No. 13-1001

In the Supreme Court of the United States

RAJ RAJARATNAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner was convicted of insider trading in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5. The evidence against him included wiretap recordings of his telephone calls authorized under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* Those recordings captured dozens of conversations in which petitioner acquired, discussed, and planned to trade on inside information. The questions presented are:

1. Whether, after instructing the jury that the government was required to prove that petitioner "used" material nonpublic information, the district court erred by further instructing that a person "uses" such information if it is "a factor, however small, in [the] decision to purchase or sell stock."

2. Whether the lower courts correctly held that the framework established in *Franks* v. *Delaware*, 438 U.S. 154 (1978), applies when a defendant seeks to suppress the results of a Title III wiretap because of misstatements or omissions in the wiretap application, and whether the lower courts correctly held that the omissions in the application in this case did not require suppression under *Franks*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 719 F.3d 139. The opinion of the district court (Pet. App. 45a-126a) is not published in the *Federal Supplement*, but is available at 2010 WL 4867402.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2013. A petition for rehearing was denied on November 18, 2013 (Pet. App. 127a-128a). The petition for a writ of certiorari was filed on February 18, 2014 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petition-

er was convicted on five counts of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and nine counts of securities fraud, in violation of 15 U.S.C. 78j(b), 78ff, and 17 C.F.R. 240.10b-5. He was sentenced to 132 months of imprisonment, to be followed by two years of supervised release. He was also ordered to forfeit approximately $54 million and to pay a $10 million fine. The court of appeals affirmed. Pet. App. 1a-44a.

1. a. Section 10(b) of the Securities Exchange Act of 1934 makes it illegal to "use or employ, in connection with the purchase or sale of any security * * * , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission (SEC)] may prescribe." 15 U.S.C. 78j(b).[1] Rule 10b-5(a), adopted pursuant to that authority, prohibits the use of "any device, scheme, or artifice to defraud" in connection with a securities trade. 17 C.F.R. 240.10b-5(a).

Insider trading is one of the deceptive devices prohibited by Section 10(b) and Rule 10b-5. Under the "classical theory" of insider trading, a corporate insider violates Rule 10b-5 by "trad[ing] in the securities of his corporation on the basis of material, nonpublic information." *United States* v. *O'Hagan*, 521 U.S. 642, 651-652 (1997). Such trading is a "deceptive device" because of the "'relationship of trust and confidence'" between corporate insiders and the corporation's

[1] In 2010, after the events at issue here, Congress made a technical amendment to Section 10(b). See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 762(d)(3), 124 Stat. 1761. Like the petition and the decision below, this brief cites the current version of the statute.

shareholders. *Id.* at 652 (quoting *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980)). That relationship "gives rise to a duty to disclose [inside information] or to abstain from trading because of the necessity of preventing a corporate insider from taking unfair advantage of uninformed stockholders." *Ibid.* (brackets, ellipses, and internal quotation marks omitted) (quoting *Chiarella*, 445 U.S. at 228-229). The duty to disclose or abstain also extends to a "tippee" who receives material nonpublic information from an insider if the tippee knows or should know that the disclosure breached the insider's fiduciary duty. *Dirks* v. *SEC*, 463 U.S. 646, 659-661 (1983).

Under the "misappropriation theory" of insider trading, a person violates Rule 10b-5 "when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." *O'Hagan*, 521 U.S. at 652. Whereas the classical theory "premis[es] liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock," the misappropriation theory rests on the "fiduciary-turned-trader's deception of those who entrusted him with access to confidential information." *Ibid.* The misappropriation theory thus "outlaws trading on the basis of nonpublic information" by "outsiders" to the corporation who act fraudulently. *Id.* at 652-653.

In 2000, the SEC promulgated Rule 10b5-1 to define the circumstances in which a purchase or sale qualifies as one made "on the basis of" inside information for purposes of Rule 10b-5's prohibition on insider trading. 17 C.F.R. 240.10b5-1. In general, Rule 10b5-1 provides that a trade is "on the basis of" material nonpublic information "if the person making

the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale." 17 C.F.R. 240.10b5-1(b).

b. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, governs the interception of wire, oral, and electronic communications. The statute provides that a district judge may authorize an interception by law enforcement officers if the judge finds probable cause and further finds, among other things, that a wiretap is necessary because "normal investigative procedures" have failed or are unlikely to succeed. 18 U.S.C. 2518(3)(b) and (c). An application for a wiretap must include "a full and complete statement" of the facts establishing probable cause and "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. 2518(1)(b) and (c). An "aggrieved person" may seek to suppress evidence obtained through a wiretap if the authorizing order was facially invalid, if the wiretap was not conducted in conformity with the order, or if the evidence was "unlawfully intercepted." 18 U.S.C. 2518(10).

In *Franks* v. *Delaware*, 438 U.S. 154 (1978), this Court addressed the circumstances in which a defendant seeking to suppress evidence collected pursuant to a warrant may challenge the veracity of the affidavit on which the warrant was based. *Franks* held that a defendant is entitled to an evidentiary hearing if he makes a "substantial preliminary showing" that the affidavit included a false statement made "knowingly and intentionally, or with reckless disregard for the truth," and if the alleged falsehood was "necessary to

the finding of probable cause." *Id.* at 155-156. The evidence must be suppressed if the defendant establishes at the hearing that the false statement was intentional or reckless and if "the affidavit's remaining content is insufficient to establish probable cause." *Id.* at 156. Lower courts have extended *Franks* to allow challenges to intentional or reckless omissions as well as affirmative misstatements. See 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 4.4(b), at 687-688 & n.50 (5th ed. 2012).

2. Petitioner was the head of the Galleon Group, a family of hedge funds. Pet. App. 6a. Galleon was highly successful, at one point managing billions of dollars for its clients. *Ibid.* That success, however, depended in part on the systematic exploitation of material nonpublic information. From 2003 to 2009, petitioner conspired with Galleon employees and with others to gather inside information on 19 public companies and to profit from that information by trading on it. Gov't C.A. Br. 2-10. The proceeds of his illegal trades totaled roughly $50 million. Pet. App. 22a.

