No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

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 July 12, 2018.

OPINION BELOW

The not precedential opinion of the Court of Appeals for the Third Circuit (Appendix A) is at *United States v. Wheeler,* ___ F.App'x ___, 2018 WL 3409991 (3d Cir. 2018). The order denying the petition for rehearing with suggestion for rehearing *en banc* (Appendix B) is also unreported.

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 July 12, 2018. His petition for rehearing with suggestion for rehearing *en banc* was denied on September 26, 2018. The Petition for Writ of Certiorari is due on or before December 26, 2018.

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, agents transported the keys to 500 Mills Avenue at the direction of the Assistant United States Attorney "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 no evidence of drug transactions at, or near, Mills Avenue. Nor did the evidence connect any of the 30 related defendants to Mills Avenue.

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[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 filed at No. 16-3780 on the Third Circuit's electronic docket.

Acting at the direction of the 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. The prosecutor directed officers to enter.

Only then, relying on information gleaned from the 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. 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 *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 plainly freely accessed it) 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.

At trial, the government's theory was that Willis Wheeler conspired with Richard Bush and Mayank Mishra to distribute heroin. The government ***theorized*** Wheeler supplied heroin to Bush, who (1) cut and packaged it for sale using diluent and stamp bags he purchased from Mishra and (2) distributed it in the East Hills section of the City of Pittsburgh. 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 (including video surveillance) between August 2011 and March 2012, the government failed to present a single witness who observed Wheeler supply Bush heroin.

Nevertheless, 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), 21 U.S.C. § 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 government's case was circumstantial and not overwhelming. 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 conspiracy was to supply Bush with heroin, and inadmissible lay and expert opinion interpreting wiretapped calls to mean Bush and Wheeler were working together. 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 8, the panel nevertheless affirmed Mr. Wheeler's conviction.

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 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 inexplicably viewed a locked apartment door within a multi-unit dwelling as a "common area" over which residents lack a reasonable expectation of privacy. Appendix A at 29. And it deemed information gleaned from the warrantless intrusion into the home—that keys seized from within the suspect's control accessed the apartment—too insignificant to warrant protection. *Id*. In so finding, the panel relied on opinions from the First, Fourth, Sixth, Seventh and Ninth Circuit Courts of Appeals 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 29

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

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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)).

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)).

Moreover, the Third Circuit's holding is at odds with a First Circuit opinion 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) (turning key in locked apartment door to gather information was unreasonable warrantless search under both a reasonable-expectation-of-privacy test (*see Katz v. United States*, 389 U.S. 347 (1967) and a trespassory test).

Certiorari is warranted to resolve the split of authority. Alternatively, given that the Third Circuit's decision is plainly wrong under the settled authority of this Court that the panel elected to disregard, 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 waived. *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 the threshold of the house or curtilage to gather information without a warrant.

At the very core of the Fourth Amendment is the right of a person to be in their 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. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. *Id*. The area immediately surrounding and associated with the home—the curtilage —is part of the home for Fourth Amendment purposes and entitled to the same protections as the home itself. *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (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).

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 held that police, by obtaining information regarding the home's interior that was not visible to the naked eye 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.

Kyllo 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)).

Here, 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 keys seized from Mr. Wheeler's car accessed the apartment. *See Kyllo*, 533 U.S. at 40.

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).

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, officers conducted a warrantless search that was presumptively unreasonable. *Kyllo*, 533 U.S. at 40.

Jardines only reinforces this conclusion. *Jardines* considered use of a drug-sniffing dog on a porch to investigate contents of the home. The *Jardines* majority applied "a property rubric," explaining that the Fourth Amendment "establishes a simple baseline": When "the Government obtains information by physically intruding" on a constitutionally protected area, that is, persons, houses, papers, or effects, "'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Jardines*, 569 U.S. at 5 (quoting *United States v. Jones*, 565 U.S. 400, 506-07, n.3 (2012)).

Significantly, Justice Kagan concurred to explain that although the majority decided the case under a property rubric, the case could have been decided just as easily under a reasonable-expectation-of-privacy rubric. *Jardines*, 569 U.S. at 13 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.); *id.,* at 16 (focusing on privacy interests makes this an easy case "twice over"). Because property and privacy concepts "align" when entry is of a house, Justice Kagan continued, a decision under the reasonable-expectation-of-privacy rubric would have mirrored the majority opinion 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).

As set forth, *Kyllo* draws a "firm" line at the "entrance to the house." *Id*., 569 U.S. at 14 (Kagan, J., concurring) (quoting *Kyllo*, 533 U.S. at 40). When officers use

a device—whether crude or sophisticated, 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).

