No. 25-1205

In the Supreme Court of the United States

MICHAEL MENDENHALL,

Petitioner,

v.

CITY & COUNTY OF DENVER, COLORADO

Respondent.

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

BRIEF OF LAW ENFORCEMENT ACTION PARTNERSHIP AS *AMICUS CURIAE* SUPPORTING PETITIONER

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STATEMENT OF INTEREST[1]

The Law Enforcement Action Partnership (LEAP) is a nonprofit organization of police, prosecutors, judges, corrections officers, and other law enforcement officials committed to criminal justice reforms that make our cities safer and more just. Five police officers founded LEAP in 2002 to unite the voice of law enforcement and advocate for more practical and ethical policies. Originally focused on drug policy, LEAP's speakers' bureau now numbers more than 275 criminal justice professionals who advise on police-community relations, incarceration, harm reduction, and global issues.

SUMMARY OF THE ARGUMENT

From the ratification of the Bill of Rights until *Jones v. United States*, 362 U.S. 257 (1960), courts read the Fourth Amendment to require an affiant with firsthand knowledge to establish probable cause. Officers seeking warrants testified to what they observed or presented an affiant who could. Judges could examine the witness and the facts offered to determine whether probable cause existed. Warrants issued. Crime was pursued and prosecuted.

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[1] No part of this brief was written by any party's counsel, and no person or entity other than *amicus curiae* funded its preparation or submission. Counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief.

That protection of a sovereign populace is lost. Now, to establish probable cause, the officer seeking the warrant only needs to take an oath that someone else relayed the facts to him. Law enforcement and judges across the country must engage in a strange exercise of evaluating the reliability of both the absent witness and their testimony to decide whether probable cause exists under the totality of the circumstances. In short, *Jones* permits searches based on unexamined secondhand testimony. Witnesses, informants, and unscrupulous officers lie about facts. Officers obtain warrants based on this faulty information, often for the wrong house. Innocent Americans are severely harmed or even killed.

The modern warrant process compounds those problems. Judges grant most warrant applications after only a few minutes of review. And that review is often remote and electronic, which further reduces the judge's ability to probe the truthfulness of the secondhand testimony supporting the application.

The petition should be granted, and *Jones* should be overruled.

ARGUMENT

I. Warrant Applications That Rely on Secondhand Information Are Unreliable.

Before *Jones*, only sworn firsthand testimony established probable cause. After *Jones*, law

enforcement and judges are left evaluating the trustworthiness of an absent witness and their testimony. These absent witnesses may have questionable motives and limited knowledge. Searches pursuant to warrants granted in these circumstances go wrong far too often. The Fourth Amendment requires more to safeguard Americans from the legal and physical harms that result from faulty searches based on secondhand testimony.

A. *Judges cannot test ulterior motives or faulty testimony when the witness is absent.*

Relying on statements by an absent witness carries obvious and well-documented risks—that is why such testimony is inadmissible at trial.

A witness may provide false testimony to avoid suspicion, for retribution on another, to ingratiate themselves with law enforcement, or just for the sake of telling a story to someone who will listen. *See On Lee v. United States*, 343 U.S. 747, 757 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility."). Confidential informants, often criminals themselves, may exaggerate or fabricate information to get a better deal in their own prosecutions or to continue to be paid. *See* Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals As Witnesses*, 47 Hastings L.J. 1381, 1383 (1996) ("Criminals are likely to say and do almost anything to get what they want . . .

[including] lying, committing perjury, [and] manufacturing evidence . . . . A 'reliable informer' one day may turn into a consummate prevaricator the next.").

Warrant applications are *ex parte* and the judge hears only from the "officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). The ability to provide testimony without further examination incentivizes faulty testimony in the first instance and prevents a judge from examining the truth of that testimony in the second. In the courtroom, American judges may not rely on secondhand testimony to remove a person's liberty; outside the courtroom, secondhand testimony should fare no better.

B. Disastrous raids often result from faulty or fabricated secondhand information.

Not surprisingly, warrants issued based on secondhand information—particularly that provided by confidential informants—routinely result in disastrous wrong-house raids. *See* Paige Fernandez & Carl Takei, *The Use of 'Confidential Informants' Can Lead to Unnecessary and Excessive Police Violence*, ACLU (Sept. 21, 2019)[2]; Jonathan Blanks, *Criminally*

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[2] https://www.aclu.org/news/criminal-law-reform/the-use-of-confidential-informants-can-lead-to-unnecessary-and-excessive-police-violence

Confidential, Democracy Journal (Oct. 16, 2018).[3] For example:

