No. _____

In The Supreme Court of the United States

GERAND RATCLIFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041 (1973), the Court stated that "whether a consent to a search was in fact 'voluntary' . . . is a question of fact to be determined from the totality of all the circumstances." 412 U.S. at 227, 93 S. Ct. at 2047–48. *Schneckloth* did not concern the standard governing appellate review of voluntariness determinations, but many federal courts of appeals and state courts of last resort have taken the Court's "question of fact" characterization to mean that voluntariness should be reviewed with the same deference as other findings of fact. Many other courts disagree, noting that the deference of clear-error review is inconsistent with the independent review the Court has prescribed for other fact-intensive determinations affecting constitutional rights, including the voluntariness of a suspect's confession. And courts on both sides of the divide have handled the matter inconsistently.

This split of authority is intractable and longstanding, with some courts explicitly stating that *Schneckloth* will bind them to their current approaches until the Court resolves the matter. Mr. Ratcliff petitions for a writ of certiorari to address this question:

> Is the voluntariness of consent to search a question of fact that is subject to the same deferential review as findings of historical fact?

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Gerand Ratcliff respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The district court's memorandum opinion and order denying Mr. Ratcliff's motion to suppress with regard to physical evidence and granting the motion with regard to certain statements are unpublished, and they are included in Appendix A.

The Eleventh Circuit's decision affirming the district court's judgment, *United States v. Ratcliff*, --- F. App'x ---, 2018 WL 1081208 (11th Cir. Feb. 28, 2018), and its order denying Mr. Ratcliff's petition for panel rehearing are unreported, and they are included in Appendix B.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit affirmed Mr. Ratcliff's conviction on February 28, 2018, and denied his petition for panel rehearing on April 11, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides,

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

INTRODUCTION

Mr. Ratcliff signed a handwritten consent-to-search form after watching police roam freely throughout his house for over an hour with neither a warrant nor consent. During that time, they confronted him with incriminating evidence and questioned him about it. Some officers disappeared from his view for lengthy periods. After receiving his consent, the police searched the home further, and their observations formed much of the basis for their subsequent application for a search warrant.

Police depend heavily on consent to justify searches that otherwise would require probable cause and, in many cases, warrants. Yet the federal courts of appeals and state courts of last resort are hopelessly divided over the correct standard for reviewing determinations of whether consent to a search was voluntary. Individual courts regularly apply different standards of review from case to case, often without giving a reason for the inconsistency or even acknowledging it.

The courts that review the voluntariness of consent as a question of fact, reversible only for clear error, often cite this Court's statement in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041 (1973), that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." 412 U.S. at 227, 93 S. Ct. at 2047–48. The question before the Court in *Schneckloth*, however, was how *a trial court* should evaluate voluntariness—specifically, whether the government must show "knowledge of the right to refuse consent," *id.* at 249, 93 S. Ct. at 2059. Noting the limited nature of *Schneckloth*'s

holding, many other courts have held that the proper standard of appellate review is de novo.

Voluntariness of consent is one of the most frequently contested Fourth Amendment questions, yet for decades the standard of review for those questions has sharply divided the nation's appellate courts. Even as police "increasingly . . . rely upon purported 'consents'" as the entire justification for searches, 4 Wayne R. LaFave, *Search & Seizure* § 8.2 (5th ed. 2017), deferential review of trial courts' conclusions limits the ability of "appellate courts . . . to maintain control of, and to clarify, the legal principles" governing the validity of police methods, *Ornelas v. United States*, 517 U.S. 690, 697, 116 S. Ct. 1657, 1662 (1996).

Mr. Ratcliff's case is an excellent vehicle for the Court to resolve this split of authority. The voluntariness of his consent in the midst of police officers' extended, warrantless intrusion in his house was crucial to the validity of the search warrant they subsequently obtained. This Court has stated that consent must be "the product of an essentially free and unconstrained choice by its maker," *Schneckloth*, 412 U.S. at 225, 93 S. Ct. at 2047, not mere "acquiescence to a claim of lawful authority," *Bumper v. North Carolina*, 391 U.S. 543, 549, 88 S. Ct. 1788, 1792 (1968). But in reviewing the district court's application of those principles, the Eleventh Circuit gave "'a great deal of deference' to" the district court's voluntariness finding, Pet. App. 58a, and affirmed because it did not have "a 'definite and firm conviction that the trial judge erred' in finding that Ratcliff's consent was voluntary," *id.* (quoting *United States v. Garcia*, 890 F.2d 355, 359 (11th Cir. 1989)). The Court should grant

certiorari to resolve the enduring conflict as to the proper standard of appellate review.

STATEMENT OF THE CASE

1. Federal Criminal Charges. Gerand Ratcliff was indicted in the Northern District of Alabama on counts of possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B); possession of a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A); and possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). Doc. 28 (superseding indictment); *see also* Doc. 10 (initial three-count indictment).

2. Proceedings in District Court. Mr. Ratcliff moved to suppress statements he made to police and physical evidence seized from his house. The district court held evidentiary hearings on the motion and suppressed certain statements of Mr. Ratcliff's but held that all physical evidence was admissible. Mr. Ratcliff entered a conditional guilty plea to all three counts, reserving the right to appeal the partial denial of his motion to suppress, and he was sentenced to 120 months' imprisonment.

