No. 16-1009

In the Supreme Court of the United States

MURAT AKSU, *Petitioner,*

v.

CALIFORNIA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPERIOR COURT, COUNTY OF VENTURA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should require a uniform standard of review for state court appeals of trial court findings regarding voluntariness of consent to search.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

STATEMENT

1. Shortly after learning about complaints that a man had been suspiciously following women and manipulating a briefcase while walking close to, but never entering, the secured entrance of the Ventura County courthouse, Sheriff's Deputy Stephen Egnatchik saw Petitioner Murat Aksu walking toward the building. Pet. App. 3a.; Tr. 36.[1] When Aksu noticed the deputy, he put his cell phone to his ear and walked in a different direction to a nearby bench. Pet App. 3a.; Tr. 63.

Speaking in a respectful "middle voice," Deputy Egnatchik contacted Aksu near the bench, placing no physical restrictions on Aksu's movements: Aksu was not handcuffed, no force was employed, and no weapon was drawn. Tr. 45, 74; Pet. App. 9a. Before other deputies arrived, Deputy Egnatchik requested consent to search Aksu's person and briefcase using a "mild mannered" tone. Tr. 67, 68, 74, 77, 88, 223; Pet. App. 4a. Aksu agreed to the search and Deputy Egnatchik searched Aksu's person. Tr. 46. Throughout the contact, Aksu was "very cooperative." Tr. 82, 97, 143. In Aksu's pockets, Deputy Egnatchik found two photographs of nude women which had been torn from a magazine. Tr. 47; Pet. App. 4a.

Deputy Eric Veloz did not arrive until after Deputy Egnatchik had completed the search of Aksu's person. TR 48, 80. Pursuant to Aksu's earlier consent, Deputy Veloz searched Aksu's briefcase, in which he found a small wireless video camera. Tr.

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[1] Citations to "Tr." Refer to the transcript of the hearing on Petitioner's motion to suppress evidence. *See* Pet. 4 n.1. Citations to "CI" refer to the Chronological Index prepared by the Clerk of the Superior Court for Aksu's appeal. Both of these were part of the record below.

48, 80; Pet. App. 4a. Aksu became emotional as he explained that he used the video camera secreted in his briefcase to record videos of women, and that he had accidentally filmed up one woman's skirt. Tr. 48-49, 81.

Sergeant Robert Arthur arrived after Deputy Veloz had discovered the video camera and secured Aksu's oral consent to view the recordings it contained. Tr. 93. Sergeant Arthur asked another deputy to bring a written consent form for Aksu to sign. Tr. 92. Aksu refused to sign the form because it contained the word "residence," but repeated to Sergeant Arthur his oral consent to the search of his person and briefcase – which had already concluded – and to the impending search of the video camera and of Aksu's car. Tr. 93-94, 121-122.

Aksu was arrested sometime after his vehicle was searched. Tr. 51. He waived his *Miranda* rights with "eagerness," and answered Detective Steve Rhods's questions about the events that had just transpired. Tr. 134-135; Pet. App. 34a. During the interview, which the trial court later described as "not a confrontational situation," *see* Tr. 274, Pet. App. 25a, Aksu confirmed that he had given permission to search his briefcase and camera. Tr. 136; Pet. App. 25a, 34a-35a. He did not state that the permission he gave was unwilling. Pet. App. 25a.

2. Aksu was charged with misdemeanor disorderly conduct. CI I1-I2; Pet. App. 2a, 5a. Before trial, he moved to suppress the evidence against him on the basis that the warrantless searches of his person and briefcase violated the Fourth Amendment. AOB[2] 2-14; Pet. App. 4a.

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[2] Aksu filed two distinct appeals. The Petition for Writ of Certiorari pertains only to the Appeal from Judgment. All citations to appellate briefs are therefore to the briefs filed in

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At the hearing on Aksu's motion to suppress evidence the prosecution called three witnesses: Deputy Egnatchik, Sergeant Arthur, and Detective Rhods, who testified to the foregoing facts. Tr. 34, 90, 131. Aksu testified as well, claiming Deputy Egnatchik never sought permission to search his person and that any consent Aksu did provide was "unwilling" and based on intimidation. Tr. 152, 156.

After hearing the testimony and listening to a recording of Aksu's statements to Detective Rhods, the trial court concluded that Aksu's testimony was "quite uncredible," and his lack of credibility "permeate[d]" the court's consideration of the motion. Pet. App. 22a-23a, 25a. Specifically, the court found that Aksu "was not very credible …, for example, with regards to the consent." Pet. App. 25a.

