Case No. 25-50481

In the United States Court of Appeals for the Fifth Circuit

TEXAS ASSOCIATION OF MONEY SERVICES BUSINESSES, TAMSB; NYDIA REGALADO, doing business as BEST RATE EXCHANGE; SAN ISIDRO MULTI SERVICES, INCORPORATED; MARIO REGALADO, doing business as BORDER INTERNATIONAL SERVICES; REYNOSA CASA DE CAMBIO, INCORPORATED; LAREDO INSURANCE SERVICES, L.L.C.; ESPRO INVESTMENT, L.L.C., doing business as LONESTAR MONEY EXCHANGE; CRIS WIN, INCORPORATED, doing business as BROWNSVILLE CASA DE CAMBIO; HIGH VALUE, INCORPORATED; R & C, INCORPORATED, doing business as TEMEX MONEY EXCHANGE; ARNOLDO GONZALEZ, JR.; E.MEX. FINANCIAL SERVICES, INCORPORATED,

Plaintiffs–Appellees/Cross-Appellants,

v.

PAMELA BONDI, U.S. ATTORNEY GENERAL; SCOTT BESSENT, SECRETARY, U.S. DEPARTMENT OF TREASURY; UNITED STATES DEPARTMENT OF TREASURY; ANDREA GACKI, DIRECTOR OF THE FINANCIAL CRIMES ENFORCEMENT NETWORK; FINANCIAL CRIMES ENFORCEMENT NETWORK,

Defendants–Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Western District of Texas

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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Certificate of Interested Persons

Tex. Ass'n of Money Serv. Bus., et al. v. Bondi, No. 25-50481

The undersigned counsel-of-record for *amicus curiae* Restore the Fourth, Inc. hereby certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of the above, consolidated appeals. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Defendants–Appellants/Cross-Appellees

- Pamela Bondi, *in her official capacity* as U.S. Attorney General;
- Scott Bessent, *in his official capacity* as U.S. Treasury Secretary;
- U.S. Department of Treasury;
- Financial Crimes Enforcement Network (FINCEN); and
- Andrea Gacki, *in her official capacity* as FINCEN Director.

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Plaintiffs–Appellees/Cross-Appellants

- Texas Association of Money Services Businesses, TAMSB;
- Nydia Regaldo, *doing business as* Best Rate Exchange;
- San Isidro Multi Services Inc.;
- Maria Regaldo, *doing business as* Border International Services;
- Reynosa Casa de Cambio, Inc.;
- Laredo Insurance Services, LLC;
- Espro Investment, LLC *doing business as* Lonestar Money Exchange;
- Cris Win, Inc., *doing business as* Brownsville Casa de Cambio;
- High Value, Inc.;
- R & C, Inc., *doing business as* Temex Money Exchange;
- Arnoldo Gonzalez, Jr.; and
- E.Mex. Financial Services, Inc.

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Restore the Fourth, Inc., Amicus Curiae

Dated: September 8, 2025

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Amicus Identity, Interest, & Authority to File

A. Amicus Identity

Restore the Fourth, Inc. ("RT4") is a non-partisan nonprofit civil liberties group dedicated to robust enforcement of the Fourth Amendment to the U.S. Constitution. RT4 advances this mission through a nationwide network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. RT4 also files friend-of-the-court briefs in key Fourth Amendment cases. *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Neither Party, *Barnes v. Felix*, 145 S. Ct. 1353 (2024) (No. 23-1239); Brief of *Amici Curiae* Restore the Fourth, Inc. & Restore the Fourth Minnesota Supporting Appellant Jennifer Lynn Nagle, *State v. Nagle*, No. A23-0927 (Minn. filed Nov. 15, 2024) (decision pending).

B. Amicus Interest

RT4 is interested in *Texas Association of Money Service Businesses* because this appeal concerns "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). The district court enjoined a surveillance order that arbitrarily intrudes upon the privacy of numerous merchants and their customers. On appeal, the government argues that the surveillance order passes constitutional muster because the order imposes mere business recordkeeping and reporting mandates that serve important government aims.

The government's advocacy raises Fourth Amendment alarms. "[A]fter consulting the lessons of history," the Framers adopted the guarantees of the Fourth Amendment "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re*, 332 U.S. 581, 595 (1948). The adopted guarantees included a categorical prohibition of "unreasonable searches"—a protection "watchful [of] the constitutional rights of the citizen" and "stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 634–35 (1886). While the government casts its surveillance order as mere paperwork for the merchants affected, "the long view, from the original meaning of the Fourth Amendment forward," tells a different story. *Kyllo*, 533 U.S. at 40. The long view demonstrates that sustaining the government's surveillance order would "shrink the realm of guaranteed privacy" that the Framers fought so hard to secure. *Id.* at 34.

