No. 25-01081

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHAEL MENDENHALL,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF DENVER,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Colorado
No. 1:24-CV-00574-PAB-KAS
The Honorable Philip A. Brimmer

BRIEF OF CRIMINAL LAW AND EVIDENCE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors specializing in criminal procedure and evidence, as well as the Fourth Amendment and its Founding-era history.

Joshua Dressler is the Distinguished University Professor and Professor of Law Emeritus at The Ohio State University Moritz College of Law. He has written casebooks on criminal law and criminal procedure that are used by professors at about 100 law schools.

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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 intended 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 appeal.

that led in part to the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

Laurent Sacharoff is a law professor at the University of Denver Sturm College of Law. He has written numerous articles on criminal procedure and, in particular, the original meaning of the Warrant Clause.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Amendment's Warrant Clause, as originally understood, requires firsthand testimony before a warrant may issue. Indeed, the requirement of "probable cause, supported by Oath or affirmation," means that probable cause must be established through sworn witness testimony. Because a witness cannot properly swear or affirm to hearsay, a warrant cannot issue based on such information.

In the Founding era, the rule against hearsay rested largely upon the concept of the witness "oath." If the initial speaker was not under oath when he made a statement, the statement would retain that unsworn quality even when repeated by a witness who was under oath. For this reason, the sworn witness's repetition of the declarant's statement was deemed "bare speaking."[2] Geoffrey Gilbert, *The Law of Evidence* 149 (Phila. 1788).[3] Courts followed this straightforward approach for nearly 200 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 statement. *See* Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 Stan. L. Rev. 603, 603–72 (2022) (considering the original meaning in depth); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 651

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[2] Thus, we use "hearsay" in the way it was used in the Founding era—namely, to refer to out-of-court unsworn statements—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.

[3] This brief cites the 1788 Philadelphia edition of Gilbert, but all editions from 1754 to 1788 contained the same language for the portions quoted.

(1999) (explaining that the Warrant Clause required firsthand knowledge).

In 1960, the Supreme Court overturned that centuries-old understanding of the Warrant Clause and held that warrants *can* issue based solely on hearsay. *Jones v. United States*, 362 U.S. 257, 269 (1960), *overruled in part on other grounds by United States v. Salvucci*, 448 U.S. 83 (1980). *Jones* was wrongly decided because it completely ignored the "Oath" requirement and instead construed only the probable cause requirement. "Probable cause" sets the standard of proof, but the oath requirement sets the method for satisfying that standard. In other words, the Warrant Clause requires not only that the government establish probable cause, but that it do so through evidence presented under oath or affirmation. *Cf. Crawford v. Washington*, 541 U.S. 36 (2004) (holding that the Confrontation Clause commands that reliability be established by a particular means—there, cross-examination).

This case provides an ideal vehicle for revisiting *Jones* and restoring the original understanding of the Warrant Clause as requiring firsthand knowledge before a warrant may issue. The warrant here was

based on a detective's testimony that Michael Mendenhall had threatened Sean Horan with a baseball bat. But the detective who offered that testimony did not witness these supposed threats. In fact, he did not even speak to anybody who was present at the time. Instead, the detective was merely relaying what another police officer had told him, and that police officer was merely relaying Sean Horan's unsworn description of the events. At the time of the Founding, this third-hand testimony would have been considered "no Evidence." *Jones*, however, provided a license for the government to invade Michael Mendenhall's business and confiscate his property.

This brief proceeds in two parts. First, it assesses the Warrant Clause's text within the historical context of the Founding, including the common law rule requiring that witnesses have firsthand knowledge of all matters they attest to and the rule against hearsay. Second, it discusses the first set of cases to consider the Warrant Clause—just 15 years after the Fourth Amendment's adoption—which rejected the use of hearsay in obtaining warrants.

Because the warrant in this case was based only on hearsay—namely, Sean Horan's unsworn testimonial statements—a court need

not conclusively resolve whether and to what extent hearsay may be considered in addition to firsthand evidence when evaluating probable cause (for example, whether hearsay may provide mere context or background information). Rather, it need only reaffirm the original understanding of the Warrant Clause and hold that in the absence of any firsthand testimony substantiating the core criminal conduct, the constitutional requirement that probable cause be supported by "Oath or affirmation" is unmet.

ARGUMENT

I. The Text and Founding-Era Understanding of the Fourth Amendment Require That a Warrant Be Supported by Admissible Witness Testimony.

