehicle to review the *Seibert* question—a fourth one—is that it was not raised and addressed in the courts below.

As already laid out, in her direct appeal following her first trial, Root raised a general challenge to the admissibility of her statements. The Michigan Court of Appeals agreed with her, in part, and granted her a new trial. That court, however, ruled that *Seibert* did not require that Root's post-*Miranda* statements be suppressed. At her second trial, Root challenged the admissibility of those post-*Miranda* statements based on entirely different grounds (the Fourth Amendment *Carpenter* issue that she raises as a separate issue in this petition). After she was convicted following her second trial, she continued to raise the *Carpenter* issue in the state appellate courts.

She continued that trend when she applied for a writ of habeas corpus in the district court. The only claim that she asserted as a basis for relief was that her Fourth (and Fifth) Amendment rights were violated and that the Michigan Court of Appeals unreasonably applied *Carpenter* when it ruled that her

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consider the *Seibert* claim on state postconviction review, the Michigan Supreme Court could. So she still has a right under state law to raise the claim, meaning it is unexhausted.

statements after the detectives confronted her with the CSLI and phone billing evidence were admissible. (5/17/21 Br. in Supp. of Pet., R. 2, Page ID # 19–37.) She never claimed that she was being unconstitutionally detained as a result of the state court's allegedly improper application of *Seibert*. So the district court never addressed the issue.

Neither did the Sixth Circuit. In her application for a certificate of appealability, Root again raised a single issue involving *Carpenter*. (7/22/24 Mot. for Cert. of Appealability, Doc. 5, Pages 4–9.) She did not ask the court of appeals to grant her a certificate of appealability on a *Seibert* claim. That tactic makes sense. To obtain a certificate of appealability, Root was required to show "that reasonable jurists would find *the district court's assessment* of the constitutional claims debatable or wrong." *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added). It would be strange to argue the district court's assessment of the *Seibert* claim was debatable or wrong when the district court was never asked to consider that claim.

Without the benefit of a ruling from the lower court, this Court would be "writ[ing] on a clean slate," which it "ordinarily take[s] great pains to avoid." *Allen* v. *Hardy*, 478 U.S. 255, 262 (1986) (MARSHALL, J., dissenting). See also *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here."); *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018) ("[I]t is generally unwise to consider arguments in the first instance."). This Court

should therefore not consider the *Seibert* issue and should deny the petition.

II. The voluntariness question does not present an important question for review.

In her second reason for granting the petition, Root asserts that this Court should review the determination that her confession was voluntary. This question is unworthy of review for two reasons.

First, like the *Seibert* issue, Root has neither properly exhausted this claim in the state courts nor has it been raised and decided in the federal courts below. The last time the voluntariness of her statements was litigated was in the Michigan Court of Appeals following Root's first trial. That court found that her statements were voluntarily made. *Root*, 2017 WL 3798495, at *11. But because that court ultimately ruled in her favor and granted a new trial, she did not challenge that ruling in the Michigan Supreme Court. And she raised a Fourth Amendment challenge, not a voluntariness challenge, on direct review following her second trial. App. 23a. She continued to raise that Fourth Amendment challenge within her application for habeas corpus relief in the district court and on appeal in the Sixth Circuit. Although she vaguely argued that the Fifth Amendment was also implicated by her claim, she never asserted that her statements were involuntary. Because she last raised her voluntariness claim following the intermediate appellate court's decision after her first trial, it is unexhausted and abandoned.

Second, the voluntariness question is entirely fact based. It presents no conflict among state or federal

courts, nor an unresolved important federal question. Root simply argues that the Michigan Court of Appeals' "reasoning about voluntariness was a misapplication of this Court's precedents." Pet. at 16. So the question for review consists of nothing more than a "misapplication of a properly stated rule of law," which, again, should rarely be a reason to grant a petition. Supreme Court Rule 10.

Even more, despite claiming "a misapplication of this Cout's precedents," Pet. at 16, Root cites none of those precedents. The only case she does cite is *Cardwell* v. *Taylor*, 461 U.S. 571 (1983), but *Cardwell* did not address voluntariness at all. Rather, *Cardwell* determined that the habeas petitioner's Fourth Amendment claim was barred by *Stone* and that the petitioner was only entitled to habeas relief if he could show that his statements were involuntary under the Fifth Amendment. *Id*. at 572–73. It did not review the voluntariness of the petitioner's statements or make any pronouncements of law on the issue. The Court *did* remand for the lower courts to adjudicate the voluntariness issue, *id*. at 573—because the petitioner specifically challenged the voluntariness of his statements within his habeas petition, see *Taylor* v. *Cardwell*, 579 F.2d 1380, 1382 (9th Cir. 1978). Root did not do so here.