The court noted that Aksu was not restrained or surrounded by police officers, and no weapon was drawn during the encounter. Pet. App. 26a. Also, the detention was not extended inappropriately. Pet. App. 27a. And the court rejected the defense argument that Aksu was not "savvy enough to know what was going on," finding that "he's obviously an intelligent man" based on his background (Aksu held an advanced degree) and testimony at the hearing. Pet. App. 28a-29a. The court posited that Aksu's consent was "directed," by which the court meant that Aksu "wanted to get out of there" since he was humiliated by the situation. Pet. App. 26a. The court also found Aksu's testimony that Deputy Egnatchik blocked him from leaving was not credible. Pet. App. 28a. Instead the court believed "the

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the Appeal from Judgment. "AOB" refers to the Appellant's Opening Brief; "RB" refers to the Respondent's Brief; and "ARB" refers to the Appellant's Reply Brief.

Deputy's testimony was credible in that regard." Pet. App. 28a; *see* Tr. 118, 126. The court concluded that Aksu's consent was "willingly given, not compelled." Pet. App. 30a; *see also id.* at 26a (Aksu gave "legitimate consent, not forced consent"), 28a ("consent was willingly given, not forced").

3. Aksu appealed to the Appellate Division of the Ventura County Superior Court, challenging in part the trial court's determination that he had voluntarily consented to the searches. In the respondent's brief, the prosecution stated that voluntariness is a question of fact reviewed for "substantial evidence" – the usual California standard of review for factual issues on direct appeal. RB 10, 12. Although he had not mentioned the standard of review applicable to the voluntariness question in his opening brief, Aksu argued in his reply brief that voluntariness is a legal question subject to independent review. ARB 3-4 & n.1. Without engaging the dispute about the standard, the appellate division recited the longstanding rule that "voluntariness of the consent is in every case a question of fact to be determined in the light of all the circumstances," Pet App. 6a (quotation marks and citations omitted), and affirmed the trial court's ruling, Pet. App. 10a.

The appellate division noted the trial court's express reliance on "the length of the detention, the lack of restraints or drawn weapons, and the number of officers present," as well as "Aksu's level of sophistication, his cooperative behavior, and the reasons for the cooperative behavior." Pet. App. 9a-10a. In addition, and "[p]erhaps most importantly," the appellate division recognized the trial court's determination that Aksu was not credible in advancing a different version of the factual circumstances of the encounter. Pet. App. 10a. The

appellate division concluded that the trial court's finding of free and voluntary consent was supported by substantial evidence and that it had therefore properly denied the suppression motion. *Id.*

ARGUMENT

Aksu asks this Court to resolve a conflict in authority concerning "the standard by which appellate courts review a trial court's holding that a defendant voluntarily consented to a warrantless search for Fourth Amendment purposes." Pet. i. To the extent state and federal appellate courts have applied differing standards of review to that question, few have done so on the basis of considered analysis despite the apparent longevity of the conflict. That the issue has not attracted the particular attention of appellate courts is perhaps attributable to the fact that, as this case illustrates, the standard of review will seldom, if ever, control the outcome of the question. Therefore, the conflict does not appear to be a very significant one.

Moreover, California appropriately applies a deferential standard of review to the issue. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), this Court unequivocally held that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress of coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." *Id.* at 227; *accord id.* at 248-249. Questions of fact are ordinarily reviewed deferentially. And *Schneckcloth* expressly rejected the parallel that Aksu seeks to draw here between Fourth Amendment voluntariness in the search context and Fifth Amendment voluntariness in the confession context. *Id.* at 235-246.

This case in any event would not be an appropriate vehicle for any further review of the issue by this Court. The appellate division below did not squarely grapple with the question. Nor has the California Supreme Court ever directly confronted the question or reconsidered its longstanding rule that Fourth Amendment voluntariness is reviewed deferentially as a question of fact. Further, given the trial court's findings regarding credibility and historical fact, the outcome of this case on appeal does not depend on the particular standard of review that applies. And finally, the question Aksu raises here involves only appellate standards of review, and does not call into doubt the underlying constitutional rule itself. This Court would therefore have to confront at the threshold an additional complication: whether the Constitution compels the States to apply a particular standard of review on appeal to a given constitutional question.

1. The apparent conflict in authority Aksu points to is not an especially significant one. Though longstanding, it appears to have generated little concern among our nation's courts. Few have tackled the issue head on, most notably the Supreme Court of Vermont in *State v. Weisler*, 35 A.3d 970 (Vt. 2011). *See also State v. Thurman*, 846 P.2d 1256, 1258 (Utah 1993); *Clark v. State*, 287 S.W.3d 567 (Ark. 2008). But the vast majority have not treated the issue with any depth of consideration.

