No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

WILLIS WHEELER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED

I.

This Court's longstanding authority draws a "firm line at the entrance to the house," deeming "any physical invasion of the structure of the home, 'by even a fraction of an inch'" "too much" and "*all* details" within the home "intimate details," and recognizing that in the home there is a "minimal expectation of privacy that *exists,* and that is acknowledged to be *reasonable*." *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001) (emphasis in original) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980) and *Silverman v. United States*, 365 U.S. 505, 512 (1961)). The question presented is:

> Whether a law enforcement officer's warrantless insertion of keys into a locked apartment door, within a secured multi-unit dwelling, to gain information that was unavailable to the naked eye is an unreasonable search.

II.

> Whether the Third Circuit's rule limiting parties to the precise arguments raised in the district court directly conflicts with this Court's traditional rule that parties are *not* limited to the precise arguments made below but can make any argument in support of a claim that was properly presented.

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Willis Wheeler, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on September 10, 2021.

OPINION BELOW

The not precedential opinion of the Court of Appeals for the Third Circuit issued following this Court's June 3, 2019 order granting certiorari, vacating, and remanding, *see Wheeler v. United States*, 139 S. Ct. 2664 (2019), is at *United States v. Wheeler,* ___ F. App'x ___, 2021 WL 4129731 (3d Cir. 2021). Appendix A.

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a), which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

The petitioner's judgment was affirmed by an opinion filed September 10, 2021. The Petition for Writ of Certiorari is due on or before December 9, 2021.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States 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.

STATEMENT OF THE CASE

This case involves the warrantless physical intrusion by police into a secured multi-unit dwelling and into the locked apartment door to a unit within that building to gather information in building a case against Willis Wheeler.

Four months into a wide-ranging investigation into suspected heroin dealing by multiple actors, federal agents stopped a car being driven by Willis Wheeler, arrested Wheeler, and searched the car. Seized from the car was an unmarked set of keys. Agents initially took the keys to Mr. Wheeler's home. The keys did not work at that location. Hours later and at the direction of the Assistant United States Attorney, agents transported the keys to 500 Mills Avenue "to see if those keys worked at that location."[1]

Mills Avenue's lone connection to this investigation was Mr. Wheeler's single 30-minute visit hours before his arrest. More particularly, before stopping Mr. Wheeler, agents followed him from his home to 500 Mills Avenue, where he stayed about 30 minutes, and then to Kentucky Fried Chicken. Although agents had been surveilling Mr. Wheeler for months, they saw him at the Mills Avenue location only once—the day he was arrested. And when Mr. Wheeler left Mills Avenue, officers watched him discard a trash bag containing nothing of evidentiary value. There was

[1] Citations to the record supporting the factual summary are provided in the briefing filed by Mr. Wheeler in the Third Circuit Court of Appeals and in the Appendix [hereinafter "Appendix"] filed at No. 16-3780 on the Third Circuit's electronic docket. *See* https://ecf.ca3.uscourts.gov/n/beam/servlet/TransportRoom

no evidence of drug transactions at, or near, Mills Avenue. Nor did the evidence connect any of the 30 related defendants to Mills Avenue.

Acting at the direction of an Assistant United States Attorney, and without securing a warrant, agents "started trying keys on that keyring to the security door" at 500 Mills Avenue until they found a key that worked. The Assistant United States Attorney then "instructed" officers "[t]o go inside and see if [they] could locate an apartment that one of the keys may go to." Officers tried the keys in several doors before opening Apartment 4, entering, and securing that apartment. *See* Appendix at 123.

Only then, relying on information gleaned from the unlawful warrantless entry of 500 Mills Avenue and Apartment 4, did officers apply for and obtain a search warrant. During execution of that warrant, agents found a locked safe in a bedroom, inside a box. Inside this safe was a "block" of heroin cut differently from all other heroin seized in this case. Law enforcement did not find a key to the safe despite searching Mr. Wheeler's car, person, and house.

Mr. Wheeler moved to suppress evidence derived from the warrantless search, arguing in pertinent part that the officers conducted an unlawful search and committed a *per se* violation of the Fourth Amendment when they inserted keys in the locks at 500 Mills Avenue to identify the apartment to be searched. Without that identification, there was no probable cause to issue a warrant to search Apartment 4 given the complete absence of any nexus between the place to be searched and illegality at that address.

Preliminarily, the parties and courts below assumed Mr. Wheeler had standing to challenge the search. At the suppression hearing, the parties stipulated that the landlord would have testified that Mr. Wheeler and another individual appeared in person to rent the Mills Avenue apartment and that rent payments were left therein. Notably, in Pennsylvania, written leases, like the payment of rent, are not essential to a landlord-tenant relationship. *E.g., Mirizio v. Joseph*, 4 A.3d 1073 (Pa. Super. 2010). Mr. Wheeler had keys to this apartment and paid for utilities there after placing those utilities in the names of others.

The district court denied the motion to suppress, and the Third Circuit Court of Appeals affirmed that ruling.

The government's case was circumstantial and not overwhelming. It theorized that Willis Wheeler conspired with Richard Bush and Mayank Mishra by supplying heroin to Bush, who cut and packaged it for sale (using diluent and stamp bags he purchased from Mayank Mishra) and then distributed it. Although this investigation led to not less than 15 other prosecutions and involved wiretaps of not less than 16 phones (including Bush's and Wheeler's), capturing "thousands and thousands" of calls, and extensive surveillance between August 2011 and March 2012 (including video surveillance), the government failed to present a single witness who observed Wheeler supply Bush heroin or any evidence Wheeler knew about, spoke to, or met with Mishra.

