NO. 21-_____

In the
# Supreme Court of the United States

APRIL DIANE MYRES,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

April Myres was convicted of mail and wire fraud related to an insurance claim. At trial, the Government elicited testimony from an insurance adjuster that Myres had not been cooperative when two FBI agents came to her house and that this was an indicator of fraud. That testimony was drawn exclusively from her not consenting to a warrantless search of her house for fingerprints.

The question presented is:

Whether the Fourth Amendment permits the Government to introduce testimony, based only on the defendant's not consenting to warrantless fingerprinting of her home, that her conduct was an "indicator" of fraud.

## RELATED PROCEEDINGS

This case arises from the following proceedings in the Ninth Circuit Court of Appeals and the Northern District of California District Court, listed here in reverse chronological order:

- *United States v. April Myres*, No. 19-10415 (9th Cir.). Denial entered Apr. 26, 2021;
- *United States v. April Myres*, No. 19-10415 (9th Cir.). Judgment entered Feb. 16, 2021;
- *United States v. April Myres*, No. CR-1700180-RS (N.D. Cal.). Judgment entered Nov. 21, 2019.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within this Court's Rule 14.1(b)(iii).

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## PETITION FOR WRIT OF CERTIORARI

Petitioner April Myres was convicted of mail and wire fraud based on evidence that she lawfully exercised her right to be free from warrantless searches within her home. The court of appeals' decision affirming her conviction conflicts with two lodestars of this Court's constitutional jurisprudence: First, that the home is sacrosanct, a "first among equals" entitled to special protection against government overreach; and second, that a criminal defendant's exercise of her constitutional rights cannot be used as evidence of guilt. Under the decision below, the government may seek to invade a person's most private spaces, then use the person's assertion of their constitutional rights in response to that invasion as evidence of a crime. This Court should grant review to address the tension between that decision and this Court's jurisprudence and answer a question of exceptional importance.

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013); *see also Caniglia v. Strom*, 141 S. Ct. 1596, 1599 (2021). "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Jardines*, 569 U.S. at 6 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). And this Court has prohibited a defendant's assertion of her constitutional rights from being used against her.

Turning this principle on its head, the Ninth Circuit allowed the government to admit testimony, based on nothing more than the defendant's not

allowing warrantless fingerprinting in her home, that her conduct was an "indicator" of fraud, that it was "unusual" for a theft victim to be uncooperative, and that she was "defensive." In so doing, the Ninth Circuit wrote off Myres' Fourth Amendment protections, stating that the testimony was too "vague" to raise constitutional concerns because it went directly to the prejudicial conclusion that Myres was uncooperative and that this was indicative of fraud, without mentioning fingerprinting along the way. But that licenses the government to use constitutionally prohibited inferences to convict defendants—all it needs to do is state the prohibited inference of guilt in a general but nonetheless highly prejudicial fashion. That is what it did here, and the only basis on which it did so was Myres' exercise of her constitutional rights.

The Ninth Circuit's decision gives short shrift to this Court's repeated admonition that "when it comes to the Fourth Amendment, the home is first among equals." *Jardines*, 569 U.S. at 6. This Court has repeatedly required the Government to obtain a warrant (or consent) before searching someone's home. And it has backstopped those protections by suppressing or refusing to allow testimony about a refusal to consent. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). In holding that the Government may circumvent the Fourth Amendment simply by jumping to the prejudicial bottom line, without mentioning the constitutionally protected conduct it was based on, the Ninth Circuit invited the Government to violate the Fourth Amendment whenever it wants by having its witnesses skip the details and move directly to the prohibited conclusion.

That holding gives the government free leave to punish criminal defendants for exercising their constitutional rights—something this Court has repeatedly prohibited.

Because the decision below conflicts with this Court's jurisprudence and presents a question of exceptional importance, this Court should grant certiorari. *See* S. Ct. R. 10(c).

## OPINIONS BELOW

The unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit appears at 844 F. App'x 987 and is reproduced at App.1-7. The Ninth Circuit's order denying rehearing en banc, App.20, is unpublished. The order of judgment of the United States District Court for the Central District of California are unpublished and reproduced at App.8-19.

## JURISDICTION

The Ninth Circuit issued its memorandum disposition affirming Myres' conviction and vacating and remanding in part for resentencing on February 16, 2021. The Ninth Circuit denied her timely petition for rehearing en banc on April 26, 2021. This petition is timely under this Court's March 2020 order extending the time to file any petition for certiorari to 150 days from the date of any order denying a petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides that:

> [t]he 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.