C. Amicus Authority-to-File

FRAP 29(a)(2) permits the filing of this amicus brief, RT4 having sought and received all parties' consent to this filing.

RT4 further affirms under FRAP 29(a)(4)(E) that no party, nor counsel for any party, in this appeal: (1) wrote RT4's brief in part or in whole; or (2) contributed money meant to fund the preparation or the submission of RT4's brief. Only RT4, including its members and its counsel, have contributed any money to fund the preparation and submission of RT4's amicus brief in this appeal.

Argument

In 1792, Thomas Paine experienced a reminder of the tyranny that inspired the American Revolution over a decade earlier.[1] On his way to France, Paine stopped over in the British town of Dover.[2] A Crown tax collector and supporting agents seized Paine. Claiming to possess "an information" against Paine, the tax collector searched Paine's pockets and next asserted the power to search Paine's bags "for prohibited articles."[3] When Paine asked to see the information justifying this search, the collector refused to show it.[4]

The collector opened Paine's bags and "took out every paper and letter, sealed or unsealed," including "a personal letter" from President Washington to Paine.[5] Then, over Paine's vocal objections to the "the bad policy and illegality of seizing papers and letters," the collector "proceeded to read" Washington's letter.[6] Paine mused aloud "that it was very extraordinary that General Washington could not write a letter of private friendship … without [the letter] being subject to be read by a custom-house officer."[7]

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1 Paine related this experience in a letter dated September 15, 1792 to British Home Secretary Henry Dundas. *See* 3 WRITINGS OF THOMAS PAINE 41–44 (Conway ed. 1895); *see* ROA.1503 (district court observing "the spirit of Thomas Paine" in deciding this case).

2 3 WRITINGS OF THOMAS PAINE, *supra* note 1, at 41-42.

3 *Id.*

4 *Id.*

5 *Id.* at 42.

6 *Id.* at 42-43.

7 *Id.* at 43.

In this case, an agency order dictates that merchants in various ZIP Codes along the southwest border may not provide ordinary financial services without these transactions being subject to review by federal officers. ROA.367–69. Based on this 'very extraordinary' situation, the district court identified a likely Fourth Amendment violation. ROA.1503–38. The court observed the intrusion "on most transactions" and immense burden imposed—echoes of the search-and-seizure abuses that led to the Revolution. ROA.1522–24.

The government argues on appeal that its surveillance order "bears no resemblance" to this founding era history. Gov't Br. 17-20 (5th Cir. Dkt. 61). But the government fails to identify any historical analogue showing that the surveillance order's recordkeeping and reporting mandates would have been acceptable to founding era Americans. The government also makes numerous arguments that founding era history squarely rejects—most notably, that merchants have diminished privacy interests against police searches.

To be sure, historical analysis under the Fourth Amendment can be difficult at times, pointing in multiple directions. But here, founding era history establishes that the district court got it right. Like Thomas Paine two centuries ago, the merchants in this case face a burdensome search that the government lacks any genuine or proven cause to perform. By halting the surveillance order, the district court ensured that "[r]ights declared in words" are not "lost in reality." *Weems v. United States*, 217 U.S. 349, 373 (1910).

I. Proper application of the Fourth Amendment's protection against "unreasonable searches" begins with history.

The Fourth Amendment guarantees the security of the people "against unreasonable searches and seizures." U.S. CONST. amend. IV. "In determining whether a search or seizure is unreasonable, **we begin with history**." *Virginia v. Moore*, 553 U.S. 164, 168 (2008) (bold added). "[T]he [F]ramers chose not to protect privacy in some ethereal way dependent on judicial intuitions." *Carpenter v. United States*, 585 U.S. 296, 392 (2018) (Gorsuch, J., dissenting). The Framers specifically used the words "unreasonable searches and seizures" to ensure "preservation of that degree of privacy against government **that existed when the Fourth Amendment was adopted**." *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001) (bold added).

Applying this principle in practice means looking at challenged searches and seizures through the lens of founding era history and asking (in essence): how would the Framers respond? Consider *Boyd v. United States*, 116 U.S. 616 (1886)—the first major Supreme Court case applying the Fourth Amendment. At issue was the fifth section of the Act of June 22, 1874, which compelled production of invoices to furnish evidence for the forfeiture of goods. *Id.* at 618. Concluding this section violated the Fourth Amendment, the Court located "the true criteria" of the Amendment's distinction between "reasonable and 'unreasonable'" searches in the following question: would the very persons "who proposed" the Amendment "have approved the 5th section of the [A]ct of June 22, 1874." *Id.* at 630–31.