Devastating to Mr. Wheeler's defense was improper lay-opinion offered by investigating agents on the critical disputed issue, that Wheeler's role in the East

Hills drug conspiracy was to supply Bush with heroin, and inadmissible lay and expert opinion interpreting wiretapped calls to mean Bush and Wheeler were working together. Agents also opined that the Mills Avenue location was Wheeler's stash house. Although validating defense counsel's unwavering position that (1) lay-opinion not based on personal, first-hand knowledge and (2) lay "opinion concerning the ultimate issue that 'merely tells the jury what result to reach' based on evidence . . . before the jury," was inadmissible, Appendix A at 14-15, the panel nevertheless affirmed Mr. Wheeler's conviction.

Mr. Wheeler was convicted of conspiracy to distribute and possess with intent to distribute one kilogram or more of heroin, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(ii), 846, possession with intent to distribute more than 100 grams of heroin, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii), and unlawful possession of a firearm, 18 U.S.C. § 922(g)(1). He was sentenced to concurrent terms of 240 months for conspiracy and 120 months each for possessing the drugs and gun. The kilogram quantity subjecting Mr. Wheeler to the now repealed 20-year statutory sentence derived in pertinent part from the 760-gram block of heroin seized from the concealed, locked safe found within the Mills Avenue apartment. *See* First Step Act of 2018, Pub. L. No. 115-391, Title IV, § 401.

This Court grants Mr. Wheeler's Petition for Writ of Certiorari, Vacates the Judgment and Remands for Further Proceedings on a Procedural Sentencing Issue.

On December 19, 2018, Mr. Wheeler filed a petition for writ of certiorari, asking this Court to resolve, *inter alia*, a question over which the courts of appeals

are divided notwithstanding this Court's longstanding authority holding that the Fourth Amendment draws a firm line at the entrance to the house, which line police may not cross absent a warrant or exigent circumstances: whether an officer's insertion of keys into a locked apartment door to gather information in building a case against the accused is a search for which the Fourth Amendment requires a warrant.

After the petition was filed, new legislation was enacted altering statutory penalties and reducing the statutory mandatory minimum under which Mr. Wheeler was sentenced from 20 years to 15 years. Mr. Wheeler filed a Supplemental Brief, arguing that the First Step Act, enacted December 21, 2018, applies to pending, non-final criminal cases on direct appellate review and should be applied to reduce his sentence. Supplemental Brief for Petitioner, *Wheeler v. United States*, S. Ct. No. 18-7187 (filed March 19, 2019).

By order dated June 3, 2019, this Court granted certiorari, vacated the lower court judgment, and remanded to the Court of Appeals for the Third Circuit for the court to consider the First Step Act. *Wheeler v. United States*, 139 S. Ct. 2664 (2019).

After the GVR order issued, this Court issued an intervening decision also bearing on Mr. Wheeler's case. *Rehaif v. United States*, 139 S. Ct. 2191 (June 21, 2019). In *Rehaif*, the Court held that 18 U.S.C. § 922(g) requires proof both that the defendant knew he possessed a firearm and "knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.*, at 2200.

Mr. Wheeler requested permission to file supplemental briefing addressing new authority, including new authority calling into question the Third Circuit's substantive ruling that insertion of a key into the front door of an apartment is not an impermissible warrantless search under a reasonable expectation of privacy theory. *See* Motion to File Supplemental Briefs, Appeal No. 16-3780 (filed July 10, 2019); Renewed Motion to File Supplemental Briefs, Appeal No. 16-3780, Doc. 240 at ¶¶ 10-11 (filed June 26, 2021). The Third Circuit did not authorize supplemental briefing.

In ultimately affirming the judgment, the Third Circuit relied on an intervening Third Circuit opinion rejecting application of the First Step Act to cases pending on appeal at the time of enactment. Appendix A at 7-8 (citing *United States v. Aviles*, 938 F.3d 503 (3d Cir. 2019)). It also relied on this Court's decision in *Greer v. United States*, 141 S. Ct. 2090 (2021), rejecting a *Rehaif* based claim under plain error review. Appendix A at 7-11. The remainder of the opinion affirming the judgment was materially identical to the initial opinion.

This timely petition follows.

REASONS FOR GRANTING THE WRIT

This case presents the question whether the Fourth Amendment allows officers acting without a warrant to insert unmarked keys seized from within a suspect's car into a locked apartment door within a secured multi-unit dwelling in order to gain information to build its case against that suspect.

The Third Circuit viewed a locked apartment door within a secured multi-unit dwelling as a "common area" over which residents lack a reasonable expectation of privacy. Appendix A at 33-34 (citing *United States v. Correa*, 653 F.3d 187 (3d Cir. 2011)). In so ruling, the panel followed authority from the First, Fourth, Sixth, Seventh and Ninth Circuit Courts of Appeals, including abrogated authority, holding that "inserting a key into a lock is either not a search at all, or else so minimal an invasion of privacy that a warrant is not needed." Appendix A at 34.

The Third Circuit's holding directly conflicts with this Court's longstanding authority drawing a "firm line at the entrance to the house,"[2] deeming "any physical invasion of the structure of the home, 'by even a fraction of an inch'" "too much"[3] and "*all* details" within the home "intimate details,"[4] and recognizing that in the home there is a "minimal expectation of privacy that *exists,* and that is acknowledged to be *reasonable*." *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001)

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[2] *Payton v. New York*, 445 U.S. 573, 590 (1980).

[3] *Silverman v. United States*, 365 U.S. 505, 512 (1961).

[4] *Kyllo v. United States*, 533 U.S. 27, 37-38 (2001) (emphasis in original) (citing *United States v. Karo*, 468 U.S. 705 (1984)).

(emphasis in original) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980) and *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

Moreover, the Third Circuit's holding is at odds with opinions from the First and Sixth Circuits reaching the opposite conclusion on identical facts and so creates a direct conflict among the circuits on a matter of federal constitutional law. *United States v. Bain*, 874 F.3d 1 (1st Cir. 2017) (holding that turning a key in a locked apartment door to gather information is an unreasonable warrantless search under both a reasonable expectation of privacy theory, *see Katz v. United States*, 389 U.S. 347 (1967), and a trespass theory, *see Florida v. Jardines*, 569 U.S. 1 (2013)); *United States v. Heath*, 259 F.3d 522, 527-27, 533-34 (6th Cir. 2001) (holding that officers who seized keys from a suspect, used keys to enter an apartment building and then on various apartment doors before finding the corresponding lock, violated the tenant's subjective expectation of privacy).