## STATEMENT OF THE CASE

### A. Factual Background

April Myres, a prison guard at the time of the offense, was convicted of one count each of mail and wire fraud, arising out of a claim she submitted on her homeowner's insurance. At trial, both sides agreed that Myres had made the mistake of getting into a relationship with an inmate at the San Francisco County Jail, Antoine Fowler, and that their relationship did not end with his release from custody. Both sides also agreed that a few months after Fowler's release and after their relationship ended, Myres reported a burglary at her home and filed an insurance claim to recover losses.

Pretty much everything else at trial was hotly contested. The Government contended that Myres' insurance claim, seeking recovery for 43 items, was false. But the defense offered evidence that Fowler committed the burglary and kept the loot, that Myres had broken up with Fowler before the burglary, and

that she and Fowler—who had nearly shot her son in the weeks leading up to the break-up—never contacted each other again.

The Government made a show of establishing that ten months after the burglary, twelve FBI agents came to Myres' home with a search warrant looking for the 43 items that were on Myres' insurance claim. The agents found only three—with their leading find being a purse that Myres could easily have thought was stolen because it was found in the wrong duster bag (and Myres had a very large collection of purses). C.A. Excerpts of Record ("ER") 873-76, 897-99. The defense also established that Fowler possessed and was trying to fence many of the missing items right after the burglary, ER 876-92, including items from Myres' home that should have been included in her insurance claim but were not, ER 885-87, 1729—all of which strongly suggested that her claim form was sloppily rather than fraudulently prepared, or at least that the Government could not prove the contrary beyond a reasonable doubt. And when the Government offered evidence seeking to establish that Myres made false statements to her insurer in addition to the items she claimed as losses, the defense responded with evidence that the alleged lies were either accurate, *e.g.*, ER 1195, made in good faith, *e.g.*, ER 1372, 1720-21, or made to save her job as a Deputy Sheriff, *e.g.*, ER 1362, 1381-82, not to defraud her insurer.

Over defense objection, the Government bulldozed through the problems with its proof by using Myres' exercise of her Fourth Amendment rights against her. In particular, the government sought to introduce

proof that, a few days after the burglary, Myres was visited at her home by two FBI agents (who did not have a warrant). Those agents asked if they could dust her home for fingerprints, and she declined. Before trial, the district court granted a defense motion to exclude that evidence, finding that it would violate Myres' constitutional rights. ER 1632.

Undeterred, the Government instead called the adjuster for Myres' insurance company, who was present when the FBI agents asked to dust for fingerprints. Before the adjuster testified, the defense asked the court to preclude him from giving his impressions of Myres' encounter with the FBI. The Government assured the court that the adjuster had a basis for those impressions that was independent of Myres' assertion of her constitutional rights. The court denied both the defense's request to voir dire the witness and to bar the adjuster's impressions. Instead, the court merely directed the Government to avoid expressly tying the impressions to the fingerprint request. ER 93-94.

The Government asked questions to elicit testimony that the FBI had asked Myres to do something, that in response she was "agitated" and "defensive," that "it didn't seem to be going too well," that she was not cooperative with the FBI, that her lack of cooperation was "unusual," and that he took note of it because it was an "indicator[]." ER 98-99. The word "indicator" was used multiple times by the insurance company witnesses and meant an indicator of fraud—the crime for which she was on trial. ER 1108, 1047, 1050, 1077, 1078. As a result, without mentioning the word fingerprinting, the Government

jumped directly to the inference that she had not cooperated because she was guilty.

While the Government and the adjuster did not expressly mention fingerprints, the testimony was based entirely on the request for fingerprints. All of the adjuster's impressions flowed from what he observed when she declined the FBI's request. ER 98. Indeed, when the defense renewed its objection, the district court acknowledged that the testimony was in fact based wholly on Myres' response to the fingerprint request, and the government has never contested that conclusion. ER 111.

Following trial, the jury convicted Myres of mail and wire fraud. It acquitted as to the charge of misprision of a felony. The district court sentenced her to 14 months' imprisonment.

### B. The Ninth Circuit's Decision

1. Myres appealed her conviction and sentence. As to her conviction, she argued that the district court erred in allowing the government to use her refusal to consent to warrantless fingerprinting against her.

2. The Ninth Circuit affirmed Myres' conviction. In its view, "the district court did not commit constitutional error in allowing testimony from an insurance claims adjuster regarding his impression of Myres' response to a request that federal law enforcement agents made during a visit to Myres' home." App.3. It believed that Myres' comment to the agents that "she didn't have time" for "something" they had asked her, did not lead to the conclusion that Myres refused a warrantless search. App.3.