Modern Supreme Court precedent reinforces this emphasis on history in construing the Fourth Amendment. A good example is *Carpenter v. United States*, 585 U.S. 296 (2018), which addresses the Fourth Amendment's applicability when the government acquires "cell phone records that provide a comprehensive chronicle of the user's past movements." *Id.* at 300. The lower courts affirmed the government's warrantless collection of this cell-phone information, deeming the information "business records … not entitled to Fourth Amendment protection," *id.* at 303, and citing the Supreme Court's decision in *Smith v. Maryland*, 442 U.S. 735, 741 (1979).

The Supreme Court reversed: "this [surveillance] tool risks Government encroachment of the sort the Framers, after consulting the lessons of history, drafted the Fourth Amendment to prevent." *Carpenter,* 585 U.S. at 329 (cleaned up). Like *Boyd,* the Court made history the true criteria of the Fourth Amendment. *See id.* at 303–06. The Court emphasized that "[t]he Founding generation crafted the Fourth Amendment as a response to the reviled 'general warrants' and 'writs of assistance' of the colonial era." *Id.* at 303 (cleaned up). The Court next stressed: "[w]e have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools." *See id.* at 305. The Court finally noted the "basic guideposts" afforded by "historical understandings of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted." *Id.* (cleaned up).

Cases like *Boyd* and *Carpenter* expose the fundamental flaw in the government's defense of the financial surveillance order at issue here. The government asserts that its surveillance order "bears no resemblance to the 'general warrants' the Fourth Amendment was enacted to prohibit." Gov't Br. 17. But the government provides no substantive discussion of history to support this conclusion. At no point does the government even ask (much less attempt to answer) the following question: had colonial authorities imposed a version of the order, would the same persons "who proposed" the Fourth Amendment "have approved[?]" *Boyd,* 116 U.S. at 635.

The government instead defends the order almost entirely by reference to *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974)—a Supreme Court decision that validated certain domestic financial reporting requirements without any real discussion of founding-era history. *See id.* at 63-70; Gov't Br. 12-17. But as more recent Supreme Court decisions illustrate, whatever the Court's Fourth Amendment cases from the 1970s and 80s might say, the Amendment's original meaning remains "an irreducible constitutional minimum." *United States v. Jones*, 565 U.S. 400, 414 (2012) (Sotomayor, J., concurring). The Supreme Court's decision in *Carpenter* thus did not begin and end with a parsing of *Smith v. Maryland*, 442 U.S. 735 (1979). Rather than embrace *Smith*'s reliance on judicial intuition and "subjective expectations of privacy," *Carpenter* flagged "the lessons of history" as the Court's Fourth Amendment guide. 585 U.S. at 329.

The government also defends its surveillance order by citing financial reporting requirements that Congress, states, and localities have enacted "without apparent Fourth Amendment implications." *See* Gov't Br. 19. This argument cements the ahistorical nature of the government's Fourth Amendment analysis. "[F]ounding-era citizens were skeptical of using the [statutory] rules for search and seizure set by government actors as the index of reasonableness." *Moore*, 553 U.S. at 168-69. The Framers adopted a *constitutional* protection so as to prevent any revival of the *statutorily*-authorized searches that the Framers resisted "for more than twenty years." *Boyd,* 116 U.S. at 630; *United States v. Hagood*, 78 F.4th 570, 585 (2d Cir. 2024) (Calabresi, J., dissenting) ("In the 1760s, a statute authorized 'writs of assistance' ….''). "No early case or commentary" suggests that the Framers ever meant the Fourth Amendment "to incorporate subsequently enacted statutes." *Moore*, 553 U.S. at 169 (collecting authorities).

So while the government may claim that its surveillance order 'bears no resemblance' to the abusive searches of the founding era, the government's analysis at bottom invites reliance upon judicial intuition (versus history) in administering the Fourth Amendment. But down that road lies "an often unpredictable—and sometimes unbelievable—jurisprudence." *Carpenter*, 585 U.S. at 394 (Gorsuch, J., dissenting). For example, judicial intuition gives us the notion that the Fourth Amendment affords no protection against "a police helicopter hovering 400 feet above a person's property." *Id.*

Reliance on judicial intuition (rather than history) to construe the Fourth Amendment also "tacitly mark[s]" the Amendment's protections as "second-class rights." *Brinegar v. United States*, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting). "[W]e protect other constitutional rights"—like free speech and jury trials—through the expectation that "the government must generally point to *historical* evidence" showing the permissibility of the government's conduct. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24–25 (2022) (italics in original). Historical analysis "can be difficult" at times, but this methodology is "more legitimate"—and more protective of liberty—than intuitive guesswork about "costs and benefits." *Id.*

