No. 24-6459

IN THE SUPREME COURT OF THE UNITED STATES

KYLE ANTHONY SHEPHARD,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

Respectfully submitted,

June 11, 2025

JAMES M. CHAVEZ
The Law Office of James M. Chavez
501 W. Broadway, Suite 240
San Diego, California 92101
Telephone: (619) 894-6464
Email: james@jameschavezlaw.com

ALANA L. MCMAINS
McMains Law, APC
185 W. F St. #100-R
San Diego, California 92101
Telephone: (619) 310-5421
Email: alana@mcmainslaw.com

Attorneys for Petitioner

prefix

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Other Authorities

IN THE SUPREME COURT OF THE UNITED STATES

KYLE ANTHONY SHEPHARD,
Petitioner,

- v. -

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

ARGUMENT

Certiorari should be granted in order to firmly settle the division among lower courts regarding the appropriate standard of review when considering the voluntariness of consent to search. The government's brief intentionally ignores the plethora of outlier cases so that it can present the use of the "clear error" standard of review as a well-settled legal proposition across the nation. But a closer review of precedent shows that due to "confusion about the voluntariness test, lower courts are deeply divided about what exactly the standard is meant to capture." *See* Roseanna Sommers, Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1971

(2019). Without this Court's intervention, the lower courts will remain divided on this vital and frequently recurring issue.

Kyle Shephard's case presents the perfect opportunity to address this issue. Law enforcement searched Mr. Shephard's hotel room without a warrant, claiming that he had given them consent to do so. Mr. Shephard moved to suppress the evidence found during the search, arguing that any consent he had given was involuntary. Based on the coercive conditions at the time of the consent, the Ninth Circuit Court of Appeals appeared to agree with Mr. Shephard's assertion. *See United States v. Kyle Anthony Shephard,* No. 21-50194, Mem. Disp. (9th Cir. May 10, 2024) (Mendoza, J., concurring) ("Frankly, I doubt that a person in Shephard's shoes could freely and voluntarily consent to a search."). But due to the Ninth Circuit's use of the clear error standard of review when analyzing the voluntariness of consent to search, it was required to affirm the district court's finding on voluntariness because it was not "illogical, implausible, or without support in the record." *See id.*

Thus, this case represents a unique occasion wherein the appellate court's hands were tied by the clear error standard, and it was forced to affirm an application of constitutional law that it did not endorse. The application of a different standard of review in Mr. Shephard's case would absolutely have changed the outcome of his motion to suppress. Given that the parties did not dispute the facts surrounding his interrogation, the precedent of the Eleventh Circuit Court of

Appeals would have permitted *de novo* review.[1] This would have allowed the appellate panel to conduct the totality of the circumstances analysis from *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), and reach the conclusion that Mr. Shephard did not voluntarily consent to the search. And it is not only the Eleventh Circuit—depending on the panel, Mr. Shephard might have received *de novo* review in other circuits as well.

The rights at stake—and the risk of permitting contradictory and piecemeal constitutional precedent throughout the nation—merit thoughtful consideration and clear guidance from the Supreme Court. Because of the split among circuits, and because *de novo* review is the ideal way to ensure the proper development of constitutional jurisprudence, this Court should grant Mr. Shepard's petition for certiorari.

I.

The Issue of the Correct Standard of Review Is Properly Before this Court

Contrary to the government's assertion, this Court is not precluded from reviewing the question presented by Mr. Shephard. The government claims that the issue was waived; it was not. Generally, certiorari should not be granted where "the question presented was not pressed or passed upon below." *United States v.*

[1] The Government incorrectly asserts that there was a factual dispute in this case. But the sole fact of dispute relevant to voluntariness was whether Mr. Shephard consented to search (specifically, whether he had said, "Yes, I guess" or "Yes, I object," to the deputy). For the purpose of the voluntariness analysis, the court of appeals (as well as Mr. Shephard) accepted the testimony of the deputy as true and assumed that Mr. Shephard had consented.