The Supreme Court has urged courts to interpret the Bill of Rights by first focusing on its text and structure. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 2 (2022); *Ramos v. Louisiana*, 590 U.S. 83 (2020). But the Court has also made clear that the text and structure must be read against the background of the common law as it existed at the time of the Framing, especially when interpreting the Fourth Amendment. *See, e.g.*, *Torres v. Madrid*, 592

U.S. 306, 313–14 (2021); *McGrain v. Daugherty*, 273 U.S. 135, 156 (1927); *Ex parte Bollman*, 8 U.S. 75 (1807).

In determining the historical content of the common law, the Court has looked to case law, treatises, colonial laws, early state constitutions, and practice. *See, e.g.*, *Torres,* 592 U.S. at 313; *Lange v. California*, 594 U.S. 295, 311 (2021); *Ramos*, 590 U.S. at 90–91. It has regularly turned to treatises from familiar luminaries such as Edward Coke, Matthew Hale, William Hawkins, William Blackstone, and Geoffrey Gilbert, along with American Founding-era Justice of the Peace ("JP") manuals. *See, e.g.*, *Lange*, 594 U.S. at 311; *Smith v. United States*, 599 U.S. 236, 249 (2023); *Giles v. California*, 554 U.S. 353, 359 (2008); *Gonzalez v. United States*, 145 S. Ct. 529, 530 (2025).

This text-and-tradition approach to constitutional interpretation is exemplified by *Ramos*, in which the Court considered whether the term "jury" in the Sixth Amendment requires a unanimous jury to support a criminal conviction. 590 U.S. at 88–93. The Court expressly considered, but rejected, a hyper-literal approach that would have read the term "jury" to encompass any decision-making body, no matter how many members it has and no matter how it decides cases (for example,

by simple majority or unanimously). *Id.* at 97–98. Instead, the *Ramos* Court held that "jury" "meant" a 12-person, unanimous jury. *Id.* It did so by reading the text in light of the Founding-era use of the term, pointing to state constitutions as well as treatises by Hale, Blackstone, and Dane—all of which required unanimity. *Id.* at 90–91.

Although the Founding era had no police, it had customs officials who conducted intrusive and abusive searches authorized by writs of assistance. The Fourth Amendment specifically sought to abolish these writs by imposing on law enforcement officials the same safeguards that govern search warrants in ordinary criminal cases, including sworn allegations by someone with knowledge of the particular places listed—as James Otis expressly argued in the Writs of Assistance case. Sacharoff, *supra*, *at* 653. The drafters and ratifiers of the Fourth Amendment sought to prevent future innovations, simply for law enforcement convenience, that would sidestep Fourth Amendment protections—innovations, we argue here, such as the *Jones* decision allowing hearsay simply to make it easier for police to obtain search warrants. *Id.* at 649–56.

Applying this analytical framework to the Warrant Clause confirms that hearsay is not a proper basis for a warrant. The term "oath" was understood at the Framing to encompass only admissible witness testimony. And at common law, a witness could not introduce hearsay precisely *because* the out-of-court statement was not made under oath.

A. The Term "Oath" Was Shorthand for "Testimony" at the Time of the Framing.

The Fourth Amendment requires that probable cause be supported by "Oath or affirmation." This means a *testamentary* oath or affirmation—that is, a promise to tell the truth and not, say, an oath of office or a juror oath. *Atwood v. Welton*, 7 Conn. 66, 72 (1828) (distinguishing witness oath from other types of oath); *Smith v. Parkhurst*, 95 Eng. Rep. 414 (K.B. 1738) (distinguishing witness and juror oath). In other words, "Oath" in the Fourth Amendment means, essentially, witness testimony. Indeed, the term "Oath" was a shorthand expression for witness testimony widely used at the Framing in (i) treatises, (ii) case law, and (iii) state constitutions.

First, as to treatises, Geoffrey Gilbert noted in his influential evidence treatise that a wife may not testify if she would benefit from

her husband's gain: "she by her Oath gains an interest," meaning she gains an interest by her *testimony*. As a result, he wrote, she "was no Evidence." Gilbert, *supra*, at 135. Gilbert elsewhere said that a wife may testify if she is the only available "Witness" because "there could be no other Proof but by the Oath of the Wife," again meaning legal evidence by the testimony of the wife. *Id.* at 134; *see also id.* at 59, 60.