Put another way, "[i]t makes all the difference in the world" to recognize that the Fourth Amendment is "a safeguard against [a] recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution." *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). The Framers' struggle against abusive Crown searches "was so vivid" they "assumed that it would be carried down the stream of history." *Id.* at 69–70. "One cannot [then] wrench [the words] 'unreasonable searches' from the text and context and historic content of the Fourth Amendment." *Id.* "A disregard of the historic materials underlying the Amendment does not answer them"—and here, as detailed below, those historic materials show the Framers would not have approved of anything like the government's financial surveillance order. *Id.*

II. Founding-era history supports robust Fourth Amendment scrutiny of recordkeeping and reporting mandates.

A. Merchants inspired the Fourth Amendment.

The Fourth Amendment "grew in large measure out of the colonists' [bitter] experience with the writs of assistance." *United States v. Chadwick*, 433 U.S. 1, 7–8 (1977). First authorized during the reign of Charles II by Parliament's adoption of an "Act of Trade,"[8] the writs of assistance afforded "customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford v. Texas*, 379 U.S. 476, 481 (1965). The writs made their way to the American colonies in the 1750s as part of the Crown's effort to protect the royal treasury and "prohibit commerce with the French during the Seven Years War."[9] American colonists "were attempting to carry on a provision trade with the French in Canada," prompting royal officers to avail themselves of the writs "in their zeal to stamp out trade with the enemy."[10]

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[8] George Wolkins, *Writs of Assistance in England*, 66 PROCEED. OF MASS. HIST. SOC'Y 357, 357 (1936–41); *see also* 13 & 14 Car. II, c. 11, §5 (1662) ("[I]t shall be lawful … for any Person … authorized by Writ of Assistance … [to] go into any House, Shop, Cellar, Warehouse, or Room, or other Place … and from thence to bring any Kind of Goods or Merchandize whatsoever, prohibited ad uncustomed, and to put and secure the same in his Majesty's Store-house …."), *digitized copy online at* https://perma.cc/S99J-ZDY5 (statutes at large).

[9] Emily Hickman, *Colonial Writs of Assistance*, 5 NEW ENGLAND Q. 83, 85 (1932), https://www.jstor.org/stable/359492.

[10] *Id.*

This history clarifies that "it would be a mistake to conclude" that American opposition to the writs merely concerned "intrusions into the home." *Chadwick*, 433 U.S. at 8. By design, the writs' main focus was places of business. As a 1761 writ of assistance prepared by Massachusetts colonial governor Thomas Hutchinson declared, writs of assistance gave customs officials the authority to: "enter and go into the **vaults cellars warehouses shops and other places** where any prohibited goods wares or merchandizes" might be stored and "search for … said goods wares and merchandizes."[11] The writs put privacy in ordinary commerce on the chopping block, eliciting fierce opposition from the founding era's merchant class.

In the colonial Massachusetts superior court, "[s]ixty-three Boston merchants petitioned against the continued issuance of the writs." *Commw. v. Haynes*, 116 A.3d 640, 649–50 (Pa. Super. Ct. 2015). Renowned American patriot and attorney James Otis "resigned his position as advocate general to the vice-admiralty court … to avoid defending the writ." *See id.* The Boston merchants hired Otis, and in February 1761, Otis delivered a courtroom oratory on behalf of his clients that would redefine the course of American history. *See id.* "Otis's 1761 speech condemning writs of assistance was 'the first act of opposition to the arbitrary claims of Great Britain' and helped spark the Revolution itself." *Carpenter*, 585 U.S. at 303–04.

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[11] Thomas Hutchinson's Draft of a Writ of Assistance (Dec. 1761), FOUNDERS ONLINE, https://perma.cc/M6TX-42RM (bold added).