3. Statement of the Facts. On November 3, 2015, a car dealership contacted OnStar, a remote-access system, to report a cream-colored Cadillac Escalade as stolen. An OnStar agent remotely accessed the vehicle's GPS coordinates, which placed it in Pleasant Grove, Alabama. The agent called the Pleasant Grove Police Department to report what she had learned.

Three uniformed Pleasant Grove police officers went to the address OnStar provided, a single-residence property where Mr. Ratcliff lived. They arrived at the house at 5:49 p.m. The officers testified that they planned to conduct a "knock and talk." Two of them, Corporal Duane Martin and Officer Kendal Coker, walked up a driveway to the right side of the house and looked into Mr. Ratcliff's basement garage through a window in the garage door. Inside, they saw a vehicle that they believed to be a cream-colored Escalade. The third officer, Samuel Powell, walked across the front lawn to the left side of the house, where he could see inside through a window.

After looking in the garage, Corporal Martin approached Mr. Ratcliff's front door. Officer Coker remained in the driveway. Corporal Martin knocked on the front door and announced, "Police Department." Doc. 25 at 100. He heard footsteps approach the door, then a voice mumble something Corporal Martin could not discern. He next heard footsteps moving away from the door, first walking and then running. On the left side of the house, Officer Powell also heard the sound of running footsteps and "saw a blur go by." *Id.* at 49. The officers watched for a person coming out of the house, but no one did, and after about 30 seconds, Mr. Ratcliff opened the front door.

Corporal Martin immediately grabbed Mr. Ratcliff's arm and pulled him to the floor as Officers Coker and Powell came up onto the front porch to assist. All three officers testified that they smelled a strong odor of raw marijuana when the door opened. Officer Coker handcuffed Mr. Ratcliff, and at 5:59 p.m. an officer radioed a dispatcher to say that Mr. Ratcliff had been detained.

Corporal Martin and Officer Powell performed a protective sweep of the house to see if anyone else was inside. No one was, but during the sweep they saw a pill bottle with no label sitting on a bedroom nightstand, the butt of a pistol sticking out from between a mattress and box springs, and, floating in a toilet, a piece of raw marijuana. After about two minutes, they finished the sweep in the basement garage, again seeing the Escalade, then returned to the front door to inform Officer Coker that the house was clear.

Mr. Ratcliff still lay on the floor in handcuffs. The officers moved him into a seated position in the front doorway and asked him about the Escalade and the marijuana smell. He told them the Escalade belonged to a friend and was not his. He said a small bag of marijuana in the kitchen was the source of the marijuana odor, but the officers did not find a bag of marijuana.

Officer Powell had a key to the Escalade—he testified that he did not recall how he got it—and he and Corporal Martin returned to the basement, leaving Officer Coker with Mr. Ratcliff. They checked registration information for the vehicle, but both the vehicle identification number ("VIN") and the license plate number were legally registered to a vehicle that was owned by a woman in Montgomery, Alabama, and had never been reported stolen. Officer Powell opened the driver's door, sat down, and pushed a button to speak with an OnStar agent. The agent remotely activated the Escalade's alarm, headlights, and horn. The officers testified that they were not sure how long they were in the garage, but they allowed that it might have been 20 to 30 minutes. When they were done, they rejoined Officer Coker at the front door,

and one of the officers called Pleasant Grove narcotics detective Andy Reed to ask him to come to the house. He arrived about ten minutes later, around 6:30 or 6:40 p.m. Mr. Ratcliff still sat in the doorway.

Detective Reed testified that he also smelled a strong odor of marijuana as he approached the house. When he entered, the officers moved Mr. Ratcliff to a sofa in a room at the front of the house. Detective Reed sat down beside him and asked him about the marijuana smell. Mr. Ratcliff said that he had flushed about an ounce of marijuana down the toilet when he first saw police outside.

While Detective Reed questioned Mr. Ratcliff, Corporal Martin went back to the bedroom where he had seen a pistol earlier. He cleared it of ammunition and, at 6:57 p.m., radioed the gun's serial number to a dispatcher.

Detective Reed also talked to Mr. Ratcliff, who was still handcuffed, about consenting to a search of his house. He testified, "I basically asked for consent, [']either you can give me permission to search your residence because I'm here because of the way your house smells, or I can go find a judge, get a search warrant, and then I'll come back and then we will do that.[']" Doc. 34 at 244.

Mr. Ratcliff said he would consent, and Detective Reed went outside to his truck to look for a pre-printed consent-to-search form. He was unable to find one, so he hand-wrote a statement giving Pleasant Grove police permission to search the house for illegal narcotics and related items. Detective Reed removed Mr. Ratcliff's handcuffs, and both of them signed the paper and recorded the time as 7:05 p.m.

Detective Reed put handcuffs back on Mr. Ratcliff and began what he described as a walk-through of the house, which he estimated lasted between 10 and 30 minutes. He picked up the unlabeled pill bottle and inspected its contents. He recognized them as hydrocodone pills, an opioid medication. He opened dresser drawers and saw plastic baggies and two digital scales.

Detective Reed also saw a large safe in a bedroom closet and suspected that it might contain marijuana. He asked Mr. Ratcliff whether the safe contained marijuana, or guns, or a million dollars, and Mr. Ratcliff said no each time. He then asked whether the safe contained $100,000. Mr. Ratcliff said yes and told Detective Reed that he would split the money with him if Detective Reed would allow him to leave. The offer made Detective Reed suspicious that there might be more drugs in the house. He had Mr. Ratcliff open the safe and saw a large amount of cash inside. Mr. Ratcliff again offered half of it to him.

