No. 25-1205

IN THE

Supreme Court of the United States

MICHAEL MENDENHALL,

Petitioner,

v.

CITY & COUNTY OF DENVER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment requires a witness with firsthand knowledge of facts supporting probable cause to swear the oath before a warrant may issue, such that *Jones v. United States*, 362 U.S. 257 (1960), should be reconsidered.

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INTEREST OF *AMICI CURIAE*[1]

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[1] No counsel for any party authored this brief in whole or in part. No party, counsel for any party, or person other than *amici* or their counsel contributed money to fund the preparation or submission of this brief. *Amicus* Laurent Sacharoff represented Mr. Mendenhall in the district court but is not representing him in this Court. Counsel of record for all parties received timely notice of *amici*'s intent to file this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Amendment's Warrant Clause serves two purposes: it sets forth (1) *what* the government must show before a warrant may issue and (2) *how* it must make that showing. Specifically, under the plain text of the Warrant Clause, the government must show "probable cause" that a crime has been committed, and that showing must be "supported by Oath or affirmation." U.S. Const. amend. IV.

Historically, the "Oath or affirmation" requirement could be satisfied only with sworn testimony from a witness who had *firsthand knowledge*. At the Founding, the term "supported by Oath or affirmation" did not refer to any statement by a person who happens to be under oath but rather was a shorthand for "supported by Evidence." And because unsworn statements did not constitute "Evidence," those statements could not properly be attested to by a witness under "oath or affirmation." *See* Geoffrey Gilbert, *The Law of Evidence* 149 (1788). Courts followed this straightforward approach for more than 150 years, requiring those seeking warrants to swear to firsthand facts and excluding hearsay because the person who did have firsthand knowledge—the original declarant—had not been under oath when

making the statements.[2] *See* Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 Stan. L. Rev. 603, 603–72 (2022); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 651 (1999).

In 1960, this Court broke from that longstanding tradition by holding in *Jones v. United States*, 362 U.S. 257 (1960), that "hearsay may be the basis for a warrant" so long as it "is reasonably corroborated by other matters within the officer's knowledge." *Id.* at 269–71. But *Jones* did not fully grapple with the original understanding of the Warrant Clause; in fact, the *Jones* Court did not consider it at all. The result was an interpretation of the Warrant Clause that is not only untethered from its historical meaning, but that is far more indeterminate and difficult for lower courts to consistently apply.

This case provides an ideal vehicle for revisiting *Jones* and restoring the original understanding of the Warrant Clause. The warrant here was based solely on a detective's testimony that Petitioner had threatened Sean Horan with a baseball bat. But the detective who offered that testimony was not even present when the threats were allegedly made. Instead, he relayed what he had been told by another officer, who in turn was relaying Mr. Horan's unsworn description of the events. Under the original understanding of the Warrant Clause, this thirdhand

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[2] We use "hearsay" in the way it was used in the Founding era—namely, to refer to out-of-court unsworn statements—and not in the more comprehensive sense established by the Federal Rules of Evidence. The modern definition of hearsay had not emerged at the time the Fourth Amendment was adopted.

testimony could not have been considered in evaluating whether there was probable cause for a warrant. *Jones*, however, provided a license for the government to invade Mr. Mendenhall's business and confiscate his property without the proper foundation of evidence under oath. The Court should grant certiorari.

ARGUMENT

I. Under the Common Law at the Founding, Repeating Hearsay Under Oath Did Not Make the Hearsay "Evidence" or "Supported by Oath."

1. By the time the Framers crafted the Fourth Amendment, the common law had long required that sworn witnesses testify only to their firsthand observations. *See* 1 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 657 at 751–52 (1904). Chief Justice Vaughn stated this rule succinctly in *Bushell's Case*, a leading English case well known in America at the Founding: "A witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses." *Bushell's Case*, 124 Eng. Rep. 1006, 1009 (C.P. 1670).