Certiorari is warranted to resolve the split of authority. *See* Brief of Respondent in Opposition, *Wheeler v. United States*, S. Ct. No. 18-7187, filed Apr. 5, 2019 (acknowledging there is "some disagreement" "among the courts of appeals as to whether a key test can violate the Fourth Amendment"). Alternatively, given that the Third Circuit's decision is wrong under the settled authority of this Court that the panel elected to disregard and that circuit authority the Third Circuit relied on either predates or overlooks *Kyllo*, is inapposite, or has been abrogated, this Court may grant the petition and order summary reversal.

Additionally, the Third Circuit's opinion declined to consider this Court's holding in *Florida v. Jardines*—that a warrantless physical intrusion (the insertion of keys) into a constitutionally protected area (a house) to gather information (that keys seized from the suspect accessed the apartment) is a search under a common-law trespassory test—by deeming that issue forfeited. *See* 569 U.S. 1, 11 (2013); *United States v. Jones*, 565 U.S. 400, 404-05 (2012). The Third Circuit's rule limiting parties to the precise arguments raised in the district court directly conflicts with this Court's traditional rule that parties are not limited to the precise arguments made below but can make any argument in support of a claim that was properly presented. This Court should grant the petition to eliminate this conflict.

I. The warrantless insertion of keys into a locked apartment door to detect information that is unavailable to the naked eye is an unreasonable search according to long-standing Fourth Amendment principals articulated in *Kyllo* and *Katz*. Notwithstanding this Court's settled authority, the Courts of Appeals are divided on this question, and this Court should accept certiorari to resolve this conflict.

A. The Fourth Amendment draws a firm line at the entrance to the house and, absent exigent circumstances, police may not cross that threshold to gather information without a warrant.

"When it comes to the Fourth Amendment, 'the home is first among equals.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013). At the very core of the Fourth Amendment is the right of a person to be in his own home free from unreasonable governmental intrusion. *Payton v. New York*, 445 U.S. 573 (1980). The Fourth Amendment draws "a firm line at the entrance to the house" and, "[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." 445 U.S. at 590.

The question presented is whether officers acting without a warrant may take unmarked keys seized from within a suspect's car and insert them into locked apartment doors within a secured multi-unit dwelling, which building the suspect was seen visiting once during four months of surveillance and had no other connection to the targeted conspiracy, to gain information to build its case against that suspect.

Kyllo v. United States, 533 U.S. 27 (2001) resolves this case.

Kyllo considered an officer who pointed a thermal-imaging device at a house to gather information from within, *i.e.*, the heat emanating from the house. This Court reaffirmed that the Fourth Amendment draws a "firm line at the entrance to the house." *Id.*, at 40 (quoting *Payton v. United States*, 445 U.S. 573, 590 (1980)). And it reiterated that "any physical invasion of the structure of the home, 'by even a fraction of an inch,' [is] too much." *Kyllo,* 533 U.S. at 37 (quoting *Silverman v. United States,* 365 U.S. 505, 512 (1961)). While it may be difficult to determine whether an individual has an expectation of privacy society is prepared to recognize as reasonable when the search is of telephone booths or automobiles, when the search is of a home there is a "minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*." *Kyllo*, 533 U.S. at 34 (emphasis in original).

This Court held that police, by obtaining information regarding the home's interior that was not visible to the naked eye through "ordinary visual surveillance" from a lawful vantage point and "could not otherwise have been obtained without

physical 'intrusion into a constitutionally protected area,'" conducted an unreasonable warrantless search. *Id.*, 533 U.S. at 34-35, 39.

Soo too here.

As in *Kyllo*, officers were engaged "in more than naked-eye surveillance of a home." *Kyllo,* 533 U.S. at 33. They inserted keys into a locked apartment door to "explore details of the home" that were "unknowable" without that intrusion—that unmarked keys seized from Mr. Wheeler's car accessed this specific apartment wherein a quantity of heroin and paraphernalia was recovered. *See Kyllo*, 533 U.S. at 40. When officers use a "sense-enhancing" device—whether "'crude' or 'sophisticated'" or "old or new"—to explore details of the home that they would not otherwise have discovered without the intrusion, they violate "our 'minimal expectation of privacy'—an expectation 'that *exists*, and that is acknowledged to be *reasonable*.'" *Jardines*, 569 U.S. at 15 (quoting *Kyllo*, 533 U.S. at 34, 36). Thus, by inserting keys into a locked apartment door to gain information in building its case against Mr. Wheeler, which information was unknowable without the intrusion through "naked-eye" visual observation, officers conducted a warrantless search that was presumptively unreasonable. *Kyllo*, 533 U.S. at 40.

B. The Courts of Appeals are divided on the question whether the insertion of a key into a locked apartment door is a search for which the Fourth Amendment requires a warrant.

Jardines makes plain that had police acting without a warrant inserted keys seized from a suspect into the locked front door of a single-family dwelling to

connect the suspect to the house, they would have conducted an unconstitutional search under both a trespass and a reasonable expectation of privacy theory.

Jardines applied a common-law trespassory test to conclude that "[w]hen 'the Government obtains information by physically intruding'" into a constitutionally protected area (the curtilage of a house), a search within the original meaning of the Fourth Amendment has occurred. *Jardines*, 569 U.S. at 5 (quoting *United States v. Jones*, 565 U.S. 400, 404-05 (2012)). *See United States v. Bain*, 874 F.3d 1, 13, 15 (1st Cir. 2017) (holding that turning a key in an apartment door "constitute[s] a trespassory invasion under *Jones* and *Jardines*"; "Paraphrasing *Jardines*: To find a visitor knocking on the door is routine (even if sometimes unwelcome); to find that same visitor trying a series of keys on the door's lock 'would inspire most of us to—well, call the police.'"). The majority observed that "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Jardines*, 269 U.S. at 11.

