No. 16-1009

IN THE
Supreme Court of the United States

MURAT AKSU,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari
to the Superior Court of the State of California
for the County of Ventura, Appellate Division

REPLY BRIEF FOR THE PETITIONER

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Respondent acknowledges that there is a conflict among the lower courts on the question presented in the petition. *See, e.g.*, BIO at 5, 6-9. Respondent tries to minimize the significance of that conflict by insisting that the standard of review makes little difference and that this case is not an appropriate vehicle for resolving the question. Respondent also repeatedly invokes this Court's decision in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), as support for its position. Respondent is wrong at every turn.

1. Respondent's argument that the standard of review in cases of this kind makes little difference, *e.g.*, BIO at 5-6, 9-10, 13, is implausible on its face and is inconsistent with the approach this Court has repeatedly taken. *See, e.g.*, Harry T. Edwards & Linda A. Elliot, *Federal Court Standards of Review* vii (2007) (standards of review "are critically important in determining the parameters of appellate review"); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric*, 62 U. Chi. L. Rev. 1371, 1391 (1995) (the standard of review "more often than not determines the outcome"). And, of course, the Court often grants certiorari solely to decide what standard of review applies. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005); *Koon v. United States*, 518 U.S. 81, 85 (1996).

The question in this case – whether consent to a search was given voluntarily – is analytically indistinguishable from the question of whether a confession was made voluntarily. Contrary to what Respondent says, that is the basis of this Court's decision in *Schneckloth v. Bustamonte*, as we note

below. *See* pp. 6-7, *infra*. But this Court has certainly not treated the standard of review in voluntariness of confession cases as "not . . . especially significant." BIO at 6. On the contrary, the Court has been emphatic in "reaffirm[ing] that it [is] 'not bound by' a state-court voluntariness finding" and "reiterate[ing] its historic 'duty to make an independent evaluation of the record.'" *Miller v. Fenton*, 474 U.S. 104, 110 (1985) (quoting *Mincey v. Arizona*, 437 U.S. 385, 398 (1978)). Far from treating the standard of review as an insignificant question that might appropriately be resolved one way on some occasions (or in some jurisdictions) and in a different way on others – as Respondent urges in this case – the Court has "[w]ithout exception" held that "the ultimate issue of 'voluntariness' is a legal question" and one that imposes upon an appellate court an "independent obligation to decide the constitutional question." *Miller*, 474 U.S. at 110. What is true of the voluntariness of a confession should also be true of the voluntariness of consent.

Similarly, the Court also did not think it was inconsequential when lower courts disagreed about the standard of review of a trial court's determination of another Fourth Amendment issue that, like the voluntariness of consent, arises frequently: whether officers have probable cause or reasonable suspicion to justify a seizure. The Court granted certiorari to resolve that conflict in *Ornelas v. United States*, 517 U.S. 690 (1996), and the Court's opinion in *Ornelas* explained why that conflict should be resolved in favor of *de novo* review. The Court's explanation, *a fortiori*, rebuts Respondent's suggestion that there is no harm in

allowing different states and different federal circuits to apply different standards of review. Allowing such variation would mean that the scope of the Fourth Amendment would depend on "'whether different trial judges dr[e]w [different] conclusions'" from similar facts. 517 U.S. at 697 (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)). "Such varied results," this Court said, "would be inconsistent with the idea of a unitary system of law" and, "if a matter-of-course, would be unacceptable." 517 U.S. at 697. Moreover, "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify . . . legal principles," and "*de novo* review tends to unify precedent and will come closer to providing law enforcement officers with" clear guidance. *Id.* *See also* *Thompson v. Keohane*, 516 U.S. 99, 106 (1995). All of these points apply with at least equal force to the question of whether an individual has voluntarily consented to a full-body search and a search of his personal property.

Respondent says that many lower courts have not reconsidered their positions in light of this conflict or analyzed that issue in recent opinions. *See* BIO at 6-9. But that is an argument for, not against, this Court's intervention. It shows that the conflict is entrenched and will not be resolved by the lower courts themselves, and that the conditions that the *Ornelas* Court sought to avoid will persist until this Court decides the question.

2. This case itself illustrates why the standard of review matters and why *de novo* review is appropriate. For that reason alone, this case is a suitable vehicle for this Court's review.

As the Court has explained, *de novo* review is appropriate when the historical facts can be analytically separated from the legal standard that the trial court applied, so the legal standard can be reviewed by an appellate court. *See, e.g.*, *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998); *Ornelas*, 517 U.S. at 696-97; *Miller*, 474 U.S. at 117. This case meets that description. Even the trial judge in this case recognized this point. He began his oral opinion by remarking on the difficulty of the question he was about to resolve, referring to "very legitimate issues" and saying "[t]his one the Court has to – had to think hard on." Pet. App. 22a. But the trial judge's uncertainty was not about questions of fact; he brusquely rejected Aksu's testimony and credited the officers'. *See id.* at 22a, 28a. The difficult question that the trial judge acknowledged was whether those facts satisfied the legal standard for consent.