Some courts have responded to this Court's unequivocal pronouncement that voluntariness is a question of fact, *Schneckloth v. Bustamonte*, 412 U.S. at 248-249, by applying the ordinary and widespread standards of review concerning factual questions. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (three traditional categories of judicial decisions on review); *People v. Cromer*, 15 P.3d 243, 245 (Cal. 2001)

(deferential review traditional for findings of fact). In California, where Fourth Amendment voluntariness has long been understood to be a question of fact, the "substantial evidence" standard has been used to review Fourth Amendment voluntary consent issues since before *Schneckloth*. *People v. Michael*, 290 P.2d 852, 854 (Cal. 1955).[3]

Courts that apply a de novo or mixed review standard do so with varying degrees of consideration. At least three cases cited by Aksu rely on independent state grounds.[4] Others declare they will

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[3] California's substantial evidence test is best described as follows: "the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence." *People v. Leyba*, 629 P.2d 961, 964 (Cal. 1981).

[4] For example, in *State v. Yon Shik Won*, 372 P.3d 1065, 1076 (Haw. 2015), the court cites *State v. Trainor*, 925 P.2d 818, 823 (Haw. 1996), as setting the de novo standard of review. *Trainor*, however, relied on the Hawai'i Constitution as the source of its analysis. *State v. Trainor*, 925 P.2d at 828 (consent exception to article I, section 7 of the Hawai'i Constitution). In contrast is *State v. Phillips*, 382 P.3d 133, 163 (Haw. 2016), which declared that on review, "the findings of a trier of fact regarding the validity of a consent to search must be upheld unless clearly erroneous," and *State v. Ganal*, 917 P.2d 370, 380 (Haw. 1996), which applied the clearly erroneous test to a question of voluntary consent under the Fourth Amendment.

State v. Overbay, 810 N.W.2d 871, 875 (Iowa 2012) also appears to rely, at least in part, on independent state grounds. *Overbay* cites *State v. Hutton*, 796 N.W.2d 898, 906 (Iowa 2011) to justify its application of de novo review. *Hutton*, in turn, refers to a standard for voluntary consent to search that was rejected by this Court as a Fourth Amendment standard: "The ultimate question is whether the decision to comply with a valid request under the implied-consent law is a reasoned and

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apply a de novo standard, but ultimately resolve the issue based on a deferential test.[5] Still others appear to conflate the standards for voluntariness under the Fifth and Fourth Amendment – an approach rejected by this Court in *Schenckloth* v. *Bustamonte*, 412 U.S. at 237-246.[6]

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informed decision." *State v. Hutton*, 796 N.W.2d 898, 906 (Iowa 2011) (citing *State v. Bernhard*, 657 N.W.2d 469, 473 (Iowa 2003)); *see also State v. Shelton*, 990 A.2d 191, 199 (R.I. 2010) (relying on *State v. Texter*, 923 A.2d 568, 576–77 (R.I. 2007) ("The determination of voluntariness *vel non* involves a mixed question of fact and law that impacts a constitutional right.")).

Oregon's high court appeared to rely on independent state grounds in *State v. Moore*, 318 P.3d 1133 (Or. 2013), where the question presented was whether "a driver has the *constitutional* right to refuse to consent to a seizure of his bodily fluids under Article I, section 9, of the Oregon Constitution …." *Id.* at 1138 (emphasis original).

[5] Compare *State v. Tyler,* 870 N.W.2d 119, 127 (Neb. 2015), which adopts a de novo standard without discussion, with the Nebraska Supreme Court's repeatedly stated rule that "[a] trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous." *State v. Bjorklund*, 604 N.W.2d 169, 200 (Neb. 2000) (citing *State v. Strohl,* 587 N.W.2d 675 (Neb. 1999) and *State v. Konfrst,* 556 N.W.2d 250 (Neb. 1996)), *abrogated on other grounds by State v. Mata*, 745 N.W.2d 229 (Neb. 2008); *see also State v. Eberly*, 716 N.W.2d 671, 676 (Neb. 2006). Similarly, in *State v. Davis*, 304 P.3d 10 (N.M. 2013) the New Mexico court announced it would apply a de novo standard and then stated, "[t]he question is whether the [trial] court's decision is supported by substantial evidence, not whether the trial court could have reached a different conclusion." *Id.* at 13 (quotations and citations omitted). Ultimately the court decided "there was substantial evidence that Defendant voluntarily consented to the search." *Id.* at 8.

