11-324

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No.: 11-324
UNITED STATES OF AMERICA,
Appellant-Cross-Appellee,
—v.—
ROBERT STEVEN BRODIE WILLIAMS,
Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF APPELLANT THE UNITED STATES OF AMERICA AND FOR REVERSAL OF THE DISTRICT COURT'S ORDER

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STATEMENT OF INTEREST[1]

The Center on the Administration of Criminal Law at New York University School of Law (the "Center") respectfully submits this brief in support of appellant, the United States of America. The Center is dedicated to promoting and defending good government practices in the criminal justice system through academic research, litigation, and participation in the formulation of public policy. The Center's litigation practice aims to use the Center's empirical research and experience to assist courts in important criminal justice cases.

The Center's interest in this case is to further its mission of promoting and defending good government practices in the criminal justice system. This case considers the appropriate use of *Miranda* warnings by law enforcement in "two-stage interrogations" and the admissibility of "second-stage" confessions in criminal prosecutions. The Center seeks to prevent undue limitation on law enforcement power resulting from a misapplication of controlling Supreme Court precedent. The decision in this case has implications for government and law enforcement conduct, both in general and in the particular context of national security cases.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Second Circuit Rule 29.1(b), counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In a "two-stage interrogation," a law enforcement officer questions a suspect without *Miranda* warnings, then subsequently issues the warnings and interrogates the suspect further. The District Court here, constrained by the majority opinion in *United States* v. *Capers*, suppressed the defendant's second-stage confession. But the *Capers* majority misapplied governing Supreme Court precedent, *Missouri* v. *Seibert*. The *Capers* majority wrongly created a test that, in a two-stage interrogation, requires that the reason for delaying *Miranda* warnings satisfies a recognized legal exception to *Miranda*. Furthermore, the *Capers* majority ignored the distinction between purposeful delay of *Miranda* warnings for a *bona fide* reason and deliberate efforts to vitiate *Miranda*. *Seibert*, properly applied, is concerned only with the latter. In this way, *Capers* misapplied *Seibert*, and that error led to the result here.

The doctrinal error committed by the *Capers* majority has adverse effects in the national security context. The *Capers* majority opinion forces the government to choose, in an incipient national security investigation, between intelligence-gathering and law enforcement strategies. But, properly interpreted, *Seibert* preserves the co-existence of both approaches. In this way, *Capers* threatens to skew government decisionmaking in the national security arena.

ARGUMENT

I. THIS COURT'S *CAPERS* DECISION INCORRECTLY APPLIES THE SUPREME COURT'S DECISION IN *SEIBERT*

The District Court here, "constrained" by this Court's decision in *Capers*, suppressed the defendant's confession. But the *Capers* majority misapplied governing Supreme Court precedent, *Missouri* v. *Seibert*. The majority in *Capers* injected into *Miranda* doctrine a test that wrongly requires that a delay in delivering *Miranda* warnings in a two-stage interrogation be justified by a reason that satisfies a recognized exception to *Miranda*. In this way, *Capers* misapprehended *Seibert*. This doctrinal error led to the result in this case.

A. APPLICABLE LAW: TWO-STAGE INTERROGATION JURISPRUDENCE

(1) *Elstad* and *Seibert*

In *Oregon* v. *Elstad*, the Supreme Court held that, in a two-stage interrogation, where pre-*Miranda* statements are voluntary, post-*Miranda* confessions are admissible so long as they, too, are voluntary. *Oregon* v. *Elstad*, 470 U.S. 298, 309 (1985). In *Missouri* v. *Seibert*, a fragmented Court suppressed the defendant's inculpatory statements made during a two-stage interrogation, in which the defendant was initially interrogated without *Miranda* warnings and confessed, and later repeated her confession after being Mirandized. 542 U.S. 600,

604 (2004). The interrogation was conducted pursuant to a "question-first" police strategy under which law enforcement deliberately withheld *Miranda* warnings until obtaining a confession, and then interrogated the suspect again after *Miranda* protections had been waived . *Id.* at 609-10. For the *Seibert* plurality, the threshold issue was whether the midstream warnings functioned effectively to advise the defendant of her rights. *Id.* at 611-12. In order to determine the effectiveness of the warnings, the plurality considered the following factors:

> the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and 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. at 615. In *Seibert*, the similar content of the two rounds of interrogation, including explicit referrals back to the pre-*Miranda* confession in the second interrogation, the close timing and same station house setting, and the continuity of law enforcement led the plurality to conclude that the midstream warnings did not effectively apprise the suspect of her rights. *Id.* at 616-17. Thus her statements made after the formal *Miranda* warnings were deemed inadmissible. *Id.* at 617.