The rule against hearsay in the Founding era was simply the mirror image of this firsthand knowledge requirement. As Gilbert stated, "a mere Hearsay is no Evidence," Gilbert, *supra*, at 149, and therefore is "not allowed," *id.*, at 153; *see also* 2 William Hawkins, *A Treatise of the Pleas of the Crown* 431 (1721) ("no Manner of Evidence"); Joseph Greenleaf, *An Abridgement of Burn's Justice of the Peace and Parish Officer* (1773) [hereinafter Burn Abridgement]

("hearsay is no evidence"); Richard Starke, *The Office and Authority of a Justice of the Peace Explained and Digested* (1774); *Albertson v. Robeson*, 1 U.S. 9 (1764).

The chief rationale for the rule against hearsay was that the person who originally made the statement was not under oath. Gilbert's explanation became the standard, following a sequence of logical steps:

First, he said, all witnesses must have firsthand knowledge, "for Testimony being but an Appeal to the Knowledge of another, if indeed he doth not know, he can be no Evidence." Gilbert, *supra*, at 149.

Second, all witnesses must swear an oath; a person who did not or could not swear an oath could not be a witness. *Id.*; *see also King v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202, 202 (K.B. 1779) ("no testimony whatever can be legally received except upon oath").

Third, when a testifying witness repeats what another has said, and that other person's statement was not under oath, it is as if that other person attempted to testify to those facts in court without being sworn. Since that person could not testify to those facts in court without being sworn, the testifying witness could not repeat the statement and thereby cure the original defect. Gilbert, *supra*, at 149.

2. To be clear, the rule against hearsay in the Founding era was not concerned with whether the testifying witness was competent, but whether a particular assertion counted as "evidence." A witness may legitimately have testified based on what she personally knew in addition to repeating assertions she heard from others. But the latter assertions were

not "evidence," but rather "bare speaking."

Gilbert's explanation shows how these concepts of oath, hearsay, and firsthand knowledge are linked:

> Besides, though a Person testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; and if a Man had been in Court and said the same Thing and had not sworn it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a Speech makes it no more than a bare Speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath.

Gilbert, *supra*, at 149–50.

The phrase "supported by oath," or simply "by oath," was shorthand for supported by legal evidence. Repeating hearsay, even under oath, did not transform that unsworn hearsay into legal evidence; therefore, "supported by oath" rules out reliance on hearsay. Hawkins, for example, noted that something could be "proof" if it was "made out by Oath"—meaning made out by testimony. Hawkins, *supra,* at 429; *see also* Gilbert, *supra* at 134 (making "Proof . . . by the Oath" the equivalent of being a "Witness" and therefore evidence); *see also id.* at 59, 60, 135.

Gilbert's account of the rule against hearsay, including the "bare speaking" label, had unrivaled

influence, recurring throughout the decades. Other leading English treatises took up the same language. *See, e.g.*, Henry Bathurst & Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* (1761); Henry Bathurst, *The Theory of Evidence* (1761). And Gilbert's rationale also made its way to America. John Adams had read an English edition of Gilbert's treatise by 1766, and the 1788 Philadelphia edition of Gilbert had far reach. *See, e.g.*, Starke, *supra*, at 150 ("Hearsay is no Evidence . . . if the first Speech was without Oath, another oath that there was such Speech makes it no more than a bare Speaking."); William Waller Hening, The New Virginia Justice 175, 181 (1795).

3. Why was the oath so important for Gilbert and, later, the Founding generation? It was not merely shorthand for firsthand evidence but an assurance—nearly a guarantee—of truth. As Gilbert wrote, "any matter under the Sanction and Solemnities of an Oath, is intitled to Faith and Credit, so that under such Attestation the Fact is understood to be fully proved." Gilbert, *supra*, at 139–40; *see also* George Fisher, *The Jury's Rise as a Lie Detector*, 107 Yale L.J. 575, 580, 583 (1997) (showing that the power of the witness oath was rooted "in the perceived divine power of the oath to compel truthful testimony" and the "threat of divine vengeance").

