No. 21-1468

In the Supreme Court of the United States

ERICKSON MEKO CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly affirmed the denial of petitioner's suppression motion, "[i]n light of the policy underpinnings of the exclusionary rule and the specific circumstances of this case," based on a good-faith exception argument that the government failed to advance at the panel stage, but advanced before both the district court and the en banc court of appeals.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-130a) is reported at 26 F.4th 860. The opinion of the court of appeals panel (Pet. App. 172a-204a) is reported at 912 F.3d 1340. The amended opinion of the court of appeals panel (Pet. App. 132a-171a) is reported at 970 F.3d 1342. The opinion of the district court (Pet. App. 205a-224a) is unreported but is available at 2015 WL 13927094.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2022. The petition for a writ of certiorari was filed on May 17, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Georgia, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. The court sentenced petitioner to 28 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed, Pet. App. 172a-204a, issued an amended panel opinion that likewise affirmed, *id.* at 132a-171a, and then reheard the case en banc and affirmed, *id.* at 1a-130a.

1. In December 2013, a deputy patrolling a highway in Georgia twice observed petitioner's car drifting out of its lane and crossing into the shoulder of the highway. Pet. App. 3a. The deputy also observed a malfunctioning turn signal. *Ibid.* The deputy stopped the car, spoke to petitioner, and decided to issue a written warning. *Id.* at 3a-4a.

The deputy continued to converse with petitioner while writing out the warning. Pet. App. 5a. The conversation included "about twenty-five seconds" of questioning about whether petitioner had drugs or other contraband in his car. *Ibid.* Petitioner answered that he did not. *Ibid.* The deputy then asked petitioner if he could search the car for those items, and petitioner consented to the search. *Ibid.* The search uncovered a semi-automatic pistol and ammunition hidden in the trunk. *Ibid.* Petitioner admitted that he had lied about traveling with a firearm because he was a convicted felon. *Ibid.*

2. A federal grand jury indicted petitioner for possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5a. Petitioner

moved to suppress the firearm, contending that the deputy had (1) lacked reasonable suspicion to initiate the traffic stop and (2) unlawfully prolonged the stop. *Id.* at 5a-6a. The district court held an evidentiary hearing and requested briefing on, *inter alia*, the applicability of the good-faith exception to the exclusionary rule. *Id.* at 11a.

The district court subsequently denied petitioner's suppression motion. Pet. App. 205a-224a. The court found that the stop was supported by reasonable suspicion and had not been unlawfully prolonged. *Id.* at 213a-221a. "Because the seizure was reasonable, exclusion was unavailable and there was no reason for the [c]ourt to decide * * * whether—as the Government [had] argued in its supplemental briefing—the good-faith exception to the exclusionary rule applied." *Id.* at 13a. Petitioner entered a conditional guilty plea, and the court sentenced him to 28 months of imprisonment, to be followed by three years of supervised release. *Id.* at 13a; Judgment 2-3.

3. A panel of the court of appeals affirmed. Pet. App. 172a-204a.

The court of appeals first determined that the deputy had reasonable suspicion to initiate the traffic stop, but that some of his conduct had unlawfully prolonged the stop. Pet. App. 186a, 196a-197a. The court concluded that, under this Court's decision in *Rodriguez* v. *United States*, 575 U.S. 348 (2015), an officer unlawfully prolongs a stop if he "(1) conduct[s] an unrelated inquiry aimed at investigating other crimes (2) that adds time to the stop (3) without reasonable suspicion." Pet. App. 194a. And it found that, although most of the deputy's conduct was consistent with that requirement, the deputy's questions concerning the presence of

contraband in the car unlawfully "added 25 seconds to the stop." *Id.* at 197a; see *id.* at 195a-197a.