Indeed, as President John Adams, who saw Otis's speech, put it years later: "Then and there, the child Independence was born." *Riley v. California*, 573 U.S. 373, 403 (2014) (quoting Adams). So what exactly did Otis say that had this revolutionary effect? Otis's speech followed Jeremiah Gridley. Arguing for the Crown in defense of the writs.[12] Gridley admitted it was "true" that the writs of assistance did limit "the common privileges of Englishmen."[13] Gridley argued that this reality made no difference because: "the necessity of having public taxes effectually and speedily collected is of infinitely greater moment to the whole, than the Liberty of any Individual."[14] Gridley went so far as to argue the writs served a purpose "more important, than the imprisonment of Thieves, or even Murderers."[15]

Otis responded that it was the court's solemn responsibility "to demolish this monster of oppression, and to tear into rags this remnant of Star [C]hamber tyranny."[16] In making this argument, Otis distinguished the writs from "special warrants," which Otis deemed "legal" because special warrants rested on particularized ("specially named") suspicion and "sworn" testimony.[17]

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12 *See* Editorial Note—Legal Papers of John Adams, Volume 2, MASS. HIST. SOC'Y, https://perma.cc/QR3E-6BQ8.

13 John Adams's 'Abstract of the Argument' (ca. Apr. 1761), FOUNDERS ONLINE, https://tinyurl.com/5n7ycu9k.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

Otis identified three aspects of the writs of assistance that endangered the liberty of every person. **First**, the writs had "no return"—meaning that no judge supervised execution of the writ (i.e., unlike a special warrant).[18] Officers were then "accountable to no person for [their] doings" under the writs, putting "the liberty of every man in the hands of every petty officer."[19] **Second**, the writs governed in a universal manner, invading "all houses, shops, [etc.] at will" and—worse still—"command[ed] all to assist."[20] **Third**, the writs allowed searches on "bare suspicion without oath."[21] So even if a given exercise of the writ rested on simple "malice or revenge," nothing could be done—"no court [could] inquire."[22]

Otis provided a concrete example of this reality, describing the actions of "Mr. Ware," an officer who possessed the writ:

> Justice Walley … [called] Mr. Ware before him, by a constable, to answer for … profane swearing. …. "Well then," said Mr. Ware, "I will show you a little of my power. I command you to permit me to search your house for uncustomed goods"—and went on to search [the Justice's] house from the garret to the cellar; and then [Mr. Ware] served the constable in the same manner![23]

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18 John Adams's 'Abstract of the Argument,' *supra* note 13.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*

Otis thus condemned writs of assistance as "destructive of English liberty" and "the worst instrument of arbitrary power."[24] Despite his eloquence, Otis failed to persuade the court to terminate all writs of assistance. *Haynes*, 116 A.3d at 650. But as John Adams later wrote of Otis's speech: "[e]very man of a crowded audience appeared … ready to take arms against writs of assistance." *Riley*, 573 U.S. at 403 (quoting Adams). Otis—and the 63 Boston merchants behind Otis—ultimately made it very "difficult for such writs to be enforced in various colonies even in the face of direct parliamentary authorization." *Haynes*, 116 A.3d at 650 (citations omitted).

In this manner, merchants inspired the Fourth Amendment. Merchant opposition to the writs of assistance then points to a key Fourth Amendment lesson: founding era Americans recognized that privacy in their shops, warehouses, cellars, and vaults and privacy in their homes was cut from the same cloth. Permitting the Crown to diminish the former only invited Crown violations of the latter. So Otis and the Boston merchants took issue with writs of assistance as a whole,[25] recognizing "any privilege of search and seizure without warrant … [officers] will push to the limit." *Brinegar*, 338 U.S. at 182. One of the most prominent examples of this during the founding era came in the form of a recordkeeping and reporting mandate.

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[24] John Adams's 'Abstract of the Argument,' *supra* note 13.

[25] *See id.* ("[R]eason and the constitution are both against this writ. … No more than one instance can be found of it in all our law books, and that was in the zenith of arbitrary power ….").

B. Colonial recordkeeping and reporting mandates aggrieved founding-era Americans.

Writs of assistance are not the only search-and-seizure power that angered colonial Americans, leading to the Fourth Amendment. The Excise Act of 1754 was another critical flashpoint. "An excise is a tax imposed on the manufacture, sale, or use of goods or on an occupation or activity." *U.S. Venture, Inc. v. United States*, 2 F.4th 1034, 1036 (7th Cir. 2021) (cleaned up). Early in its history, colonial Massachusetts adopted a liquor excise and the excise "remained in force down through the years."[26] Over time, Boston merchants took advantage of "loopholes" in the excise law.[27] Colonial authorities were "forced to admit that the purpose of the law was 'in a great measure frustrated.'"[28] Of particular concern: "a significant quantity of rum was being sold in avoidance of the excise."[29]

"[C]onsidering the extent and importance of the rum traffic," in mid-1754, Massachusetts's colonial legislature proposed a new excise law.[30] The draft bill regulated every person "consuming" or "expending" in their "house, family, apartment, or business" any "rum or other distilled spirits, or wine."[31] The bill required every

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26 *See* Paul S. Boyer, *Borrowed Rhetoric: the Massachusetts Excise Controversy of 1754*, 21 WM. & MARY Q. 328, 329 (1964).