Founding-era hearsay exceptions for criminal cases also reflect the oath as the central rationale for the rule against hearsay. Dying declarations were admissible in large part because the person's awful and solemn situation made his statements as if under "oath." As one leading English case explained:

> The *declarations* therefore of a person dying under such circumstances, are considered as equivalent to the *evidence* of the living witness upon oath.

King v. Drummond, 1 Leach 338, 338, 168 Eng. Rep. 271, 272 (K.B. 1784) (emphasis added). Another leading case echoed this language:

> [A] situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.

King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

4. The primacy of the oath as the guarantor of truthfulness distinguishes the rule against hearsay in the Founding era from the rule today. It also explains why the Framers thought it necessary to explicitly demand that warrants issue only upon a showing of probable cause "supported by Oath or affirmation."

Today, the rule against hearsay primarily protects the opportunity to cross-examine witnesses. Because warrants issue *ex parte* in preliminary proceedings, it might strike the modern lawyer as odd to bar the consideration of hearsay in that context. But in the Founding era, the rule against hearsay rested largely upon the "oath." Gilbert, as well as the many treatises that followed his lead, did not even mention cross-examination as a justification for the rule against hearsay until 1795; Hawkins and his successors mentioned it as a secondary reason after the oath-rationale.

Applying these principles to the Fourth Amendment, we see that when the government seeks a warrant based on hearsay, the hearsay cannot figure into the probable cause determination because the original statement was not sworn; the witness's repetition of it, even if under oath, does not render the original statement one under "Oath or affirmation" as that term was understood by the Framers. Importantly, however, that does not mean a judge must formally exclude such hearsay. Instead, he or she must simply do as a Founding-era judge would and ensure that probable cause is also adequately "supported" by firsthand testimony.[3]

II. The Rules for Obtaining a Warrant Under the Common Law Envisioned a Firsthand Witness Under Oath.

1. The common law also had rules that governed the issuance of warrants specifically—rules the Framers sought to codify when drafting the Fourth Amendment.

In the ordinary criminal cases for which warrants were required, the victim or alleged victim would drive the prosecution, seek any warrant, and thus always have personal knowledge. *See* Sacharoff, *supra*, at 650–51. Sheriffs, their deputies, and constables did not seek warrants; rather, they executed them. *Id.* For this reason, Hawkins observed

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[3] The Court need not resolve whether the Warrant Clause's "Oath or affirmation" requirement prohibits all hearsay, or only testimonial hearsay of the sort addressed in *Crawford v. Washington*, 541 U.S. 36 (2004), because the hearsay in this case was indisputably based on Sean Horan's testimonial out-of-court statements.

that the "old Books seem generally to disallow all Arrests for the Suspicion of Felony made by any other Person whatsoever, except the very Person who hath the Suspicion." Hawkins, *supra*, at 84. And it is *that* person who should seek the warrant to "make the Arrest in his proper Person." *Id.* at 85. Later English treatises further insisted that Justices of the Peace carefully examine the accuser. *See, e.g.*, Richard Burn, *The Justice of the Peace and Parish Officer* (1755); William Blackstone, *Commentaries on the Laws of England* (1765) (writing that it is "fitting" for the magistrate to examine the person "under oath" who must "prove" probable cause); 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* *31 (Phila. 1819) (Justices of the Peace must "interrogate" the accuser and require him to swear to those "facts").

The most influential articulation of these rules came from Matthew Hale's treatise published in the early 1700s. In it, Hale emphasized that the party seeking the warrant must be sworn and that the Justice of the Peace must "examine" that person: The "party that demands [the warrant] ought to be examined upon his oath touching the whole matter." He added that this examination should be "put into writing." 2 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 111 (Philadelphia, Robert H. Small 1st Am. ed. 1847). James Otis, in his famous Writs of Assistance Case argument, stated Hale's requirements as fundamental law, as did prominent cases such as *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765). *See* Sacharoff, *supra*, at 650–51.