Justice Kagan's concurrence explained that focusing on Jardines' privacy interests would make this an "'easy cas[e] easy' twice over." *Id.*, 569 U.S. at 16 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.). Because property and privacy concepts "align" when entry is of a house, Justice Kagan summarized how a decision applying a reasonable expectation of privacy rubric would have mirrored the majority's decision applying a property rubric with only one divergence: "[H]ad [we] decided this case on privacy grounds, we would have realized that *Kyllo* [] already resolved it." *Id.*, 569 U.S. at 13-15 (Kagan, J.,

concurring). *Kyllo* drew a "'firm' and 'bright' line at 'the entrance to the house.'" *Id.*, at 14. Police violated Jardines' reasonable expectation of privacy by using a sense enhancing device, a drug-sniffing dog, "to 'explore details of the home' (the presence of certain substances) that they would not have otherwise discovered without entering the premises." *Id.*, at 15. *See Bain*, 874 F.3d at 14 (holding that the warrantless insertion of a key into a locked apartment door to gather information to be used in building a criminal case against a suspect constitutes a Fourth Amendment violation under a reasonable expectation of privacy test).

The Third Circuit ignores *Kyllo* entirely, applying a different rule to a particular type of dwelling, that is, an apartment building. The Third Circuit holds that the insertion of keys into an apartment door's lock is a search of the common areas of a secured multi-unit apartment building, over which a resident lacks an objectively reasonable expectation of privacy. Appendix A at 33-34 (quoting *United States v. Correa*, 653 F.3d 187 (3d Cir. 2011) (holding that a resident of a multi-unit apartment complex with a locked exterior door lacks a reasonable expectation of privacy in the common areas of that building to affirm a warrantless arrest of a resident in a hallway following the officers' unlawful trespass into that secured building)). In concluding that Justice Kagan's concurrence in *Jardines*—providing that a warrantless dog sniff on a home's front porch, which the majority identifies as curtilage, violates a reasonable expectation of privacy—"sheds no light on whether an individual has any reasonable expectation of privacy to the fact that a key works within his home's lock," Appendix A at 34, the Third Circuit necessarily

concludes that Fourth Amendment privacy protections afforded to curtilage do not extend to residents of multi-family dwellings.

In so ruling, the Third Circuit follows its "sister Courts of Appeals who have addressed the issue under the reasonable expectation of privacy theory" and concluded that inserting a key into a lock either is not a search, or, if a search, not one that requires a warrant because the privacy interest in the information held by a lock (*i.e.*, that the key works in the home's lock) is minimal. Appendix A at 34 (citing *United States v. Thompson*, 842 F.3d 1002, 1008 (7th Cir. 2016) (relying entirely on *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991), which held that the insertion of a key into a locked apartment door is a search because the keyhole contains information that is not accessible to public view but not one that requires a warrant because the privacy interest in the information held by a lock is so small)); *United States v. Moses*, 540 F.3d 263, 272 (4th Cir. 2008) (holding that the discrete act of inserting a key into the lock of an apartment door to discover whether it fit did not offend the Fourth Amendment); *United States v. Salgado*, 250 F.3d 438 (6th Cir. 2001) (holding that inserting a key into an apartment door to determine the key unlocked that door was not a search and that the accused had no reasonable expectation of privacy where the lock to the apartment door faced an unlocked common hallway that was accessible to passersby).[5]

[5] Parenthetically, the First and Ninth Circuit authority relied upon by the Third Circuit involving the insertion of keys into a vehicle lock or storage lockers is inapposite because "when it comes to the Fourth Amendment, the home is first among equals." *Collins v. Virginia*, 138 S. Ct.1663, 1670 (2018) ("privacy expectations are most heightened" in the home and curtilage); *Florida v. Jardines*,

The foregoing cases pre-date (or ignore) *Kyllo* and do not survive *Kyllo* or *Jardines*, a fact acknowledged by at least two of those circuits. *See Bain*, 874 F.3d at 15-16 (explaining that *Salgado's* view that the lock on an apartment door in an unlocked hallway is undeserving of protection because it is as accessible to the public as an automobile lock does not survive *Jardines*, which found that the Fourth Amendment protects the curtilage of a home from unlicensed searches even though the curtilage is readily accessible to the public); *United States v. Dixon*, 984 F.3d 814 (9th Cir. 2020) (explaining that its holding in *$109,179 in U.S. Currency* is "'clearly irreconcilable'" with *Jardines*).

Kyllo expressly rejected the position articulated in those cases and accepted by the panel here, Appendix A at 34, that the Fourth Amendment's protections depend on the *type* of information gathered from within a house such that the information gleaned from the instant search, that the key turns the lock, is too insignificant to warrant protection. *See Kyllo*, 533 U.S. at 37 (rejecting government

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569 U.S. 1, 6 (2013). *See* Appendix A at 34 (citing *United States v. Lyons*, 898 F.2d 210, 212-13 (1st Cir. 1990) (insertion of key into padlock of storage locker was not a search) and *United States v. $109,179 in U.S. Currency*, 228 F.3d 1080, 1087-88 (9th Cir. 2000) (inserting key into car door lock to identify owner of the car was not an unreasonable search), *abrogated by United States v. Dixon*, 984 F.3d 814 (9th Cir. 2020) (relying on *Jones* and *Jardines* to hold that officer's insertion of a key into a lock on a vehicle's door is a search that requires a warrant or an exception as it is a physical intrusion into a constitutionally protected area)). The First and Ninth Circuits have themselves recognized this crucial distinction. *See Bain*, 874 F.3d at 15-16 (explaining that cases like *Lyons and $109,179 in U.S. Currency*, which involved the warrantless insertion of a key in a storage container padlock or vehicle, were inapposite as "the Fourth Amendment protects effects markedly less than it protects houses" and this Court repeatedly has held that "'people's expectations of privacy are much lower in their cars than in their homes.'"); *Dixon, supra*.

argument that search was constitutional because it did not detect "private activities occurring in private areas" or reveal "intimate details"). "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Id.* "In the home, . . . *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo,* 533 U.S. at 37 (emphasis in original) (citing *United States v. Karo,* 468 U.S. 705, 715-17 (1984) (warrantless installation of a tracking device in the home, which device merely revealed the presence within the home of the container housing that device, was a presumptively unreasonable search)).