In his equally influential criminal law treatise, William Hawkins noted that something could be "proof" if it was "made out by Oath"—meaning made out by testimony. 2 William Hawkins, *A Treatise on the Pleas of the Crown* 429 (London, E. & R. Nutt & R. Gosling 3d ed. 1739). Hawkins's shorthand use of the term "by Oath" found its way into numerous American Justice of the Peace manuals. *See, e.g.*, Richard Burn, *Burn's Abridgement, or the American Justice* 132 (Dover, Eliphalet Ladd 1792); William Waller Hening, *The New Virginia Justice* 175 (Richmond 1795) ("no better credit than his oath," meaning his testimony under oath).

Second, American courts likewise used the term "oath" as a shorthand for witness testimony. The North Carolina Supreme Court did so in 1819, construing a 1756 statute's phrase, "*To make out by his*

oath," to be synonymous with "*to prove*." *Kitchen v. Tyson*, 7 N.C. 314, 315 (1819); s*ee also Poultney v. Ross*, 1 U.S. 238 (Pa. Com. Pl. 1788) ("the book, proved by the oath of the Plaintiff himself"); *Mallon v. Owens*, 1 Del. Cas. 538, 538 (1815) (account book, "supported by her oath … was produced and given in evidence"); *Black v. Digges' Ex'rs*, 1 H. & McH. 153, 153 (Md. Prov. 1744) ("plaintiff offered in evidence to the Jury an account proved by the oath of the plaintiff and another witness"); *Rice v. Jones*, 8 Va. 89, 90 (1786) ("proved by the oaths of two witnesses").

Third, warrant clauses in state constitutions as early as 1776 used "by oath" as a shorthand for witness testimony. Delaware and Maryland, for example, required simply an "oath," but likely drew on Article X of Virginia's 1776 Declaration of Rights, which twice required "evidence." Del. Decl. of Rts. of 1776, § 17; Md. Decl. of Rts. of 1776, art. 23. Specifically, Virginia's Article X required that arrest warrants be "supported by evidence" and that search warrants be supported by "evidence of a fact committed."[4] North Carolina similarly required

[4] Virginian James Madison wrote the first draft of the Fourth Amendment, including using the term "oath," likely shorthand for

"evidence" in its 1776 constitution. N.C. Decl. of Rts. of 1776, § XI. Thus, when Delaware and Maryland later used "oath" alone, and other states including Massachusetts and Pennsylvania used "cause or foundation" or "sufficient foundation" alone, we can surmise that they too meant "evidence" and excluded hearsay. *E.g.*, Mass. Const. of 1780, pt. I, art. XIV; Pa. Const. of 1776, ch. I, art. X.

In some ways, the point is obvious: of course "by oath" meant "by testimony under oath." But it is important to unpack the expression. Once we see that "by oath" meant witness testimony under oath, two principles immediately follow: the firsthand knowledge requirement for witnesses and the rule against hearsay. Both were Founding-era rules that focused centrally upon, and were rooted in, the "oath."

B. The Rule Against Hearsay at the Time of the Framing Relied Upon the "Oath."

The common law long required that sworn witnesses testify to their firsthand observations only. 1 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 657, at 751–52 (1904); *see also* Noah Webster, *American Dictionary of the English*

Virginia's requirement of "evidence." *Cf. Ramos*, 590 U.S. at 91 (pointing to Madison's authorship of the Sixth Amendment).

Language (1828) (defining "witness" to include personally observe as well as one who testifies). In a leading English case well-known in America, *Bushell's Case*, Chief Justice Vaughan elaborated on the firsthand knowledge requirement for witnesses: "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 (1670). The rule against hearsay in the Founding era was simply the mirror image of the firsthand knowledge requirement. And it was well-established, at least at its core. Treatises and cases made clear that "hearsay" was not "evidence." As Gilbert flatly asserted, "a mere Hearsay is no Evidence." Gilbert, *supra*, at 149. It is therefore "not allowed." *Id.*, at 153; *see also* Hawkins, *supra*, at 431 ("no Manner of Evidence"); Joseph Greenleaf, *Abridgement of Burn's Justice of the Peace and Parish Officer* (Boston 1773) ("hearsay is no evidence"); Richard Starke, *The Office and Authority of a Justice of the Peace* (Williamsburg, 1774) (same); *Albertson v. Robeson*, 1 U.S. 9 (Pa. 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, such as atheists or very young children, could not be a witness. *Oath* and *witness* were practically equivalent by definition. *Id.*; *see also King v. Brasier*, 168 Eng. Rep. 202, 1 Leach 199 (1779) ("no testimony whatever can be legally received except upon oath").

