

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Warrant Clause requires probable cause to be “supported by Oath or affirmation.” U.S. Const. Amend. IV. Denver’s defense of *Jones v. United States*, 362 U.S. 257 (1960), reduces that requirement to a formality: An officer who knows only that an informant spoke may put the report under oath, and the magistrate may infer the rest. But swearing to a report does not put the underlying facts under oath. At the Founding, “supported by Oath” meant sworn facts from the witness who observed them. (Part I.)

For 150 years, American courts construed the Fourth Amendment to require exactly such a real accuser’s oath. Denver never mentions, let alone disputes, the unbroken line of decisions construing the Fourth Amendment to require an oath from a firsthand witness. What remains is a naked convenience argument that *Jones* itself invoked. (Part II.)

The founding generation heard the same argument and adopted the oath requirement anyway. Denver’s practical objections fare no better. Rule 41’s procedures, consent, and exigency answer every hypothetical; indeed, the firsthand rule is more administrable than the regime *Jones* created. And because the Warrant Clause was written to prevent unlawful searches, not remedy them, Denver’s ex post remedies answer nothing. (Part III.)

That leaves Denver’s procedural objections, which defeat themselves. The absence of a circuit split is a consequence of *Jones* itself, and Denver’s municipal-liability theory would make every precedent unreviewable. Mean-

while, *Jones* was dispositive below, so the question is cleanly presented. (Part IV.)

This case is the ideal vehicle. Denver’s warrant issued on double hearsay, authorizing the midnight search of an innocent man’s house on the word of an accuser no judge ever saw, and no oath ever bound. Pet.App.10a, 26a–28a.

The petition should be granted.

ARGUMENT

I. Denver cannot reconcile *Jones* with the Warrant Clause’s text.

Denver reads the Warrant Clause to require only that someone swear to something, BIO4–6, but the Clause requires that probable cause itself be supported by oath.

Constitutional terms carry their original, settled meaning. *Ramos v. Louisiana*, 590 U.S. 83, 90 (2020). “Jury” in the Sixth Amendment carries the meaning it had “at the time of the Sixth Amendment’s adoption,” including unanimity, a word the text nowhere contains. *Ibid*. So too here. The settled content of “Oath or affirmation,” which the Founders did not need to spell out, was sworn testimony from a witness with personal knowledge. LawScholarsBr.2–3.

A. The Warrant Clause oath is testimonial, not promissory.

Denver’s principal textual argument is that “Oath or affirmation” appears three more times in the Constitution

and in each instance imposes only “a solemn legal obligation,” not a firsthand-knowledge requirement. BIO1, 5.

But Denver’s other examples are promissory oaths that bind future conduct. The President swears to “faithfully execute the Office.” U.S. Const. Art. II, § 1, Cl. 8. State and federal officers swear “to support th[e] Constitution.” U.S. Const. Art. VI, Cl. 3. And Senators trying impeachment are sworn for that purpose. U.S. Const. Art. I, § 3, Cl. 6. These promises assert no facts, so the question of firsthand knowledge never arises. The Warrant Clause oath, on the other hand, can only be testimonial. It must “support[]” a showing of probable cause—facts that have already occurred. The only oath that can support facts is a witness’s oath, sworn to “what hath fallen under his senses.” *Bushell’s Case*, 124 Eng. Rep. 1006, 1009 (C.P. 1670). Denver’s intratextual comparison thus proves Mendenhall’s point. Read uniformly, “Oath or affirmation” means the perjury-backed act suited to its subject. An oath about future duties is a promise. An oath supporting probable cause is testimony—and testimony, at the Founding, required personal knowledge.

Denver’s own definitions confirm the firsthand requirement. Its dictionaries define the oath by its sanction: a declaration “made under the penalties of perjury.” BIO5. But perjury required swearing “absolutely and directly”; it was no perjury when a person “swears a Thing according as he thinks, remembers or believes.” 1 William Hawkins, *A Treatise of the Pleas of the Crown* 175 (1739). An officer repeating an informant’s account can swear only to the fact that a statement was made. The facts establishing probable cause are sworn by no oath whatsoever. That is why Denver errs in saying petitioner “conflates *what* an oath guarantees with *who* may make an

oath.” BIO7. Since the oath seeks perjury-backed truth-telling about the facts supporting probable cause, only the person who observed those facts can supply that guarantee. Denver’s reading reduces the oath to an empty recital that any application would satisfy as a matter of course, rendering “Oath” surplusage. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); see also Pet.21.