Some of petitioner's co-conspirators described his use of inside information at his trial. Anil Kumar, a partner at the consulting firm McKinsey & Company, testified that petitioner paid him $500,000 a year for confidential information about his clients' financial results and "potential mergers and acquisitions." Trial Tr. (Tr.) 263-264, 278-280. In 2005 and 2006, for example, Kumar repeatedly tipped petitioner about the progress of a planned acquisition by the technology firm AMD. *Id.* at 354-388. Petitioner invested nearly $90 million in the target company's stock and reaped a profit of almost $23 million when that stock

increased in value after the deal became public. Gov't C.A. Br. 5. Shortly after the announcement, petitioner phoned Kumar to thank him for the tip, calling Kumar "a star" or "a hero" and telling him: "I just wanted to thank you. That was fantastic. We are all cheering you right now." Tr. 387. Later that year, petitioner paid Kumar a $1 million bonus. *Id.* at 387-388.

In other cases, petitioner's insider trading was revealed through wiretaps, phone records, and trading patterns. In 2008, for example, the investment bank Goldman Sachs learned that it would likely have a quarterly loss of approximately $2 per share—its first-ever loss and an event that "would be a surprise" to the market. Tr. 1753-1755. Goldman's board of directors learned about the anticipated loss in a call ending at 4:50 p.m. on October 23. *Id.* at 1755-1756; C.A. J.A. 533. Twenty-three seconds later, a board member who had previously been recorded giving petitioner confidential information about the board's deliberations called petitioner's office. C.A. J.A. 533; see *id.* at 710-713. That call ended after the stock market had closed for the day, but at 9:31 a.m. the next morning—one minute after the market opened—petitioner began selling all of his Goldman stock. *Id.* at 533-534. Those sales avoided $3.8 million in losses. *Id.* at 535. Later that day, petitioner was recorded telling a Galleon employee that he "heard yesterday from somebody who's on the board of Goldman Sachs, that they are gonna lose $2 per share." *Id.* at 830.

3. In 2003, the SEC began investigating suspected insider trading at Galleon. Pet. App. 89a & n.22. In 2007, the SEC referred an investigation to the United States Attorney's Office for the Southern District of

New York and the Federal Bureau of Investigation (FBI) (collectively, the government). *Id.* at 7a, 89a. Over the next year, the SEC met with the government several times and shared the fruits of its investigation, including four million pages of trading records, e-mails, and other documents obtained through administrative subpoenas, as well as transcripts of depositions of petitioner and five others. *Id.* at 89a-93a. The documents revealed suspicious trading patterns and other circumstantial evidence of insider trading, but "strongly suggested that [petitioner] had been careful to exchange nearly all of his inside information by telephone." *Id.* at 104a.

In March 2008, the government sought authorization under Title III to place a wiretap on petitioner's cell phone. Pet. App. 48a. The affidavit supporting the application relied on information and consensually recorded calls provided by a cooperating witness, on other intercepted calls, and on corroborating information about trading patterns from the SEC investigation. *Id.* at 16a-17a n.7, 77a-80a. It also stated that conventional investigative techniques were unlikely to succeed. The affidavit did not, however, detail the full "extent of the SEC investigation" or the volume of documentary and other evidence the SEC had already provided. *Id.* at 17a n.7.

The district court authorized the wiretap, finding that the affidavit established probable cause and necessity. Pet. App. 48a. The wiretap was later reauthorized seven times. *Id.* at 9a.

4. A grand jury in the Southern District of New York indicted petitioner on five counts of conspiracy to commit securities fraud, in violation of 18 U.S.C.

371, and nine counts of securities fraud, in violation of 15 U.S.C. 78j(b), 78ff, and 17 C.F.R. 240.10b-5.

a. Petitioner moved to suppress the wiretap recordings and sought a *Franks* hearing, arguing that the Title III application had included misleading statements and omissions related to both probable cause and necessity. With respect to probable cause, petitioner argued that the government omitted or misrepresented information about its informant's criminal record, the date she began cooperating with the FBI, and the contents of two recorded conversations. Pet. App. 10a. As to necessity, petitioner contended that the application improperly omitted a full description of the SEC investigation. *Id.* at 10a-11a.

The district court found that the affidavit established probable cause even without the alleged misstatements and omissions and therefore denied that aspect of petitioner's motion without a hearing. Pet. App. 13a, 77a-82a. The court held a *Franks* hearing on the necessity issue, at which the prosecutor and FBI agent responsible for preparing the affidavit testified that they did not consider describing the SEC investigation because they could not direct the SEC's activities and thus did not think of "the SEC investigation as an alternative technique that was available to FBI agents." *Id.* at 32a. Although the court "comfortably conclude[d] that no one acted with the deliberate intent to mislead," it found the omission reckless because the SEC investigation was "clearly critical" to the necessity of a wiretap. *Id.* at 97a-99a. Nonetheless, the court declined to suppress the recordings because an affidavit disclosing the omitted information about the SEC investigation still would

have "shown that a wiretap was necessary and appropriate." *Id.* at 47a; see *id.* at 99a-113a.

b. After a seven-week trial, the district court instructed the jury that the government was required to prove, among other things, that petitioner "used" material, non-public information. C.A. J.A. 432. The court further instructed that "[a] person uses material, non-public information in connection with a stock purchase or sale if that information is a factor in his decision to buy or sell." *Ibid.* The court explained that the inside information "need not be the only consideration" and that it is sufficient if the information "was a factor, however small, in [petitioner's] decision to purchase or sell stock." *Id.* at 433. The jury convicted on all counts. Pet. App. 22a.

5. The court of appeals affirmed. Pet. App. 1a-44a.

a. The court of appeals first rejected petitioner's claim that the misstatements and omissions in the wiretap application required suppression without regard to recklessness or materiality because the *Franks* standard is inapplicable in Title III cases. Pet. App. 22a-26a. Relying on circuit precedent, the court explained that "the *Franks* standard is consistent with the purposes of Title III." *Id.* at 24a (brackets omitted) (quoting *United States* v. *Bianco*, 998 F.2d 1112, 1126 (1993), cert. denied, 511 U.S. 1069 (1994)). The court also noted that "*every* Court of Appeals to have considered this question has relied on *Franks* to analyze whether alleged misstatements and omissions in Title III wiretap applications warrant suppression." *Id.* at 24a-25a n.16.