Detective Reed then spoke with Corporal Martin and Officers Coker and Powell, and "I basically said, [']okay, we're done.[']" *Id.* at 254. He explained, "[N]othing against my handwritten [consent form], but I just felt more comfortable going ahead and getting a search warrant . . . ." *Id.*

Detective Reed drafted two alternative affidavits in support of the application—one "based on the marijuana floating in the toilet," and one "for the pills sitting on the nightstand" that he had identified during his post-consent walk-through. *Id.* at 256. He presented both to a judge to "allow him to determine which one was the stronger between the two," and the judge issued a warrant based on "the

[affidavit] with the pills . . . .” *Id.* Near the end, the affidavit stated, “Said Hydrocodone and evidence will support Ratcliff’s involvement in illegal activities, more specifically illegal drug activities . . . .” Gov’t Ex. 8 at 3.

Police returned to the house to execute the search warrant later that night. They seized the pill bottle; two pistols; a shotgun; ammunition magazines; two packages containing about a kilogram of cocaine apiece; several digital scales; a food vacuum sealer; kilogram wrappers with white powder residue; and approximately $247,460 in cash.

4. Appeal to Eleventh Circuit. Mr. Ratcliff appealed his convictions to the Eleventh Circuit, arguing that the district court erred in denying his motion to suppress the physical evidence seized from his house. Among other grounds for reversal, he argued that his consent “was not voluntary and was irredeemably tainted by the Fourth Amendment violations that preceded it.” Ratcliff Initial Br. 43.

The Court of Appeals affirmed. It held that officers’ pre-consent actions were justified both to prevent imminent destruction of evidence and as a protective sweep to ensure officer safety. Pet. App. 55a–57a. The court also affirmed the district court’s determination that Mr. Ratcliff’s consent was voluntary, stating, “When a district court finds that consent was voluntarily given, we give ‘a great deal of deference’ to that finding. We will disturb such a finding ‘only if we are left with the definite and firm conviction that the trial judge erred.’” *Id.* at 58a (citations omitted) (quoting *United States v. Garcia*, 890 F.2d 355, 359 (11th Cir. 1989)). And having held that

none of the information in the warrant affidavit was obtained in violation of the Fourth Amendment, the court held that the warrant was valid. *Id.* at 59a–60a.

REASONS FOR GRANTING THE PETITION

I. Federal and state appellate courts are deeply divided over how to review Fourth Amendment determinations regarding voluntariness of consent to search.

This Court "'[o]ver and again . . . has emphasized' . . . that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 356, 88 S. Ct. 507, 514 (1967) (footnotes omitted) (quoting *United States v. Jeffers*, 342 U.S. 48, 51, 72 S. Ct. 93, 95 (1951)). Yet it is surpassingly common for police officers to inspect citizens' "persons, houses, papers, and effects," U.S. Const. amend. IV, with neither a prior nor a subsequent judicial determination of probable cause, because they elicit individuals' consent.

That by itself is not necessarily a Fourth Amendment problem. "The practice of making searches by consent is not a disfavored one," 4 Wayne R. LaFave, *Search & Seizure* § 8.1 (5th ed. 2017), and it is an appealing option for police, for several reasons. Since an officer may ask for consent whether he has probable cause or not, doing so can open the door to a search—literally, in many cases—where it otherwise would remain closed. *See id.* And because consent will avoid later inquiry into probable cause or other justification, police may regard "the consent search . . . as the 'safest' course of action in terms of minimizing the risk of suppression." *Id.* Certainly,

obtaining consent on the spot is less of a hassle than securing a warrant, *see id.*, and it might also be easier; this Court has noted the "substantial number of instances in which suspects who are asked for permission to search actually consent, albeit imprudently," *Georgia v. Randolph*, 547 U.S. 103, 122, 126 S. Ct. 1515, 1528 (2006). Experience has taught police that after a consent search, "absent extraordinary circumstances, chances are that a court . . . will conclude that the consent was valid . . . ." 4 LaFave, *Search & Seizure* § 8.2 (quoting Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 212 (2002)). So it is unsurprising that "police . . . have increasingly come to rely upon purported 'consents' as the basis upon which wholesale searches are undertaken without probable cause and upon no or minimal suspicion." *Id.*

To justify a search, consent must be voluntarily given, and with the present-day profusion of consent searches, the voluntariness of a person's consent is a frequent subject of criminal litigation. Even so, this Court has never prescribed a standard of appellate review of trial courts' voluntariness determinations, and federal courts of appeals and state courts of last resort have been unable to reach consensus on their own. Many federal and state courts have held that voluntariness is a factual conclusion that is reviewed only for clear error on appeal,[1] even though that differs