The panel reached that conclusion even though the government had argued that Myres refused to cooperate because she was guilty—having successfully worked to elicit from its witness that Myres had refused something, and that this refusal was "unusual" and an "indicator" of fraud. And in reaching that conclusion, the Ninth Circuit simply ignored the other parts of the witness's testimony, including testimony that Myres' conduct was an "indicator" of fraud—as well as how "unusual" it was for a theft victim to be uncooperative, and how "defensive" she was.

Finally, the court found that even if "the testimony in question were considered a comment on the exercise of Myres' Fourth Amendment rights, the testimony was admitted for a proper purpose: to undermine Myres' theme that she was the victim of a burglary." App.3. The court rejected Myres' other substantive challenges as well, none of which are at issue in this petition, but it vacated Myres' sentence and remanded for resentencing.

3. Myres petitioned for rehearing en banc, challenging the panel's conclusion that the Government did not violate the Fourth Amendment by using Myres' refusal to consent to a warrantless search against her. The Ninth Circuit denied the petition for rehearing.

## REASONS FOR GRANTING THE PETITION AND SUMMARY OF ARGUMENT

**I.** One of the fundamental protections enshrined in the Bill of Rights is the right to be free of unreasonable or warrantless searches of the home. As

this Court has described it, the "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Jardines*, 569 U.S. at 6 (quoting *Silverman*, 365 U.S. at 511). Just this past term, this Court again recognized the "constitutional difference" between the home and other places in rejecting the so-called "community caretaking" exception adopted by some lower courts. *Caniglia*, 141 S. Ct. at 1599 (quoting *Cady v. Dombrowski*, 413 U.S. 433, 439, 441 (1973)).

The decision below conflicts with these principles—a classic reason to grant the petition. *See* S. Ct. R. 10. There can be no doubt that Myres had the constitutional right not to consent to a warrantless search of her home. But the Government convicted Myres in part based on testimony that her refusal to consent to a warrantless search of her home was an "indicator" of fraud. In finding no error, the Ninth Circuit failed to give any consideration at all to the special protections afforded the home.

The Ninth Circuit likewise disregarded this Court's cases holding that a defendant's invocation of her constitutional rights may not be used against her. *E.g.*, *Doyle*, 426 U.S. at 618; *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010). And though the Court has permitted a defendant to waive these rights by speaking with the police, *see Shatzer*, 559 U.S. at 103, the Court has never permitted an invocation of these rights—absent waiver—to be used against a defendant at trial. Yet the decision below allowed a government witness to declare in multiple ways that

Myres was hiding something based only on her invocation of her Fourth Amendment rights.

That decision rendered Myres' "core" right to refuse a search in her home a dead letter. *Jardines*, 569 U.S. at 6. And it did exactly what *Doyle* and other cases prohibit: it used the fact that she had exercised her constitutional rights as proof of her guilt. 426 U.S. at 618. The decision thus conflicts with this Court's decisions on two exceptionally important constitutional issues—a classic reason to grant review. S. Ct. R. 10.

**II.** This case is an ideal vehicle to consider these issues. The testimony about Myres' refusal to consent to a warrantless search was unquestionably prejudicial. Myres preserved her objections to that testimony below, both the trial and appellate courts addressed the issue, and the relevant facts are undisputed. This petition thus cleanly presents the question presented and is ripe for the Court's review.

## I. Invocation of the Fourth Amendment May Not Be Used Against a Defendant at Trial

When it comes to the Fourth Amendment, the home is "first among equals." As this Court has described it, the "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Jardines*, 569 U.S. at 6 (quoting *Silverman*, 365 U.S. at 511). An unbroken line of this Court's precedent thus establishes that "the Fourth Amendment draws 'a firm line at the entrance to the house.'" *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (Scalia, J.). Just this past term, this Court again

recognized the important "constitutional difference" between the home and other places where law enforcement might conduct a search. *Caniglia*, 141 S. Ct. at 1599 (quoting *Cady*, 413 U.S. at 439).

For that reason, an officer's physical intrusion on a home or its curtilage to gather evidence "is presumptively unreasonable absent a warrant." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018). This rule, rooted in the text and history of the Fourth Amendment, recognizes that the right of the people to be free from unrestrained search and seizure is at its apex in the home, where privacy interests are "most heightened," *California v. Ciraolo,* 476 U.S. 207, 213 (1986). And under this rule, the Government may not "engage in conduct not explicitly or implicitly permitted by the homeowner." *Jardines*, 569 U.S. at 6.

To backstop these protections, this Court has also prohibited actions by the Government that impermissibly burden fundamental constitutional rights. It has long been held that a defendant's invocation of her constitutional rights may not be used against her. *E.g.*, *Doyle*, 426 U.S. at 618 (finding that it would be "fundamentally unfair" to allow an arrested person's silence to be used against them); *Shatzer*, 559 U.S. at 103 (discussing prophylactic rules to protect the exercise of a suspect's rights under *Miranda*). And reflecting the degree of protection that must be afforded Fourth Amendment rights, this Court has prohibited the Government from invalidating one occupant's refusal to consent to a search of a home by obtaining consent from another

occupant. *Georgia v. Randolph*, 547 U.S. 103, 106 (2006).