B. At the Founding, “supported by Oath” meant supported by evidence, and hearsay was no evidence of the facts asserted.

Denver’s fallback is that a hearsay affidavit places the fact that an informant spoke under oath—along with the officer’s assurance that the informant is reliable. BIO7. The magistrate may then find probable cause in facts no one ever swore to. *Jones* adopted the same position, 362 U.S. at 269–271, but it is wrong. At the Founding, “supported by oath” was shorthand for supported by legal evidence, and legal evidence excluded hearsay—so the oath excluded it too. LawScholarsBr.6.

Start with the equivalence of oath and evidence. At the Founding, no testimonial proof existed except upon oath: “[N]o evidence is to be admitted but what is upon oath.” William Hening, *The New Virginia Justice* 181 (1795); 2 William Hawkins, *A Treatise of the Pleas of the Crown* 429 (1739) (a fact is “proof” when “made out by Oath”). Because the oath was the era’s sole instrument of proof, “supported by oath” and “supported by evidence” were two formulations of the same requirement. The state provisions from which the Fourth Amendment descends used them interchangeably. Virginia, for instance, required that arrest warrants be “supported by evidence” and that search warrants rest on “evidence of a fact committed.”

Va. Declaration of Rights Art. X (1776); Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 Stan. L. Rev. 603, 657–660 (2022).

Legal evidence, in turn, excluded hearsay. “Testimony being but an Appeal to the Knowledge of another, if indeed he doth not know, he can be no Evidence.” Geoffrey Gilbert, *The Law of Evidence* 149 (1788). A repeated statement was mere “bare Speaking,” because the first speaker was never under oath. *Ibid.* The defect could not be cured by the repeater’s own oath. Sworn credit could “rise no higher than the Fountain from whence it flows,” for “if the first Speech was without Oath, an Oath that there was such a Speech * * * [is] of no Value in a Court of Justice.” Gilbert at 149–150.

It follows that the Warrant Clause “Oath” excluded hearsay too. If probable cause must be supported by oath, and an oath supports facts only by supplying evidence, then facts known solely by report could not support probable cause, however solemnly the report was repeated. The facts establishing probable cause had to come, under oath, from a witness who perceived them, subjecting the witness—not a third party—to the penalties of perjury.¹

Denver restates the question presented as whether the Fourth Amendment “prohibits courts from issuing warrants based on hearsay.” BIOi. If “based on” means that hearsay is necessary to support probable cause, that is precisely the rule. Hearsay may still appear in an application (e.g., helpful background), and the judge need not

¹ The rules of evidence today do not govern warrant applications. Fed. R. Evid. 1101(d)(3). But “Oath” includes the firsthand requirement of its own force; Founding-era evidence law shows what the word meant.

strike it, but the sworn, firsthand facts must establish probable cause on their own. The warrant here rests on secondhand accounts *alone*, failing that test.

C. The oath is the safeguard in ex parte warrant proceedings.

Denver’s remaining textual response is structural. When the Founders wanted witnesses, Denver observes, they said so, as in the Confrontation Clause. BIO6. The objection assumes that the Founding-era rule against hearsay had the modern rule’s rationale. It did not. Today, the bar on hearsay is justified by the right of cross-examination. Fed. R. Evid. 801(d)(1) advisory committee’s note to 1972 proposed rules (the oath “receives much less emphasis than cross-examination”). At the Founding, hearsay was excluded largely because the person with firsthand knowledge never swore. The repeated statement was therefore “no Evidence.” Gilbert at 149.

Denver’s objection also fails on its own terms. There is no chance of cross-examination in a warrant proceeding. Warrants are sought *ex parte*, before any arrest, when there is no accused to confront. So each clause supplies the safeguard suited to its own setting. At trial, the Sixth Amendment commands “not that evidence be reliable, but that reliability be assessed in a particular manner”—by confrontation. *Crawford v. Washington*, 541 U.S. 36, 61 (2004). At the warrant stage, the Fourth

Amendment does the same—by the firsthand witness’s oath. LawScholarsBr.8–9.