27 *Id*.

28 *Id.* at 329–30.

29 *Id.* at 330.

30 JOHN STETSON BARRY, HISTORY OF MASSACHUSETTS 249 (1857).

31 3 ACTS & RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY 782–90 (1878) (as finally enacted) (Act of Dec. 19, 1754, ch. 16) ("An

person fitting this description to "give in writing" every year "a full account of all such rum , or other distilled spirits, or wine, by them used, consumed, or expended" outside of any licensed provider ("a taverner, innholder, or retailer").[32] The bill imposed a 10-pound fine (roughly $3,700 today) for any failure or refusal to comply with the bill's recordkeeping and reporting mandate.[33] At the same time, the bill exempted the governor, lieutenant governor, Harvard College (i.e., the College president, fellows, professors, tutors, and students), "settled ministers," and grammar-school masters.[34]

Massachusetts colonial governor William Shirley refused to sign the proposed excise bill.[35] Governor Shirley criticized the bill's recordkeeping and reporting mandate as "imposing a burden upon the people" that was "inconsistent with the natural rights of every private family."[36] He further deemed the "Account" required by the bill to be "extraordinary" and "altogether unprecedented."[37] Shirley asked the legislature to "order[] the [b]ill to be printed" so that the "general voice of the people" could be heard on this "matter which

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Act for Granting Unto His Majesty an Excise Upon Spirits Distilled and Wine, and Upon Limes, Lemmons, & Oranges").

32 *Id.*

33 *Id.*

34 *Id.* at pp.789–90 (ch. 16, §24).

35 *See* Boyer, *supra* note 26, at 333.

36 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS (vol. 31) 1754–1755, at 45–46 (Mass. Hist. Soc'y ed. 1956); *see also id.* at vii-viii (introductory note explaining Gov. Shirley's action).

37 *Id.* at 45–46

purely concerns the[] [people's] own just rights."[38] Shirley finally predicted that imposing the liquor excise in this manner was bound to be widely perceived as "*grievous* and *unconstitutional*."[39]

Governor Shirley's prediction soon materialized. Publication of the bill "excited great opposition."[40] "[I]n every town the law was more or less denounced; [and] the press teemed with pamphlets, in which the members of the [colonial legislature] were attacked …."[41] Eleven "[a]nti-excise pamphlets" circulated, most written by authors who elected to remain anonymous given the censorious libel laws of the time.[42] But the pamphlets carried titles that left no doubt about their opposition to the bill—titles like *The Crisis* and *The Monster of Monsters* (a satirical parody).[43] Perusal of these pamphlets reveals the broad concern and sensitivity of founding era Americans to all the ways that recordkeeping and reporting requirements (like those contained in the excise bill) might curtail their rights.

Written by Reverend Samuel Cooper, *The Crisis* explained that the excise bill marked a turning point for American liberty: "those whose inclinations never prompted them to drink either wine or rum have for the pure love of liberty … endeavored to chase th[is]

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38 JOURNALS, *supra* note 36, at 45–46 (capitalization omitted).
39 *Id.* (italics in original)
40 BARRY, *supra* note 30, at 249–50.
41 *Id.* at 330.
42 Boyer, *supra* note 26, at 337–38 (collecting pamphlet titles).
43 *Id.*

deformed monster back to the den of arbitrary power ….”[44] Cooper branded the excise bill “an entering wedge into the Constitution”: “may not our superiors take occasion from our readiness to adopt this *unconstitutional test*, to put us upon oath with regard to all we eat, drink, or wear.”[45] The excise bill’s supposedly laudable goals would equally betray the colonists: “[t]he expected revenues will fall short. To make them good, stricter officers will be appointed. [M]ore articles will excised. Security and severity will go hand in hand. Arbitrary power will tread close on their steps.”[46]

A Plea for the Poor and Distressed made the excise bill’s practical restrictions on liberty easy to grasp.[47] The pamphlet asked readers to imagine “[a] poor laboring Man” who “in the course of the year has had eight or ten bottles or pints of rum, more or less, perhaps given to him by his employers after faithful service.”[48] A person like this would “keep[] no account, nor does he know how to keep any, nor think it necessary, or it may be [he] neglects it, and forgets whether he had half of [the rum] from a person licensed or not.”[49] For this person, the excise bill risked financial ruin: “he is threatened with

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44 SAMUEL COOPER, THE CRISIS 11 (1754) (cleaned up), *online at* https://hdl.handle.net/2027/nnc2.ark:/13960/t2t53833r.