The court of appeals then affirmed the denial of petitioner's suppression motion based on the good-faith exception to the exclusionary rule. Pet. App. 197a-200a. The court explained that, under that exception, a court should not suppress evidence obtained "in objectively reasonable reliance on binding appellate precedent," even if that precedent is later abrogated by a decision of this Court. *Id.* at 198a (quoting *Davis* v. *United States*, 564 U.S. 229, 232 (2011)). The court observed that in *United States* v. *Griffin*, 696 F.3d 1354 (11th Cir. 2012), cert. denied, 571 U.S. 1149 (2014), it had held that a police officer acted lawfully in questioning a suspect for 30 seconds about crimes unrelated to a stop. Pet. App. 192a. The court accordingly found that the deputy in this case had acted in objectively reasonable reliance on *Griffin* during the 2013 traffic stop here, which postdated *Griffin* (issued in 2012) and predated *Rodriguez* (issued in 2015). *Id.* at 199a. And while the court acknowledged that the government had not argued the good-faith exception in its appellate brief, the court invoked its discretion to affirm on that ground. *Ibid.*

Judge Martin concurred in part and dissented in part. Pet. App. 200a-204a. She agreed with the court of appeals' application of the Fourth Amendment, but would not have relied on the good-faith exception because the government had not affirmatively advanced that argument on appeal. *Id.* at 200a-201a.

4. Petitioner filed a petition for a writ of certiorari seeking this Court's review of the court of appeals' application of the good-faith exception. This Court denied the petition. See 140 S. Ct. 196 (2019).

After this Court denied review, the court of appeals *sua sponte* issued an amended opinion affirming the denial of the suppression motion, which elaborated on the original opinion's discussion of the government's failure to raise the good-faith exception on appeal. See *id.* at 159a-166a. Judge Martin again concurred in part and dissented in part, reiterating her earlier view. *Id.* at 166a-171a.

5. The court of appeals granted petitioner's request for rehearing en banc. Pet. App. 14a. The parties filed supplemental briefs, in which the government maintained (*inter alia*) that suppression was unwarranted under the good-faith exception to the exclusionary rule. *Id.* at 11a, 13a. The en banc court of appeals affirmed. Pet. App. 1a-130a.

a. Like the panel, the en banc court found that the deputy had lawfully initiated the stop, that he had unlawfully prolonged it with approximately 25 seconds of questions about contraband in the car, and that suppression was unwarranted under the good-faith exception because the deputy's actions complied with then-controlling circuit precedent. *Id.* at 35a-52a.

In deciding to reach the good-faith exception, the court of appeals distinguished between waiver (the intentional relinquishment of a known right) and forfeiture (the failure to assert a right on time). Pet. App. 18a. The court determined that the government had forfeited, but had not waived, the good-faith exception at the panel stage. *Id.* at 24a-29a. The court then explained that, although it generally refuses to consider forfeited arguments, it retains the discretion to decide a case on a forfeited ground, which it can exercise if it finds that one of five "forfeiture exceptions" applies and also that "extraordinary circumstances" exist. Pet.

App. 29a, 35a; see *id.* at 19a-20a. And the court found both conditions satisfied here, observing that "the proper resolution of the issue [wa]s beyond any doubt" and determining that, "[i]n light of the policy underpinnings of the exclusionary rule and the specific circumstances of this case," it presented an "extraordinary circumstance." *Id.* at 29a-30a.

The court of appeals observed that its practice of supplemental en banc briefing inherently invites the parties to advance, and the court to rely on, arguments asserted for the first time at the en banc stage. The court then noted that, although the government had not raised the good-faith exception at the panel stage, it "did properly brief the good-faith exception to the *en banc* Court." Pet. App. 15a n.5; see *id.* at 15a-16a. The court of appeals was also "loath to reverse the District Court," which had "denied the suppression motion," "simply because the Government failed to adequately defend the Court's ultimately correct judgment." *Id.* at 32a-33a. And, recognizing that the exclusionary rule imposes significant costs on society in order to deter the police from violating the Fourth Amendment, the court explained that, "since the focus of the exclusionary rule is solely on deterring police misconduct, there is little sense in excluding evidence based on Government counsel's mistakes." *Id.* at 32a.

b. Chief Judge William Pryor issued a concurring opinion. Pet. App. 54a-60a. He emphasized that, once a court of appeals vacates a panel opinion and grants rehearing en banc, a party may properly raise additional arguments that it had not previously raised at the panel stage. *Ibid.*

Judge Newsom and Judge Jordan issued a dissent, in which three other judges joined. Pet. App. 61a-130a.