Justice Kennedy's concurrence provided the critical fifth vote. Justice Kennedy, arguing that the plurality's suspect-focused effectiveness test "cut too broadly," proposed an officer intent-based test to be applied only in cases of

deliberate two-stage interrogations in which the technique was used in a calculated way to undermine the *Miranda* warnings. *Id.* at 621-22. If such deliberateness was found, curative measures, like a substantial break in time and circumstances between the interrogations, or an additional warning explaining the inadmissibility of the pre-warning statements, could sufficiently inform defendant of his rights and allow for the admission of the statements. *Id.* at 622.[2]

(2) *Capers*

In *United States* v. *Capers*, in a divided opinion, this Court sought to interpret and apply the holding of *Seibert*.[3] 627 F.3d 470 (2d Cir. 2010). Affirming its holding in *United States* v. *Carter*, the Court adopted Justice Kennedy's *Seibert* concurrence as the governing precedent,[4] and expanded its

[2] Justice Breyer concurred, arguing that fruits of initial unwarned questioning should be suppressed unless the failure to warn was in good faith. *Id*. at 617 (Breyer, J., concurring). The dissent rejected Justice Kennedy's officer intent-based approach, arguing that because voluntariness is the touchstone of Fifth Amendment analysis, the inquiry should focus "on the way in which suspects experience interrogation." *Id.* at 624 (O'Connor, J. dissenting) (internal citations omitted).

[3] This Court also analyzed *Seibert's* holding in *United States* v. *Carter*, 489 F.3d 528 (2d Cir. 2007), but updated and more thoroughly explained its interpretation in *Capers*.

[4] "When 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." *Marks* v. *United States*, 430 U.S. 188, 193 (1977). Applying the *Marks* rule, most circuits have held that Justice Kennedy's concurrence is the *Seibert* Court's narrowest view and thus represents its holding. *See, e.g., United States* v. *Williams*, 435 F.3d 1148, 1157-58 (9th Cir. 2006); *United States* v. *Street*, 472 F.3d 1298, 1313 (11th Cir. 2006); *United States* v. *Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *United States* v. *Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006). *But see United States* v. *Heron*, 564 F.3d 879, 884 (7th Cir. 2009) (reasoning that Justice Kennedy's holding cannot be

application beyond the clear facts of *Seibert*—a two-step interrogation pursuant to a "question-first" police policy—to situations with less obvious evidence of deliberate intent.[5] *Id.* at 476-79. Specifically, the majority held that the "totality of objective and subjective evidence" should be considered to determine deliberateness and endorsed the analysis of objective proof to evaluate subjective intent. *Id.* at 479. Applying this test, the majority considered the officer's testimony, the overlap between the statements from the first and second interrogation, the consistent inquisitorial setting and the continuity of interrogating officers, and concluded that the officer had employed a deliberate question-first strategy, thus rendering the defendant's statements inadmissible.[6] *Id.* at 480-84.

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taken as the "narrowest ground" because his intent-based test was rejected by both the plurality and dissent). In *Capers*, this Court agreed with the majority of the circuits and held that Justice Kennedy's concurrence is *Seibert*'s holding. 627 F.3d at 476.

[5] As this Court noted, since the record in *Seibert* was clear that the officers deliberately intended to circumvent *Miranda* protections, "Justice Kennedy had no reason to explore how a court should determine when a two-step interrogation strategy had been executed deliberately." *Id.* at 477.