The Ninth Circuit's ruling conflicts with these principles. That is reason enough to grant this Petition. *See* S. Ct. R. 10. The Ninth Circuit allowed the government to use Myres' decision not to allow a warrantless search—her constitutional right—against her at trial. There is no dispute that the Government did not obtain a warrant to fingerprint Myres' home, that Myres did not "explicitly or implicitly permit[]," *Jardines*, 569 U.S. at 6, the Government to conduct a search, or that the Government then elicited testimony that used that refusal against her.

The Ninth Circuit brushed these cases aside on the basis that the testimony that Myres had not been cooperative and that this was an "indicator" was too vague to implicate her Fourth Amendment Rights. But accepting the Ninth Circuit's reasoning would turn the Fourth Amendment—and any other constitutional protections—into a dead letter by allowing witnesses to go directly to the constitutionally prohibited inference so long as they omit the constitutionally protected conduct on which it is based. Fundamental constitutional rights cannot be so easily circumvented, nor can they be conditioned on the incantation of a few magic words. *Brown v. Illinois*, 422 US 590, 602-03 (1975) ("Any incentive to avoid Fourth Amendment violations would be eviscerated by making the [Miranda] warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.'").

The same infirmity dooms the Ninth Circuit's fallback argument—that the constitutional issue is irrelevant because the testimony had a "proper purpose." It didn't. This was not a case in which a defendant opened the door to otherwise inadmissible evidence by advancing an argument that that evidence could contradict. *See* Kenneth S. Broun et al., *Fighting Fire With Fire: Inadmissible Evidence as Opening the Door*, 1 McCormick on Evid. § 57 (8th ed.). Myres never contended that she cooperated with law enforcement. Instead, she contended that she was the victim of a burglary, that she was entitled to recover her losses, and that she made her insurance claim imperfectly but in good faith. The only way in which her refusal refutes her defense is not by direct contradiction but by the prohibited inference that if she was a burglary victim, she would not have exercised her right to refuse to allow fingerprinting. That is no different from the prohibited inference that if an individual isn't guilty, he or she would simply talk to the police. *Mitchell v. United States*, 526 U.S. 314, 329 (1999) ("The rule against adverse inferences from a defendant's silence in criminal proceedings, including sentencing, is of proven utility."). The insurance adjuster testified that Myres didn't cooperate—and that this was an indicator of guilt—based only on her exercise of her constitutional right to decline a warrantless search of her home. Allowing the Government to take her constitutionally protected conduct—conduct at the "very core" of the Fourth Amendment—and use it to prove that Myres was a criminal cannot be squared with the Constitution.

## II. This Petition Is an Ideal Vehicle to Address This Question

This case is the right vehicle to decide the question presented. Myres raised the issue in the trial court, it was at the heart of her appeal, both courts ruled on the issue, and the facts about what was testified to and the basis for it aren't in dispute.

Moreover, the evidence was undoubtedly prejudicial and not harmless. *See* Fed. R. Crim. P. 52; *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (the government must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). This was a case where the evidence was hotly contested. To find Myres guilty required the jury to believe that knowingly made false statements on her insurance form. But the Government's evidence on that point was underwhelming. Of the 43 items on her insurance claim form, the government only found 3 that it believed were wrongly claimed. At the same time, Myres had failed to claim other items that were stolen, all suggesting that her claim form was sloppily rather than fraudulently prepared. The testimony that Myres was not cooperative and this was an "indicator" of fraud undoubtedly swayed the jury's determination in whether Myres made misstatements fraudulently or just sloppily, and despite multiple opportunities to do so, the government has never even tried to argue that the admission of the adjuster's testimony was harmless beyond a reasonable doubt.

Nor is the fact that the Ninth Circuit's decision was unpublished a reason not to grant review. This

Court has never treated a decision's unpublished status as a reason to deny review. *See* S. Ct. R. 10; *see also, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518 (2018) (reversing unpublished opinion in Fourth Amendment case). There is good reason for not exempting unpublished decisions from this Court's review. Doing so would insulate from review the bulk of decisions handed down by federal appellate courts. Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 Mich. L. Rev. 533, 551-54, 561 (2020).

Accordingly, this Court should grant certiorari to consider the issues addressed here because they raise questions of broad importance, regardless of the fact that the Ninth Circuit chose to dispose of this particular case through an unpublished disposition.

## CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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