The dissent viewed the government as having waived, rather than forfeited, the good-faith exception. *Id.* at 84a-85a. The dissent further concluded that, even if the government had merely forfeited the issue, the court should not have excused that forfeiture. *Id.* at 99a. The dissent acknowledged that the court had "articulate[d] the correct legal standard governing *sua sponte* consideration and decision of a forfeited issue," but took the view that it did not justify affirmance based on the good-faith exception in the circumstances of this case. *Id.* at 99a-100a.

ARGUMENT

Petitioner contends (Pet. 12-29) that the en banc court of appeals erred by considering the applicability of the good-faith exception when the government failed to advance that ground for affirmance at the panel stage. The court correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review of the court of appeals' factbound decision is unwarranted.

1. This Court has explained that, under the principle of party presentation, a court should generally consider only the issues and arguments presented by the parties. *Wood* v. *Milyard*, 566 U.S. 463, 472 (2012). The Court has recognized, however, that the rule is not absolute, and that courts retain the discretion to consider forfeited issues (though not necessarily waived issues) in "exceptional cases." *Id.* at 473. Here, the court of appeals permissibly determined that the particularized circumstances of this case supported affirmance based on the good-faith exception to the exclusionary rule.

To begin with, although the government failed to affirmatively advance the good-faith exception as a ground for affirmance in its panel-stage brief, it "did

properly brief the good-faith exception to the *en banc* Court." Pet. App. 15a n.5. A court of appeals has the authority to consider contentions that a party raises at the en banc stage, even if the party did not raise them at the panel stage. When a court of appeals grants rehearing en banc, it vacates the panel decision and directly reviews the district court's judgment. See 11th Cir. R. 35-10. A court of appeals that has granted rehearing en banc is "review[ing] the issues anew," as if "hearing the appeal directly from the district court," and has the discretion to consider new contentions raised in the en banc briefs. Pet. App. 55a (W. Pryor, C.J. concurring); see *id.* at 54a-56a. If that were not so, courts of appeals "would simply look to the panel briefs while sitting *en banc* instead of requesting parties to submit new briefs." *Id.* at 15a n.5 (majority opinion).

Furthermore, the court of appeals was appropriately circumspect about imposing the costs of the judicially crafted exclusionary rule for the first time in this case, based solely on the government's forfeiture. See Pet. App. 30a-32a. A judgment entered by a federal court is "presumptively correct," *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 26 (1994) (citation omitted), and it is well established that a reviewing court may affirm a lower court's judgment on a rationale that the prevailing party does not affirmatively advance. In this case, the district court denied petitioner's motion to suppress the evidence seized during his traffic stop and ultimately entered a judgment of conviction. Pet. App. 32a. The court of appeals was rightly "loath to reverse the District Court simply because the Government failed to adequately defend the Court's ultimately correct judgment." *Id.* at 33a. "Exclusion exacts a heavy toll on both the judicial system

and society at large"; it "almost always requires courts to ignore reliable, trustworthy evidence," and "its bottom-line effect * * * is to suppress the truth and set the criminal loose in the community without punishment." *Davis* v. *United States*, 564 U.S. 229, 237 (2011). This Court's cases require society to "swallow this bitter pill when necessary, but only as a 'last resort.'" *Ibid.* (citation omitted).

Finally, the court of appeals correctly determined—and neither the dissent below nor the petition for a writ of certiorari has disputed—that the application of the good-faith exception here involved a "pure [issue] of law" whose "proper resolution" was "beyond any doubt" and "jump[ed] off the page." Pet. App. 29a-30a, 33a. It is well settled that a court may, in appropriate circumstances, consider a forfeited issue if the proper resolution of that issue is "obvious," *Day* v. *McDonough*, 547 U.S. 198, 209 (2006), a traditional principle reflected in a variety of procedural rules. See, *e.g.*, Sup. Ct. R. 24.1(a) ("[This] Court may consider a plain error not among the questions presented but evident from the record."); Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); Fed. R. Civ. P. 51(d)(2) ("A court may consider a plain error in the instructions that has not been preserved."). That principle carries added force with respect to pure issues of law. See, *e.g.*, *Kamen* v. *Kemper Financial Services*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 51

(1939) ("We are not bound to accept, as controlling, stipulations as to questions of law.").