II. The pre-*Jones* constitutional tradition confirms the firsthand requirement.

Denver does not dispute that every federal circuit to address the question between 1850 and 1960 held that the Fourth Amendment oath required firsthand knowledge. Pet.11–13 & nn.4–5. It does not address *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the Burr proceedings, or *Grau v. United States*, 287 U.S. 124 (1932). Denver’s response is that history “does not alter” the text, BIO6–8, and that this Court distinguishes constitutional requirements from “judicial or state-developed rules of practice,” citing *Virginia v. Moore*, 553 U.S. 164 (2008).

Moore is inapposite twice over. First, the state statute there did not purport to construe the Fourth Amendment. The state legislature made a choice “to protect privacy beyond the level that the Fourth Amendment requires.” *Moore*, 553 U.S. at 171 (such choices do not raise the federal floor). Second, the statute was modern. It was enacted nearly two centuries after ratification, so it sheds no light on the Amendment’s original meaning. The pre-*Jones* authorities differ from *Moore* on both counts. First, they construed the Fourth Amendment itself. Second, they did so across the very period that supplies the history and tradition against which the Amendment is read.

In 1877, Justice Bradley held that under the Warrant Clause “the magistrate ought to have before him the oath of the real accuser.” *In re Rule of Court*, 20 F. Cas. 1336, 1337 (C.C.N.D. Ga. 1877). The First Circuit held that the Amendment required the affiant to state “what he saw, or

heard, or smelled, or tasted.” *Giles v. United States*, 284 F. 208, 214 (1st Cir. 1922). And this Court essentially agreed, in two steps. First, the Fourth Amendment oath must put facts before the magistrate: “Mere affirmance of belief or suspicion is not enough.” *Nathanson v. United States*, 290 U.S. 41, 47 (1933). Second, the facts must come from one who perceived them: Citing *Giles*, the Court held that a warrant may issue “only upon evidence which would be competent in the trial of the offense before a jury.” *Grau*, 287 U.S. at 128. This rule was as old as the Amendment. See *Bollman*, 8 U.S. (4 Cranch) at 110 (argument of Lee) (“All the facts necessary to constitute this probable cause must appear upon oath or affirmation,” and “no hearsay” may “be received in evidence[.]”); *United States v. Burr*, 25 F. Cas. 1, 2 (C.C.D. Ky. 1806) (refusing an order akin to an arrest warrant where the supporting “evidence is the oath of a person who has been informed by one not upon oath”); LawScholarsBr.14–17.

A uniform course of constitutional cases spanning 150 years, atop a century of common-law practice, is among the strongest evidence of original meaning. See *Ramos*, 590 U.S. at 90–93; *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 35–36 (2022). Instead of “alter[ing]” the text, the history reveals its meaning.

Denver says the historical sources show only that oaths serve “truth.” BIO7. But that supports Mendenhall, because Founding-era law secured truthful accusations in three ways, each requiring a firsthand witness. The first was solemnity: Matter sworn “under the Sanction and Solemnities of an Oath” was “intitled to Faith and Credit,” so the firsthand requirement kept that credited account free of secondhand error. Gilbert at 139–140. The second was perjury: A witness who perceived the facts swore at

her peril, whereas a witness who repeated another’s account risked nothing as to the underlying facts. 1 Hawkins at 175; *Veeder v. United States*, 252 F. 414, 418 (7th Cir. 1918) (“There must be consequences for the accuser to face.”). The third was the best-evidence principle: So long as the observer lived, a secondhand report of what he said was not “the best evidence” of what he had seen. Hening at 181.

III. Convenience cannot amend the Warrant Clause.

Denver’s remaining substantive arguments reduce to *Jones*’s policy rationale: Warrants are easier to obtain if hearsay suffices. Sometimes, perhaps. But the Constitution’s purpose is not to make things easier for the government. Defenders of general searches made the same argument at the Founding. Thomas Hutchinson—the judge who upheld the writs of assistance over James Otis’s objection—later explained that if an informer’s oath were required, no one would come forward for fear of the “rage of the people.” Sacharoff, 74 Stan. L. Rev. at 654. The founding generation adopted the requirement over that objection. Efficiency “can never by itself justify disregard” of the Fourth Amendment’s commands. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). See also *Entick v. Carrington*, 19 How. St. Tr. 1029, 1073 (1765) (the common law “does not understand that kind of reasoning”).