Third, when a testifying witness repeated what another had said, and that other person's statement was not under oath, it was *as if* that other person attempted to testify to those facts in court *without being sworn*. Since that person could not come to court to testify to those facts without being sworn, the testifying witness could not repeat that other person's statement and cure the original defect. Gilbert, *supra*, at 149. An unsworn statement does not enjoy the imprimatur of the oath through later repetition by a sworn witness; it cannot be laundered through a sworn witness. That means that as to this repeated assertion, it is not really under oath even though the witness who repeats it is

himself sworn at the outset of their testimony. Instead, the repeated statement is deemed unsworn and labeled "bare speaking." *Id.*

To be clear, the question was not whether the testifying witness was competent. Rather, assuming a sworn witness, the question was whether a particular assertion counted as "evidence." A witness may legitimately have testified based on what she personally knew in addition to making assertions she heard from others. But the latter assertions were not "evidence," but again, "bare speaking."

It is worth quoting Gilbert's explanation in full to see 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.

Gilbert's rationale for 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 Trial at Nisi Prius* (London 1761); Henry Bathurst, *Theory of Evidence* (London 1761). Gilbert's rationale also made its way into America—John Adams had read an English version of Gilbert's treatise by 1766, and the 1788 Philadelphia edition of Gilbert and numerous American JP manuals, including in Virginia, 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"); Hening, *supra*, at 181.

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 149. George Fisher has canvased in depth the central role the oath played in the common law as a perceived guarantor of truth. 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. 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, 168 Eng. Rep. 271, 1 Leach 338 (1784). Another leading case echoed the same language:

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

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

Indeed, even an exception to the dying declaration exception followed the oath rationale. The dying declarations of those facing imminent execution were not admissible. *Drummond*, 168 Eng. Rep. at 272. As felons, they were considered incompetent to take the oath and testify, and thus their situation could not be deemed analogous to

taking an oath in court—their unsworn statements could not be repeated by a witness under oath. *Id.*

One might object that the rule against hearsay rests primarily in the requirement that defendants have the opportunity to cross-examine witnesses and that warrants issue *ex parte*. But in the Founding era, unlike today, the hearsay rule rested largely upon the "oath," rather than upon the need to cross-examine. Gilbert, as well as the many treatises following his lead, did not even mention cross-examination as a justification for his rule against oral hearsay until 1795; Gallanis, and Hawkins and his successors, mentioned it as a reason after the oath-rationale. Thus, even for an *ex parte* proceeding, the oath triggers a firsthand knowledge requirement even in the absence of the applicability of cross-examination by the suspect. Note also, as discussed below, the judge was to essentially cross-examine the person in any event.

To fully grasp the importance of the "oath" as opposed to cross-examination as the central rationale for the Founding-era rule against hearsay, one must also understand that the Founding-era often split what we call hearsay into two main categories: (1) "oral hearsay," or

repetition of another's unsworn statement, and (2) depositions sworn elsewhere that the prosecution (or sometimes the defense) sought to admit at trial. Treatise writers such as Gilbert and Hawkins, and later American JP manuals, often labeled as "hearsay" only this first category of oral hearsay. "Hearsay" was thus somewhat literally what the witness "heard" another "say." Gilbert, *supra*, at 152 ("what a Stranger has been heard to say"); *see also* Richard D. Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. Pa. L. Rev. 1171, 1209 (2002) (discussing this "oral hearsay"). This first type of oral hearsay rested upon the "oath" rationale. By contrast, these treatise writers discussed the admissibility of depositions separately, without even using the term hearsay. Gilbert, *supra*, at 139; Hawkins, *supra*, at 429–230; *see also* Wigmore, *supra*, at §§ 1360–64 (noting the distinction and later overlap). For these *sworn* depositions, the chief objection against their admission at trial was, of course, the absence of an opportunity to cross-examine the declarant. The discussion above focused on the first category of oral hearsay—i.e., repeating an unsworn statement—which is the type almost always at issue when a party seeks a warrant.

Finally, as to application: a judge need not formally exclude hearsay. Instead, he or she must simply do as a Founding-era judge would: ensure that probable cause is also adequately "supported" by firsthand testimony.[5]

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

The common law also had rules, aside from the above, that governed the issuance of warrants—rules the framers of the Fourth Amendment sought to codify. The most influential articulation, examined below, came from Matthew Hale's treatise published in the early 1700s. American JP manuals regularly repeated his words verbatim. 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.