The court of appeals further held that *Franks* did not require suppression of the recordings in this case. With respect to probable cause, the court agreed with

the district court that even if the alleged misstatements and omissions had been made recklessly, they were immaterial because a corrected affidavit still would have justified the approval of a wiretap. Pet. App. 36a-37a. And with respect to necessity, the court found that the omission of the information about the SEC investigation was neither reckless nor material. The district court had found reckless disregard based solely on the fact that the SEC investigation was "clearly critical" to the necessity inquiry. *Id.* at 31a-32a. The court of appeals held that although recklessness "can sometimes be inferred from the omission of critical information," it was impossible to conclude that the government acted recklessly here because "it is clear that fully disclosing the details of [the SEC] investigation would only have *strengthened* the wiretap application's 'necessity' showing" by confirming the limits of conventional investigative techniques. *Id.* at 31a-33a. In the alternative, the court agreed with the district court that even if the omissions had been reckless, they were immaterial because a corrected affidavit still would have established necessity. *Id.* at 34a-35a.

b. The court of appeals also rejected petitioner's challenge to the instruction allowing the jury to find that he "used" inside information if it "was a factor, however small" in his trades. C.A. J.A. 432-433; see Pet. App. 37a-43a. Relying on circuit precedent and Rule 10b5-1, the court explained that the government need only prove that a defendant "purchased or sold securities while knowingly in possession of the material nonpublic information." Pet. App. 41a (quoting *United States* v. *Teicher*, 987 F.2d 112, 119 (2d Cir.), cert. denied, 510 U.S. 976 (1993)); see *United States* v.

Royer, 549 F.3d 886, 899 (2d Cir. 2008), cert. denied, 558 U.S. 935 (2009). The instructions given here were more favorable to petitioner because they required the jury to find not only that he traded while in knowing possession of inside information, but also that the information influenced his decisions. Pet. App. 41a & n.26.

ARGUMENT

Petitioner renews his contentions (Pet. 12-39) that the court of appeals' "knowing possession" test is inconsistent with Section 10(b); that the framework established in *Franks* v. *Delaware*, 438 U.S. 154 (1978), should not apply to Title III affidavits; and that the lower courts misapplied *Franks* to the facts of this case. The court of appeals correctly rejected those arguments, and its decision neither conflicts with any decision of this Court nor implicates any square conflict among the courts of appeals. In addition, this case would be a poor vehicle for considering several of the issues petitioner seeks to raise. No further review is warranted.

1. Petitioner first challenges (Pet. 16-27) the court of appeals' holding that a defendant may violate Section 10(b) and Rule 10b-5 by buying or selling securities while in "knowing possession" of inside information. This Court has previously declined to consider that question, see *Royer* v. *United States*, 558 U.S. 935 (2009) (No. 08-10357); *Teicher* v. *United States*, 510 U.S. 976 (1993) (No. 93-138), and there is no reason for a different result here. The decision below is consistent with Section 10(b) and with the SEC's governing regulation. And although two other courts of appeals have required proof that the defendant "used" inside information, those courts have not considered

the matter in light of Rule 10b5-1 and will therefore be required to reexamine the issue if it arises again. Moreover, even if the question otherwise warranted review, this would be an exceptionally poor vehicle in which to consider it. This case does not implicate any disagreement among the courts of appeals because the jury found that petitioner "used" inside information, not merely that he knowingly possessed it. And in light of the overwhelming evidence that petitioner's trades were the direct and immediate result of his receipt of inside information, any error was harmless.

a. Section 10(b) and Rule 10b-5 do not require proof that an insider-trading defendant "used" material nonpublic information in making the charged trades, beyond the defendant's awareness of the information when trading.

i. Section 10(b) makes it unlawful to use a deceptive device "in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 78j(b). In 2000, pursuant to that rulemaking authority, the SEC promulgated Rule 10b5-1 to define "when a purchase or sale constitutes trading 'on the basis of' material nonpublic information in insider trading cases." 17 C.F.R. 240.10b5-1. The rule provides that a trade is "on the basis of" inside information "if the person making the purchase or sale was aware of the material nonpublic information" at the time of the transaction. 17 C.F.R. 240.10b5-1(b). The rule also establishes an affirmative defense that applies where a trade resulted from a binding contract, instruction, or written plan adopted before the trader became aware of the material nonpublic information. 17 C.F.R. 240.10b5-1(c).

As in other circumstances in which Congress has authorized the SEC to "prescribe legislative rules" implementing a statutory provision, courts must accord Rule 10b5-1 "'controlling weight unless [the rule] is arbitrary, capricious, or manifestly contrary to the statute.'" *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (brackets omitted) (describing the SEC's power under 15 U.S.C. 78n(e) and quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984) (*Chevron*)); see *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002). The Second Circuit first articulated its "knowing possession" standard before Rule 10b5-1 was adopted. *United States* v. *Teicher*, 987 F.2d 112, 120, cert. denied, 510 U.S. 976 (1993). But in adhering to that approach, the court of appeals has deferred to the SEC's rule, explaining that Rule 10b5-1 is "entitled to deference" under *Chevron* and that the "knowing possession" standard is equivalent to the rule's "aware[ness]" test. *United States* v. *Royer*, 549 F.3d 886, 899 (2d. Cir. 2008), cert. denied, 558 U.S. 935 (2009); see Pet. App. 40a-41a & n.24.[2]

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[2] Petitioner asserts (Pet. 21-22) that the "knowing possession" standard differs from Rule 10b5-1 because it does not account for the rule's affirmative defense. The Second Circuit has not considered that defense, and it had no occasion to do so in this case because petitioner's trades were not made pursuant to a binding "contract, instruction, or plan" adopted before he acquired inside information. 17 C.F.R. 240.10b5-1(c). But petitioner is wrong to suggest that the Second Circuit would allow a criminal prosecution if the defendant qualified for Rule 10b5-1's affirmative defense. To the contrary, a person who traded in compliance with Rule 10b5-1 would not be subject to prosecution because Section 10(b) prohibits only actions taken "in contravention of [the] rules and regulations" promulgated by the SEC. 15 U.S.C. 78j(b). And the SEC's exercise of its rulemaking authority to establish a narrow affirmative