[6] *See State v. Nadeau*, 1 A.3d 445, 454 (Me. 2010) (citing (continued…)

Other courts rely, as does Aksu, on *Ornelas v. United States*, 517 U.S. 690 (1996).[7] But *Ornelas* was concerned with probable cause and reasonable suspicion – concepts that are quite different from the voluntariness of consent. *Ornelas v. United States*, 517 U.S. at 691. *Ornelas* did not signal a departure from *Schneckloth's* determination that voluntariness of consent to a search is a question of fact. To the contrary, since *Ornelas* this Court has "reiterated its deferential standard of review for Fourth Amendment voluntariness determinations." *United States v. Tompkins*, 130 F.3d 117, 120-121 (5th Cir. 1997), citing *Ohio v. Robinette*, 519 U.S. 33, 40 (1996); *see also State v. Jenkins*, 3 A.3d 806, 833 n.33 (Conn. 2010) ("The *Ornelas* decision is, however, limited only to appellate review of determinations of probable cause and reasonable suspicion"). In any event, courts that have cited *Ornelas* in this context do not appear to have reflected upon, or even identified, any particular problem in choosing one standard over another.

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Miller v. Fenton, 474 U.S. 104 (1985), with no analysis of choice of standards); *People v. Chavez-Baarragan*, 379 P.3d 330, 338 (Colo. 2006) (citing *People v. Metheny*, 46 P.3d 453, 460 (Colo. 2002), involving a question of custody for *Miranda* purposes, as reason for adopting de novo standard); *State v. Wilson*, 367 A.2d 1223, 1231 (Md. 1977) (citing *Davis v. State of North Carolina*, 384 U.S. 737, 741-742 (1966) (standard of review for "dealing with the question whether a confession was involuntarily given")).

[7] *See Payton v. Commonwealth*, 327 S.W.3d 468, 417-472 (Ky. 2010) (citing without analysis *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002) which in turn cited, without analysis, *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) a case about the knock-notice rule which referenced *Ornelas* as the source of the standard of review).

One reason for that may be that the practical effects of any conflict are not as significant as Aksu suggests. The two-tiered standard of review which Aksu advocates would require reviewing courts to accept trial courts' findings of historical fact when those are supported by substantial evidence. *See Arizona v. Fulminante* 499 U.S. 279, 287 (1991); *Miller v. Fenton* 474 U.S. at 117. Aksu acknowledges that historical facts should be reviewed deferentially. Pet. App. 14. But in a fact-intensive determination like voluntariness of consent to a search, questions of fact and law tend to merge. Once a trial court has determined witness credibility and found the historical facts, there will typically be little room left for independent evaluation of the narrow question of voluntariness. This case is a good example. The police officers described a situation in which Aksu's consent was manifestly voluntary, and Aksu testified to the contrary. The trial judge made findings of credibility and historical fact in favor of the prosecution, and in light of those findings, which all agree are reviewed deferentially on appeal, there could be only one conclusion on the issue of voluntariness.

There is therefore no compelling reason to believe the outcome of many cases would be affected by the selection of the standard of review on appeal. This is likely why so few courts have shown any interest in acknowledging, much less confronting, the conflict Aksu describes. *Cf. Dickinson v. Zurko*, 527 U.S. 150, 162-163 (1999) (analyzing 89 administrative law cases reviewed under differing standards of review and finding none where "use of one standard rather than the other would in fact have produced a different outcome").[8]

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[8] Nor is there reason to think that the employment of (continued…)

2. Aksu is also wrong in arguing that California employs an incorrect standard of review to the Fourth Amendment voluntary consent issue and should instead apply the same standard used in evaluating the voluntariness of a confession under the Fifth Amendment. Application of a de novo standard of review to the issue of voluntariness in the confession context follows this Court's precedents, which, "[w]ithout exception," have held "that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." *Miller v. Fenton*, 474 U.S. at 110. In contrast, this Court has consistently distinguished the issue of Fourth Amendment consent as one of fact. *Schneckloth v. Bustamonte*, 412 U.S. at 248-249. The distinction recognizes fundamental differences in the protections granted by the Fourth and Fifth Amendments. Courts assess voluntariness under the Fifth Amendment to protect defendants' rights not to be convicted based on compelled confessions. But the