[1] *See United States v. Isiofia*, 370 F.3d 226, 232 (2d Cir. 2004) ("[W]e review the District Court's conclusions on the voluntariness of Isiofia's consents for clear error."); *United States v. Givan*, 320 F.3d 452, 459 (3d Cir. 2003) ("The district court's determination that [a person's] consent was voluntary was a determination of fact subject to review on a clear error basis."); *United States v. Lee*, 793 F.3d 680, 684 (6th Cir. 2015) ("We will . . . review the question of consent under the 'clear error' standard."); *United States v. Quintero*, 648 F.3d 660, 665 (8th Cir. 2011) ("The

voluntariness of a consent to search is a factual question that is reviewed for clear error." (quoting *United States v. Johnson,* 619 F.3d 910, 918 (8th Cir. 2010))); *United States v. Brown*, 563 F.3d 410, 414 (9th Cir. 2009) ("We review for clear error a district court's determination of the voluntariness of a defendant's consent to a search." (quoting *United States v. Todhunter*, 297 F.3d 886, 891 (9th Cir. 2002))); *United States v. Spivey*, 861 F.3d 1207, 1212 (11th Cir. 2017) ("Voluntariness is 'a question of fact' that we may disturb only if clearly erroneous." (citations omitted) (quoting *Schneckloth*, 412 U.S. at 227, 93 S. Ct. at 2048)); *United States v. Wilson*, 605 F.3d 985, 1027 (D.C. Cir. 2010) ("Since this inquiry is factually intensive, we will reverse a district court's determination that consent was voluntary only for clear error."); *State v. Butler*, 302 P.3d 609, 613 (Ariz. 2013) (en banc) ("Voluntariness is a question of fact, and '[w]e review the trial court's voluntariness finding for abuse of discretion.'" (quoting *State v. Cota*, 272 P.3d 1027, 1035 (Ariz. 2012))); *People v. Monterroso*, 101 P.3d 956, 967–68 (Cal. 2004) ("Our review of the trial court's implied finding that defendant voluntarily consented to the search is limited. . . . 'On appeal . . . the trial court's findings . . . must be upheld if supported by substantial evidence.'" (quoting *People v. James*, 561 P.2d 1135, 1139 (Cal. 1977))); *State v. Jenkins*, 3 A.3d 806, 833 n.33 (Conn. 2010) ("[W]e continue to apply the clearly erroneous standard of review to trial courts' determinations with respect to the voluntariness of consents to search."); *Knight v. State*, 690 A.2d 929, 932 (Del. 1996) ("The trial judge's determination that a defendant's consent was voluntary will not be set aside on appeal unless that finding is clearly erroneous."); *In re J.M.*, 619 A.2d 497, 501 (D.C. 1992) ("[W]e [are] 'bound to uphold the trial court's finding that a search was consensual unless such a finding is clearly erroneous.'" (quoting *Kelly v. United States*, 580 A.2d 1282, 1288 (D.C. 1990))); *State v. Varie*, 26 P.3d 31, 35 (Idaho 2001) ("The district court's determination that Varie's consent was freely and voluntarily given is supported by the evidence and is not clearly erroneous."); *People v. Smith*, 827 N.E.2d 444, 452 (Ill. 2005) ("[W]e review the circuit court's finding of fact that defendant's consent to the pat-down search was voluntary to determine if it is against the manifest weight of the evidence."), *abrogated on other grounds by People v. Luedemann*, 857 N.E.2d 187, 199 (Ill. 2006); *State v. Moore*, 154 P.3d 1, 13 (Kan. 2007) ("[V]oluntariness of a consent to search is a question of fact to be determined from all the circumstances. . . . Given our limited standard of review on this issue, we determine that substantial competent evidence . . . supports the district court's factual finding that Moore's consent to search was voluntary."); *Commonwealth v. Gray*, 990 N.E.2d 528, 540 (Mass. 2013) ("[A] finding of voluntariness . . . should not be reversed absent clear error by the judge." (quoting *Commonwealth v. Carr*, 936 N.E.2d 883, 890 (Mass. 2010))); *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011) ("[T]he 'clearly erroneous' standard controls our review of a district court's finding of voluntary consent."); *State v. LaBarre*, 992 A.2d 733, 740 (N.H. 2010) ("We will disturb the trial court's finding of consent only if it is not supported by the record." (quoting *State v. Watson*, 864 A.2d 1095, 1098 (N.H. 2004))); *Campbell v. State*, 339 P.3d 258, 265 (Wyo. 2014) ("Whether consent is voluntary is a question of fact . . . .

from the approach this Court requires for other, similarly fact-intensive Fourth Amendment determinations. But many other courts treat voluntariness as a mixed question of law and fact and review it de novo.[2] And quite a few courts do not fit easily

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We will not disturb a district court's resolution of that factual issue unless . . . we conclude that it is clearly erroneous.").