2. Petitioner provides no sound basis for his position that the court of appeals was altogether foreclosed from affirming the district court's denial of suppression on good-faith grounds. As a threshold matter, while petitioner focuses on the decision of the court of appeals *panel*—arguing (Pet. 3), for example, that the "panel" erred by considering the good-faith exception "*sua sponte*" and "without prior notice to the parties"—in the Eleventh Circuit, as in other circuits, "the effect of granting a rehearing en banc is to vacate the panel opinion and the corresponding judgment." 11th Cir. R. 35-10. Accordingly, the proper focus here is on the en banc rehearing, in which the court considered the good-faith exception only after the government advanced the issue in its en banc brief and only after petitioner had the opportunity to address the issue in his own brief. See Pet. App. 15a n.5.

In addition, petitioner's insistence (Pet. 3, 21 n.2) that the government made a "conscious decision" at the panel stage to "abandon" reliance on the good-faith exception is misplaced. The court of appeals found, after reviewing the record, that the government's failure to affirmatively advance the good-faith exception constituted only a forfeiture, not a deliberate waiver. Pet. App. 24a-29a. Petitioner's objection to that factual determination does not warrant further review. Petitioner similarly errs in suggesting (Pet. 16) that the court of appeals' decision "would seemingly justify an appellate court raising *any* forfeited argument against suppression that it perceived in the record." The court of appeals expressly stopped short of holding that the costs of suppression "[s]tanding alone" justify excusing

a forfeiture. Pet. App. 32a. The court instead relied on "case specific reasons for why this case presents an extraordinary circumstance such that [the court] should exercise [its] discretion to excuse the Government's forfeiture." *Ibid.*

Finally, petitioner's contention (Pet. 18-19) that courts should refrain from excusing forfeitures by the federal government lacks merit. The government is subject to the same rules of forfeiture and waiver as any other party, and as discussed above, those rules allowed the court of appeals to reach the good-faith exception here. See pp. 7-10, *supra*. Petitioner asserts (Pet. 19) that excusing a forfeiture by the government in a criminal case interferes with the exercise of prosecutorial discretion, but that is not the case where, as here, the government forfeited (rather than deliberately waived) an argument that it has told the court that it supports and views as correct.

3. Contrary to petitioner's contention (Pet. 14-18), the court of appeals' decision does not conflict with this Court's decision in *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575 (2020). In that case, a criminal defendant had argued in the district court and on appeal that the criminal statutes at issue "did not cover her conduct, and if they did, they violated the Petition and Free Speech Clauses of the First Amendment as applied." *Id.* at 1578. The Ninth Circuit, however, had "moved" the case "onto a different track" by "nam[ing] three *amici* and invit[ing] them to brief and argue issues framed by the panel." *Ibid.* In doing so, the court of appeals relegated the parties to a "secondary role"; the "parties were permitted, but 'not required,' to file supplemental briefs 'limited to responding to any and all amicus/amici briefs," and the court granted 20 minutes

of argument time to the invited amici but only 10 minutes to the criminal defendant. *Id.* at 1578, 1581 (citation and emphasis omitted). The court of appeals then overturned the defendant's convictions based on the newly injected arguments, adopting a First Amendment overbreadth argument that was "contrary" to the theory that the defendant herself had advanced in the district court. *Id.* at 1581.