Williams, 504 U.S. 36, 41 (1992). This Court has expressed the rule by stating, "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Here, the government correctly notes that Mr. Shephard did not "press" the standard of review issue before the Ninth Circuit Court of Appeals; Mr. Shephard acknowledged that the Ninth Circuit applies a clear error standard.

But the government ignores that the issue was *passed upon* below. "[The] rule's disjunctive phrasing is no accident—it 'permit[s] review of an issue not pressed so long as it has been passed upon' below." *June Medical Services LLC v. Russo*, 591 U.S. 299, 416 (2020), (Gorsich, J., dissenting) (quoting *Williams*, 504 U.S. at 41). In this case, the Ninth Circuit plainly considered and decided the issue, ruling that clear error was the correct standard of review (and implying in concurrence that it would have decided otherwise if not). The government cites *Cutter v. Wilkinson* in stating that this is "a court of review not of first view." 544 U.S. 709, 718 n.7 (2005). But in *Cutter*, the court of appeals "did not rule" on several of the respondents' challenges; for this reason, this Court declined to consider them. *Id.* There can be no claim here that the Ninth Circuit failed to consider the proper standard of review, when it clearly stated so.

Further, the rationale behind the "pressed or passed on" rule does not support a denial of certiorari in this case. One concern is that "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not complied with those questions in mind." *Illinois v. Gates*, 462 U.S. 213, 221

(1983) (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). In this case, however, there is no danger of an inadequate record. First, a thorough record is not necessary when considering a purely legal question. A decision on the appropriate standard of review is not dependent on the specific facts of a case, but rather on the nature of the review and the rights being protected. Second, even if a record was necessary here, there is indeed a thorough factual record of the facts surrounding Mr. Shephard's consent. For these reasons, prudential concerns do not require this Court to deny certiorari.

II.

This Court Should Grant Certiorari to Settle This Issue Among Lower Courts

The government misstates the state of the law when it argues that the Ninth Circuit's application of the clear error standard was "consistent with the decisions of every other court of appeals." Gov't. Oppo. Brief at 8. In surveying the case law, it may appear at first that each federal court of appeals is applying the clear error standard. But upon a more careful and comprehensive reading of the decisions regarding the voluntariness of consent, it becomes apparent that the approaches are far from uniform. There is a split between two approaches. In some circuits, appellate courts must apply clear error review even where the facts of the case are undisputed. In other circuits, appellate courts are permitted to use *de novo* review, typically in cases where the facts were uncontested. In an attempt to convince this Court that the clear error standard is being applied across the board in all circuits,

the government dismisses or downplays the significance of cases from multiple circuits that involve an obvious application of *de novo* review.

Stanford Law professor Orin Kerr has noted that *Schneckloth*'s decision "leaves the precise nature of voluntariness inquiries somewhat murky, and that has led to considerable uncertainty in the federal court of appeals." Orin Kerr, *Voluntariness and the Law/Fact Distinction*, The Volokh Conspiracy (Dec. 5, 2013), http://volokh.com/2013/12/05/voluntariness-lawfact-distinction/. This is because, when analyzing the voluntariness of consent, there are "two layers of facts: The facts of what happened, and the 'fact' of whether the consent was voluntary." *Id.* He notes that some courts have treated it as more of "a mixed judgment of law and fact, with that 'what happened' part reviewed for clear error and the 'so does that amount to consent' part reviewed *de novo*." *Id.* Due to the confusion, he argues that it "is an issue that the Supreme Court would be best situated to clarify." *Id.*

The government's opposition brief focuses on the first layer of fact, where the question of "what happened" is uniformly reviewed under the clear error standard. Mr. Shephard does not contest this. But the government is ignoring the multiple published federal appellate opinions that review *de novo* the second layer of fact—"does what happened amount to consent?"