Rule 10b5-1 is a permissible "regulation[]" giving content to the conduct prohibited by Section 10(b). 15 U.S.C. 78j(b). As the SEC explained, "[w]henever a person purchases or sells a security while aware of material nonpublic information that has been improperly obtained, that person has the type of unfair informational advantage over other participants in the market that insider trading law is designed to prevent." 64 Fed. Reg. 72,600 (Dec. 28, 1999). The rule thus "comports with the oft-quoted maxim," recognized by this Court, "that one with a fiduciary or similar duty to hold material nonpublic information in confidence must either 'disclose or abstain' with regard to trading." *Teicher*, 987 F.2d at 120 (citing *Chiarella* v. *United States*, 445 U.S. 222, 227 (1980)). Moreover, the rule "reflects the common sense notion that a trader who is aware of inside information when making a trading decision inevitably makes use of the information." 65 Fed. Reg. 51,727 (Aug. 24, 2000). "Unlike a loaded weapon which may stand ready but unused, material information can not lay idle in the human brain." *Teicher*, 987 F.2d at 120.

The "knowing possession" standard is consistent with statutes governing insider trading. Congress has not sought to define the scope of the insider trading activities prohibited by Section 10(b) and Rule 10b-5. But on two occasions before the SEC promulgated Rule 10b5-1, Congress provided additional remedies for insider-trading violations and described insider trading as buying or selling securities "while in possession of material, nonpublic information." 15 U.S.C.

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defense is entirely consistent with the application of the Second Circuit's "knowing possession" standard in all other cases.

78u-1(a)(1) (providing civil penalties); 15 U.S.C. 78t-1(a) (creating a private right of action).[3]

ii. Petitioner identifies no sound reason to conclude that Rule 10b5-1 is "arbitrary, capricious, or manifestly contrary to" Section 10(b). *O'Hagan*, 521 U.S. at 673 (quoting *Chevron*, 467 U.S. at 844). Indeed, petitioner fails even to acknowledge the deference owed to the SEC's interpretation.

First, petitioner asserts (Pet. 3-4, 16-17) that the decision below conflicts with this Court's opinions describing insider trading as the "use[]" of inside information, *Chiarella*, 445 U.S. at 229, or as trading "on the basis of" such information, *O'Hagan*, 521 U.S. at 652. But none of those opinions addressed the question presented here, and all of them predated Rule 10b5-1. Moreover, this Court has also described the prohibition on insider trading as imposing a duty "to disclose material nonpublic information before trading or to abstain from trading altogether"—a formulation that supports the "knowing possession" standard. *Dirks* v. *SEC*, 463 U.S. 646, 653-654 (1983) (footnote omitted); see *Chiarella*, 445 U.S. at 226-229.

Second, petitioner contends (Pet. 22-23) that the "knowing possession" standard is inconsistent with *CSX Transportation, Inc.* v. *McBride*, 131 S. Ct. 2630 (2011). That decision upheld a jury instruction allowing an injured railroad employee to recover damages if his employer's negligence "played a part—no matter how small—in bringing about the injury." *Id.* at 2644.

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[3] The legislative history of these provisions confirms that Congress understood that Section 10(b) and Rule 10b-5 prohibit "trading while in possession of material, nonpublic information." H.R. Rep. No. 910, 100th Cong., 2d Sess. 8 (1988); see H.R. Rep. No. 355, 98th Cong., 1st Sess. 2-3 (1983).

The Court contrasted this standard with the "traditional notions of proximate causation" that apply "under the RICO, antitrust, and securities fraud statutes." *Id.* at 2644 n.14. Petitioner maintains that this reference to "securities fraud statutes" makes clear that "traditional notions of proximate causation" govern in this case.

CSX Transportation is inapposite. Like the securities fraud decision it cited, that case addressed the causal relationship between an injury and a defendant's wrongdoing that a plaintiff must establish to recover damages. See 131 S. Ct. at 2644 & n.14; *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005) (requiring proof that the defendant's fraud "proximately caused the plaintiff's economic loss"). This case does not involve any form of causation of loss or damages. Rather, it addresses a question of when the possession of improperly obtained inside information is connected to a defendant's own trading decisions, and it answers that question by positing a connection when the trader is *aware* of that information. *CSX Transportation* says nothing about that issue, and petitioner identifies no reason to think that the standard that governs in the loss-causation context has any bearing on the rule applicable here.

Third, petitioner is wrong to assert (Pet. 20-21) that the "knowing possession" standard creates a "strict liability" offense or eliminates Section 10(b)'s scienter requirement. To establish scienter, the government must prove that the defendant acted with "intent to deceive, manipulate, or defraud." *Aaron* v. *SEC*, 446 U.S. 680, 686 n.5 (1980) (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 194 n.12 (1976)). In adopting Rule 10b5-1, the SEC recognized that

"[s]cienter remains a necessary element for liability" and stated that "Rule 10b5-1 does not change this." 65 Fed. Reg. at 51,727. The "knowing possession" standard is entirely consistent with the scienter requirement. It establishes that an insider-trading violation *may* occur when a person trades while in knowing possession of inside information. But there is no violation unless the defendant acts with intent to defraud by failing to disclose information that he knows he has a duty to disclose. That type of fraud is consistent with the "common law" rule that "one who fails to disclose material information prior to the consummation of a transaction commits fraud" if "he is under a duty to [disclose it]." *Chiarella*, 445 U.S. at 227-228 (citing 3 Restatement (Second) of Torts § 551(2)(a), at 119 (1976)). And the nondisclosure must be intentional to violate Rule 10b-5. Consistent with these principles, the jury found that petitioner acted "with the intent to defraud," which the district court defined as "the specific intent to deceive." C.A. J.A. 433; see *id.* at 434 ("good faith on the part of the defendant is a complete defense").