[2] *See United States v. Moon*, 513 F.3d 527, 536 (6th Cir. 2008) ("While we review the determination of the ultimate question of whether there was consent *de novo,* we must afford due weight to the factual inferences and credibility determinations made by the district court."); *United States v. Magness*, 69 F.3d 872, 874 (8th Cir. 1995) ("We review the ultimate question of voluntariness de novo but uphold the district court's factual findings unless they are clearly erroneous."); *People v. Chavez-Barragan*, 379 P.3d 330, 338 (Colo. 2016) (In determining voluntariness of consent, "we review the trial court's findings of historic fact deferentially, accepting them if they are supported by competent record evidence, but we review the legal effect of those facts de novo."); *State v. Yong Shik Won*, 372 P.3d 1065, 1076 (Haw. 2015) ("[T]he ultimate issue of whether the defendant provided 'consent' is reviewed de novo."); *State v. Nadeau*, 1 A.3d 445, 454 (Me. 2010) ("The ultimate question of whether the facts, as found, establish that an individual consented to the ensuing search and seizure is a distinctly legal question that we will review de novo."); *State v. Wilson*, 367 A.2d 1223, 1231 (Md. 1977) ("On appeal, we examine the entire record and make an independent determination of the ultimate issue of voluntariness."); *State v. Tyler*, 870 N.W.2d 119, 127 (Neb. 2015) ("[W]e review the trial court's findings [of historical facts] for clear error. However, whether those facts or circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which we review independently . . . ."); *State v. Moore*, 318 P.3d 1133, 1139 (Or. 2013) ("[U]ltimately, whether consent was voluntary is a question of law, and appellate courts are not bound by the trial judge's conclusion as to the voluntariness of a consent to search."), *adhered to as modified on other grounds on reconsideration*, 322 P.3d 486 (Or. 2014); *State v. Shelton*, 990 A.2d 191, 199 (R.I. 2010) ("[T]he determination of the voluntariness of an individual's consent to search is reviewed by this Court *de novo*. However, . . . 'we give deference to the findings of historical fact made by a trial justice in the context of making that determination.'" (citations omitted) (quoting *State v. Texter,* 923 A.2d 568, 577 (R.I. 2007))); *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993) ("[T]he trial court's ultimate conclusion that a consent was voluntary or involuntary is to be reviewed for correctness. The trial court's underlying factual findings will not be set aside unless they are found to be clearly erroneous." (citation omitted)); *State v. Weisler*, 35 A.3d 970, 982–83 (Vt. 2011) ("[W]e are persuaded that the reasoning of those courts that have adopted independent review [of the voluntariness of consent] is fundamentally sound, and that any objections are without merit."); *State v. Artic*, 786 N.W.2d 430, 439 (Wisc.

into either category, either (1) because they vacillate between the two standards of review[3] or (2) because they employ de novo review where the facts are uncontested—even while describing the contested matter of voluntariness as a question of fact.[4]

2010) ("[V]oluntariness of consent . . . [is a] question[ ] of constitutional fact. . . . We review the circuit court's findings of historical fact to determine if they are clearly erroneous, and we independently apply those facts to constitutional principles." (citations omitted)).

[3] *Compare United States v. Weidul*, 325 F.3d 50, 53 (1st Cir. 2003) ("[V]oluntariness of consent is a factual matter that is subjected to the clear error standard of review"), *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996) ("The voluntariness of consent to search is a factual question, and as a reviewing court, we must affirm the determination of the district court unless its finding is clearly erroneous."), *United States v. Perales*, 886 F.3d 542, 545 (5th Cir. 2018) ("Voluntariness of consent is a factual inquiry that is reviewed for clear error."), *and United States v. Jones*, 614 F.3d 423, 425 (7th Cir. 2010) ("We will reverse a district court's finding of voluntary consent only if it is clearly erroneous."), *with United States v. Casey*, 825 F.3d 1, 14 (1st Cir. 2016) ("This court reviews the ruling on suppression de novo, accepting its underlying factual findings unless clearly erroneous. The issue of consent to search is reviewed de novo." (citation omitted)), *United States v. Carter,* 300 F.3d 415, 423 (4th Cir. 2002) ("Because the 'voluntariness' of a search is a matter of law, it is reviewed de novo."), *United States v. Asibor*, 109 F.3d 1023, 1038 (5th Cir. 1997) ("We review *de novo* the voluntariness of consent to a search."), *and United States v. Wade*, 400 F.3d 1019, 1021 (7th Cir. 2005) ("Questions of law—that is, the legal conclusion of whether Wade's consent was voluntary and whether he was illegally seized—are reviewed *de novo*."); *see also, e.g.*, *Lee*, 793 F.3d at 684 ("As for the question of consent, this court has inconsistently announced both a de novo and a clearly erroneous standard of review."); *Chavez-Barragan*, 379 P.3d at 338 ("[W]e have sometimes treated the question of whether a defendant's consent to a search was voluntary as 'a question of fact to be decided by the trial court and upheld on appeal unless clearly erroneous.' . . . [I]n our more recent suppression cases, we have . . . review[ed] the trial court's findings of historic fact deferentially, . . . but we review the legal effect of those facts de novo." (quoting *People v. Drake*, 785 P.2d 1257, 1266 (Colo. 1990))); *Weisler*, 35 A.3d at 975 ("[W]e [previously] acknowledged a tendency to 'routinely' invoke the 'de novo' formula in reviewing motions to suppress while applying a 'more deferential' standard to the court's actual decision . . . .").

[4] *See, e.g.*, *United States v. Robertson*, 736 F.3d 677, 680 (4th Cir. 2013) ("In general, we apply a 'particularly strong' clear error standard to factual determinations when they are based on oral testimony. However, because our reversal stems from [the] version of events [that the district court credited], credibility determinations play no

This uncertainty and inconsistency can produce analyses that are difficult to explain. For example, in many cases courts have stated, in a span of a few sentences and without any hint of irony, all of the following:

- The voluntariness of consent is a question of fact.
- Questions of fact are reviewed for clear error.
- The voluntariness of consent should be reviewed de novo because the facts are uncontested.

Courts in these cases do not attempt to explain the seeming incoherence of embarking on de novo review—because the facts are "uncontested"—of the contested matter of voluntariness, which they describe as a question of fact. *See, e.g.*, *United States v. Spivey*, 861 F.3d 1207, 1212 (11th Cir. 2017); *United States v. Arias-Robles*, 477 F.3d 245, 248 (5th Cir. 2007); *United States v. Lewis*, 921 F.2d 1294, 1301 (D.C. Cir. 1990).