And *Jardines* makes clear that Fourth Amendment protections extend to the curtilage of a home, even when the curtilage is visible and accessible to others. *See also Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018) ("The ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible.").

This Court in *Jardines* reaffirmed that the curtilage is part of the home for Fourth Amendment purposes and entitled to the same protections as the home itself because it is "intimately linked to the home, both physically and psychologically." *Jardines*, 569 U.S. at 5, 6-7 (the right to retreat into one's home and be free from unreasonable governmental intrusions "would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity. …"); *Oliver v. United States,* 466 U.S. 170, 176 (1984). It identified

the front porch as the "classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" *Jardines*, 569 U.S. at 7. *Jardines* found that the Fourth Amendment protects the curtilage of a home from unwarranted searches even when the curtilage, there the front porch, is accessible to the public. Indeed, "privacy expectations are most heightened" in the home and surrounding area or curtilage. *Jardines*, 569 U.S. at 7 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

In *Collins*, the Court reached a similar conclusion with respect to a driveway "immediately surrounding [a] home" in a "residential suburban neighborhood," *Collins v. Commonwealth*, 790 S.E.2d 611, 623 n.4 (Va. 2016) (Mims, J., dissenting), *rev'd*, 138 S. Ct. 1663 (2018); *see Collins*, 138 S. Ct. at 1670-1671. The Court rejected the view that curtilage "into which an officer can see from the street" is any "less entitled to protection from trespass and a warrantless search than a fully enclosed" space. *Collins*, 138 S. Ct. at 1675. A contrary conclusion, the Court observed, would reserve constitutional rights for "those persons with the financial means" to wall off their property from view, violating the rule that "[t]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *Id.*

The front door to a home and that door's lock—whether the home is an apartment within a secured multi-unit dwelling or a single-family home in a suburban neighborhood—***is*** the home, or at minimum, the curtilage for purposes of the Fourth Amendment. The fact that other tenants may have the right to enter a

common hallway such that the front door lock is visible and accessible to others does not make the front door any less curtilage than would the fact that a door to a single-family dwelling faces outward to a busy street such that it is visible and accessible to passersby.

The common law supports the view that the door to an individual apartment in a multi-unit residence is entitled to the same protections as the outer door of a single-family home. As Blackstone explained, a rented unit, such as a "chamber in a college or an inn of court" or certain "room[s] or lodging, in any private house," would be deemed for "all" "purposes" the "mansionhouse of the owner." 2 William Blackstone, Commentaries on the Laws of England *225 (1871). Indeed, it was "agreed by all" that "a Chamber in one of the Inns of Court wherein a Person usually lodges . . . may be called his Dwelling-House; and will sufficiently satisfy the Words *Domus mansionalis*" in a burglary indictment. 1 William Hawkins, A Treatise of the Pleas of the Crown 103 (1716); *see also* Matthew Hale, Pleas of the Crown 83 (5th ed. 1716); Edward Coke, The Third Part of the Institutes of the Laws of England: Concerning High Treason, and other Pleas of the Crown, and Criminal Causes 64-65 (1797); *Mason v. People*, 26 N.Y. 200 (1863) (the "well-settled rule" was that "[w]herever a building is severed by lease into distinct habitations, each becomes the mansion or dwelling house of the lessee thereof, and is entitled to all the privileges of an individual dwelling").

The common law viewed both a standalone house and an apartment with equal regard because they served the same purpose. As Coke explained, "every

house for the dwelling and habitation of man is taken to be a mansion-house, wherein burglary may be committed." Coke, *supra*, at 64. In other words, "it was not the character of the building, such as the distinction between a commercial building and a single family residence, but its use as a home that was important." John Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295, 307 (1986).

Because the common law treats an apartment for "all" "purposes" as the tenant's "mansionhouse," it follows that an apartment would receive the common-law protections attached to a standalone house, including curtilage protections. Blackstone *225 (the primary dwelling house "protects and privileges all its branches and appurtenances"); *see also Mason*, 26 N.Y. at 203 (recognizing that a leased space is entitled to "all the privileges of an individual dwelling"). However far the curtilage might extend, it would at least cover Mr. Wheeler's front door and lock.

The First Circuit had "no difficulty" in determining that the inside of the front door lock of a multi-family building is "at least within the home's curtilage" if not "within the home itself because it is within the outer plane of the home's structure." *Bain*, 874 F.3d at 14-15. Applying the factors identified in *United States v. Dunn*, 480 U.S. 294 (1987), in making that determination, the *Bain* court explained, "[v]ery few, if any, things are more proximate to the interior of a home than is a lock on the door to the home. Certainly, too, the interior of the lock, from which the crucial information was gathered, is within or adjacent to the enclosure of the door's outer face. The uses of the lock also strongly weigh in favor of finding its

penetration to be a search. The lock, after all, is used precisely to bar unwelcome entry and invasion of privacy. Finally, the very design of a lock hides its interior from examination." *Bain*, 874 F.3d at 14-15. In short, the *Bain* Court had "no difficulty finding that the inside of the lock on the door of a home 'should be placed under the home's "umbrella" of Fourth Amendment protection.'" *Id.*

There is now a clear split of authority among the courts of appeals on an important and recurring question of constitutional law.