2. American Justice of the Peace manuals reflected the same requirement: warrants were

sought by the victim or another firsthand witness who personally appeared before the Justice of the Peace and was examined under oath. A manual authored by James Davis stated that Justices of the Peace should not issue warrants without "examining, upon Oath, the Party who requires it, and binding him over to give Evidence." James Davis, *The Office and Authority of a Justice of the Peace* (Newbern 1774). Other contemporary authorities are in accord. *See The Conductor Generalis* 323 (James Parker ed., New York 1788) ("these warrants are judicial acts, and must be granted upon examination of the fact"); Burn Abridgement, *supra*, at 417 (requiring examination under oath and citing the New Hampshire constitution); Hening, *supra*, at 402, 450 (the person seeking the warrant must "shew his reasons" and ought generally to be "examined on oath"); Nathan Dane, *A General Abridgment and Digest of American Law* 244 n.* (Boston 1824) (requiring that the accuser be "carefully examined"); Daniel Davis, *A Practical Treatise upon the Authority and Duty of Justices of the Peace in Criminal Prosecutions* 8, 18 (Boston 1824) [hereinafter Davis Treatise] (the Justice of the Peace should "interrogate the accuser, and other witnesses"); Sacharoff, *supra*, at 626–27 (collecting sources).

The forms Justices of the Peace used show that it was the victim or another firsthand witness who invariably sought the warrant. The American Justice of the Peace manuals contain scores of forms for the underlying affidavits, complaints, and resulting warrants. These forms included a blank for the accuser—always expressly labelled as an ordinary civilian, not an officer—and a separate blank for the

constable to whom the warrant was directed. Sacharoff, *supra*, at 630. As a result, the facts would necessarily be firsthand from the accuser, such as "C.D." swears that "E.F. [committed] a violent assault on the body of your complainant." Burn Abridgement, *supra*, at 435–436; Sacharoff, *supra*, at 631. A form for counterfeiting, for example, recites that the affiant saw the other person "through a hole or crany . . . making and moulding some white pieces of metal." *Id.* at 632. Note the specificity of the firsthand facts alleged here by the victim, C.D., yeoman:

COMPLAINT and WARRANT for an ASSAULT and BATTERY.

To the Hon. A. B. *Esq. one of the justices to keep the peace in and for the county of* S——*and State of*——

Complains

IN the name and behalf of said state C.D. of——in said county of S——yeoman, that E.F. of——in the county of——husbandman, on the——day of——in

436 FORMS. &c.

in the year of our Lord——at said——with force and arms a violent assault on the body of your complainant being then and there in the peace of God and said state did make, and did him grievously beat, bruise, wound, and ill treat, by striking him many heavy blows on the face and various parts of his body; and other wrongs then and there the said E.F. with force as aforesaid, to your complainant did, against the law of the land, the statute, peace and dignity of said state. Your complainant therefore prays process, that the said E.F. may be apprehended, examined touching the premises, and dealt with according to law.—— C. D.

STRAFFORD. } On the——day of——the above named C.D. made solemn oath that the aforegoing complaint by him subscribed was just and true. Before me A. B. Justice of the peace.

STRAFFORD. } *To the Sheriff of the county of S——or either of his deputies, or any constable of the town of——in said county,*

GREETING.

(L.S.) COMPLAINT being made and sworn to as above, these are to require you in the name of the said state, forthwith to apprehend the said E. F. (if he may be found within your precinct) and him bring before me or some other justice of the peace in and for said county of——that he may be examined and dealt with in the premises as to law and justice appertains. You are also to summons G.H. and J.K. of ——as witnesses, and notify the complainant of the time and place of hearing. And for so doing this is your warrant.