The instructions in this case also illustrate other requirements that prevent the imposition of strict liability on persons who innocently or inadvertently acquire inside information and then trade. At the outset, the defendant must recognize the importance and confidential character of the information; the jury had to find that petitioner "knew that the information was material, non-public information." C.A. J.A. 432; see *id.* at 427-428. For the counts charging that petitioner was tipped by others, the jury also had to find that he "knew that the information had been disclosed by an insider in breach of a duty of trust and confi-

dence." *Id.* at 432; see *Dirks*, 463 U.S. at 660. In addition, the jury had to find that petitioner acted "willfully," which the district court defined as "with an intent to do something the law forbids, that is to say with bad purpose either to disobey or disregard the law." C.A. J.A. 433. Only a "willful[]" violation of Rule 10b-5 gives rise to criminal penalties, and a person may not be subject to imprisonment for violating an SEC rule "if he proves that he had no knowledge of [the] rule." 15 U.S.C. 78ff(a). These last "two sturdy safeguards" further ensure that innocent conduct will not be subject to criminal penalties and "do[] much to destroy any force in the argument that application of the [statute] in circumstances such as [petitioner's] is unjust." *O'Hagan*, 521 U.S. at 665-666 (internal quotation marks omitted; second pair of brackets in original).

Fourth, petitioner asserts (Pet. 23-27) that the decision below will threaten the securities industry by criminalizing the everyday activities of legitimate traders. But that claim rests on the erroneous premise that a "knowing possession" standard creates a strict liability offense. As explained above, trading activities while in possession of material nonpublic information do not trigger criminal liability absent showings of awareness of the information's nature, intent to deceive, and willfulness. Experience bears this out. Rule 10b5-1 has been in place since 2000, and the "knowing possession" standard has been endorsed by the Second Circuit—home to much of the securities industry—since *Teicher* was decided in 1993. If petitioner were correct (Pet. 26) that this standard makes it "nearly impossible for market analysts to continue

to do their jobs," one would expect some evidence of a disruption during this time. Petitioner musters none.

Petitioner's concern (Pet. 23-24) about a lack of fair notice is also misplaced. Section 10(b) authorizes the SEC to define unlawful deceptive devices through rulemaking, and Rule 10b5-1 provides ample notice of what is prohibited. Indeed, one purpose of the rule was to "provide greater clarity and certainty" for the industry, 65 Fed. Reg. at 51,727, and even petitioner elsewhere concedes (Pet. 26) that a "knowing possession" standard establishes a "bright line."

b. No disagreement exists among the courts of appeals on the question presented because no circuit has held that Rule 10b5-1 exceeds the SEC's rulemaking authority under Section 10(b). Petitioner notes (Pet. 18-20) that the Ninth and Eleventh Circuits previously disagreed with the "knowing possession" standard articulated in *Teicher* and instead required proof that the defendant "used" inside information. See *United States* v. *Smith*, 155 F.3d 1051, 1066-1069 (9th Cir. 1998), cert. denied, 525 U.S. 1071 (1999); *SEC* v. *Adler*, 137 F.3d 1325, 1332-1339 (11th Cir. 1998). But *Smith* and *Adler* predated Rule 10b5-1—indeed, the SEC adopted the rule to resolve the conflict between those decisions and *Teicher*. 65 Fed. Reg. at 51,727.

"A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Neither *Smith* nor *Adler* found that the "use" test was unambiguously compelled by Section 10(b).

To the contrary, *Adler* called the issue "a difficult and close question" and observed that the SEC could reverse its holding by "promulgat[ing] a rule adopting the knowing possession standard." 137 F.3d at 1337 & n.33; see *Smith*, 155 F.3d at 1067 (concluding that the "weight of authority supports a 'use' requirement," but not finding the statute unambiguous). Now that the SEC has acted on *Adler*'s invitation, both courts will be required to reexamine the issue in light of the deference owed to the expert agency Congress has charged with implementing Section 10(b) through "rules carrying the force of law." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001).[4]

c. Even if there were a conflict warranting this Court's review, it would not be implicated in this case. The district court did not instruct the jury that it could convict based on "knowing possession," but rather required proof that petitioner "used" material nonpublic information. C.A. J.A. 432. That instruction is consistent with the "use test" adopted by the Ninth and Eleventh Circuits. *Adler*, 137 F.3d at 1337; see *Smith*, 155 F.3d at 1070 n.28 (requiring proof "that the suspect used the information").

The only challenge that petitioner preserved to the district court's lengthy instruction on the "use" of inside information was an objection to the inclusion of

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[4] Petitioner also cites (Pet. 18-19) *United States* v. *Anderson*, 533 F.3d 623, 630-631 (8th Cir.), cert. denied, 555 U.S. 997 (2008), which applied a "use" standard. But *Anderson* did not cite Rule 10b5-1, and the issue was not presented because the conduct at issue occurred before the rule became effective in October 2000 and because the government had not challenged the "use" standard in that case. *Id.* at 627-628; see also *SEC* v. *Ginsburg*, 362 F.3d 1292, 1296-1298 (11th Cir. 2004) (same).

the words "however small" in the statement that the jury was required to find that inside information "was a factor, however small, in [petitioner's] decision to purchase or sell stock." C.A. J.A. 433; see Tr. 5152. But petitioner does not cite any decision rejecting such an instruction in an insider-trading case.[5] And in *CSX Transportation*—the case on which petitioner principally relies (Pet. 22-23)—both the Court and the dissent concluded that a similar instruction given in a different context required the jury to find at least "but for" causation. 131 S. Ct. at 2641 (concluding that the instruction required both but-for causation and a form of proximate causation); *id.* at 2645 (Roberts, C.J., dissenting) (concluding that the instruction "is simply 'but for' causation"). Petitioner gives no reason to doubt that a but-for relationship between inside information and a defendant's purchase or sale qualifies as "use" of that information.

d. In any event, this case would be a poor vehicle in which to take up the question presented because any error was harmless. Given the overwhelming evidence that petitioner's inside information influenced his trading decisions, it is "clear beyond a reasonable doubt that a rational jury would have found [petitioner] guilty" even under his preferred standard. *Neder* v. *United States*, 527 U.S. 1, 18 (1999).