Of all the circuits, the Eleventh Circuit uses the *de novo* standard most frequently. In *United States v. Garcia*, that court explicitly held that the voluntariness of a consent to search should be reviewed *de novo* under some circumstances. 890 F.2d 355, 360 (11th Cir. 1989). The *Garcia* court acknowledged

that the "ordinary case" would involve clear error review. *Id.* at 359. But it stated that in cases where "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." *Id.* The government downplays the significance of *Garcia*, because it is not for the "ordinary case," and it implies that *Garcia* was an anomaly that has since been ignored. But *Garcia* is far from the only time that the Eleventh Circuit has applied that standard. *See, e.g.*, *United States v. Valdez*, 931 F.2d 1448, 1452 (11th Cir. 1991) (applying *de novo* review where facts undisputed); *United States v. Tovar-Rico*, 61 F.3d 1529, 1535 (11th Cir. 1995) (same); *United States v. Burwell*, 763 F. App'x 840 (11th Cir. 2019) (unpublished) (same); *United States v. Joseph*, 700 F. App'x 918, 921 (11th Cir. 2017) (unpublished) (same). Thus, upon review, while the *de novo* standard applied in *Garcia* may not be for the "ordinary case," it is still far from unusual.

The Eleventh Circuit is not the only circuit to have deviated from a strict application of the clear error standard when reviewing the voluntariness of consent to search. In *United States v. Wade*, the Seventh Circuit cited to *Ornelas v. United States*, 517 U.S. 690 (1996), for the proposition that the voluntariness of consent to search is really a mixed question of law and fact. 400 F.3d 1019, 1021 (7th Cir. 2005). The court noted that, "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*." *Id.* The government is incorrect when it asserts that *Wade* held

that the *de novo* standard *only* applies where there are no credibility findings at hand. The D.C. Circuit has also created exceptions to the general rule that clear error applies. In *United States v. Lewis*, the court applied the *de novo* standard to whether the defendant's consent to search was voluntary. 921 F.2d 1294, 1301 (D.C. Cir. 1990). Its reasoning was that the district court's analysis "contain[ed] none of the detail suggested in *Schneckloth*." *Id.* For this reason, the appellate court determined that the district court had made its findings "as a matter of law, rather than fact." *Id.* (citing *Garcia*, 890 F.2d at 359–60). Other cases in the D.C. Circuit have similarly analyzed the voluntariness of consent. *See United States v. Roget*, 127 Fed. App'x 505 (D.C. Circ. 2005) (unpublished) (citing *Lewis* and reviewing the district court's conclusion for errors "either as a finding of fact or a matter of law"); *United States v. Lawson*, 15 F.3d 1160 (D.C. Cir. 1994) (unpublished) (citing *Lewis* and reviewing the district court's ruling for "any misconstruction of applicable law"). The Fourth Circuit also strayed from the clear error standard in *United States v. Carter*, 300 F.3d 415, 423 (4th Cir. 2002). It noted that "[b]ecause the 'voluntariness' of a search is a matter of law, it is reviewed de novo." *Id.* Finally, the Fifth Circuit has also acknowledged the ways that the *Schneckloth* factors essentially create a mixed issue of law and fact. It has noted in multiple cases that while clear error is the appropriate standard for reviewing the voluntariness of consent, "where there are 'virtually no uncontested facts,' review is 'essentially de novo.'" *United States v. Arias-Robles*, 477 F.3d 245, 249 (5th Cir. 2007) (quoting *United States v. Vega*, 221 F.3d 789, 795 (5th Cir. 2000)). In one case, the Fifth Circuit even outright stated

that the *de novo* analysis applies. *See United States v. Asibor*, 109 F.3d 1023, 1038 (5th Cir. 1997).

Even if these cases were simply carving out tiny or rarely used exceptions, their approach is still diametrically opposed to those circuits that apply clear error even to uncontroverted facts. At least two circuits have explicitly held that the clear error standard applies even if the circumstances of the search are undisputed. In *United States v. Quintero*, the government argued to the Eighth Circuit that it could apply de novo review to the question of voluntariness "because the entire encounter was recorded, and [the person who consented to the search] did not testify at the hearing." 648 F.3d 660, 665 (8th Cir. 2011). The Eighth Circuit rejected that argument, explaining, "the clear error standard we employ here reinforces the district court's province to make factual findings regarding the nuances, tone of voice, and other subtle aspects inherent in determining whether an individual voluntarily consented to a search." *Id.* at 666. And in *United States v. Lee*, 793 F.3d 680 (6th Cir. 2015), the Sixth Circuit noted that the "facts of this case are basically undisputed," *id.* at 680, but still reviewed "the question of consent under the 'clear error' standard" *id.* at 682.