In reversing the court of appeals' decision in *Sineneng-Smith*, this Court emphasized that "a court is not hidebound by the precise arguments of counsel," but found that the Ninth Circuit's "radical transformation" of that case had gone "well beyond the pale." 140 S. Ct. at 1581-1582. No analogous circumstances are present here. None of the grounds for the court of appeals' action in this case was available in *Sineneng-Smith*: the court there was not reacting to a new argument raised by a party after a grant of rehearing; the issues injected by the court there were grounds for reversing rather than affirming the district court's judgment; and the proper resolution of the issues there was not plain or obvious. Conversely, the court of appeals here did not engage in the conduct that this Court condemned in *Sineneng-Smith*: it did not engineer a "radical transformation" of the appeal, add issues that were incompatible with a party's theory of the case, or relegate the parties to a "secondary role." 140 S. Ct. at 1578, 1582.

4. Petitioner is also mistaken in contending (Pet. 22-28; Pet. Supp. Br. 1-4), that the court of appeals' decision in this case conflicts with the decisions of other courts of appeals.

Petitioner cites (Pet. 22-27) cases in which the First, Second, Sixth, Seventh, and Tenth Circuits have

declined to consider alternative arguments for denying a suppression motion, either because the United States had failed to raise those arguments at all or because it had raised the arguments too late. See, *e.g.*, *United States* v. *Ramirez-Rivera*, 800 F.3d 1, 32 (1st Cir. 2015), cert. denied, 577 U.S. 1108 (2016); *United States* v. *Santillan*, 902 F.3d 49, 58 n.4 (2d Cir. 2018), cert. denied, 139 S. Ct. 1467 (2019); *United States* v. *Archibald*, 589 F.3d 289, 301 n.12 (6th Cir. 2009); *United States* v. *Leo*, 792 F.3d 742, 748-749 (7th Cir. 2015); *United States* v. *Woodard*, 5 F.4th 1148, 1154 (10th Cir. 2021). But although the courts in those cases declined to excuse forfeitures, none of those courts held that a court would be foreclosed from considering a forfeited argument in circumstances akin to those here. And the court of appeals' decision here did not set forth any categorical rule that would require different results in those cases.

To the contrary, the court of appeals here acknowledged that "in most situations" it is inappropriate for a court to consider a forfeited argument. Pet. App. 18a. The court found it appropriate to excuse the forfeiture here for "case specific reasons." *Id.* at 32a. Those case-specific reasons did not apply in the cases that petitioner cites. For example, in none of the cases cited by petitioner did a court of appeals refuse to consider an argument raised in an en banc brief simply because a party had failed to raise that argument in a panel-stage brief. Nor did any of the cases cited by petitioner involve an issue whose "proper resolution" was "beyond any doubt." *Id.* at 30a. And while petitioner appears to predict (Pet. 28) that the court of appeals decision here will invite disregard of forfeiture in many other cases, it is far from clear how many cases the court will view to be on all fours with this one—which involves an

unusual en banc wrinkle, see Pet. App. 15a n.5; *id.* at 55a (W. Pryor, C.J., concurring)—and to warrant an exercise of discretion to affirm on a ground not affirmatively advanced by a party. See *id.* at 18a (majority opinion) ("[I]t is inappropriate for a court to raise an issue *sua sponte* in most situations."); *id.* at 32a ("[T]here are * * * case specific reasons for why this case presents an extraordinary circumstance such that we should exercise our discretion to excuse the Government's forfeiture of the good-faith exception.").

Ultimately, petitioner accepts the court of appeals' articulation of the applicable legal standard and objects only to the court's application of that standard to this case. He acknowledges that a court may excuse forfeitures "'in exceptional cases,'" but contends that "[t]his case does not approach the type of exceptional or extraordinary circumstances required." Pet. 15 (citations and emphasis omitted). The dissent below likewise agreed that the court of appeals had "articulate[d] the correct legal standard," disagreeing only with the manner in which the court had "appl[ied]" that standard on these facts. Pet. App. 99a-100a (emphasis omitted). This Court, however, typically does not grant a petition for a writ of certiorari "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10; see *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That is all the more so when the asserted error involves the misapplication of rules governing waiver and forfeiture. See *Joseph* v. *United States*, 574 U.S. 1038, 1040 (2014) (statement of Kagan, J., respecting the denial of certiorari) ("We do not often review the circuit courts' procedural rules.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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