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.

Rather than grapple with *Kyllo*, the Third Circuit relies on its "sister Courts of Appeals who have addressed this issue under the reasonable expectation of privacy theory" and concluded that inserting a key into a locked apartment door 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 29 (citing *United States v. Moses*, 540 F.3d 263, 272 (4th Cir. 2008) (inserting 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) (inserting key into apartment door to determine the key unlocked that door was not a search); *United States v. Thompson*, 842 F.3d 1002, 1008 (7th Cir. 2016) (relying on *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991), and holding that agent's insertion of key into locked apartment door was a search that did not require a warrant "because the privacy interest in the information held by a lock (*i.e.*, the verification of the key owner's address) is so small")); *see also* Appendix A at 29 (also citing *United States v. Lyons*, 898 F.2d 210,

212-13 (1st Cir. 1990) (insertion of key into 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)).[5]

The panel elected to ignore the First Circuit's contrary decision in *United States v. Bain*, 874 F.3d 1 (1st Cir. 2017). The First Circuit distinguished its opinion in *Lyons, supra*, and held that officers who turned a key in a locked apartment door to gather information conducted an unreasonable warrantless search under both the *Katz'* reasonable-expectation-of-privacy test and the *Jones/Jardines'* trespassory test.

There is now a clear split of authority among the courts of appeals on an important question of constitutional law. Notably, the adverse authority either pre-dates *Kyllo* or relies on authority that pre-dates *Kyllo* with little or no analysis and without acknowledging *Kyllo*. The Third Circuit's opinion, here, like the Fourth, Sixth and Seventh Circuit opinions discussed, directly conflicts with this Court's settled precedent. This Court should grant certiorari to eliminate that conflict.

First, *Kyllo* expressly rejected the position articulated by the panel here, Appendix A at 29, that the existence of a privacy interest depends on the *type* of information gathered from within a house such that the information gleaned from

[5] "[W]hen 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*, 569 U.S. 1, 6 (2013). Thus, circuit authority addressing turning a key into a storage unit or vehicle lock is inapposite.

the instant search, that the key turns the lock, was too insignificant to warrant protection. *See Kyllo*, 533 U.S. at 37 (rejecting government 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)).

Second, *Jardines* and *Collins* illustrate the panel's determination that the search was of the "common areas" of a locked, multi-unit apartment building, over which a resident lacks an objectively reasonable expectation of privacy, was also wrong. Appendix A at 29 (quoting *United States v. Correa*, 653 F.3d 187 (3d Cir. 2011)). *Accord Salgado*, 250 F.3d at 455-57 (holding apartment door was in "a common area" and keyhole was accessible to, and not concealed from, those in the common area; therefore, residents did not have a reasonable expectation of privacy in the keyhole, and officers did not require a warrant to insert key to determine it operated that lock).

As set forth, this Court in *Jardines* reaffirmed that the curtilage, the area "immediately surrounding and associated with the home," is part of the home for

Fourth Amendment purposes and entitled to the same protections as the home itself. *Id.*, 569 U.S. at 5. 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.'" *Id*, 569 U.S. at 7.

Plainly, the apartment's front door and door lock constitute the area "immediately surrounding and associated with the home," if not the home itself. *Oliver*, 466 U.S. at 180; *Jardines*, 569 U.S. at 6. Indeed, the government below never disputed that the door and door lock were at least within the home's curtilage.

The First Circuit had "no difficulty" in determining that the inside of the front door lock of a home is "at least within the home's curtilage" if not within the home itself. *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.

Just last term in *Collins v. Virginia*, this Court explained that "the ability to observe inside curtilage from a lawful vantage point is not the same as the right to

enter curtilage without a warrant [to] obtain information not otherwise accessible." *Id.*, 138 S.Ct. at 1675 (driveway abutting the house, where a motorcycle was parked, was curtilage). "So long as it is curtilage… [it] is… protect[ed] from trespass and a warrantless search…." *Id.,* 1675. *Collins* thus make plain that even assuming officers were lawfully standing in a common area and could observe the curtilage (here, the front door and door lock), they could not enter the curtilage without a warrant to obtain information that was not otherwise discoverable with the naked eye (that is, officers could not insert a key into the lock to determine it accessed the apartment).

The Third Circuit's opinion, like the Sixth Circuit's *Salgado* opinion, thus, squarely conflicts with *Jardines* and *Collins*. *See Bain*, 874 F.3d at 16 (explaining that *Salgado,* which was decided well before *Jardines* and rested on an observation that the apartment door lock was in a common area and accessible, 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 resolve the split of authority among the courts of appeals. Alternatively, this Court may grant the petition and order summary reversal given the panel's clear misapplication of this Court's settled precedent.