[6] Despite the majority view among the circuits that Justice Kennedy's concurrence represents the governing precedent, unrest over the role of the suspect's experience in a *Seibert* analysis remains. Strict application of Justice Kennedy's concurrence requires sole focus on the officer's subjective intent, as evidenced by both subjective testimony and objective factors. However, even some courts that hold Justice Kennedy's concurrence governs continue to incorporate the suspect's experience into their analysis. *See, e.g.*, *Courtney*, 463 F.3d at 339 (holding that Justice Kennedy's concurrence governs, but finding *Miranda* warnings effective based on objective factors and a "reasonable suspect" analysis); *Williams*, 435 F.3d at 1157-58 (holding that Justice Kennedy's concurrence governs, but analyzing both deliberateness and effectiveness).

Significantly, the majority relied heavily upon the fact that no legally-recognized *Miranda* exception justified the delayed warnings to find deliberate intent to circumvent *Miranda*'s protections. *Id.* at 480-81. The majority discarded the district court's factual finding that the police "purpose in delaying a *Miranda* warning was not to undermine Capers' Fifth Amendment rights, but rather 'to prevent the loss or concealment of [evidence] . . . and to ascertain whether [another suspect] was involved in a crime, so that he could be freed or not.'" *Id.* at 480-482. In the majority's view, the "*[o]nly* legitimate reason to delay intentionally a *Miranda* warning until a custodial interrogation has begun" is if the reason for the delay falls within a legally-recognized exception to *Miranda*, such as the public safety exception. *Id.* at 481 (emphasis added).

In dissent, Judge Trager criticized the majority for replacing the district court's credibility determinations about the officer's testimony with its own, improperly reviewing the factual findings *de novo*, and misapplying the clearly erroneous standard. *Id.* at 485-86. Judge Trager also accused the majority of undermining Justice Kennedy's *Seibert* concurrence with its "novel 'legitimacy' test." *Id.* at 494. He noted that an *Elstad/Seibert* analysis is triggered only where a pre-warning confession is excluded due to a violation of the suspect's *Miranda* rights. *Id.* at 493. Under the majority's test, therefore, in almost all cases where an

Elstad/Seibert analysis is even triggered, a post-warning confession will be inadmissible because the officer will be unable to articulate a so-called "legitimate" reason for delaying the *Miranda* warnings. *See id.*

(3) *Williams*

In this case, the District Court sought to apply *Seibert* in light of this Court's opinion in *Capers*. Judge Gardephe observed that *Capers* "sets a high standard for the admission of a second-stage confession following a *Miranda* violation," attributing this raised threshold to the *Capers* majority's holding that the absence of *legal justification* for a delay in warnings implies deliberate intent. — F. Supp. 2d —, 2010 WL 5158158, No. 09 Cr.1202 (PGG), at *19 (S.D.N.Y. Dec. 13, 2010). As the officer's reason for failing to immediately warn—his desire to establish ownership of the seized guns—did not constitute a legally-valid *Miranda* exception, the District Court felt "constrained" to find deliberate intent and grant defendant's motion to suppress his second-stage statements. *Id.* at *20. The District Court also considered whether deliberateness could be inferred from the objective circumstances, and found that the close overlap in content in both interrogations, the consistent inquisitorial environment and the continuity of law enforcement personnel supported the argument for deliberate intent. *Id.* at *21. Thus the District Court suppressed the statements. *Id*.

B. ANALYSIS

The test enunciated in the majority opinion in *Capers* suffers from two related flaws. First, it ignores the fact that law enforcement can purposefully delay giving *Miranda* warnings in a two-stage interrogation context while not acting with a deliberate intent to circumvent *Miranda*. Second, it wrongly transforms the deliberate intent analysis set forth by Justice Kennedy in *Seibert* into a requirement that the reason for delaying warnings fits within a recognized exception to *Miranda*. These errors in *Capers* led the District Court here to feel constrained to suppress the defendant's post-warning statements, even though under a faithful application of *Seibert* those statements would be admissible.