45 *Id.* at 7, 11 (cleaned up) (italics in original).

46 *Id.* at 11 (cleaned up).

47 ANONYMOUS, PLEA FOR THE POOR & DISTRESSED (1754), *online at* https://hdl.handle.net/2027/nnc2.ark:/13960/t9q32rp52.

48 *Id.* at 12.

49 *Id.*

penalty of *ten pounds* … [which] may be more than such a man can get in silver money for his labor in seven years, and to pay that sum would break up and destroy the man and his family."[50]

The anti-excise pamphleteers "fought a losing battle."[51] While a majority of Massachusetts towns (of those voting) rejected the excise bill (16 towns against, 5 in favor), the colonial legislature passed the bill anyway and Governor Shirley signed it.[52] But much like James Otis's 1761 defeat in challenging the writs of assistance, the battle over the Excise Act of 1754 led the way to the American Revolution. Opposition to the Act "transcended" merchants and class interests.[53] The Act became "the final straw for some colonists."[54]

The Excise Act of 1754 thus resides in Fourth Amendment history right next to the writs of assistance and general warrants. The sweeping and burdensome nature of the Act's recordkeeping and reporting mandate "broaden[ed] the [founding era] consensus against general searches and seizures."[55] The Act additionally "bred legislation implementing specific warrants for impost and customs searches as a way to curb promiscuous searches."[56]

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50 ANONYMOUS, *supra* note 47, at 12.

51 Boyer, *supra* note 26, at 350.

52 *See id.*

53 Tracy Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1053 (2011).

54 *Id.* at 1053–54.

55 *Id.*

56 *Id.*

III. Applied here, founding-era history bolsters the decision below that the government's financial surveillance order likely violates the Fourth Amendment.

FinCEN—a federal agency that polices the financial system—issued an order in March 2025 that requires every money services business (MSB) located in 30 ZIP Codes along the southwest border to record and report every transaction over $200 they conduct. *See* Gov't Br. 5–6; *see also* ROA.367–69. This financial surveillance order requires "even small MSBs" to "spend[] hours daily" preparing and submitting reports while "costing the MSBs thousands in monthly commission revenue." ROA.1524. MSBs that fail to do this work face "per-violation penalties of $1,430." Tex. MSB Br.29. Meanwhile, the order does "not apply" to the MSBs' principal competitors "such as banks, credit unions, PayPal, Venmo, Wise and others." ROA.1504. And the government concedes that "most of the business that MSBs conduct is [both] legitimate and essential." ROA.373.

Does the Fourth Amendment permit the recordkeeping and reporting mandates that the financial surveillance order imposes on merchants in a sweeping manner likely to destroy the merchants—all without even bare suspicion? Viewed through the lens of history, "the question cannot admit of a doubt": the Framers "never would have approved." *Boyd,* 116 U.S. at 630. The Framers would see the government's actions here as an "insidious disguise[]" of the royal search-and-seizure abuses they so "deeply abhorred"—in particular, the writs of assistance and the Excise Act of 1754. *Id.*

The district court thus correctly held the financial surveillance order "likely violates the Fourth Amendment." *See* ROA.1521–1525. Founding-era history, in turn, disposes of the five main arguments that the government offers in defense of the order, apart from the government's overarching (misplaced) reliance on *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974) and similar precedent.

First, the government argues that its surveillance order passes Fourth Amendment muster because the order "applies generally to all businesses within certain ZIP codes" and not "at the whim of an investigator." Gov't Br. 17-18. Writs of assistance applied generally, authorizing Crown agents to "enter **all** houses, shops, etc. at will" and to "command **all** to assist."[57] The Excise Act of 1754 applied to "**every** person consuming or … expending" certain liquors.[58] The government's invocation of general applicability is a smokescreen, obscuring the reality that the surveillance order does operate 'at the whim of an investigator'—namely, FinCEN. Should FinCEN decide tomorrow that MSBs need to report transactions above $150 (instead of $200), that is the new rule. Just like the writs of assistance, whim governs the surveillance order because there is "no return" to secure accountability.[59] *See Shultz*, 416 U.S. at 79–80 (Powell, J., concurring) (noting the "particularly acute" risk for abuse when reporting rules apply "without [any] invocation of the judicial process").

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57 Adams 'Abstract of the Argument,' *supra* note 13 (bold added).

58 3 ACTS & RESOLVES, *supra* note 33, at p.788 (§18) (bold added).