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part in our ruling." (citation omitted) (quoting *Lattimore*, 87 F.3d at 651)); *United States v. Valdez*, 931 F.2d 1448, 1451–52 (11th Cir. 1991) ("[D]eterminations by a district court with regard to voluntariness of consent to search, while entitled to great deference by a reviewing appellate court, must still be overturned if clearly erroneous. . . . In an instance in which 'the decision the district court made was based solely on the circumstances described through uncontradicted testimony of the agents whose credibility was unquestioned, we believe that we are in as good a position as the district court to apply the law to the uncontroverted facts.' Accordingly, we review *de novo* the district court's determination of voluntariness of Valdez's consent to search." (citations omitted) (quoting *United States v. Garcia*, 890 F.2d 355, 360 n.5 (11th Cir. 1989))).

A. Fact-intensive determinations involving Fourth and Fifth Amendment rights are traditionally reviewed de novo.

1. The Court requires de novo review of determinations of probable cause and reasonable suspicion to justify searches and seizures.

In *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657 (1996), the Court discussed in detail the standards of review for findings of probable cause and reasonable suspicion, stating,

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.

517 U.S. at 696, 116 S. Ct. at 1661–62. The Court elaborated, "The first part of the analysis involves only a determination of historical facts"—for example, what police knew and when they knew it, what they did, what they observed, how other individuals behaved, and what those persons said. *Id.* at 696, 116 S. Ct. at 1662. An appellate court "should . . . review [those] findings . . . only for clear error and . . . give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* at 699, 116 S. Ct. at 1663.

The Court recognized that the second part of the analysis, by contrast, "is a mixed question of law and fact: '[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.'" *Id.* at 696, 116 S. Ct. at 1662 (quoting *Pullman-Standard v. Swint,* 456 U.S. 273, 289 n.19, 102 S. Ct. 1781,

1791 n.19 (1982)). Therefore, trial courts' ultimate "determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." *Id.* at 699, 116 S. Ct. at 1663.

The Court offered several reasons for de novo review of reasonable-suspicion and probable-cause determinations. First, it explained that a more deferential standard "would permit, '[i]n the absence of any significant difference in the facts,' 'the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.'" *Id.* at 697, 116 S. Ct. at 1662 (quoting *Brinegar v. United States*, 338 U.S. 160, 171, 69 S. Ct. 1302, 1308 (1949)). That result, the Court stated, "would be inconsistent with the idea of a unitary system of law." *Id.* The Court also noted that, beyond those concerns of consistency and predictability, deferential review would significantly limit the judicial development of fixed rules that give meaning to the Fourth Amendment: "[T]he legal rules for probable cause and reasonable suspicion acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.*; *see also Miller v. Fenton*, 474 U.S. 104, 114, 106 S. Ct. 445, 451 (1985) ("Where . . . the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law."), *quoted in Ornelas*, 517 U.S. at 697, 116 S. Ct. at 1662.

2. The Court requires de novo review of determinations of the voluntariness of a suspect's statement under the Fifth Amendment.

The split of authority as to appellate review of voluntary-consent determinations does not exist in the Fifth Amendment voluntary-confession context. This Court has directly resolved that matter, stating that where the voluntariness of a defendant's statement is at issue, "the nature of the inquiry itself lends support to the conclusion that 'voluntariness' is a legal question meriting independent consideration," one that "has always had a uniquely legal dimension." *Miller*, 474 U.S. at 115–16, 106 S. Ct. at 452. Therefore, the voluntariness of a confession cannot be "treat[ed] . . . as [a question] of simple historical fact." *Id.* at 116, 106 S. Ct. at 453.

Miller did not announce a new approach to the Fifth Amendment voluntariness inquiry. About 20 years earlier, and one week after deciding *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), the Court considered the voluntariness of a man's confession to rape and murder after he had been "interrogated repeatedly over a period of 16 days." *Davis v. North Carolina*, 384 U.S. 737, 739, 86 S. Ct. 1761, 1763 (1966). Mr. Davis "alleged that he was beaten, threatened, and cursed by police" and that he "repeatedly asked for a lawyer" but none was provided. *Id.* at 741, 86 S. Ct. at 1764. Charlotte police officers denied those allegations, and the trial court accepted their testimony and concluded that Mr. Davis's confession was voluntary. *Id.* at 739, 741, 86 S. Ct. at 1763–64. This Court stated that it "need not review" the findings of fact, then added, "It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine

the entire record and make an independent determination of the ultimate issue of voluntariness." *Id.* at 741–42, 86 S. Ct. at 1764.

B. The Court in *Schneckloth v. Bustamonte* described the voluntariness of consent to a search as a question of fact.

Seemingly at odds with the de novo review of fact-bound constitutional matters like probable cause and voluntariness of confessions, the Court stated in *Schneckloth v. Bustamonte* that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." 412 U.S. at 227, 93 S. Ct. at 2047–48. That statement, perhaps more than any other consideration, has been widely cited in support of the proposition that findings as to the voluntariness of consent should be reviewed deferentially on appeal, for clear error only. *See, e.g.*, *United States v. Robertson*, 736 F.3d 677, 680 (4th Cir. 2013); *United States v. Lee*, 793 F.3d 680, 684 (6th Cir. 2015); *United States v. Raibley*, 243 F.3d 1069, 1075–76 (7th Cir. 2001); *United States v. Thompson*, 524 F.3d 1126, 1133 (10th Cir. 2008); *United States v. Spivey*, 861 F.3d 1207, 1212 (11th Cir. 2017); *State v. Butler*, 302 P.3d 609, 613 (Ariz. 2013) (en banc); *State v. Jenkins*, 3 A.3d 806, 833 n.33 (Conn. 2010); *State v. Moore*, 154 P.3d 1, 13 (Kan. 2007).