As set forth, the First Circuit in *Bain* relied on *Jardines* for the proposition that the Fourth Amendment protects the curtilage of a home from unlicensed searches even though the curtilage may be accessible to the public. *Bain*, 874 F.3d at 16. And it held that officers violated a tenant's reasonable expectation of privacy by inserting keys into a locked apartment door to gather information in building its criminal case. *Id.,* at 14.

The Sixth Circuit likewise deemed the warrantless insertion of keys into locked apartment doors violative of a tenant's expectation of privacy. *United States v. Heath*, 259 F.3d 522, 527-27, 533-34 (6th Cir. 2001) (officers who seized keys from suspect, used keys to enter an apartment building and then on various apartment doors before finding the corresponding lock, violated the tenant's subjective expectation of privacy; relying on *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976), which held that a tenant has a reasonable expectation of privacy in the common areas of secured apartment building such that an agent's warrantless entry violates the Fourth Amendment)).

The Fifth Circuit has held that a tenant has a reasonable expectation of privacy in the fenced backyard of an apartment building such that the warrantless search of this area, the curtilage, violated the Fourth Amendment. *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974). "Contemporary concepts of living such as multi-unit dwellings must not dilute [a tenant's] right to privacy any more than is absolutely required." *Id.*, at 484.

The Seventh Circuit, without abrogating *Concepcion*, relied on Justice Kagan's *Jardines'* concurrence to hold that police use of a drug-sniffing dog in the hallway outside of an apartment door was a warrantless search that "clearly invaded [the tenant's] reasonable privacy expectations." *United States v. Whitaker*, 820 F.3d 849, 853-54 (7th Cir. 2016).

The Third Circuit's opinion, like the Sixth Circuit's *Salgado* opinion and the Seventh Circuit's *Concepcion* opinion, squarely conflicts with the foregoing as well as with this Court's authority in *Kyllo*, *Jardines* and *Collins*. *See Bain*, 874 F.3d at 16 (explaining that *Salgado,* which was decided before *Jardines* and rested on an observation that the apartment door lock was in a common area and as accessible to passersby as a vehicle door, could not withstand *Jardines'* holding that the Fourth Amendment protects the curtilage of a home from warrantless searches even though it is readily accessible to the public).

This Court should grant certiorari to eliminate that conflict.

C. This case is an excellent vehicle to address the Fourth Amendment protections afforded residents of multi-family dwellings.

Finally, this case presents an excellent vehicle to address a recurring question not yet expressly decided by this Court: whether the concept of curtilage extends to multi-family dwellings. By basing its rejection of Mr. Wheeler's reasonable expectation of privacy argument on its view that officers were standing in the common area of a multi-unit dwelling when they inserted keys into the apartment door lock, the panel necessarily declines to extend the privacy protection afforded curtilage to residents of multi-family dwellings. Court intervention is necessary to prevent diminishment of Fourth Amendment protections for the millions of Americans living in apartments.

More than a quarter of all households nationwide (31.5 million) occupy multi-unit dwellings. *See* U.S. Census Bureau, Households and Families: 2019 American Community Survey, https://tinyurl.com/censusdata-household. Because poor and minority communities are disproportionately likely to live in multi-unit housing, the damage caused by a limited curtilage doctrine is not evenly distributed.[6] *See, generally*, Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 Fla. L. Rev. 391 (2003) (suggesting that people with money are better able to

[6] According to recent data, 40% of households earning under $30,000 per year live in multi-unit dwellings, as compared to just 13.5% of households earning $100,000 or more per year. *See* U.S. Census Bureau, American Housing Survey Table Creator, https://tinyurl.com/censusdata-income. There are also racial, ethnic, and other disparities. *See, e.g.*, U.S. Census Bureau, American Housing Survey Table Creator, https://tinyurl.com/censusdata-race (providing that as of 2019, only 24% of white households live in multi-unit buildings while 41% of Black households do).

ensure "privacy" and that poorer Americans are more likely to experience warrantless, suspicionless government intrusions); Wayne R. LaFave, Search and Seizure, § 2.3(d) (5th ed. 2012) (quoting Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 404 (1974) and suggesting reasonable expectation of privacy approach be interpreted to give residents of a multi-unit dwellings greater protection: "For the tenement dweller, the difference between observation by neighbors and visitors who ordinarily use the common hallways and observation by policemen who come into the hallways to check up' or 'look around' is the difference between all the privacy that his condition allows and none. Is that small difference too unimportant to claim fourth amendment protection?").

As the First Circuit cogently explained, an individual has a reasonable expectation of privacy in the home as well as in the curtilage, and "[t]here is no reason to expect a different answer" when the home is a rented unit within a multi-unit building as opposed to a single-family dwelling. *Bain*, 874 F.3d at 14. *See also Whitaker*, 820 F.3d at 853-54 (cautioning that declining to extend *Jardines* beyond stand-alone houses to apartments would be "troubling" as "it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity").

