No. 24-1122

In the Supreme Court of the United States

ROBIN ROOT,

Petitioner,

v.

JEREMY HOWARD, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the two decades since it was decided, federal and state courts have struggled to apply this Court's fractured reasoning in *Missouri* v. *Seibert*, 542 U.S. 600 (2004). Multiple circuits have concluded that Justice Kennedy's lone concurrence represents the holding of the Court, even though both the plurality and dissent explicitly rejected Justice Kennedy's focus on the subjective intent of the interrogating officers. This misapplication of *Marks* has caused courts across the country to adopt as *Seibert*'s holding a position that was endorsed by (at most) two justices and explicitly rejected by seven. This result cannot stand.

The State's chief contention is that Root failed to exhaust her *Seibert* argument in state court. But the State expressly waived exhaustion in its federal court brief; it cannot resurrect that objection now to defeat review.

The State's other arguments lack merit. Root's interrogation mirrored the facts of *Seibert* almost exactly—yet the Michigan courts reached the opposite result. This error entitles Root to relief under 28 U.S.C. § 2254(d)(1). And the question presented involves an issue of fundamental constitutional rights about which courts are hopelessly divided, and for which this case is a suitable vehicle. The Court should grant certiorari.

I. THE *SEIBERT* ISSUE WARRANTS REVIEW.

A. The State acknowledges a stark split as to which *Seibert* opinion controls.

1. The State acknowledges a clear and intractable split among the circuits over which opinion from *Seibert* controls. See BIO 12 ("[S]even circuits have held that the plurality opinion from *Seibert* is

controlling, while two rely on Justice Kennedy's concurring opinion.").

There was no majority opinion in *Seibert*. Justice Souter, writing for a four-justice plurality, held that the sufficiency of *Miranda* warnings in a two-stage interrogation would depend on five objective factors. *Seibert*, 542 U.S. at 615. Justice Kennedy concurred only in the judgment. Rather than follow the plurality's "objective inquiry," he would consider whether officers employed a two-stage interrogation technique deliberately. *Id.* at 621-622 (Kennedy, J., concurring). If so, post-warning statements could be admissible only if the police take specific "curative measures." *Ibid.*

Both the four-justice plurality opinion and four justices in dissent explicitly rejected Justice Kennedy's focus on the subjective intent of the officer. 542 U.S. at 616 & n.6 (plurality) ("Because the intent of the officer will rarely be as candidly admitted as it was here … the focus is on facts apart from intent."); *id.* at 623 (O'Connor, J., dissenting) ("[T]he plurality correctly declines to focus its analysis on the subjective intent of the interrogating officer.").[1]

2. *Marks* v. *United States* teaches 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.

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[1] Justice Breyer "join[ed] the plurality's opinion in full" but endorsed Justice Kennedy's opinion "insofar as it is consistent with" the plurality's approach. 542 U.S. at 618 (Breyer, J., concurring).

188, 193 (1977). Because Justice Kennedy's opinion is not necessarily "narrower" than the plurality's, nor represents "a common denominator of the Court's reasoning," applying *Marks* to *Seibert* has resulted in pervasive disagreement among the lower courts.

Most circuits hold that Justice Kennedy's concurrence controls, though "all of these courts engage with *Marks* only superficially, quoting its language with no analysis." *Reyes* v. *Lewis*, 833 F.3d 1001, 1009 (9th Cir. 2016) (Callahan, J., dissenting from denial of rehearing en banc) (quotation marks omitted); see Pet. 10 (listing cases).

The Sixth and Seventh Circuits, by contrast, have concluded that "Justice Kennedy's intent-based test is not the narrowest ground on which the Court *agreed*." *United States* v. *Ray*, 803 F.3d 244, 270 (6th Cir. 2015) (emphasis added). Although Justice Kennedy described his analysis as "narrower," "three of the four justices in the plurality *and* the four dissenters decisively rejected any subjective good faith consideration." *United States* v. *Rodriguez–Preciado*, 399 F.3d 1118, 1139 (9th Cir. 2005) (Berzon, J. dissenting). Thus, Justice Kennedy's concurrence "'embodies a position supported by two Justices, at most.'" *Ray*, 803 F.3d at 271 (quoting *Rodriguez–Preciado*, 399 F.3d at 1138-1140 (Berzon, J., dissenting)).