The jury repeatedly heard evidence that petitioner improperly sought out inside information. For example, Kumar testified that petitioner paid him $500,000

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[5] In *Smith*, the district court had instructed the jury that inside information must be a "significant factor" in the decision to buy or sell. 155 F.3d at 1070 n.28. The Ninth Circuit rejected the defendant's challenge to that instruction, but did not hold that the "significant factor" language was required. *Ibid.*

a year for nonpublic information on Kumar's clients and "press[ed]" for details about clients' plans and financial results. Tr. 263-264, 279-280. Petitioner and his brother were recorded discussing an effort to establish a similar relationship with another consultant, explaining that he was a promising prospect because he was "a little dirty" and had already "volunteered" confidential information. C.A. J.A. 761-762.

In several instances, moreover, petitioner effectively acknowledged that he traded based on inside information. Petitioner once told Kumar that a particular tip was "very useful," Tr. 366-367, and after profiting from that information petitioner called Kumar to say "thank you," *id.* at 387; see *id.* at 3523 (same for another source); C.A. J.A. 733 (same for a third source). On another occasion, petitioner told Kumar that he "had some special information" that "Google was going to have a very bad quarter" and that he was "going to short Google to make money out of it." Tr. 408. Petitioner was also recorded telling two Galleon employees that he had "very confidential" information about a potential acquisition and that he was "going to" buy the target company's stock. C.A. J.A. 699-700.

In addition, petitioner repeatedly traded on inside information at the first available opportunity after receiving it. See, *e.g.*, C.A. J.A. 459-461 (petitioner began reversing his short position in Intel stock minutes after receiving positive news); *id.* at 505-508 (petitioner bought 400,000 shares of Hilton stock five minutes after the market opened the day after he learned positive inside information); *id.* at 528-530 (petitioner ordered $43 million in Goldman stock minutes after learning positive news from a board member); *id.* at 533-534 (petitioner began selling his

Goldman stock one minute after the opening of the market on the morning after he learned negative news from the same board member).

Finally, petitioner conspired to conceal his possession and use of inside information. A former Galleon employee testified that, at petitioner's direction, he created "an e-mail trail" documenting pretextual "legitimate reasons" for a purchase that was in fact based on inside information. Tr. 2630-2631. Petitioner was recorded directing two other Galleon employees to create a similar pretext for another purchase. Explaining that they had to "protect [them]selves," petitioner told the employees that he would send an email asking them to look at several stocks and that they should respond by recommending—purportedly based on legitimate research—an investment in a company that petitioner knew based on inside information to be the target of a confidential acquisition. C.A. J.A. 699-701. Petitioner was also recorded advising a co-conspirator to conceal her own insider trading by purchasing more shares than she wanted and then selling some of them to establish a pattern of inconsistent trades she could point to if she was "investigate[d]": "What I would do is, I would buy a million shares and sell 500,000." *Id.* at 804; see also *id.* at 768-770 (same).[6]

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[6] Despite this evidence, petitioner continues to seek to exculpate himself by pointing to "trades *inconsistent* with the alleged tips he received," including "his repeated sales of shares of ATI stock prior to its acquisition by AMD." Pet. 10. Petitioner neglects to mention that despite some sales, his much larger purchases over the same period meant that at the time of the acquisition he held more than five million shares of ATI stock, all acquired after Kumar began tipping him about the progress of the acquisition. C.A. J.A. 478; see Tr. 354-356.

2. Petitioner next contends (Pet. 28-34) that a defendant who seeks to suppress the fruits of a Title III wiretap based on misstatements or omissions in the wiretap application need not satisfy the standards set forth in *Franks*. The court of appeals correctly rejected that argument—as has every other court of appeals to consider the question. Petitioner also challenges (Pet. 34-38) the court of appeals' application of *Franks* to this case, but those arguments similarly are unsound. This Court's intervention is not warranted.

a. Title III provides that a defendant may seek to suppress evidence collected through a wiretap if, among other things, the evidence was "unlawfully intercepted." 18 U.S.C. 2518(10)(a)(i). In adopting that suppression remedy, Congress had "no intention * * * generally to press the scope of the suppression [rule] beyond present search and seizure law." S. Rep. No. 1097, 90th Cong., 2d Sess. 96 (1968). And when Title III was enacted in 1968, defendants in most jurisdictions had no right to challenge the veracity or completeness of the affidavit supporting a warrant. See *North Carolina* v. *Wrenn*, 417 U.S. 973, 974-975 & n.* (1974) (White, J., dissenting from the denial of certiorari) (collecting cases); see also *Franks*, 438 U.S. at 158-160 & nn.3-4, 176-180 (describing a trend towards permitting such challenges and citing cases almost uniformly decided after 1968); *Rugendorf* v. *United States*, 376 U.S. 528, 531-532 (1964) (explicitly reserving the question).

Petitioner is thus wrong to assert (Pet. 34 n.2) that *Franks* is a "limitation[] on the constitutional exclusionary rule" as it stood in 1968. To the contrary, this Court's decision *expanded* the exclusionary remedy that Congress would have contemplated when it en-

acted Title III. And although the Court held that defendants must be given some opportunity to challenge deliberate or reckless misstatements, it also acknowledged the "competing values" that weigh against permitting unlimited collateral attacks on the veracity of warrant affidavits. 438 U.S. at 165. The Court therefore emphasized that the new right it recognized had "a limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded." *Id.* at 167. A defendant is entitled to an evidentiary hearing only if he "makes a substantial preliminary showing," and suppression is warranted only if "the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence" and "the affidavit's remaining content is insufficient to establish probable cause." *Id.* at 155-156.