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[5] Reasonable minds may disagree as to whether the Warrant Clause's "oath" requirement prohibits all hearsay, or only testimonial hearsay of the sort addressed in *Crawford v. Washington*, 541 U.S. 36 (2004). The Court need not resolve that question here because the hearsay in this case was indisputably based on Sean Horan's testimonial out-of-court statements.

These sources presumed what was true in the ordinary criminal cases for which warrants were needed: the victim or alleged victim drove the prosecution, sought any warrant, and thus always had personal knowledge. *Id.* Sheriffs, their deputies, and constables did not seek warrants; rather, they executed them. *Id.*

As to the requirements, Hale emphasized that the party seeking the warrant must be sworn and that the JP 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). Hawkins noted 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 *that* person should seek the warrant to "make the Arrest in his proper Person." *Id.* at 85. Later English treatises further insisted that JPs carefully examine the person. *See, e.g.*, Richard Burn, *The Justice of the Peace* (1755); William Blackstone, *Commentaries on the Laws of England* (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) (JPs must "interrogate" the accuser and require him to swear to those "facts.").

American JP manuals contained the same requirements, sometimes even more expressly referencing "evidence." A manual authored by James Davis stated that JPs 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); *see also 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 person 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) (the JP should "interrogate the accuser, and other witnesses."); Sacharoff, *supra*, at 626–27 (collecting sources).

Even after the warrant has issued, we see procedures that envisioned, at least, that the person seeking it have firsthand knowledge. For search warrants, the person who obtained the warrant "should be present and assistant, *because he knows his goods*." Hale, *supra*, at 150 (emphasis added). American JP manuals repeated this injunction, including that the person "knows his goods." Burn Abridgement, *supra*, at 358; Hening, *supra*, at 403.

The forms JPs used also show us that it was the victim or another firsthand witness who, as a matter of practice, invariably sought the warrant. The American JP 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—who would therefore naturally have been the one with firsthand knowledge; the forms had a separate blank for the constable, to whom the warrant was directed. Sacharoff, *supra*, at 630. Thus, for example, the accuser-blank would be followed by a

comma, then the person's occupation or station, such as "gentleman," "yeoman," "farmer," or "carpenter." Paraclete Potter, *The Attorney's Companion* 436 (Poughkeepsie, P. Potter 1818); Sacharoff, *supra*, at 630. The facts would then be firsthand, 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 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. *Id.* at 630–32 (collecting examples).

FORMS, &c.

Indictment for an affray.

THE jurors for the ſtate of ———, upon their oath preſent, that A.O. of——in the county of——taylor, and B.O. of——in ſaid county, blackſmith, with force and arms, on the——day of——in the year of our Lord,——at——aforeſaid in the county aforeſaid, being arrayed and unlawfully aſſembled together in a warlike manner, did make an affray, to the terror and diſturbance of divers of our citizens, which is an evil example to others, againſt the law, peace and dignity of the ſtate.

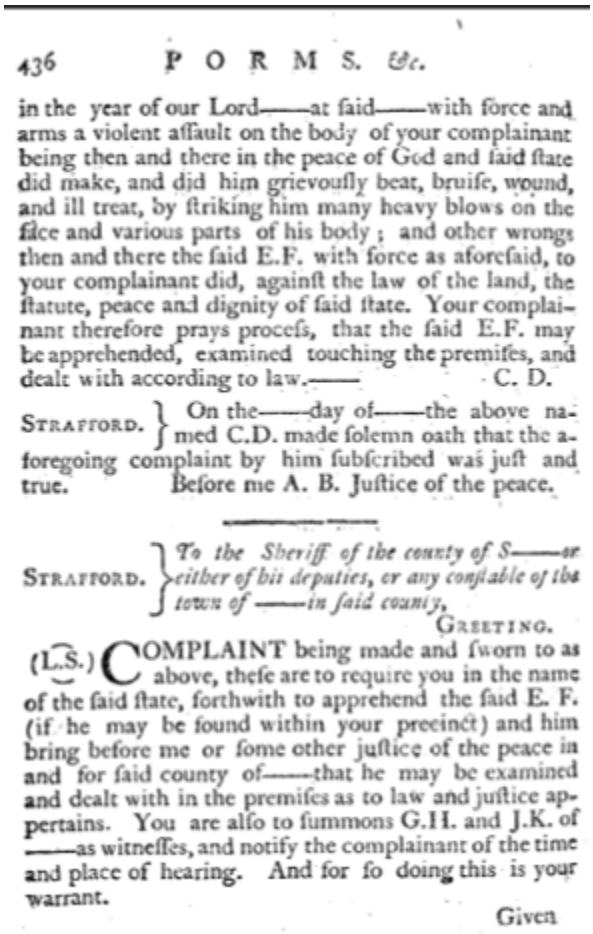
☞ The reader will obſerve, that the caption, which in this country, is conſidered as eſſential to the indictment, is omitted in all the forms in this work, as it depends on the ſtile of the courts, which differs in the different ſtates.