Nor is it clear that Justice Kennedy's concurrence *is* the narrowest ground for the result in *Seibert*. See Brief Amici Curiae of Criminal Law and Procedure Professors 15, *Alvarez* v. *United States*, No. 22-7741 (U.S. July 10, 2023) (the concurrence "is broader than the *Seibert* plurality in cases where police officers use a deliberate two-step interrogation strategy," because, regardless of whether the plurality's objective test is

met, the confession would not be admissible without "specific, curative steps"); *Reyes*, 833 F.3d at 1008 (Callahan, J., dissenting) ("[T]here are likely to be cases where relief would be granted under Justice Kennedy's test but not the plurality's test").

State courts are also divided: At least thirteen states and two U.S. territories apply Justice Kennedy's test, while thirteen *other* states apply the plurality opinion or a combination.[2] There is simply no consensus—among federal or state courts—on how to interpret *Seibert*.

3. The State attempts to downplay the importance of this division by claiming the Sixth and Seventh circuits are "not firm on the issue." BIO 12 n.1. Not so. Both courts continue to apply the objective test from the *Seibert* plurality. See *United States* v. *Woolridge*, 64 F.4th 757, 760 (6th Cir. 2023); *United States* v. *Bailon*, 60 F.4th 1032, 1038 (7th Cir. 2023) (applying both tests); see also *United States* v. *Heron*, 564 F.3d 879, 884 (7th Cir. 2009) ("[W]e find it a strain at best to view [Justice Kennedy's] concurrence * * * as the narrowest ground on which a majority of the Court could agree."). Setting aside the more evenly matched split among state high courts, the fact that the circuit split is lopsided does not undermine its durability or its importance. See, e.g., *United States* v. *Taylor*, 596 U.S. 845, 850 (2022) (resolving 3-1 split); *Elonis* v. *United* States, 575 U.S. 723 (2015) (reviewing 11-2 split).

The split, moreover, continues to widen. See *United States* v. *Neely*, 124 F.4th 937, 949 (D.C. Cir. 2024) (holding for the first time that the Justice

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[2] See Pet. at 12-13, *Alvarez*, No. 22-7741 (collecting cases).

Kennedy's concurrence controls in the D.C. Circuit). It is thus no surprise that litigants, including multiple state attorneys general, have asked this Court to resolve this issue for years. E.g., Pet., *Alvarez* v. *United States*, No. 22-7714 (U.S. June 5, 2023); Pet., *Johnson* v. *North Carolina*, No. 18-1542 (U.S. June 10, 2019); Pet., *Wass* v. *Idaho*, No. 17-425 (U.S. Sept. 20, 2017); Pet., *South Carolina* v. *Navy*, No. 09-1459 (U.S. May 27, 2010). Review is now warranted.

B. This is a suitable vehicle.

The State's vehicle objections lack merit.

1. The State incorrectly claims that the Michigan court "adopt[ed] the rule from Justice Kennedy's concurring opinion." BIO 15. But the decision does not even mention the concurrence, so it is odd to suggest that it adopted that approach. See *People* v. *Root*, 2017 WL 3798495, at *9-10 (Mich. Ct. App. Aug. 31, 2017).

At best, the Michigan court applied a mixture of the plurality and concurring opinions, and it was ultimately faithful to neither. The court cited the plurality's focus on whether the mid-stream warnings "could function 'effectively' as *Miranda* requires" (*Root*, 2017 WL 3798495, at *9), but then concluded that "the evidence does not suggest that the detectives engaged in a deliberate two-stage interrogation technique" (*ibid.*). The court never evaluated whether the warnings the officers gave Root—after interrogating her for over three hours, in the same location, with the same detectives—"effectively advised [her] of the choice the Constitution guarantees." *Seibert*, 542 U.S. at 611.

Nor is it any answer that Root contends that she is entitled to relief under either opinion. The Michigan court denied her relief on *its* application of *Seibert*, an

approach that was not true to either *Seibert* opinion. Correcting this doctrinal misunderstanding of *Seibert would* therefore "change[] the outcome of [Root's] case." BIO 12.