1. IN A *SEIBERT* ANALYSIS, THERE IS A DISTINCTION BETWEEN DELIBERATE INTENT TO CIRCUMVENT A SUSPECT'S *MIRANDA* RIGHTS AND A PURPOSEFUL DECISION TO DELAY WARNINGS

In a sequential interrogation, purposefully delaying *Miranda* warnings is not the same as deliberately using a two-step interrogation process in order to circumvent *Miranda*. Justice Kennedy's *Seibert* concurrence is troubled only by the narrow, latter scenario: deliberate intent sufficient to trigger Justice Kennedy's *Seibert* analysis requires a knowing and calculated desire to deprive a suspect of *Miranda* protections, rather than merely the purposeful delay of warnings for some

other reason. Judge McKenna, in the district court opinion in *Capers*, brings this distinction to light:

> [The officer's] conduct in interrogating defendant was purposeful both in his not giving *Miranda* warnings and in what questions he asked. There is no evidence, however, that [the officer] had the specific intent to use the two-stage questioning technique with the purpose of first obtaining unwarned incriminating statements in order, in a subsequent warned interrogation, to obtain similar incriminating statements…. [I]t was purposeful. The purpose, however, was not the subjective purpose to vitiate *Miranda* which Justice Kennedy defined.

2007 WL 959300, No. 06 Cr.266 (LMM), at *12 (S.D.N.Y. Mar. 29, 2007).

This motivational distinction between the deliberate intent to circumvent a suspect's *Miranda* rights and a decision to delay warnings for a purpose other than to vitiate *Miranda* is unexplored by most courts, yet is fundamental to a determination of deliberateness. Intentional decisions to delay *Miranda* warnings arise in many two-stage interrogation cases, and do so importantly here. In this case, the District Court concluded that the officer's intent when he failed to warn immediately was to establish ownership of the seized guns; a purposeful decision. *See Williams*, 2010 WL 5158158 at *20. Yet, there is a crucial conceptual difference between a desire to acquire information about weapons and the sinister intent contemplated by Justice Kennedy to deliberately circumvent a suspect's *Miranda* rights. The District Court here, finding a lack of legal justification to be

evidence of deliberateness, did not directly confront this question. But to apply *Seibert* properly, courts should recognize the fundamental motivational difference between purposefully delaying *Miranda* warnings and deliberately intending to undermine *Miranda* protections. Only the latter is Justice Kennedy's concern.

2. THE *CAPERS* MAJORITY'S TEST WRONGLY CONFLATES THE DELIBERATE INTENT ANALYSIS WITH AN INQUIRY INTO THE APPLICABILITY OF A *MIRANDA* EXCEPTION

The *Capers* majority held that the delay of *Miranda* warnings in the absence of a legal exception implies deliberate officer intent to circumvent *Miranda*'s protections:

> [O]nce a law enforcement officer has detained a suspect *and subjects him to interrogation* … there is rarely, if ever, a legitimate reason to delay giving a *Miranda* warning until after the suspect has confessed. Instead, the most plausible reason … is an *illegitimate* one, which is the interrogator's desire to weaken the warning's effectiveness.

Capers, 627 F.3d at 480-481 (*quoting Williams*, 435 F.3d at 1159) (emphasis in original). Accordingly, in *Capers*, as there is no legal *Miranda* exception to "preserve evanescent evidence" or "ascertain whether a suspected co-conspirator may be entitled to release," the majority found the officer's delay to warn to be the product of deliberate intent to evade *Miranda*, which in the absence of curative measures led to the suppression of the defendant's statements. 627 F.3d at 480.

Under this holding, the District Court here was "constrained" to find deliberate intent and, due to the lack of curative measures, grant the defendant's motion to suppress because it had found the officer's stated intent for the delay—to establish ownership of the seized guns—not to fall within a legal *Miranda* exception. *Williams*, 2010 WL 5158158 at *20-21.