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

Sources more directly leading to the Fourth Amendment relied upon and confirmed these common law requirements. The court in *Entick v. Carrington* held that for a person to obtain a search warrant, there "must be a full charge upon oath," and that the "*owner* must swear that the goods are lodged in a specifi[c] place." *Entick*, 19 How. St. Tr. at 1067 (emphasis added). 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.

Similarly, 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 concealed. Sacharoff, *supra*, at 653. How can an officer swear to such places unless he has firsthand knowledge? Indeed, the firsthand knowledge requirement goes hand-in-hand with the Warrant Clause's particularity requirement. *See* U.S. Const., amend. IV (requiring search warrants to describe with "particularity" the "place to be searched" and the "things to be seized").

Finally, writers and courts of this era provided several reasons to require oath and examination that only make sense if the oath required firsthand knowledge. First, JPs were to guard against abuse from lying accusers by engaging in a careful cross-examination of the person and their motives. Chitty, *supra*, at *31; Davis, *supra*, at 7–8. 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, *supra*, at 8–9. These reasons complement the more general rule against hearsay and its own focus on the oath. Finally, restoring the original meaning of the Fourth Amendment will also mean restoring the original understanding that it was chiefly the Warrant Clause that would safeguard against unjustified government intrusions. Davies, *supra*, at 551. The Founding era had no exclusionary rule; rather, it sought to prevent abusive searches and seizures before they happened.

II. Cases Decided Shortly After Ratification Confirm That Hearsay Is Not a Proper Basis for Issuing a Warrant.

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.

In 1806, a prosecutor 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 prosecutor submitted an affidavit under oath in which he

swore that he had been told Burr committed a high misdemeanor in mounting a military operation against Spain. The prosecutor provided detailed facts from the absent informant and promised that he could produce this witness in due course. *Id.*

The court rejected the application because the prosecutor's affidavit rested on hearsay. *Id.* at 2. The court wrote that the government must meet the requirement for an arrest warrant, including probable cause, with "legal evidence." *Id.* The prosecutor'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.*

The following year, the Supreme Court considered a habeas case involving two of Aaron Burr's accused accomplices. *Ex parte Bollman*, 8 U.S. 75 (1807). Counsel expressly argued that the Warrant Clause banned hearsay and generally required legal evidence to support a warrant—a proposition defense counsel and the Court appeared to accept. These were the leading lawyers and judges of the day, including current and former attorneys general and Chief Justice Marshall.

Defense 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.* Defense counsel Francis Scott Key also argued that a warrant could not rest upon hearsay, quoting at length the leading English hearsay case, *Eriswell*. *Id.* at 123 (quoting *King v. Eriswell*, 100 Eng. Rep. 815 (K.B. 1790)). He explained that a judge issuing a warrant is "bound to cross-examine the witness, to sift the facts, and to see just how far they were proved." *Id.* at 120. 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 defense 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 115–116. He simply argued that the affidavits he sought to introduce *were* proper evidence: "If it be taken before a person competent to administer it, it satisfied the provision of the constitution." *Id.* at 115. True, Rodney later said that these affidavits would not be admissible at trial, but 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[6] 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.

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

One other debate over evidence further demonstrates the lawyers' understanding that the Fourth Amendment barred 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 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." *Id.* 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.* at 119.

This case, argued and decided by the Founding generation, confirms 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. As discussed in Plaintiff's Opening Brief, courts followed this approach for the next 150 years. It was only in 1960, with the Supreme Court's *Jones* decision,

that hearsay become a proper foundation for a warrant. That decision was error.

CONCLUSION

The Court should revisit the original understanding of the Warrant Clause and urge the U.S. Supreme Court to overturn *Jones* at the earliest opportunity, including on a petition for certiorari in this case.

Dated: June 5, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on June 5, 2025. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 5, 2025 By: /s/ *Samuel Eckman*
Samuel Eckman