Some courts have expressed a belief that *Schneckloth* not only suggests clear-error review but affirmatively requires it. For example, the District of Columbia Court of Appeals has stated,

> [I]n light of the Supreme Court's repeated emphasis [in *Schneckloth*] that the voluntariness of a consent to search is "a question of fact to be determined from all the circumstances," we have considered ourselves

> "bound to uphold the trial court's finding that a search was consensual unless such a finding is clearly erroneous" . . . [u]ntil the Supreme Court signals plainly that the voluntariness of consent for Fourth Amendment purposes is no longer an issue of fact to be reviewed under the clearly erroneous standard . . . .

In re J.M., 619 A.2d 497, 500–01 (D.C. 1992) (citations omitted) (quoting *Schneckloth*, 412 U.S. at 248–49, 93 S. Ct. at 2059; *Kelly v. United States*, 580 A.2d 1282, 1288 (D.C. 1990)).

Despite the importance some courts have placed on *Schneckloth*'s characterization of voluntariness of consent as a question of fact, that decision did not involve or address the appropriate standard of appellate review. Rather, the issue before the Court was whether voluntary consent to a search, like a voluntary statement under *Miranda*, requires a knowing waiver of Fourth Amendment rights. The Court said no, and elaborated that the voluntariness of consent is instead "a question of fact to be determined from the totality of all the circumstances," with "knowledge of the right to refuse consent [being] one factor to be taken into account," *Schneckloth*, 412 U.S. at 227, 93 S. Ct. at 2048. The thrust of the oft-quoted statement, in other words, was the phrase "totality of all the circumstances," not "question of fact." But the Court's use of the latter phrase has taken on practically dispositive significance in many courts' evaluation of the proper standard of review for voluntariness determinations.

Interestingly, in *Schneckloth* the Court drew heavily from its prior decisions reviewing the voluntariness of defendants' confessions under the Fifth Amendment. *See* 412 U.S. at 223–24, 93 S. Ct. at 2045–46 ("The most extensive judicial exposition

of the meaning of 'voluntariness' has been developed in those cases . . . determin[ing] the 'voluntariness' of a defendant's confession . . . . It is to that body of case law to which we turn for initial guidance on the meaning of 'voluntariness' in the present context."). The Court long has reviewed voluntariness independently, not deferentially, in the Fifth Amendment context. And the totality-of-the-circumstances analysis that *Schneckloth* requires is the same as the Court's analysis of voluntariness under the Fifth Amendment. *See id.* at 226, 93 S. Ct. at 2047. The Court's acknowledgement that both voluntariness determinations are fact-intensive and require "careful sifting of the unique facts and circumstances of each case," *id.* at 233, 93 S. Ct. at 2050, does not suggest that the Court believed conclusions about the voluntariness of consent were entitled to greater deference than conclusions about the voluntariness of statements. Nor did the Court give any reason that voluntariness determinations under the Fourth Amendment would be reviewed differently than equivalent determinations under the Fifth Amendment—a point that many courts have noted in reviewing the voluntariness of consent as a legal determination rather than a finding of fact.

II. The Court should grant certiorari in this case to decide the proper standard of review for determinations of the voluntariness of consent.

A. The lower courts will remain hopelessly divided on this matter until the Court authoritatively decides it.

The proper standard of appellate review of voluntary-consent determinations is a matter that warrants resolution by this Court. This federal constitutional question will remain the subject of varied and conflicting application until the Court

decides it. In many jurisdictions, courts have made clear that they consider themselves bound by *Schneckloth*'s "question of fact" characterization in the absence of a direct decision of the matter by this Court. *See, e.g.*, *J.M.*, 619 A.2d at 500–01, *supra* pp. 19–20; *Lee*, 793 F.3d at 684 ("This court recently discussed its prior use of the two different standards [of review] and chose to follow *Schneckloth*." (citing *United States v. Holland,* 522 F. App'x 265, 271 (6th Cir. 2013))).

At the same time, courts in many other jurisdictions have determined that a standard of independent review is more consistent with the Court's jurisprudence generally. The Supreme Court of Vermont examined the disagreement and its origins at length in *State v. Weisler*. The court noted that "most federal courts have applied a clearly erroneous standard to the voluntary-consent issue, although the decisions are not monolithic," while "many state courts defer[ ] to the trial court's underlying findings of historical fact while independently deciding as a matter of law whether they ultimately demonstrate that the defendant's consent was voluntary," *Weisler*, 35 A.3d at 975–76. It then explored *Schneckloth*'s role in the matter:

> As so often with the law, tracing the source of a rule can yield unexpected insights. One leading criminal-law commentator notes that the clearly erroneous standard is most often "attributed to *Schneckloth* . . . ." 6 W. LaFave, Search and Seizure § 11.7(c), at 449 (4th ed. 2004). *Schneckloth*, however, said nothing specifically about the appropriate standard of appellate review. See *United States v. Navarro*, 90 F.3d 1245, 1256 n. 6 (7th Cir.1996) (noting that "[a]lthough *Schneckloth* terms the issue of consent an issue of fact to be determined from all the circumstances, it does not speak directly to the standard of appellate review."). . . . [T]he bulk of the Court's discussion was given to reviewing and adopting the test governing the voluntariness of confessions . . . .
>
> Context here is critical, because the standard of review governing the voluntariness of confessions—at the time of *Schneckloth* and since—is

> generally de novo. Clearly, the high court perceived no inconsistency in deeming the voluntariness of a confession to be a highly contextual, fact-specific inquiry in the first instance subject, nevertheless, to independent review on appeal. Simply labeling consent to search as a question of fact to be determined from the totality of the circumstances, therefore, does little to advance the standard-of-review analysis.