Denver’s appeal to the fellow-officer rule, BIO8–9, repeats *Jones*’s category error. Its cases involve a *Terry* stop, *United States v. Hensley*, 469 U.S. 221 (1985), and a warrantless search, *Felders v. Malcom*, 755 F.3d 870 (10th Cir. 2014). Warrantless action demands no oath, so those

cases, just like *Brinegar* and *Draper*; say nothing about what the oath requires. Pet.23–24.

Denver’s hypotheticals, BIO10, answer themselves. Its domestic-violence victim can consent to a warrantless search of the home, and the exigency exception covers any ongoing danger. See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (warrantless entry to render emergency aid); *Fernandez v. California*, 571 U.S. 292, 303 (2014) (consent of an abuse victim to search the shared home). And where a warrant is sought, Rule 41(d) permits the victim to submit a written affidavit or be examined by telephone. Fed. R. Crim. P. 41(d)(2)(A), (d)(3).

Nor do crimes discovered ex post, BIO11, defeat the rule because the rule requires not an eyewitness to the crime but only that whoever supplies the facts establishing probable cause have perceived those facts firsthand. The homeowner who finds his door broken and his television gone can swear to what he found; the accountant who examines the ledgers can swear to what she saw; the officer who smells marijuana can swear to what his senses perceived.

Denver’s complex-investigation hypothetical fares no better. BIO9, 11. Such cases were successfully investigated under the pre-*Jones* rule, Pet.29, and Rule 41’s remote procedures can accommodate a dozen witnesses as readily as one. Sealed proceedings protect an informant’s identity while placing the source before the magistrate.

Neither does the firsthand rule import trial protections into the warrant process. BIO12–13. A warrant application still requires no confrontation, counsel, jury, or reasonable-doubt standard. Probable cause remains the

standard; the oath is the method by which it is established. If anything, the firsthand rule is more administrable than the rule *Jones* has spawned. After *Illinois v. Gates*, 462 U.S. 213 (1983), a judge must assess an absent informant's veracity and basis of knowledge from a paper summary, filtered through an officer's observations. Under the firsthand rule, the account arrives sworn from the source. That is simpler for the officer too; she no longer must reconstruct how the informant knows what he claims and why he should be believed. Pet.27–28.

Finally, Denver's safeguards operate against the wrong party and only after the search. BIO14–16. *Franks v. Delaware* reaches only the perjury “of the affiant, not of any nongovernmental informant.” 438 U.S. 154, 171 (1978). The exclusionary rule does nothing for the innocent person against whom no evidence is ever used. And prosecutorial review is neither required nor a substitute for “a neutral and detached magistrate.” *Johnson v. United States*, 333 U.S. 10, 14 (1948). The Clause exists to prevent unlawful searches, not remedy them afterward.

IV. This case is an ideal vehicle for a question no circuit split can ever present.

Denver concedes that municipalities may be liable for facially unconstitutional policies. BIO16–17. That's this claim. Denver's policy authorizes warrants whose probable cause rests entirely on facts no firsthand witness swore to. Denver responds that Mendenhall must prove Denver intended to violate constitutional rights. BIO16. But the deliberate-indifference standard applies to facially lawful policies that lead employees to violate federal rights; it adds no separate subjective-intent element when the policy itself allegedly violates federal law. *Board*

of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405–407 (1997). Nor does reliance on *Jones* supply a defense. Municipalities have no good-faith immunity, *Owen v. City of Independence*, 445 U.S. 622, 638 (1980), and a new rule applied here would govern cases still open on direct review, *Harperv. Virginia Dep't of Tax'n*, 509 U.S. 86, 97 (1993).

Denver's no-circuit-split point fares no better. BIO3. Every jurisdiction follows *Jones*. If conformity defeated review, this Court could never reconsider its decisions in a Section 1983 suit. See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (overruling *Albrecht* while commending the lower court for applying it). Both courts below held that *Jones* defeats Mendenhall's claim, and the Tenth Circuit recognized that relief can come only from this Court. Pet.App.6a, 17a. The question presented is dispositive.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted on July 28, 2026,

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