This case is also an excellent vehicle for clarifying *Seibert* because the facts of Root's interrogation overlap almost exactly with *Seibert* itself. As in *Seibert*, Root's "unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill." *Seibert*, 542 U.S. at 616; compare *Root*, 2017 WL 3798495, at *3-7 (describing nearly four hours of prewarning interrogation in a windowless room at the Sherriff's office, flanked by armed detectives, in which one detective obtained the confession through the "interrogation technique" of using "accusatory and intense" questioning to create "a sense of inevitability and immediacy of the charges against Root, and the urgency with which she needed to respond immediately if she were to have any chance of mitigating a certain charge of first-degree murder"). The 31-minute length of this "accusatory and intense" phase of Root's interrogation was comparable to the entire prewarning questioning in *Siebert*. Compare *ibid.* with *Seibert*, 542 U.S. at 604-605 ("30 to 40 minutes").

If anything, the two-step interrogation here was more egregious than in *Seibert*: There, the Court found that "it would have been unnatural to refuse to repeat at the second stage what had been said before," in part because "[t]he warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment," and involved "the same officer." 542 U.S. at 616-617. Here too, the post-confession, post-*Miranda* questioning

continued in the same place and with the same officers, but did not even afford Root the "20-minute coffee and cigarette break" between phases that the *Seibert* Court found too short to cure the constitutional problem. *Id.* at 605; compare *Root*, 2017 WL 3798495, at *9-10.

Whatever one calls the approach the Michigan court took, it is not consistent with *Seibert*'s plurality *or* its concurrence. If one thing is clear, it is that five justices voted in *Seibert* to exclude post-warning statements that were obtained under nearly the same circumstances. At a minimum, the Court should grant, vacate, and remand so the Sixth Circuit may consider Root's *Seibert* claim anew.

2. Next, the State claims that Root failed to properly exhaust her *Miranda* claim in state court. But the State expressly waived exhaustion below. Under a heading labeled "Exhaustion," the State wrote: "The State is not arguing that consideration of any of Root's habeas claims is barred by the failure to exhaust a claim for which a state court remedy exists." D. Ct. Dkt. 7, at 4. By statute, an express waiver of exhaustion by the State can "estop[]" it from "reliance upon the requirement." 28 U.S.C. § 2254(b)(3); see *D'Ambrosio* v. *Bagley*, 527 F.3d 489, 495 (6th Cir. 2008) (finding express waiver of exhaustion by the state's conduct in district court). Having disclaimed in district court any contention that Root failed to exhaust her state-court remedies, the State cannot rely on exhaustion to urge denial of her petition now.[3]

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[3] The State's waiver makes sense, as Root objected under the Fifth Amendment to the introduction of her post-*Miranda* statements at her second trial, as the State admits (D. Ct. Dkt. 7, at

The State also suggests that the *Seibert* issue was not preserved in the federal habeas proceedings. But Root argued in her habeas petition and appeal that the introduction of her post-*Miranda* statements violated the Fifth Amendment. D. Ct. Dkt. 2, at 19, 22-23; C.A. Dkt. 5, at 4 (arguing that the officers' use of the cell-site evidence "tainted her re-iteration of her pre-*Miranda* admissions during the post-*Miranda* continuing interrogation" and "resulted in her self-incrimination in violation of her Fifth Amendment rights").

Having properly presented below the federal claim that use of her post-*Miranda* statements resulted in compelled self-incrimination in violation of the Fifth Amendment, Root "can make any argument in support of that claim" before this Court; "parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992) (arguments that ordinance constituted a taking "in two different ways * * * are not separate *claims*. They are, rather, separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking."); accord *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Hemphill* v. *New York*, 595 U.S. 140, 149 & n.2 (2022). The State's contention that the *Seibert* argument was not preserved therefore falls flat.

3. Finally, the State claims that 28 U.S.C. § 2254(d)(1) prevents Root from obtaining habeas

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26 n.5 ("Root did seek suppression of the statement and later objected to the statement at trial.")) and through her subsequent state appeals (D. Ct. Dkt. 8 at 249-240, 467-468).

relief because (it says) "there was no 'holding' from *Seibert* that can be 'clearly established.'" BIO 17.

This is wrong twice over. First, the State disregards the second half of the test: A state court decision is "contrary to" or "an unreasonable application of [] clearly established federal law" (28 U.S.C. § 2254(d)(1)) *either* "if the state court applies a rule that contradicts the governing law," *or* if it "confront[ed] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrive[d] at a result different from [the Supreme Court's] precedent." *Lockyer* v. *Andrade*, 538 U.S. 63, 73 (2003); accord *Williams* v. *Taylor*, 529 U.S. 362, 405-406 (2000). The latter is present here: The relevant facts of Root's interrogation are "materially indistinguishable" from those of *Seibert*, yet the Michigan court came to the "opposite result." *Ibid.*; see *supra* pages 5-7.