Eleven courts of appeals have applied the same framework to Title III, concluding that "[t]he application and affidavit for wiretap authorization are subject to the requirements of *Franks*." *United States* v. *Green*, 175 F.3d 822, 828 (10th Cir.), cert. denied, 528 U.S. 852 (1999).[7] As the Second Circuit explained,

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[7] See also, *e.g.*, *United States* v. *Cole*, 807 F.2d 262, 268 (1st Cir. 1986), cert. denied, 481 U.S. 1069 (1987); *United States* v. *Bianco*, 998 F.2d 1112, 1126 (2d Cir. 1993), cert. denied, 511 U.S. 1069 (1994); *United States* v. *Muldoon*, 931 F.2d 282, 286 (4th Cir. 1991); *United States* v. *Guerra-Marez*, 928 F.2d 665, 670-671 (5th Cir.), cert. denied, 502 U.S. 917 (1991); *United States* v. *Stewart*, 306 F.3d 295, 304-305 (6th Cir. 2002), cert. denied, 537 U.S. 1138 (2003); *United States* v. *Williams*, 737 F.2d 594, 602 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985); *United States* v. *Lucht*, 18 F.3d 541, 546 (8th Cir.), cert. denied, 513 U.S. 949 (1994); *United States* v. *Ippolito*, 774 F.2d 1482, 1484-1485 (9th Cir. 1985); *United*

applying *Franks* in this context "enhances the protection of * * * defendants." *United States* v. *Bianco*, 998 F.2d 1112, 1126 (1993), cert. denied, 511 U.S. 1069 (1994). Petitioner identifies no sound reason why a defendant should be allowed to avail himself of the favorable aspects of *Franks*—including the right to challenge the veracity and completeness of an affidavit and the availability of an evidentiary hearing—without being bound by the careful limits *Franks* placed on its novel suppression remedy. Petitioner also fails to cite a single decision endorsing that result.[8]

Petitioner relies primarily (Pet. 29-30, 32-34) on *United States* v. *Giordano*, 416 U.S. 505 (1974), which held that Title III required suppression when the government failed to comply with the statutory requirement that every wiretap application be approved by a senior official in the Department of Justice. *Id.* at 527-528. The Court concluded that suppression was required because this provision "directly and substan-

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States v. *Van Horn*, 789 F.2d 1492, 1500-1501 (11th Cir.), cert. denied, 479 U.S. 854 (1986); *United States* v. *Becton*, 601 F.3d 588, 597-598 (D.C. Cir. 2010); cf. *United States* v. *Heilman*, 377 Fed. Appx. 157, 184 (3d Cir.) (reserving this question), cert. denied, 131 S. Ct. 490 (2010).

[8] Petitioner contends (Pet. 34 n.2) that the application of *Franks* to Title III "stands in considerable tension" with *United States* v. *Rice*, 478 F.3d 704, 712-713 (6th Cir. 2007), and *United States* v. *Glover*, 736 F.3d 509, 515-516 (D.C. Cir. 2013), which stated that Title III does not incorporate the good-faith exception to the Fourth Amendment exclusionary rule. But the Sixth and D.C. Circuits have applied *Franks* to Title III—indeed, the Sixth Circuit did so in the decision on which petitioner relies. *Rice*, 478 F.3d at 710-711; see also, *e.g.*, *Becton*, 601 F.3d at 597-598 (D.C. Cir.); *Stewart*, 306 F.3d at 304-306 (6th Cir.).

tially implement[s] the congressional intention to limit the use of intercept procedures" to appropriate circumstances. *Id.* at 527. Petitioner contends that the requirement that an application contain a "full and complete statement" of the facts establishing probable cause and necessity, 18 U.S.C. 2518(1)(b) and (c), also "directly and substantially" implements Title III's objectives, and therefore asserts that *Giordano* mandates suppression for any violation of that requirement.

Petitioner's reliance on *Giordano* is misplaced. In that case, the government had entirely failed to comply with a required statutory procedure: personal approval by the Attorney General or Assistant Attorney General. 416 U.S. at 507-508. In the circumstances addressed by *Franks*, in contrast, all of the statutory procedures are addressed and based on the application and affidavit, a district judge determines that a wiretap is necessary and supported by probable cause. The question is whether and under what circumstances omissions or misstatements in the affidavit vitiate the judge's determination. Under petitioner's logic, *any* violation of the statutory "full and complete statement" requirement would mandate suppression. That rule would lead to absurd results, excluding evidence even for inconsequential or unintentional errors—or, as in this case, for the omission of information that "would only have *strengthened* the wiretap application[]." Pet. App. 33a. Particularly given the state of the law in 1968, when defendants generally had *no* right to attack the veracity or completeness of an affidavit underlying a warrant, nothing suggests that Congress intended that extreme and rigid result.

b. Petitioner briefly argues (Pet. 34-38) that the court of appeals erred and departed from the decisions of other circuits in its application of *Franks*. Petitioner challenges both the court's conclusion that the government did not act recklessly in omitting information about the SEC investigation and its alternative holding that the omission was immaterial. Both arguments lack merit.

i. Petitioner first claims (Pet. 34-35) that the court of appeals erred in treating recklessness under *Franks* as a subjective inquiry into the affiant's state of mind. Instead, petitioner contends that an omission is reckless whenever a reasonable person would have known that the information should have been disclosed. For at least three reasons, that issue does not warrant review.

First, "[i]t has been the traditional practice of this Court * * * to decline to review claims raised for the first time on rehearing in the court below." *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari). Adhering to that practice would preclude review here because petitioner did not raise this issue until his petition for rehearing en banc. Indeed, he took the opposite position in his brief before the panel, agreeing with the government that recklessness under *Franks* depends on the affiant's "subjective state of mind" and arguing only that the district court properly "inferr[ed] subjective intent from the importance of the omitted information." Pet. C.A. Reply Br. 33-34.

Second, the court of appeals' decision is correct. *Franks* held that a misstatement requires suppression only if made "knowingly and intentionally, or with reckless disregard for the truth." 438 U.S. at 155.

The Court did not define "reckless disregard for the truth," but that formulation appears to have been drawn from the First Amendment standard governing defamation cases involving public figures. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964) (requiring proof that the statement was made with "knowledge that it was false or with reckless disregard of whether it was false or not"). And in that context, it is well established that a person acts with "reckless disregard" only if he "in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968); see *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974) ("reckless disregard of the truth" is equivalent to "subjective awareness of probable falsity"). Numerous courts of appeals have thus concluded that the subjective "First Amendment [standard] should be applied by analogy in the *Franks* setting." *United States* v. *Williams*, 737 F.2d 594, 602 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985).[9] A subjective focus on the affiant's veracity is also consistent with *Franks*'s derivation of its rule from the text of "the Warrant Clause itself, which surely takes the affiant's good faith as its premise." 438 U.S. at 164. An "[o]ath or affirmation" would serve little purpose in justifying issuance of a warrant if an affiant could lie or harbor serious doubts about the truth of her assertions.