Finally, this case presents an ideal vehicle to address a question not yet expressly decided by this Court: whether the concept of curtilage extends to multi-family dwellings.

Jardines involved police use of a trained drug-sniffing dog at the front door of a single-family dwelling. As summarized, the majority held that the officers thereby physically intruded into a constitutionally protected area, the curtilage, to gather information and conducted a presumptively unreasonable search under a trespass rubric. *Jardines*, 569 U.S. at 11. Three Justices concurred to explain that the same result is required under a reasonable-expectation-of-privacy rubric. *Jardines*, 569 U.S. at 13 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.).

By basing its rejection of Mr. Wheeler's reasonable-expectation-of-privacy argument on its observation that officers were standing in the common area of a multi-unit dwelling when they inserted keys into the apartment door lock, which lock officers were able to observe from the common area, the panel necessarily declined to extend the privacy protection afforded by curtilage to residents of multi-family dwellings.

The effect of the Third Circuit's ruling is to diminish the Fourth Amendment protection of those who reside in multi-family dwellings, in particular the urban poor. *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 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.

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.

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).

In *Lebron*, the threshold question was whether the Court could consider argument that Amtrak was not a private entity but the government itself for First Amendment purposes, a position Lebron disavowed in the lower courts. *Id*., at 378. In those courts, Lebron had argued that Amtrak's actions in denying him permission to display an advertisement were subject to constitutional requirements because Amtrak, although a private entity, was closely connected with federal entities. *Id*., 378-79. This Court found the argument raised on appeal preserved, explaining the contention that Amtrak is part of the government was not a new claim "but a new argument to support what has been his constituent claim: that Amtrak did not accord him the rights it was obligated to provide by the First Amendment." *Id*., 379 (citing *Yee*, 503 U.S. at 534-34).

The Courts of Appeals have long applied this Court's traditional rule. *See, e.g., United States v. Sineneng-Smith,* ___ F.3d ____, 2018 WL 6314287, at *3 (9th Cir. 2018); *Tree of Life Christian Schools v. City of Upper Arlington, Ohio*, 905 F.3d 357, 385 (6th Cir. 2018); *United States v. Williams*, 846 F.3d 303, 311 (9th Cir. 2016) (where party advanced probable cause argument in the district court (that agents did not need probable cause), it was not prohibited from advancing more specific argument in support of its theory on appeal (that border search exception applied to obviate need for probable cause)); *Pugliese v. Pukka Development, Inc.*,

550 F.3d 1299, 1304 (11th Cir. 2008); *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)

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 applied *Joseph* to hold that Mr. Wheeler waived argument 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 27-28. As a result, the Third Circuit barred review of that meritorious argument.

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.

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 raised two, entirely complementary, arguments in support of a single claim. In the district court, trial counsel moved to suppress evidence seized from inside the apartment, arguing that "insertion of the key into the lock[ed] apartment doors to gain information" was a warrantless search conducted without any exception to the warrant requirement and a *per se* violation of the Fourth Amendment. *See* Appendix to Opening Brief for Appellant Wheeler filed at No. 16-3780 on the Third Circuit's electronic docket at pages 115-16, 165-67. On appeal, Mr. Wheeler argued that insertion of keys into the locks to gain information was an unreasonable warrantless search conducted in violation of the Fourth Amendment under both the *Jones/Jardines* common-law-trespass rubric and the *Katz* reasonable-expectation-of-privacy rubric. Mr. Wheeler relied on Justice Kagan's view, expressed in the *Jardines* concurrence, that when entry is of a house, property and privacy concepts "align," meaning that a decision resolving

either argument (like a brief raising either argument) would "run[] mostly along the same path." *Jardines*, 569 U.S. at 13-14 (Kagan, J., concurring). *See* Opening Brief of Appellant Wheeler at 70-73 & n.19; Petition for Rehearing with Suggestion for Rehearing *En Banc* at 3, 7-8. Mr. Wheeler thus raised two arguments in support of a single claim—that the entry was an unconstitutional search under the Fourth Amendment.

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 19, 2018

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 19, 2018, which is timely pursuant to the rules of this Court. The names and addresses of those served in this manner are as follows:

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

This filing pursuant to Rule 29.2 was contemporaneous with the electronical filing.

Date: December 19, 2018

s/ Renee Domenique Pietropaolo
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