59 Adams 'Abstract of the Argument,' *supra* note 13.

Second, the government urges that the Fourth Amendment interests of businesses are "heavily diminished." *See* Gov't Br. 18. Founding-era history teaches the opposite lesson: that merchants inspired the Fourth Amendment, and that the protection of homes and businesses against unreasonable searches went hand in hand. In challenging the writs of assistance, James Otis did not argue that the writs were valid so long as Crown agents limited themselves to shops and warehouses. Rather, Otis recognized that the same writs allowing warrantless entry into shops and warehouses also meant "[c]ustom house officers may enter our houses when they please."[60] Otis thus decried the writs of assistance as "destructive of English liberty" in general—not just one's privacy at home.[61]

Third, the government stresses that its financial surveillance order does not "authorize the search of everything or everyone in sight"—just submission of "specific, limited information." Gov't Br. 18. The Excise Act of 1754 required a single annual report from each Massachusetts denizen of specific information related to particular liquors (rum, spirits, and wine).[62] This mandate still crossed the line for founding-era Americans. As Reverend Cooper declared: "if an Account of any part of [a man's] innocent conduct is extorted," then "every other part may with equal reason be required."[63]

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60 Adams 'Abstract of the Argument,' *supra* note 13.

61 *Id.*

62 3 ACTS & RESOLVES, *supra* note 33, at p.788 (§18).

63 COOPER, *supra* note 44, at 5 (cleaned up).

Fourth, the government argues that the burdensomeness of its financial surveillance order is of "secondary" importance compared to the "relevance" and "specificity" of the financial data sought. *See* Gov't Br. 19-20. By that reasoning, however, the Excise Act of 1754 should have engendered no public controversy, as the Act sought relevant, specific information about the consumption of unlicensed liquor for excise purposes. Yet, even Governor Shirley recognized that the Act's recordkeeping and reporting mandate "impos[ed] **a burden** upon the people" that could not be ignored or dismissed.[64] Other colonial critics of the Act highlighted the burden posed by the Act's penalties, such that a person could bankrupted under the Act for neglecting to report their consumption of unlicensed liquor even though the actual excise owed might amount to a trifle.[65]

The government argues in the alternative that the financial surveillance order's burden on MSBs is "reasonable" in light of the government's strong interest and "the [order's] limited duration." Gov't Br. 21. Strong government interests supported the Excise Act of 1754, including protection of the royal treasury and enforcement of the tax laws. The Act's requirement of a single report every year still drew broad outrage. The surveillance order here requires MSBs to generate dozens of additional reports every single day of the year while risking untold financial liability while doing so.

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64 JOURNALS, *supra* note 36, at 45–46 (bold added).

65 ANONYMOUS, *supra* note 47, at 12.

Fifth and finally, the government maintains that "a warrant based on probable cause" is in no way required by the facts of this case. Gov't Br. 21. But founding-era history teaches that the farther government strays from the norms of 'special warrants'—i.e., "that an officer should show probable grounds, should take his oath on it, should do this before a magistrate"—the closer the government gets to exercising "arbitrary power."[66] *Cf. Chadwick*, 433 U.S. at 8 ("There is … a strong historical connection between the Warrant Clause and the initial clause of the Fourth Amendment … safeguarding against unreasonable searches …."); *Riley*, 573 U.S. at 403 ("Our answer to … what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.").

Conclusion

"[W]here one comes out on a case depends on where one goes in." *Rabinowitz,* 339 U.S. at 68–69 (Frankfurter, J., dissenting). The government reaches the wrong conclusions about its financial surveillance order because the government starts in the wrong place. Lacking any substantive consideration of the founding era, the government defends surveillance that the Framers never would have approved. This Court thus should not hesitate to affirm the decision below, and, by the same token, "the norms that the Fourth Amendment was meant to preserve." *Moore*, 553 U.S. at 168.

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[66] Adams 'Abstract of the Argument,' *supra* note 13.

Respectfully submitted,

Dated: September 8, 2025

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Certificate of Service

The undersigned counsel certifies that on September 8, 2025, he electronically filed the Brief of *Amicus Curiae* Restore the Fourth, Inc. with the Clerk of the Court for the Fifth Circuit by using the CM/ECF system. The undersigned counsel also certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 8, 2025

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Certificate of Compliance

The undersigned counsel for *amicus curiae* Restore the Fourth, Inc. certifies under FRAP 32(g) that this brief meets the formatting and type-volume requirements prescribed by FRAP 32(a) & 29(a)(5). This amicus brief is printed in 14-point, proportionately-spaced typeface using Microsoft Word 2010 and contains **5,686 words**, including headings, footnotes, and quotations, and excluding all items specifically identified under FRAP 32(f).

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