The officers' testimony revealed the following facts. Aksu was confronted by an officer who demanded that he put down his cell phone and speak with the officer. Tr. 65, 88.[1] The officers acknowledged that Aksu was not free to leave and that one of them stood in a position designed to prevent him from escaping. Tr. 63-64, 66, 79. The officers initially accused Aksu of plotting a terrorist attack. Tr. 80-81. Aksu, the trial judge found, "did break down at times. He was obviously very concerned and scared." Pet. App. 25a. The officer who conducted the search held Aksu's hands behind his back. Tr. 213.

[1] "Tr." refers to the transcript of the suppression hearing. See Pet. 4 n.1.

When the trial judge announced his conclusion that Aksu had consented, he called it "directed consent" and said that Aksu "wanted to get out of there. He wanted to consent because it was his perception that consenting would allow him to just move on." Pet. App. 26a. But at the time Aksu gave the putative consent, the officers were entitled to detain him only for a short period of time, as an investigatory stop (the officers did not have probable cause for an arrest, as they acknowledged), and there is no evidence that Aksu understood that.

These facts raise a well-defined legal question, suited to *de novo* review by an appellate court, about the voluntariness of Aksu's consent. Respondent's assertion that an appellate court could not possibly have disagreed with the trial judge's resolution of that issue is plainly incorrect given the trial judge's own acknowledgment that it was a difficult issue. Pet. App. 22a. But whatever the proper resolution of the issue, the approach taken by the court on appellate review below – to recite only those facts that could support a voluntariness finding, ignore all the remaining circumstances, and affirm the judgment so long as the trial court's "findings" were "supported by substantial evidence" – was misconceived. The proper question is not whether the trial court's ruling had some factual basis but rather whether the trial court's legal conclusion about voluntariness was correct. The appellate court never answered that question.

To put the point another way: if Aksu had confessed to a crime in these precise circumstances, an appellate court would review *de novo* the legal question of whether the confession was voluntary. The same

standard should apply to the voluntariness of Aksu's consent to the search.

3. Respondent repeatedly invokes *Schneckloth v. Bustamonte*, *supra*, in support of its position. It is true that *Schneckloth*, citing the standard used by California courts, said that voluntariness "is a question of fact to be determined from the totality of all the circumstances." *E.g.*, 412 U.S. at 227. That phrase may be the source of the view held by the courts, on one side of the split in this case, that use a deferential standard of review. As we explained in the petition, however, that phrase did not purport to define the standard of appellate review. *See* Pet. 32-33. As the Court said, the question in *Schneckloth* was "what must the prosecution prove" at trial to demonstrate that consent was voluntarily given. 412 U.S. at 223.

More important, though, the lynchpin of the Court's reasoning in *Schneckloth* – indeed, the central theme of the Court's opinion – is the similarity between the inquiry into the voluntariness of consent to a search and the inquiry into the voluntariness of a confession. The Court began its analysis by discussing, at length, the standard of voluntariness used in the confession cases. *See* 412 U.S. at 223-29. The Court's conclusion in *Schneckloth* was that "there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness,'" *id.* at 229 – by which the Court meant the definition developed in the confession cases. *See, e.g.*, *id.* at 248 & n.37.[2] The Court in

[2] Respondent's arguments to the contrary are based on obvious misreadings of *Schneckloth*. Respondent cites the portions of the

Schneckloth could hardly have been clearer that the same definition of voluntariness applies whether the issue is the voluntariness of consent or the voluntariness of a confession. It follows that the standard of appellate review should be the same as well.

4. Finally, Respondent makes a somewhat vague argument to the effect that state courts should be allowed to adopt their own standards of appellate review in a case of this kind. BIO at 14.

It is not entirely clear what Respondent means. A state court of course may establish the standards of review that apply to claims under the state constitution, but this case unquestionably raises a claim under the Fourth Amendment of the United States Constitution – as underscored by Respondent's own reliance on *Schneckloth*. The conflict among the lower courts concerns that issue, as well. Respondent refers to this Court's lack of supervisory authority over state courts, but in cases raising issues similar to the one presented

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opinion in *Schneckloth* that address whether *additional* safeguards should be required to ensure that consent to a search is voluntary – for example, a requirement of "'an intentional relinquishment or abandonment of a known right or privilege,'" 412 U.S. at 235 (citation omitted), or warnings like those required by *Miranda v. Arizona*, 384 U.S. 436 (1966). In answering this question in the negative, the Court distinguished the question of consent under the Fourth Amendment from the waiver of trial rights, *see* BIO at 8, citing 412 U.S. at 237-46, and distinguished the Fourth Amendment exclusionary rule from principles that protect the truth-seeking function of a trial, *see* BIO at 12, citing 412 U.S. at 241-42. Those passages in *Schneckloth* did not concern the definition of voluntariness, which the Court discussed at length earlier in the opinion.

here, such as *Ornelas v. United States*, *supra*, there is no suggestion that the Court was limiting its holding to federal courts. Instead, the analysis in that case is equally applicable to both state and federal courts, and the question here likewise concerns the implementation of a constitutional right. And, of course, many of the cases about appellate review of the voluntariness of confessions – the most direct analogy to the issue here – arose in state court and thus involved appellate review of a state court decision. At one point, BIO at 14, Respondent seems to suggest that state appellate courts may devise their own standards of review, independent of what this Court determines, even when they are deciding federal constitutional questions. But Respondent cites no authority for that far-reaching suggestion and certainly no reason to believe that the court below relied on any such theory.

CONCLUSION

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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