Second, even as to the first prong of the test, the State's argument is essentially that this Court's review is precluded any time there is a circuit split over the proper interpretation of the Court's case law. Cf. BIO 17. But mere lower court disagreement on how to apply this Court's precedents cannot preclude review under Section 2254. In *Lockyer*, for example, the Court recognized that its Eighth Amendment precedents did not "establish[] a clear or consistent path for courts to follow." 538 U.S. at 72. Yet the Court granted certiorari to determine the "governing legal principle." *Ibid.* For this reason, too, Section 2254(d)(1) is no obstacle.

C. The question presented is important and recurring.

The question presented concerns a fundamental rule of constitutional law: under what circumstances a suspect may make a "free and rational choice" to waive the "constitutional privilege to remain silent" (*Miranda* v. *Arizona*, 384 U.S. 436, 465 (1966)) despite questioning prior to *Miranda* warnings. "*Miranda's* clarity is one of its strengths" (*Seibert*, 542 U.S. at 622 (Kennedy, J., concurring)), but "*Seibert* has been a puzzle for police and lower courts" (Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. Davis L. Rev. 1407, 1428 (2011)), eroding that clarity and undermining constitutional rights.

This situation is untenable for officers and defendants alike. Officers "must have workable standards to apply to the complex, ever-changing fact patterns that play out in the real world," but the "shifting sands of federal jurisprudence provide no certainty concerning the standard that might apply." *State* v. *O'Neill*, 175, 936 A.2d 438, 454 (N.J. 2007) (noting the "confusion in federal and state courts" that the "*Seibert* opinions have sown").

And confusion among lower courts allows coercive interrogation tactics to persist. Among later-exonerated prisoners, 20% to 25% had falsely confessed to police. Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 SAGE J. 112 (2014). "These outcomes occur because the suspect is exposed to highly suggestive interrogation tactics and acquiesces [to] escape from a stressful situation." Brief Amici Curiae, *supra*, at 27-28. Worse, false confessions are more likely to occur in "serious cases,

especially homicides." *Id.* at 30 (citing Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1065 (2010)).

False confessions undermine the trustworthiness of confessions in general and erode public confidence in our justice system. See *Michigan* v. *Tucker*, 417 U.S. 433, 448 (1974) ("When involuntary statements or the right against compulsory self-incrimination are involved," courts risk relying "on untrustworthy evidence"). And no one could dispute that "uniformity among federal courts is important" for standards governing *Miranda*. *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995). The Court's review is warranted.

II. ROOT'S OTHER CLAIMS ARE WORTHY OF REVIEW.

The State maintains that Root's second question is unfit for review because it was unexhausted and "is entirely fact based." BIO 21. Neither is correct. Root challenged the voluntariness of her confession throughout the state and federal proceedings. *See supra* at 7-8. And Root's second question asks whether the Sixth Circuit correctly applied *Stone* v. *Powell* to conclude that Root's Fourth and Fifth Amendment claims were "inextricably intertwined." Pet. *i.* At a minimum, the Court should remand for consideration of Root's Fifth Amendment claim. See *Cardwell* v. *Taylor*, 461 U.S. 571, 573 (1983) (remanding for reconsideration on voluntariness); *Withrow* v. *Williams*, 507 U.S. 680, 688 (1993) (*Stone* does not bar habeas review of a "claim that [a] conviction rests on statements obtained in violation of the safeguards mandated by *Miranda*").

Finally, Root's third question presented is undoubtedly important. In *Carpenter*, the Court

reserved the question whether "real-time CSLI or 'tower dumps'" violate the Fourth Amendment when accessed without a warrant. *Carpenter* v. *United States*, 585 U.S. 296, 316 (2018). Courts are intractably divided over how to apply *Carpenter* when officers obtain—as they did here—troves of cell-tower data detailing the movements of any person in a particular area at a particular time. See *United States* v. *Chatrie*, 136 F.4th 100 (4th Cir. 2025) (affirming the use of this technique in a one-sentence opinion en banc, spawning nine separate opinions), *petition for cert. filed*, No. 25-112 (U.S. July 28, 2025); *United States* v. *Smith*, 110 F.4th 817 (5th Cir. 2024) (holding geofence warrants are "general warrants" categorically prohibited by the Fourth Amendment), *petition for cert. filed*, No. 24-7237 (U.S. May 19, 2025).

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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