Given

3. Sources more directly leading to the Fourth Amendment relied on and confirmed these common law requirements. The court in *Entick v. Carrington*, for example, held that for a person to obtain a search warrant, there "must be a full charge upon oath" and the "*owner* [of allegedly stolen goods] must swear that the goods are lodged in a [specific] place." *Entick*, 19 How. St. Tr. at 1067 (emphasis added). Similarly, the accuser must attend the search to "shew [the goods] to the officer." *Id.* Perhaps most significantly, the *Entick* court contrasted these firsthand requirements with the Crown's proposal, which the court rejected because it would allow officers to search based upon "informers [who are] unknown." *Id.* at 1064. And in the Writs of Assistance Case in Boston, James Otis, in insisting upon an oath to obtain a warrant, argued that the oath must be made by the person who can swear and identify the particular places the goods are allegedly concealed. Sacharoff, *supra*, at 653.

Finally, writers and courts of the Founding era provided several reasons to require oath and examination that make sense only if the oath required firsthand knowledge. First, Justices of the Peace were to guard against abuse from lying accusers by engaging in a careful examination of the person and their motives. Chitty, *supra*, at *31; Davis Treatise, *supra*, at 7–8. Despite the supposed guarantee of the oath, writers and judges knew witnesses often lied when making accusations, including in some of the most famous English cases. *See*, *e.g.*, John Kenyon, The Popish Plot (1972). Second, the oath imposed accountability: A lying firsthand witness could be prosecuted for perjury, unlike the witness who merely

repeats the lies of another. *Entick*, 19 How. St. Tr. at 1067–68*; see also Veeder v. United States*, 252 F. 414, 418 (7th Cir. 1918) ("There must be consequences for the accuser to face [i]f the sworn accusation is based on fiction"). Third, writers urged the oath at the warrant stage with an eye on that same witness testifying later at trial. Davis Treatise, *supra*, at 8–9. These reasons complement the more general rule against hearsay and its focus on the oath.

III. Cases Decided Shortly After Ratification Confirm That Probable Cause Cannot Be Supported Solely by Hearsay.

The cases arising out of Aaron Burr's alleged treason plot provide important insight into the original understanding of the Warrant Clause as requiring firsthand knowledge—not hearsay—to support probable cause.

1. In 1806, a prosecuting attorney asked a Kentucky federal judge to order Burr's arrest. *United States v. Burr*, 25 F. Cas. 1 (C.C.D. Ky. 1806) (No. 14,692). The attorney submitted an affidavit under oath in which he swore that he had been told that Burr committed a high misdemeanor in mounting a military operation against Spain. The attorney provided detailed facts from the absent informant and promised that he could produce this witness in due course. *Id.* at 1.

The court rejected the application because the attorney's affidavit rested on hearsay. *Id.* at 2. The court wrote that the government must meet the requirements for an arrest warrant, including probable cause, with "legal evidence." *Id.* The attorney's affidavit was "not legal evidence" for the

very reasons Gilbert had long adduced—it lacked a valid oath. *Id.* The court said: "The evidence is the oath of a person who has been informed by one not upon oath." *Id.*

2. The following year, this Court considered a habeas case by two of Aaron Burr's accused accomplices challenging their pre-trial commitment. *Ex parte Bollman and Ex Parte Swartwout*, 8 U.S. 75 (1807). Samuel Swartwout's counsel expressly argued that the Warrant Clause banned hearsay and instead required legal evidence to support a warrant—a proposition the government and the Court appeared to accept. The case was argued and decided by the leading lawyers and judges of the day, including current and former attorneys general and Chief Justice Marshall.

In particular, Swartwout's counsel, Charles Lee, former attorney general under Presidents Washington and Adams, argued that the Warrant Clause governed the warrants and prohibited hearsay. He first quoted the Fourth Amendment verbatim, before arguing that: "All the facts necessary to constitute this probable cause must appear upon oath or affirmation." *Id.* at 110. In particular, he argued: "No belief of a fact tending to show probable cause, no hearsay, no opinion of any person . . . can be received in evidence on this examination." *Id.* Co-counsel Francis Scott Key also argued that a warrant could not rest upon hearsay, quoting at length the leading English hearsay case, *King v. Eriswell*, 100 Eng. Rep. 815 (K.B. 1790). *Id.* at 123. Finally, in a separate argument, Key made clear that warrants must rest upon "evidence," an argument taken as falling under the Fourth Amendment. *Id.* at 113; *see*

also id. at 120–21 (argument of Bollman counsel Harper).