Justice Kennedy's deliberateness test differs significantly from the *Capers* majority's legitimacy test. In *Seibert*, Justice Kennedy targeted relatively extreme law enforcement conduct to fashion a "narrow[ ] test applicable only in the infrequent case." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). Justice Kennedy contemplated that "deliberate violation[s] of *Miranda*" would be revealed in this very small subset of cases by fact-intensive analysis of officer intent. *See id.* at 620-21 (finding "deliberate violation" because officers withheld warnings "to obscure both the practical and legal significance of the admonition when finally given," "relie[d] on an intentional misrepresentation," and conducted a "postwarning interview [that] resembled a cross-examination"). But the *Capers* majority opinion requires law enforcement to demonstrate a "legitimate reason" for delaying warnings, and defines "[t]he only legitimate reason" as "protect[ing] the safety of the arresting officers or the public." *Capers*, 627 F.3d at 480-81.

Transforming the fact-based, officer-intent focused deliberateness inquiry into a legal inquiry whether a recognized *Miranda* exception justified delayed warnings eviscerates *Seibert*. Under Justice Kennedy's approach in *Seibert*, an *Elstad* analysis is only triggered when a pre-warning statement is excluded due to a *Miranda* violation. *See Seibert*, 542 U.S. at 619-20 (Kennedy, J., concurring). But if the justification for the delayed *Miranda* warnings satisfies a *Miranda* exception, then no *Elstad* analysis—and thus no *Seibert* analysis—is necessary. *See Courtney*, 463 F.3d at 337 (holding that, in a two-stage interrogation, "because the first two statements were not obtained in violation of *Miranda*, the district court erred in applying *Seibert*"); *United States* v. *Kiam*, 432 F.3d 524, 532-33 (3d Cir. 2006) (holding that, in a two-stage interrogation, applying *Seibert* "was unnecessary" because warnings were not required in first stage of interrogation); *see also Capers*, 627 F.3d at 493 (Trager, J., dissenting). Accordingly, transforming Justice Kennedy's test for "deliberateness" into a "legality" analysis renders the *Seibert* deliberateness test meaningless.

Moreover, the *Capers* majority's emphasis on legal legitimacy ignores the distinction between purposeful delay of *Miranda* warnings and deliberate efforts to vitiate *Miranda*. Not every situation without legal justification for delaying *Miranda* warnings implies deliberate intent. Even beyond cases of officer

inexperience and good-faith mistake,[7] there are reasons for officers to question suspects before issuing *Miranda* warnings which do not rise to the level of legal exception, yet lack the requisite intent to deprive a suspect of *Miranda*'s protections. *See, e.g.*, *Carter*, 489 F.3d at 532 (affirming admission of second-stage statement where officer questioned suspect before *Miranda* warnings about drugs "out of curiosity" since in his experience "it was uncommon to have a substance like heroin mixed in with all this cocaine."); *United States* v. *Jackson*, 608 F.3d 100, 104 (1st Cir. 2010) (affirming admission of post-warning statement in two-stage interrogation context where officer first questioned the suspect without *Miranda* warnings to determine the location of a hidden gun). By requiring the justification for delay to fit a recognized legal exception to *Miranda*, the *Capers* majority's test ignores the fact that reasons for delay can fall along a spectrum that ranges from a deliberate desire to vitiate *Miranda*, to purposefulness short of deliberateness, to good faith.

Finally, the *Miranda* exception most often used to justify two-stage interrogations—the public safety exception—is narrowly defined and difficult to

[7] This Court in *Capers* recognizes situations of officer inexperience and good-faith mistake as lacking deliberate intent, even where there is no legal *Miranda* exception. 627 F.3d at 481.

meet.[8] Therefore, with regard to outcomes, the consequence of subsuming the deliberateness analysis within a legality inquiry is to find deliberate intent in most two-stage interrogation cases, thus resulting in the suppression of most second-stage confessions, unless objective factors indicate that the warnings were effective. This result is in direct conflict with the "narrow[ ]" test contemplated by Justice Kennedy, *Seibert*, 542 U.S. at 622, and transforms it instead into a broad-reaching—even all-encompassing—inquiry applied to most two-stage interrogation cases.[9]

II. APPLYING THE *CAPERS* MAJORITY'S TEST RATHER THAN JUSTICE KENNEDY'S *SEIBERT* TEST HAS ADVERSE EFFECTS IN THE NATIONAL SECURITY CONTEXT