The substantial number of cases contradicting the more commonly used clear error standard demonstrates that *Schneckloth* failed to provide sufficient clarity as to the nature of appellate review of the voluntariness analysis. The uncertainty as to the proper standard of review is exacerbated by this Court's decisions in *Thompson v. Keohane*, 516 U.S. 742 (1970), *Miller v. Fenton*, 474 U.S. 104 (1985),

and *Ornelas v. United States*, 517 U.S. 690. . The government appears to misapprehend Mr. Shephard's argument, focusing on the fact that those cases addressed the appropriate standards of review in different contexts. But Mr. Shephard never claimed that those cases directly ruled on the issue of the standard of review for voluntariness of consent to search. Those cases do not *directly* conflict with the use of the clear error standard of review. Rather, the *spirit* and *rationale* of those cases are at odds with the characterization of voluntariness of consent to search as a pure issue of fact that merits only clear error review. What the government fails to do is address the similarity between the types of analysis addressed in *Thompson, Miller*, and *Ornelas* and the type of analysis used under *Schneckloth*. All three involve fact-intensive, case-specific inquiries that are often based on credibility determinations, but at the same time require critical objective application of constitutional law, with crucial rights at stake. In fact, the Ninth Circuit used to review whether a suspect was in custody for *Miranda* purposes under the clear error standard, prior to the Supreme Court's holding in *Thompson*, because it viewed the issue as a "question of fact." *See, e.g.*¸ *People of the Territory of Guam v. Palomo*, 35 F.3d 368, 375 (9th Cir. 1994), as amended (July 19, 1994).

It is thus unsurprising that cases like *Wade* base their reasoning on *Ornelas*, given the similarities. It is difficult to find any logical reason that voluntariness of consent to search should differ in its standard of review from voluntariness of confession, for example, and the government has failed to offer one. Thus, even if the federal circuits were entirely uniform in applying the clear error standard to the

issue of voluntariness of consent to search, that would still be a mistake. This Court can and should finally make an explicit ruling that voluntariness of consent to search is a mixed question of law and fact, wherein appellate courts would apply *de novo* review to the second layer of facts—whether the factual scenario amounts to consent in light of our constitutional jurisprudence.

Given all this, Mr. Shephard respectfully requests that this Court grant his petition. The government is erroneous in asserting that "all federal courts of appeals with jurisdiction over criminal cases have held that the inquiry into whether a defendant voluntarily consented to a search is a question of fact subject to clear error review." Gov't. Oppo. Brief at 14. Mr. Shephard does not attempt to assert that *de novo* review is the primary standard of review in any federal circuit, but the law is not consistent or uniform across each circuit. The government concedes that there is a split among the courts of last resort across the states, but argues that it is not a basis to grant certiorari. This split among states, however, further highlights the difficulty that courts have in interpreting *Schneckloth* and reconciling it with *Ornelas*, *Miller*, and *Thompson*.

These contrary approaches are more than mere intra-circuit quibbles that should be left to each appellate court to work out on its own; there are sufficient exceptions and variations to raise a concern for this Court. The government correctly notes that this issue has come before this Court on at least four prior petitions for writs of certiorari, all of which were denied. If this Court chooses to also deny Mr. Shephard's petition, the "murky" nature of Supreme Court guidance

on this issue ensures that appellate courts will continue to disagree and defendants will continue to seek certiorari to clarify the proper standard.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Date: June 11, 2025

s/ Alana L. McMains
ALANA L. MCMAINS
McMains Law, APC

JAMES M. CHAVEZ
The Law Office of James M Chavez

Attorneys for Petitioner