Counsel for the government, Attorney General Caesar A. Rodney, did not dispute Lee and Key's arguments concerning hearsay. On the contrary, he conceded that the Fourth Amendment governed and required legal evidence to support probable cause. *Id.* at 115–16. He simply argued that the affidavits he sought to introduce were proper evidence. *Id.* at 115. Although Rodney later said that these affidavits would not be admissible at trial, it was not because their content was hearsay, but because they were affidavits and not live testimony—the affidavit, he said, did not appear "in a proper shape." *Id.* at 115.

For the Court's part, two of the justices said that probable cause for a warrant "ought to be proved by testimony in itself legal." *Id.* at 130. Those two contended that the proceeding, even if *ex parte*, "ought in many other respects to be such as a court and jury might hear." *Id.* Significantly, Chief Justice Marshall was one of the two voting to admit the affidavit, in part because it appeared the affiant had personal knowledge of the information within it. Sacharoff, *supra*, at 663.[4]

One other debate in *Ex parte Bollman* further demonstrates the lawyers' shared understanding that the Fourth Amendment bars hearsay. The government sought to introduce President Jefferson's address to Congress stating that there existed a state of war. Harper, counsel for Bollman, argued that

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[4] Chief Justice Marshall said that four of the six justices considered the admissibility of the affidavits—two for and two against admission.

Jefferson's address was inadmissible to establish any fact because his address was not "testimony" and admitting it as testimony would be "a direct violation of the constitution." *Bollman*, 8 U.S. at 119. The government neither disputed that the Warrant Clause required witness testimony nor that it barred hearsay. Instead, the government lawyer essentially argued a hearsay exception, and that Bollman "did not attempt or wish to introduce it as direct evidence." *Id.*

3. These cases, argued and decided by the Founding generation, confirm what the text and history of the Fourth Amendment make clear: The original understanding of the Warrant Clause requires firsthand witness testimony before a warrant may issue, and hearsay is categorically insufficient to establish probable cause.

Courts followed the approach established by these cases for the next 150 years, and early 20th-century practice confirms that the firsthand knowledge requirement was not merely historically grounded but practically workable. Then as now, law enforcement undertook complex, multi-defendant investigations, including prohibition and prostitution cases that relied on multiple informants. *See, e.g.*, *Lucania Convicted with 8 In Vice Ring on 62 Counts Each*, N.Y. Times, June 8, 1936, at 1 (noting that a trial stemming from a larger investigation into prostitution involved hundreds of detectives, prosecutors, witnesses, and defendants). Officers in these and similar cases could obtain warrants based upon firsthand knowledge only, both by statute and the Fourth Amendment as interpreted by the almost uniform voice of federal courts of appeal. *See, e.g.*, *Giles v. United States*, 284 F. 208, 211–13 (1st Cir.

1922); Sacharoff, *supra*, at 669; *id.* at 670–71 (discussing the 1917 search warrant statute applicable to prohibition cases and that more generally required firsthand knowledge until *Jones*).

That historical practice also underscores the administrability of the original rule. Before *Jones*, courts distinguished between whether probable cause existed and whether it was established in the constitutionally required manner. This pre-*Jones* framework was simple and transparent: The central facts supporting probable cause had to be established through sworn firsthand evidence. *Jones* and its progeny replaced that straightforward inquiry with a far more complicated assessment of hearsay, informant credibility and reliability, real-time corroboration, an informant's previous history of tips, her criminal record, and any rewards—with courts even differing on whether officers can or must reveal these facts. *E.g.*, *United States v. Bradford*, 905 F.3d 497, 503 (7th Cir. 2018) (five-factor test for informants). Restoring this original approach would unburden warrant practice and thereby promote judicial efficiency.!

CONCLUSION

The Court should grant the petition for writ of certiorari, overturn *Jones*, and reinstitute the original understanding of the Warrant Clause.

Respectfully submitted,

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