Finally, the court's error in admitting this evidence was not harmless as the Government's evidence was circumstantial, controverted and far from overwhelming. Moreover, the good-faith exception to the exclusionary rule is inapplicable here, as the warranted search was preceded by the unlawful

warrantless search and information derived from the illegal predicate search was essential to the probable cause determination; in other words, the warrant itself was fruit of the illegality. *See United States v. Loera,* 923 F.3d 907, 926 (10th Cir. 2019) (holding that the good faith exception does not apply when a warrant affidavit is based on tainted evidence from a prior, unlawful search); *United States v. Scott,* 731 F.3d 659, 664 (7th Cir. 2013) (holding that evidence discovered pursuant to a warrant based on illegally-obtained evidence will be inadmissible unless other, untainted information in the affidavit establishes probable cause); *United States v. Mowatt*, 513 F.3d 395 (4th Cir. 2008) (explaining that the exclusionary rule operates to penalize officers for Fourth Amendment violations preceding the magistrate's involvement, that is, the original illegal warrantless search); *United States v. McGough*, 412 F.3d 1232 (11th Cir. 2005) (rejecting good faith exception where information derived from the illegal predicate home search was used to obtain the warrant), *abrogated on other grounds by, Kentucky v. King*, 563 U.S. 452 (2011); *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987) (*Leon* exception inapplicable where the essential facts showing probable cause to obtain the warrant derived from the prior illegal warrantless search); *United States v. Reilly*, 76 F.3d 1271 (2nd Cir. 1996) (holding *Leon* did not apply where the issuance of the warrant was itself premised on material obtained in a prior illegal search); *see also Jardines*, 569 U.S. at 3 (affirming the lower court's holding that intrusion into the curtilage to obtain information was an unlawful search "rendering invalid the warrant based on information gathered during that search"). *See* Appellant's Letter, Appeal No. 16-

3780, filed Apr. 6, 2018; Appellant's Informational Letter, Appeal No. 16-3780, filed Apr. 16, 2018.

Critical to the warrant's issuance was information unlawfully obtained that unmarked keys found in Mr. Wheeler's car accessed the Mills Avenue apartment. Excising the tainted evidence from the warrant affidavit, the application does not provide probable cause to believe that evidence of a crime would be found in Apartment 4. Before the unlawful search, police did not know the keys were to Mills Avenue, or to any particular apartment therein. Indeed, all officers knew about 500 Mills Avenue was that Mr. Wheeler stopped there once for 30 minutes and that when he departed he discarded trash containing nothing of evidentiary value. The affiant does not describe Mr. Wheeler's (or anyone's) involvement in drug transactions at, or near, Mills Avenue. Nor does the affiant claim to have ever seen other targets of the investigation at Mills Avenue.

In sum, this Court's intervention is necessary to protect the rights of millions of disproportionately lower-income and minority Americans to be secure in their homes.

II. The Third Circuit's rule limiting parties to the precise arguments raised in the district court directly conflicts with this Court's traditional rule that parties are *not* limited to the precise arguments made below but can make any argument in support of a claim that was properly presented. This Court should grant the petition to eliminate this conflict.

Throughout the course of this litigation, Mr. Wheeler's consistent claim has been that evidence seized from within the apartment must be suppressed because the officer's insertion of keys recovered from within Mr. Wheeler's car into locked

apartment doors to gain information in building its case against him was a warrantless search conducted in violation of the Fourth Amendment.

In the district court, trial counsel moved to suppress, arguing that "insertion of the key into the lock[ed] apartment doors to gain information" was a warrantless search of a home conducted without any exception to the warrant requirement and a *per se* violation of the Fourth Amendment. *See* Appendix to Opening Brief for Appellant, *United States v. Wheeler*, Appeal No. 16-3780, pages 115-16, 165-67.

On appeal, Mr. Wheeler argued that the officer's insertion of keys into apartment door locks to gain information was an unreasonable warrantless search conducted in violation of the Fourth Amendment, specifying that the entry was unlawful under both the *Jones/Jardines* common law trespass rubric and the *Katz* reasonable expectation of privacy rubric.

To explain why the warrantless intrusion into the home constituted ***both*** a violation of his reasonable expectation of privacy ***and*** a trespass, Mr. Wheeler relied on Justice Kagan's *Jardines* concurrence for the proposition that when as here the entry is of a home, "property concepts and privacy concepts . . . align." *Jardines*, 569 U.S. at 13 (Kagan J., concurring with Ginsburg and Sotomayor, JJ.). *See* Opening Brief for Appellant, *United States v. Wheeler*, Appeal No. 16-3780, pages 69-73 & n.19; Reply Brief, pages 24-27; Informational Letter dated Apr. 16, 2018.

Justice Kagan explained that while the majority had resolved the case under a property rubric, she could just as easily have decided the matter under a privacy

rubric. *Id*., 569 U.S. at 13 (Kagan, J., concurring). Moreover, a decision resolving the case under a privacy rubric would have "run[] mostly along the same path" as the decision resolving the case under a property rubric. *Id*. That is, a privacy-based opinion still would have "talked about ""the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."" [] It would have insisted on maintaining the "'practical value'" of that right by preventing police officers from standing in an adjacent space and "'trawl[ing] for evidence with impunity." [] It would have explained that ""privacy expectations are most heightened"" in the home and the surrounding area. [] And it would have determined that police officers invade those shared expectations when they use trained canine assistants to reveal within the confines of a home what they could not otherwise have found there." *Jardines*, 569 U.S. at 13 (Kagan, J., concurring) (internal citations omitted). The only divergence in a privacy-based opinion would have been a citation to *Kyllo v. United States*, 533 U.S. 27 (2001), as having already resolved the question whether police conduct a search when they use a device (whether crude or sophisticated) to explore details in the home otherwise unknowable. *Id*., 569 U.S. at 14 (Kagan, J., concurring).

In short, Mr. Wheeler relied on the same facts and legal principles to advance two complementary arguments in support of a single consistently articulated claim—that the insertion of keys into locked apartment doors was an unconstitutional search under the Fourth Amendment.

This Court has held that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido,* 503 U.S. 519, 534 (1992). This Court adhered to its "traditional rule" that parties are not limited to the precise argument they made below but can make any argument in support of a claim that was properly presented in *Lebron v. National Railroad Passenger Corporation,* 513 U.S. 374, 379 (1995). And more recently, in *Citizens United,* this Court reaffirmed its "practice" that "'[o]nce a claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Citizens United v. Federal Election Commission*, 558 U.S. 310, 331 (2010) (citing *Lebron*, 513 U.S. at 239).