The *Capers* majority's convolution of legality with deliberateness presents particularly significant implications in the national security context, which

[8] *See New York* v. *Quarles*, 467 U.S. 649, 658 (1984) (recognizing a "narrow exception" for unwarned public safety questioning); *see also United States* v. *Estrada*, 430 F.3d 606, 612 (2d Cir. 2005) (noting that that this Court has "expressly … not condoned the pre-*Miranda* questioning of suspects [based on a concern for public safety] as a routine matter," and further, satisfaction of the public safety exception requires "immediate danger" and questioning that is neither "investigatory in nature [n]or designed solely to elicit testimonial evidence").

[9] Judge Gardephe identifies this effect of *Capers*: "Justice Kennedy … proposed an approach that he envisioned would have a much more confined application… The effect of *Capers*, however, is to take Justice Kennedy's test well beyond 'the unique and never-again-to-be-repeated circumstances of *Seibert*' and to apply it to a much broader category of cases." *Williams*, 2010 WL 5158158 at *19 (quoting *Capers*) (internal citation omitted).

frequently can involve two-stage interrogations.[10] In these situations, law enforcement and intelligence agents may have reasonable—even compelling—justifications for delaying *Miranda* warnings. But while agents might seek to invoke the public safety exception, their questioning is frequently unlikely to satisfy it or any other *Miranda* exception.[11] Thus, the threat of a robust application of *Capers* in the national security context negatively constrains the government's investigatory choices in the field by forcing it to choose at the front-end between intelligence-gathering and law enforcement.

In this Court, public-safety questioning must relate to a "reasonable need to protect the police or the public from any immediate danger" but "may not be investigatory in nature." *Estrada*, 430 F.3d at 612 (internal citations omitted). And the Supreme Court's and this Court's public safety cases all involve on-the-

[10] For example, Umar Farouk Abdulmutallab (the "Christmas bomber") was questioned for 50 minutes and Faisal Shahzad (the "Times Square bomber") for three to four hours before being Mirandized. Charlie Savage, *Holder Backs a Miranda Limit for Terror Suspects*, N.Y. Times, May 10, 2010, at A1, *available at* http://www.nytimes.com/2010/05/10/us/politics/10holder.html?pagewanted=1&_r=1&partner=rss&emc=rss.

[11] The other *Miranda* exceptions, which usually will not apply here, are articulated in: *Pennsylvania* v. *Muniz*, 496 U.S. 582 (1990) (routine booking questions); *Illinois* v. *Perkins*, 496 U.S. 292 (1990) (undercover police officer); *Michigan* v. *Tucker*, 417 U.S. 433 (1974) (third-party witness); *Harris* v. *New York*, 401 U.S. 222 (1971) (impeachment); and *Kiam*, 432 F.3d at 528-31 (routine immigration questioning at border). The mere existence of these other exceptions further highlights the overbreadth of the *Capers* majority's assertion that the "only legitimate reason to delay intentionally a *Miranda* warning until after a custodial interrogation has begun is to protect the safety of the arresting officers or the public." *Capers*, 627 F.3d at 481.

spot questioning regarding weapons that are present or possibly nearby. *See id*. at 609-14 (chronicling cases). Moreover, in order to fall within the public safety exception, questioning cannot be designed to investigate—that is, to collect evidence—using public safety as a pretext. *See id.* at 613. Yet the goal in national security investigations is frequently to gather information about a serious threat, but such investigations need not address an *imminent* danger. Thus, to facilitate questioning of suspected terrorists, some have argued for creating a national security exception to *Miranda*.[12] But no such exception is yet recognized.