The wrong address provided by an informant led to law enforcement shattering innocent social worker Anjanette Young's door with a battering ram and handcuffing her unclothed at gunpoint while they searched her apartment. Dave Savini, et al., *'You Have the Wrong Place:' Body Camera Video Shows Moments Police Handcuff Innocent, Naked Woman During Wrong Raid*, CBS News (Dec. 17, 2020).[4] SWAT officers held three young children at gunpoint after a confidential informant provided the wrong house. Joey Oliver, *MSP sued by Flint family after they say troopers raided the wrong house*, MLive (May 16, 2022).[5] And an innocent veteran lost his beloved dog after a confidential informant provided law enforcement an incorrect address and home color, but was "unable to name the individual—not even a first name, or to describe the age, ethnicity, height, weight, color of hair, color of eyes, race or any distinguishing features of the man he claimed he purchased drugs from." Frank Parlato, *Sergeant Aljoe takes first step in*

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[3] https://democracyjournal.org/arguments/criminally-confidential/

[4] https://www.cbsnews.com/chicago/news/you-have-the-wrong-place-body-camera-video-shows-moments-police-handcuff-innocent-naked-woman-during-wrong-raid

[5] https://www.mlive.com/news/flint/2022/05/msp-sued-by-flint-family-after-it-says-troopers-raided-the-wrong-house.html

lawsuit against police who killed his dog in wrong house raid, ArtVoice (Mar. 2, 2017).[6]

It is not just confidential informants who fabricate evidence. Allowing law enforcement to rely on secondhand testimony unfortunately enables unscrupulous officers to do so as well. The detective who obtained the warrant for the fateful raid that killed Breonna Taylor lied that a postal inspector had told him her former boyfriend was having packages delivered to her apartment. Nicholas Bogel-Burroughs, *Breonna Taylor Raid Puts Focus on Officers Who Lie for Search Warrants*, N.Y. Times (Aug. 6, 2022).[7]

In 2019, a Houston officer obtained a fatal warrant based on a fictitious informant—two inhabitants of the home were killed and four officers were shot when they served the warrant. Jyesha Johnson & Damali Keith, *Harding Street raid trial: Gerald Goines found guilty of murders in 2019 raid*, Fox 26 Houston (Sept. 26, 2024).[8]

Aside from violating the sanctity of the home and the victims above, police raids pose significant physical danger to citizens, officers, and property. *See*

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[6] https://artvoice.com/2017/03/02/sergeant-aljoe-takes-first-step-lawsuit-police-killed-dog-

[7] https://www.nytimes.com/2022/08/06/us/breonna-taylor-police-search-warrants.html

[8] https://www.fox26houston.com/news/harding-street-raid-trial

Florida v. Jardines, 569 U.S. 1, 6 (2013) ("the home is first among equals"); *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1086 (9th Cir. 2011) (nighttime SWAT searches "constitute much greater intrusions on one's privacy . . . and carry a much higher risk of injury to persons and property"). Entry is generally by surprise and by force. Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, Cato Institute 5–6 (2006).[9] Standard practice is to incapacitate all present by handcuffing them and forcing them to lay on the ground, often at gunpoint. *Id.* The home is searched and often damaged in what can resemble a ransack. *Id.* at 19, 29, 36, 49–50.

C. Redress for these disastrous searches is exceptionally difficult.

Americans have little recourse when they suffer one of these wrongful searches. Challenges to searches conducted pursuant to a warrant require proof of deliberate falsity or reckless disregard as to specific portions of the supporting affidavit, and the warrant stands if otherwise supported by probable cause. *Franks v. Delaware*, 438 U.S. 154, 171 (1978); *see also* Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 Stan. L. Rev. 603, 612 (2022). "A magistrate's determination of probable cause should

[9] https://www.cato.org/white-paper/overkill-rise-paramilitary-police-raids-america

be paid great deference by reviewing courts." *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (citation modified).

Qualified immunity further stymies citizens who seek redress for a wrongful search. *Malley v. Briggs*, 475 U.S. 335, 344 (1986). "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of [qualified] immunity be lost." *Id.* at 344–45. Evidence gathered under a faulty warrant is not suppressed in a criminal proceeding if the officers who obtained the warrant reasonably relied on the false information that purportedly established probable cause. *United States v. Leon*, 468 U.S. 897, 922–23 (1984). And throughout all this, the affiant's identity usually remains secret. *McCray v. Illinois*, 386 U.S. 300, 311 (1967).