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different standards of review among different jurisdictions would affect defense counsel's ability to perform effectively within a particular jurisdiction. The amicus curiae brief of the National Association for Public Defense argues (at p. 4) that the lack of uniformity across state and federal courts presents a "great challenge" in advising clients. But defense counsel are no doubt capable of determining the standard of review applicable in a given jurisdiction and representing their clients accordingly. The argument that a hypothetical client might misinterpret a split of authority as incompetence of counsel (Amicus Brief at p. 8) is speculative, and nothing of the sort occurred here. There is no indication that counsel in the present case, who was retained rather than appointed, was confused, or that the state of the law resulted in the client losing confidence. And, for the reasons discussed in the text, there is little chance that any confusion or even error in this regard would cause any actual prejudice to a defendant.

determination of whether consent to search was voluntary does not similarly implicate a trial right. Rather it is focused, as is the exclusionary rule itself, on deterring unreasonable police conduct. *See Schneckloth v. Bustamonte*, 412 U.S. at 241 ("There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment."); *id* at 242 ("The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial.").

This Court has employed the equivalent of California's substantial evidence test when reviewing a federal trial court's determination of voluntariness under the Fourth Amendment. In *United States v. Mendenhall*, 446 U.S. 544, 557-560 (1980) this Court found that because "the totality of the evidence in this case was plainly adequate to support the District Court's finding that the respondent voluntarily consented to accompany the officers to the DEA office," the court of appeals was wrong to substitute its own judgment. And, absent "exceptional circumstances" this court defers to the factual findings of the states' courts "even when those findings relate to a constitutional issue." *Hernandez v. New York*, 500 U.S. 352, 365-366 (1991) (deferring to state court's determination that prosecutor's exercise of peremptory challenges was not motivated by racial bias). The Constitution does not require more than Aksu was provided.

3. This case in any event would not be a good vehicle for any further consideration of the standard-of-review issue by this Court. Though the parties did articulate differing standards on the voluntariness question before the appellate division of the superior court, the issue received cursory attention at best.

Neither party engaged in a detailed analytical argument of what standard should be employed. The appellate division's opinion recited the standard of review, but gave no indication that it weighed competing standards. Instead, the appellate division relied on the standard dictated to it by the California Supreme Court in *People v. Michael*, 290 P.2d 852, 854 (Cal. 1955). The California Supreme Court has not been asked to reexamine that precedent since this Court's *Schneckloth* decision. For good reason: the substantial evidence standard described in *People v. Michael* was applied by the California Court of Appeal in *People v. Bustamonte*, 76 Cal. Rptr. 17, 20 (Cal. App. 1969), the direct appeal of the conviction that was the subject of collateral attack in *Schneckloth v. Bustamonte*. This Court recognized the California Court of Appeal's use of the substantial evidence standard of review in its discussion of the case. *See Schneckloth v. Bustamonte*, 412 U.S. at 221, citing *People v. Bustamonte*, 76 Cal. Rptr. at 20.

Nor would the outcome of this case depend on which standard of review the appellate court applied. In light of the historical facts resolved by the trial court, and the unequivocal credibility determination it made against Aksu, which must under any standard be reviewed deferentially, there can be no serious question about the voluntariness of Aksu's consent even if that narrow question is reviewed independently. Aksu testified both that he was not asked for and that he did not give voluntary consent. Tr. 152, 156. The trial court, however, found Aksu's testimony "quite uncredible." Pet. App. 22a-23a. The appellate division showed no hesitation in accepting the trial court's credibility determination. Thus the only evidence left to consider was Deputy Egnatchik's repeated testimony that he requested and received

consent to search Aksu and Aksu's briefcase, Tr. 67, 68, 74, 77, 88, 223, and the corroborative testimony of Sergeant Arthur, Tr. 93-94, 121-122, and Detective Rhods., Tr. 136; Pet. App. 25a. Voluntariness was not a close question.

In addition, because this case arises from a state-court appellate decision, it would require the Court to confront a potentially complicated threshold question about the scope of federal management of state court appellate proceedings. Since there is no conflict over the voluntariness rule as applied in the trial courts, Aksu's claim implicates only the non-federal question of how states implement their appellate systems (systems that are not constitutionally compelled in the first place) through standards of review. This Court properly may set the standard of review to be employed by federal courts over which this Court has supervisory authority "to prescribe rules of evidence and procedure that are binding in those tribunals." *Dickerson v. United States* 530 U.S. 428, 437 (2000). But this is not true of the state courts. "It is beyond dispute" that this Court does not "hold a supervisory power over the courts of the several States." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 345-346 (2006) (citing *Dickerson v. United States,* 530 U.S. at 438). More importantly, as the States are "free to devise their own systems of review in criminal cases," *Carter v. People of State of Illinois*, 329 U.S. 173, 176 (1946), the Constitution does not compel the States to provide uniform standards of appellate review and this case provides no compelling reason for this Court to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 12, 2017