The failure to even cite Supreme Court precedent on the voluntariness issue presents an additional reason to deny review. The claim was adjudicated on the merits by a state court. Under 28 U.S.C. § 2254(d), that means that Root is only entitled to relief if the state court's decision "was contrary to, or involved an unreasonable application of," this Court's precedents

or "was based on an unreasonable determination of the facts." Root makes no argument suggesting that either of those preconditions have been met.

She instead focuses on a single fact—that detectives told her that "prosecutors were standing by and that she was going to be charged"—as evidence that her statements were involuntary. Pet. at 16. She acknowledges that the state court had relied on other factors (i.e., she drove herself to the interview; she had ended earlier interviews on her terms; she initially tried to explain away inculpatory evidence in an intelligent manner; etc.), Pet. at 15, but she does not say why her single factor outweighs the factors demonstrating that her statements were voluntary. Nor does she say how, under the "totality of all the surrounding circumstances," her "will was overborne." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973). And she does not explain why all "fairminded jurists" would disagree with the state court's voluntariness determination, which was entirely reasonable. *Richter*, 562 U.S. at 102. Her question is not worthy of review.

III. The proposed *Stone* exception is precluded by this Court's precedents and, regardless, cannot form the basis for relief in this case.

In her final reason to grant the petition, Root argues that this Court should carve out an exception to the rule from *Stone* that precludes review of a Fourth Amendment claim if the applicant has had a full and fair opportunity to litigate the claim in the state courts. Review is unwarranted, though, because the exception is analytically unsound on its face. And even if it were not, this is a poor vehicle to evaluate the

viability of the novel exception for two additional reasons: (1) the claim was not presented below as here, and (2) the proposed exception is designed to procure a new rule of law, which cannot form the basis for relief under § 2254(d)(1) when, as here, the state court ruled on the claim's merits.

A. The *Stone* exception is precluded by this Court's retroactivity principles.

To understand why the exception that Root advocates for would not work, look briefly at the reasoning underlying the *Stone* rule.

In *Stone*, this Court outlined the "exclusionary rule," which it described as "a judicially created means of effectuating the rights secured by the Fourth Amendment." 428 U.S. at 482. The rule, the Court said, is designed to "deter future unlawful police conduct," *id*. at 484; it is "not a personal constitutional right," *id*. at 486. Therefore, not every Fourth Amendment violation requires excluding the unconstitutionally obtained evidence. *Id*. at 485–89. Courts must employ a "balancing process" in individual cases, weighing the deterrent effect of the rule with the interest in determining the truth at trial. *Id*. at 487–89.

The Court employed that balancing test to the issue in *Stone*, which was whether the exclusionary rule should be extended to cases on federal habeas corpus review. *Id*. at 489. It found that the benefit of the rule on collateral review was small in relation to its costs. *Id*. at 489–93. In particular, the Court noted that "[t]he view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious

assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal." *Id*. at 493. Therefore, the Court held, if "the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief" on that claim. *Id*. at 494.

Root contends that there should be an exception to the *Stone* bar when the Fourth Amendment issue involves technology that "enhances law enforcement's surveillance abilities." Pet. at 17. According to her, "the law often develops slower than the technology," so a state court evaluating "questions of first impression" regarding a specific technology will not have "guidance from this Court" as to how to resolve the issue. Pet. at 18. Thus, she says, a petitioner raising such a claim can never have a full and fair opportunity to litigate the claim in state courts. Pet. at 18.

Whatever the intrigue of Root's question, the answer she proposes would violate retroactivity principles. A "question[ ] of first impression"—in other words, an issue that would result in a new legal rule—cannot be applied to a case on federal habeas review. In *Edwards* v. *Vannoy*, this Court was clear: only if a new constitutional rule is *substantive* does it "apply retroactively on federal collateral review." 593 U.S. 255, 276 (2021). If the new rule is procedural, on the other hand, it does "not apply retroactively on federal collateral review." *Id*. What's the difference? "New substantive rules alter 'the range of conduct or the class of persons that the law punishes,' " while "[n]ew procedural rules alter 'only the manner of

determining the defendant's culpability.' " *Id*. (quoting *Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004)). The application of the Fourth Amendment's exclusionary rule to new technology that "enhances law enforcement's surveillance abilities," Pet. at 17, would affect only what evidence could be admitted against a criminal defendant at trial—*i.e*., " 'the manner of determining the defendant's culpability,' " *id*. (quoting *Summerlin*, 542 U.S. at 353). Thus, Root proposes a new procedural rule that cannot be retroactively applied on federal collateral review.