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[9] See also, *e.g.*, *Miller* v. *Prince George's Cnty.*, 475 F.3d 621, 627-628 (4th Cir.), cert. denied, 552 U.S. 818 (2007); *United States* v. *Ranney*, 298 F.3d 74, 78 (1st Cir. 2002); *Beard* v. *City of Northglenn*, 24 F.3d 110, 116 (10th Cir. 1994); *United States* v. *Davis*, 617 F.2d 677, 694-695 (D.C. Cir. 1979), cert. denied, 445 U.S. 967 (1980).

Petitioner, in contrast, would focus not on the affiant's subjective good faith, but on whether the omitted fact is something "any reasonable person would have known" should have been included. Pet. 35 (quoting *Wilson* v. *Russo*, 212 F.3d 781, 788 (3d Cir. 2000)). That reasonable-person standard cannot be reconciled with *Franks*, which emphasized that mere "negligence" does not warrant suppression. 438 U.S. at 171.

Third, petitioner is wrong to contend (Pet. 35) that the Third and Eighth Circuits have adopted his objective approach to recklessness. In *United States* v. *Jacobs*, 986 F.2d 1231 (1993), the Eighth Circuit stated that "reckless disregard * * * may be inferred" when an officer omits information that is "clearly critical to the finding of probable cause." *Id.* at 1235 (internal quotation marks omitted). But that observation is consistent with the decision below, which recognized that "[s]ubjective intent * * * is often demonstrated with objective evidence" and that "the 'reckless disregard' aspect of a *Franks* inquiry can sometimes be inferred from the omission of critical information." Pet. App. 31a.[10] Other decisions by the Eighth Circuit explicitly endorse the subjective standard, holding that an officer must have "at least 'entertained serious doubts' as to the truth of the statements." *United States* v. *Porchay*, 651 F.3d 930, 941 (2011), cert. denied, 132 S. Ct. 1610 (2012).

In *Wilson*, the Third Circuit relied on and quoted *Jacobs* in stating that an officer acts recklessly if he omits a fact that "'[a]ny reasonable person would have

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[10] The same is true of the additional case cited in the amicus brief filed by the Federal Defenders of New York (at 6). See *United States* v. *Gifford*, 727 F.3d 92, 98-99 (1st Cir. 2013) (stating that recklessness "may be inferred" from objective circumstances).

known * * * was the kind of thing the judge would wish to know,'" and further stated that a misstatement is reckless if the officer "had obvious reasons to doubt the accuracy" of the affidavit. 212 F.3d at 788 (quoting *Jacobs*, 986 F.2d at 1235). As discussed above, however, *Jacobs* did not depart from the subjective approach applied by other circuits, but simply allowed an inference about a subjective state of mind to be drawn from objective facts. And more recently, the Third Circuit made explicit that interpretation of *Wilson*, stating that although a court can infer recklessness from objective facts, the test is whether the affiant had "a subjectively reckless state of mind." *United States* v. *Brown*, 631 F.3d 638, 645 (2011); see *id.* at 646 & n.8 (noting that courts, including the Third Circuit, have derived the *Franks* recklessness standard from First Amendment actual malice cases).

ii. Petitioner also contends (Pet. 36-37) that the lower courts erred by considering facts not included in the original affidavit in determining whether the omissions from that affidavit were material. But as numerous courts have recognized, that is the only way to apply *Franks* in a case involving omissions. Because the error was the failure to include relevant information, materiality depends on whether "the affidavit, if supplemented with the omitted information, would * * * be sufficient to support a finding of probable cause." *Jacobs*, 986 F.2d at 1235; see also, *e.g.*, *United States* v. *Gifford*, 727 F.3d 92, 98 (1st Cir. 2013) (a defendant must "show that, with the recklessly omitted information added to the affidavit, the reformed affidavit fails to establish probable cause").

Petitioner asserts (Pet. 36) that the Seventh and Ninth Circuits do not permit consideration of omitted

material in this fashion. But both courts have repeatedly held, consistent with the decision below, that in a *Franks* case involving omissions the court must determine "whether a hypothetical affidavit that included the omitted material would still establish probable cause." *United States* v. *Robinson*, 546 F.3d 884, 888 (7th Cir. 2008); see *Whitlock* v. *Brown*, 596 F.3d 406, 411 (7th Cir. 2010) (same); see also *Cameron* v. *Craig*, 713 F.3d 1012, 1019 (9th Cir. 2013) ("if the omitted material had been included, the warrant would still be supported by probable cause"); *United States* v. *Fernandez*, 388 F.3d 1199, 1255 (9th Cir. 2004) ("the pivotal question is whether an affidavit containing the omitted material would have provided a basis for a finding of probable cause"), cert. denied, 544 U.S. 1043 (2005).

The two cases on which petitioner relies are not to the contrary. *Baldwin* v. *Placer County*, 418 F.3d 966, 971 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006), addressed false statements, not omissions. And in *United States* v. *Harris*, 464 F.3d 733 (2006), the Seventh Circuit confirmed that a court must decide whether probable cause exists by "incorporating omitted material facts" and then judging the sufficiency of the corrected affidavit. *Id.* at 738. The court held only that a reviewing court should not allow the government to supplement its showing of probable cause with new information *other than* the facts that were improperly omitted from the original affidavit. *Id.* at 738-739. But that is not what happened here: petitioner claimed that the omission of a full description of the SEC investigation was improper, and the lower courts found the omission immaterial because an affidavit disclosing "all the details of the SEC's

investigation" still "would have shown that a wiretap was necessary and appropriate." Pet. App. 47a; see *id.* at 34a-35a.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] The additional cases cited in the Former Federal Judges' Amicus Brief (at 10-11) add nothing to petitioner's claimed split. Some of them are not *Franks* cases at all, and the remainder involved misstatements rather than omissions.