Robust application of *Capers*—and thereby misapplication of *Elstad* and *Seibert*—constrains the government's tactical options in the field. *Capers* forces the government to choose, in an incipient investigation, between intelligence-gathering and law enforcement strategies. In the national security context, this distorts government decisionmaking. Even if the government has a *bona fide* reason to delay warnings in order to gather intelligence, *Capers* means that

[12] For example, Attorney General Eric Holder and Senator Lindsey Graham have discussed the benefits of legislation to expand the public safety exception to accommodate national security concerns. *See* "Meet the Press" transcript for May 9, 2010 (May 9, 2010), http://www.msnbc.msn.com/id/37024384/ns/meet_the_press//; Charles Krauthammer, *Modernizing Miranda: A new consensus*, Washington Post, May 14, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/13/AR2010051303555.html (discussing Holder and Graham). Professor Richard Pildes has also discussed the possibility of legislating the expansion of the public safety exception to address national security concerns. *See* Rick Pildes, *Should Congress Codify the Public-Safety Exception to* Miranda *for Terrorism Cases?*, Balkanization (May 6, 2010), *available at* http://balkin.blogspot.com/2010/05/should-congress-codify-public-safety.html.

decision has potentially profound negative repercussions in a later prosecution, unless that *bona fide* reason satisfies a recognized legal exception to *Miranda*. *Capers* thereby creates tension between intelligence-gathering and law enforcement strategies and forces the government to choose between the two paths, even though under *Elstad* and *Seibert*—read properly—the two options should co-exist. In this way, the *Capers* majority, "by adopting this expansive view of Fifth Amendment compulsion," imposes a "high cost [on] legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being compelled to testify against himself." *Elstad*, 470 U.S. at 312 (internal citations omitted); *accord Seibert*, 542 U.S. at 620 (Kennedy, J., concurring) (approving of *Elstad* for its "balanced and pragmatic approach to enforcement of the *Miranda* warning" and criticizing the categorical suppression of second-stage confessions as "extravagant" and not serving "the general goal of deterring improper police conduct [ ]or the Fifth Amendment goal of assuring trustworthy evidence.").

A hypothetical involving compelling national security interests that do not satisfy a *Miranda* exception makes the point about the effect of the misapplication of *Seibert* by the *Capers* majority. Imagine the interrogation of a suspect in an inchoate, but serious, terrorist plot. To gather information to prevent future attack

and find other members of the terrorist cell at home and abroad, law enforcement might first intentionally withhold *Miranda* warnings. After getting the crucial information, they Mirandize the suspect and question him again to build a criminal case. Assuming voluntariness, whether his post-warning statements get admitted at trial would depend on whether a court applies the *Capers* majority's test or faithfully applies Justice Kennedy's *Seibert* test.

Under the *Capers* majority test, a court would likely suppress the statements if no legal exception justifies the agents' intentional pre-warning questioning. In the hypothetical, the public safety exception would not apply because the future threat of attack is not imminent, and gathering information about the plot and co-conspirators is investigatory. Moreover, no recognized *Miranda* exception justifies unwarned questioning based solely on national security concerns. Thus, a court would likely suppress the post-warning statements.

On the other hand, under Justice Kennedy's *Seibert* test, a court would admit the statements unless the agents had the specific intent to render *Miranda* warnings ineffective. In the hypothetical, the agents engaged in a two-step interrogation in order to gather intelligence to prevent a serious future, but not imminent, threat to national security. This is the very sort of "purposeful" delay of *Miranda* warnings that falls short of a deliberate intent to vitiate *Miranda*. Justice Kennedy's *Seibert*

analysis would not bar admission of a post-warning statement in these circumstances, because Justice Kennedy's concern is to prevent deliberate circumvention of *Miranda*, not merely purposeful delay.

As this hypothetical illustrates, application of the *Capers* majority test in the national security arena would result in suppression in instances in which Justice Kennedy's test would result in admission of the same post-warning statements. Thus, the choice between faithful application of *Seibert* and the *Capers* majority's test has outcome-determinative effects in this important category of cases. As a result, *Capers* threatens to skew government decisionmaking in the national security investigatory context.

CONCLUSION

For the foregoing reasons, the Center respectfully requests that the Court reverse the District Court's suppression of defendant's statements.

Dated: New York, NY
May 16, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the wordprocessing system used to prepare this brief, there are 4,655 words in this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2011, I electronically transmitted the above document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all participants in this case, and caused to be served one PDF copy by e-mail and two copies by first-class mail to counsel for each of the parties:

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May 16, 2011

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