For a clearer look, take the facts here. Remember, in the state courts, Root argued that, under *Carpenter*, the CSLI obtained by a "tower dump" without a warrant was an unconstitutional search. *Carpenter*, however, involved the CSLI from a targeted individual. 585 U.S. at 301–02. After ruling that obtaining those records was a search, the *Carpenter* Court specifically noted that its holding did *not* apply to " 'tower dumps' (a download of information on all the devices that connected to a particular cell site during a particular interval)." *Id*. at 316. The facts of this case being firmly outside the opinion's reach, what Root was really arguing for was to *extend Carpenter*, something the Michigan Court of Appeals was unwilling to do.[6] So, she argues now, an exception to *Stone* should apply so that the federal courts on collateral review can consider extending *Carpenter*.

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[6] Root now acknowledges the underlying issue is "whether *Carpenter* should be *extended* to the type of cell phone dump used to gather information against the Petitioner." Pet. at 4 (emphasis added).

A rule that would extend the Fourth Amendment's exclusionary rule to a new context would not place certain conduct " 'beyond the power of the criminal law-making authority to proscribe.' " *Teague* v. *Lane*, 489 U.S. 288, 307 (1989) (quoting *Mackey* v. *United States*, 401 U.S. 667, 692 (1971) (HARLAN, J., concurring in judgments in part and dissenting in part)). Rather, it would alter the manner—precluding the prosecution from using tower dump CSLI at a criminal trial—of determining culpability. Again, the proposed exception is a procedural rule that cannot be retroactively applied on federal collateral review.

Because *Stone* applies only to collateral proceedings, and because Root's proposed exception to *Stone* cannot be applied retroactively on collateral review, the exception is entirely foreclosed. It does not warrant this Court's review.

B. This case presents a poor vehicle to review the proposed *Stone* exception.

Even if the proposed *Stone* exception were analytically viable, this case is not the one to consider it, for two reasons.

First, just like her other issues, the proposed *Stone* exception has not been litigated in the courts below. After she was convicted following her second trial, Root argued in the state appellate courts that obtaining the CSLI and her phone billing records without a warrant were Fourth Amendment violations under this Court's decision in *Carpenter*, and therefore the statements that she gave after the police confronted her with that information should have

been suppressed. App. 23a. After the state courts denied relief, she made the same argument in the district court, though she tacked on a perfunctory citation to the Fifth Amendment without any analysis. App. 31a. The district court determined that the claim was barred under *Stone*. App. 30a–31a. Then, in her application for a certificate of appealability in the Sixth Circuit, she argued that her claim should not be barred by *Stone* because the claim *also* implicated the Fifth Amendment. App. 5a. Noting that the substance of the claim implicated only the Fourth Amendment and not the Fifth Amendment, the Sixth Circuit denied her application. App. 5a. In sum, the argument that Root put forth, and that the courts below rejected, was that *Stone* did not even apply to her *Carpenter* argument.

Now, in this petition, she seems to concede that her *Carpenter* argument is barred by *Stone*, yet, for the first time, she maintains that there should be some sort of rapidly-changing-technology exception to *Stone*. This Court should not countenance such a rapidly-changing-litigation tactic. Because the courts below were presented with an argument that was, in effect, the inverse of the question presented here, the question is not prime for review. See *Cutter* and *Byrd*, *supra*.

Second, the proposed exception could not apply in this case because it is precluded by § 2254(d)(1)'s litigation bar. Because the Michigan Court of Appeals adjudicated Root's *Carpenter* claim on the merits, App. 23a–29a, she *cannot* obtain relief unless the court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law,"

§ 2254(d)(1). When determining what is clearly established federal law, federal courts look to "this Court's precedents as of the time the state court renders its decision." *Greene* v. *Fisher*, 565 U.S. 34, 38 (2011) (cleaned up). And " 'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.' " *White* v. *Woodall*, 572 U.S. 415, 426 (2014) (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004)).

Root now acknowledges that the CSLI information obtained in her case did not fall under *Carpenter*. In fact, she describes the issue as "whether *Carpenter* should be *extended* to the type of cell phone dump used to gather information against" her. Pet. at 4 (emphasis added). So even if the exception to *Stone* that she advocates for was adopted, her Fourth Amendment claim, on its face, could not form the basis of relief in her § 2254 habeas petition.

In sum, the proposed *Stone* exception does not present a viable question for certiorari review in this case—or any other.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: JULY 2025