Id. at 976–77 (some citations omitted).

After thoroughly reviewing other courts' explanations of the reasons for the various standards they employ, the Vermont court concluded, "[W]e are persuaded that the reasoning of those courts that have adopted independent review in this setting is fundamentally sound, and that any objections are without merit. . . . The ultimate question is whether 'a reasonable person in defendant's circumstances' would have felt free to refuse the officer's request." *Id.* at 982 (footnote omitted); *see also Thompson v. Keohane,* 516 U.S. 99, 113, 116 S. Ct. 457, 465–66 (1995) (explaining that a *Miranda* custody analysis "presents a 'mixed question of law and fact' qualifying for independent review" because while "[c]redibility determinations . . . may sometimes contribute to the establishment of the historical facts . . . the crucial question" is how "a 'reasonable person'" would perceive the circumstances), *quoted in Weisler*, 35 A.3d at 983. Other authorities that have similarly examined the matter have reached the same conclusions. *See, e.g.*, 6 LaFave, *Search & Seizure* § 11.7(c); *State v. Phillips*, 577 N.W.2d 794, 800–02 (Wisc. 1998).

B. This case is an ideal vehicle for the Court to decide the proper standard of review.

In reviewing the voluntariness of Mr. Ratcliff's consent to a search of his home in this case, the Eleventh Circuit did not consider at length the standard that should

govern its review, stating simply that it gave "'a great deal of deference' to [the district court's] finding" of voluntary consent. Pet. App. 58a (quoting *Garcia*, 890 F.2d at 359). That it cited *Garcia* as the source of that rule is surprising, because that decision actually is an example of the inconsistent standards that many courts have employed. The Eleventh Circuit did state in *Garcia* that "[n]ormally, we will accord the district judge a great deal of deference regarding a finding of voluntariness . . . because the trial judge usually bases his finding on credibility choices resulting from conflicting testimony." 890 F.2d at 359. But that statement actually came immediately after the court finished explaining that it would review the ultimate determination of voluntariness, *not* deferentially, but de novo. *See id.* at 358–59 ("Initially, we must determine under which standard to review the trial court's ruling that Garcia's consent to the search of his home was involuntary. . . . [W]hile we must defer to the trial judge's findings of fact unless clearly erroneous, we are to review the district judge's application of law to the facts *de novo*.").

Mr. Ratcliff did not challenge any of the district court's credibility determinations or argue that its findings of fact were clearly erroneous, so under a bifurcated review like *Ornelas* describes, the district court's voluntariness determination would have been reviewed de novo on appeal. And there is a reasonable likelihood that de novo review would have produced a different result. When Mr. Ratcliff gave consent, four members of the Pleasant Grove, Alabama, police department were inside his house without either a warrant or consent. Three of them had been inside for over an hour, during which they demonstrated their control over

the premises by roaming freely from room to room and confronting him about their most incriminating observations. They had continued those activities despite the fact that both of the exigencies that the district court found justified their presence—performing a protective sweep for officer safety and preventing the destruction of evidence—were resolved about two minutes after they entered. They had proceeded without his consent up to that point and had given no indication that it mattered.

Considering the question of voluntariness de novo in light of government witnesses' uncontroverted testimony and the district court's uncontested findings of fact, the court of appeals could have concluded that Mr. Ratcliff's purported consent was not voluntary but rather an expression of resignation—of acquiescence to the officers' implied claim of lawful authority to explore his house. *Cf. Bumper*, 391 U.S. at 548–49, 88 S. Ct. at 1792 (government's burden of proving voluntariness "cannot be discharged by showing no more than acquiescence to a claim of lawful authority"); *see also* 4 LaFave, *Search & Seizure* § 8.2(a) ("One factor very likely to produce a finding of no consent under the *Schneckloth* voluntariness test is an express or implied false claim by the police that they can immediately proceed to make the search in any event." (footnotes omitted)). But having determined that it should "give 'a great deal of deference' to" the district court's finding of voluntary consent, the court of appeals easily concluded, after just a few sentences' recitation of facts, that it had "nothing near a 'definite and firm conviction that the trial judge erred' in finding that Ratcliff's consent was voluntary." Pet. App. 58a (quoting *Garcia*, 890 F.2d at 359).

Schneckloth's seemingly offhand use of the phrase "question of fact" has assumed dimensions that it is not clear the Court ever intended. The Eleventh Circuit should have engaged in a searching analysis of whether Mr. Ratcliff's consent for police to continue searching his house was "the product of an essentially free and unconstrained choice," *Schneckloth*, 412 U.S. at 225, 93 S. Ct. at 2047 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 1879 (1961)). The Court should grant certiorari in this case to resolve the enduring split of authority regarding the proper standard of review for determinations regarding the voluntariness of consent under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted this, the 10th day of July, 2018.

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