These doctrines make relief elusive. Once "warrants issue, both the warrant itself and the resulting search are nearly impossible to challenge successfully." Tracy Hresko Pearl, *On Warrants & Waiting: Electronic Warrants & The Fourth Amendment*, 99 Ind. L. J. 1, 28 (2023). Warrants are rarely reviewed because so few are challenged and because challenges rarely succeed and are not typically appealed. *Id.* at 25. One study found that motions to suppress—the modern remedy for wrongful search and seizure—succeeded for only 0.9% of warrants. Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and Lost Cases: The Effects of the Exclusionary*

Rule in Seven Jurisdictions, 81 J. Crim. L. & Criminology 1034, 1052–53 (1991).

If men were angels, the Bill of Rights would not be necessary. But the *Jones* rule does not adequately constrain man's flaws. Too many faulty warrants issue. Too many searches go wrong. *Jones* was ungrounded in text or history when decided and is unworkable in practice. The Court should issue the writ and overrule *Jones* to return the Oath requirement to its rightful place as an important safeguard of Americans' rights.

II. The Modern Warrant Process Exacerbates *Jones*'s Harm By Minimizing Judicial Scrutiny.

The judge's scrutinizing function "is the last bulwark preventing any particular invasion of privacy before it happens." *Franks v. Delaware*, 438 U.S. 154, 167 (1978). It is the cornerstone of the warrant process. *McDonald v. United States*, 335 U.S. 451, 455–56 (1948); *Gates*, 462 U.S. at 238. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Id.* at 239. Unfortunately, "ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should." *Malley*, 475 U.S. at 345–46. Indeed, the data suggests that warnings from this Court about when the process would be unacceptable

have come true, and rubber-stamped warrants are a present reality.

A. Judges often do not closely scrutinize warrant applications.

Empirical studies suggest that judges often spend only minutes on warrant applications. Brian Dolan, *To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing*, 93 St. John's L. Rev. 201, 204–05 (2019); L. Joe Dunman, *Warrant Nullification*, 124 W. Va. L. Rev. 479, 509–10 (2022); Richard Van Duizend et al., National Center for State Courts, *The Search Warrant Process: Preconceptions, Perceptions, and Practices* 26 (1985); Jessica Miller Schreifels & Aubrey Wieber, *Warrants approved in just minutes: Are Utah judges really reading them before signing off?*, Salt Lake Tribune (Jan. 14, 2018) (reporting that, over a year, more than half of 8,400 electronic warrants were approved in ten minutes or less and two dozen in less than a minute).[10]

Some applications no doubt require little time to review. Others are lengthy and fact-intensive. Judges should review the affidavit carefully to ensure that the facts support the affiant's conclusions, to assess the affiant's trustworthiness, and to determine whether the totality of the circumstances establishes

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[10] https://www.sltrib.com/news/2018/01/14/warrants-approved-in-just-minutes-are-utah-judges-really-reading-them-before-signing-off

probable cause. Hresko Pearl, *supra* p. 8, at 8–9. Consistently brief review times suggest less scrutiny. When a judge approves a warrant almost instantly, the judge looks less like a neutral magistrate and more like a rubber stamp.

Furthermore, rejections of warrant applications are rare. Van Duizend, *supra* p. 10, at 47. In a Utah sample of 8,400 warrant applications, only about 2 percent were denied. Schreifels & Wieber, *supra* p. 10. In Denver, judges denied only five of 163 no-knock warrant requests in one year. Dara Lind, *Cops do 20,000 no-knock raids a year. Civilians often pay the price when they go wrong.*, Vox (May 15, 2015).[11]

That limited scrutiny is especially troubling when judges, applying a totality-of-the-circumstances test, must evaluate the reliability of a witness who is not present. Overruling *Jones* and restoring the bright-line rule that probable cause must rest on a sworn firsthand statement would simplify the inquiry and better protect Americans.

B. The electronic warrant application process further minimizes scrutiny.

The advent of electronic warrant systems further erodes judicial scrutiny. "E-warrants" allow officers to apply for a warrant remotely and judges to approve it

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[11] https://www.vox.com/2014/10/29/7083371/swat-no-knock-raids-police-killed-civilians-dangerous-work-drugs

with a few clicks, often without any discussion. Hresko Pearl, *supra* p. 8, at 14. As of 2023, twenty-four States, the federal government, and the District of Columbia allowed e-warrants. *Id.* at 12. Without the formality of an in-person review, judges are less able to question the veracity of facts in the affidavit. *Id.* at 23. Preliminary studies suggest that e-warrants receive even less scrutiny than traditional warrant applications. *Id.* at 22. This streamlined process increases the risk that judges cannot or will not meaningfully test secondhand testimony before issuing a warrant.

CONCLUSION

For these reasons and those in Petitioner's brief, the petition should be granted and *Jones* should be overruled.

April 30, 2026

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