The Courts of Appeals have long applied this Court's traditional rule that once a claim is properly presented, an appellant can make any argument in support of that claim and is not limited to the precise arguments made below. *See, e.g., United States v. Boyd,* 5 F.4th 550, 556 (4th Cir. 2021) (variations on arguments made below may be pursued on appeal so long as the appellant "'asked both courts to evaluate the same fundamental question'"); *Does v. Wasden,* 982 F.3d 784, 792-93 (9th Cir. 2020) (declining "invitation to turn inartful briefing into waiver"; appellant's challenge to district court's dismissal of Ex Post Facto clause claim encompassed both facial and as-applied challenges to statute) (quoting *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by

the parties, but rather retains the independent power to identify and apply the proper construction of governing law.")); *United States v. Williams*, 846 F.3d 303, 311 (9th Cir. 2016) (where the government argued generally in the district court that officers had probable cause to arrest the suspect because he ran, it did not waive a more precise argument in support of that claim on appeal that officers had probable cause to arrest the suspect because he violated a specific statute); *United States v. Litvak*, 808 F.3d 160, 175 n.17 (2d Cir. 2015) (explaining that an appellant is not limited to the "precise arguments" he made in the district court and may submit additional support for a proposition presented below); *United States v. Guzman-Padilla*, 573 F.3d 865, 877 n.1 (9th Cir. 2009) (where government's claim in the district court was that officers did not require probable cause to conduct search, it did not waive new argument in support of that claim on appeal that probable cause was unnecessary because the border search exception applied); *Pugliese v. Pukka Development, Inc.*, 550 F.3d 1299, 1304 n.3 (11th Cir. 2008) (new arguments in support of preserved claims may be reviewed in appeal); *Teva Pharmaceuticals, USA, Inc. v. Leavitt*, 548 F.3d 103, 105 (D.C. Cir. 2008); *Bew v. City of Chicago*, 252 F.3d 891, 895 (7th Cir. 2001) (appellate court will consider a new argument in support of a claim made in the district court).

The Third Circuit, however, is to the contrary.

In *United States v. Joseph*, 730 F.3d 336 (3d Cir. 2013), the Third Circuit held that "raising an issue [or claim] in the District Court is insufficient to preserve for appeal all arguments bearing on that issue. Instead, to preserve a suppression

argument, a party must make the same argument in the District Court that he makes on appeal." *Id.*, 730 F.3d at 341.

The panel here holds that by failing to articulate before the district court the magic word trespass, Mr. Wheeler forfeited his right to argue in the appellate court that officers unlawfully physically intruded into a constitutionally protected area to gain information by inserting a key into the locked apartment door under the trespass theory articulated in *United States v. Jones*, 565 U.S. 400 (2012) and *Florida v. Jardines*, 569 U.S. 1 (2013). Appendix A at 31-33 ("Wheeler asserted before the District Court that the key-insertion was a search in violation of the Fourth Amendment, but did not articulate a more specific theory within the Fourth Amendment."). As a result, the Third Circuit barred review of that meritorious argument.[7]

The Third Circuit's waiver jurisprudence is directly in conflict with this Court's rule that "parties are not limited to the precise arguments they made below." *Yee*, 503 U.S. at 534; *Lebron*, 513 U.S. at 379. Explication of *Yee*'s facts illustrates the Third Circuit's error.

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[7] As in *Bovat v. Vermont*, "[i]t is hard to see how [this case] could have been decided without reference to *Jardines*," by either the prosecutor, defense attorney, or district court. 141 S. Ct. 22, 23 (2020) (Gorsuch, J., Statement respecting the denial of certiorari, joined by Sotomayor and Kagan, JJ.). *See* Appendix at 168 (prosecutor averring that he had been unable to find any authority suggesting that insertion of a key into a home's door is a search that requires a warrant). That the district court here, like the Vermont Court in *Bovat*, missed *Jardines,* which had been decided nearly 20 months before the instant suppression hearing*,* suggests "*Jardine's* message about the protections due a home's curtilage has . . . eluded" courts such that this Court should step in to correct this oversight.

In *Yee*, the parties raised before the district court a Fifth Amendment takings claim premised on physical occupation of property. *Id.*, 503 U.S. at 534-35. Before the Supreme Court, however, they argued that the taking occurred by regulation. *Id*. It was unclear whether the petitioners made a regulatory taking argument in the lower courts and also unclear whether the Court had addressed that argument. *Id.*, 534. This Court deemed the difference immaterial because the appealing party asked both courts to evaluate the same fundamental question: whether the challenged acts constituted a taking. As this Court explained, petitioners' claims on appeal, that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, "are not separate *claims*," but are "separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking" under the Fifth Amendment. *Id.*, 503 U.S. at 534-35 (emphasis in original).

Here, too, Mr. Wheeler relied on the same universe of facts to raise two, entirely complementary, arguments in support of a single claim. Because the Third Circuit's rule that a party must make the same argument in the district court that he makes on appeal directly conflicts with this Court's "traditional rule" that parties are not limited to the precise argument they made below but can make any argument in support of a claim that was properly presented and also with the Courts of Appeals applying that traditional rule, this Court should grant certiorari to eliminate that conflict.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case.

Dated: December 9, 2021

Respectfully submitted,

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CERTIFICATE OF MEMBERSHIP IN BAR

I, Renee Domenique Pietropaolo, Assistant Federal Public Defender, hereby certify that I am a member of the Bar of the Supreme Court of the United States.

/s/ Renee Domenique Pietropaolo
RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

WILLIS WHEELER,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I hereby declare on penalty of perjury, as required by Supreme Court Rule 29, that the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari were sent to the Clerk of the United States Supreme Court in Washington, D.C., through the United States Postal Service by first-class mail, postage prepaid, on December 9, 2021, at the following address:

Scott S. Harris, Clerk
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

In addition, the within documents have been submitted electronically through the Court's electronic filing system as required by S. Ct. Rule 28.7.

Date: December 9, 2021

/s/ Renee Domenique Pietropaolo
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