No. _____

SUPREME COURT OF THE UNITED STATES

MICHAEL FRANCIS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were Petitioner's Fourth Amendment rights violated when an FBI Agent, acting on information from an informant, obtained a search warrant for Petitioner's car from a Magistrate, but the FBI Agent deliberately withheld from the affidavit in support of the warrant the facts that the informant had been convicted of a felony crime of dishonesty and had lied to the police when arrested, such that the FBI Agent, rather than the Magistrate, made the determination of whether the informant was reliable and credible?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Constitutional Provisions

Supreme Court Decisions

Federal Appellate Court Decisions

Federal District Court Decisions

PETITION FOR WRIT OF CERTIORARI

Petitioner, Michael Francis, respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

PROCEEDINGS IN THE LOWER COURTS

Francis pled guilty to possession with intent to distribute cocaine and reserved his right to appeal the district court's denial of his motion to suppress. *United States v. Francis*, No. 21-cr-000153, 2023 U.S. Dist. LEXIS 177643, 2023 WL 6443948 (D.N.H., Oct. 3, 2023). The United States Court of Appeals for the First Circuit affirmed the district court's denial of the motion to suppress. *United States v. Francis*, No. 24-1386, 132 F.4th 101 (1st Cir. 2025); Cert. App. 24-39.

STATEMENT OF JURISDICTION

The Court of Appeals issued its decision on March 24, 2025. Petitioner did not seek a rehearing. This petition is timely filed according to Supreme Court Rule 13(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE[1]

A drug dealer facing serious felony charges made a deal with an FBI Agent to become an informant.[2] The drug dealer turned informant claimed to FBI Agent Ryan Burke that Petitioner Michael Francis provided drugs to the informant in the past. The FBI Agent obtained a search warrant for Francis's car based on the claims made by the informant, but as detailed below, the Agent left out the facts that the informant had a prior conviction for a felony crime of dishonesty and had recently lied to police. The FBI Agent applied to a United States Magistrate for a search warrant for Francis's car. The application detailed the claims of the informant but did not claim that the informant had any track record of providing reliable

[1] Citations to the district court order and United States Court of Appeals for the First Circuit decision in *United States v. Francis*, No. 24-1386, 132 F.4th 101 (1st Cir. 2025) are cited to the included Appendix as "Cert. App. #." Other citations regarding the facts and procedural history of the case are to the Appendix for the appeal, cited as "App. #", the Sealed Appendix, cited as "S.App. #", and the Addendum, cited as "Add. #", at the United States Court of Appeals for the First Circuit in *Francis*, No. 24-1386, 132 F.4th 101.

[2] The Defense and the Government referred to the individual as an "informant" in their initial motions. App. 25-43, 83-107. At the hearing on the motion to suppress, the FBI Agent used the term "cooperating witness," and the Government and district court subsequently adopted this terminology. App. 149-367; Cert. App. 1-23; Add. 8-30. Considering that the individual's confidentiality was protected by redactions to the affidavit, that he was facing serious criminal charges, and that he was providing information willingly to attempt to limit his criminal liability, Francis submits that he easily qualifies as an "informant" and uses that term in this brief. The First Circuit, however, described the informant as a "cooperating witness" or "CW" because the "individual was not a government-paid confidential informant, and the [Manchester Police Department] obtained the information from the CW in the normal course of his post-arrest interview." *Francis*, 132 F.4th at 104, n. 1; Cert. App. 26.

information or that any alleged criminal conduct by the informant had been corroborated. The Magistrate issued the search warrant.

Law enforcement surreptitiously observed Francis prior to executing the search warrant. They saw another person put a bag in Francis's car, although Francis was not in the car at the time. Francis and the other person later drove away. When they parked, the agents detained them, searched the car, and found cocaine in the bag.

The Government initially brought an indictment charging multiple crimes in five counts based on searches of both the car and of an apartment associated with Francis, but after negotiation and litigation, the Government proceeded only on two counts arising from the search of the car: conspiracy to distribute and possess with intent to distribute more than 500 grams of cocaine in violation of 21 U.S.C. §§ 841 (a)(1), 841(b)(1)(B)(ii) & 846, [Count 1], and possession with intent to distribute more than 500 grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(B)(ii) [Count 2].

Francis filed a motion to suppress the evidence seized from his car on the grounds that the search warrant was not justified by probable cause, that the good faith exception did not apply, and that the FBI Agent recklessly failed to disclose discrediting information about the drug dealer turned informant, including his prior felony conviction for a crime of dishonesty and history of deception. App. 25-43.

The district court held a hearing on the motion to suppress, which included a *Franks* hearing, on June 14 and July 12, 2023. App. 149-287, 295-367. Francis filed

a supplemental motion to suppress on July 11, 2023, and the Government filed an objection on September 15, 2023. App. 288-294, 368-72. On October 3, 2023, the district court denied Francis's remaining motion to suppress. Cert. App. 1-24; Add. 8-30.

On November 6, 2023, pursuant to a "C-Plea," Francis pled guilty to Count 2 of the Superseding Indictment. App. 396-409. The plea agreement reserved the right for Francis to appeal the denial of his Motions to Suppress. App. 406-7. On April 10, 2024, the district court sentenced Francis to 150-months in prison, as provided in the Plea Agreement. Add. 1-7. Counts 1, 3, 4, and 5 were dismissed on the motion of the Government. Add. 1. Francis filed his notice of appeal to the First Circuit Court of Appeals on April 18, 2024. App. 417.

After briefing, the First Circuit heard oral argument on March 5, 2025. Thereafter, the First Circuit issued an opinion on March 24, 2025, affirming the district court's denial of Francis's motion to suppress. *See United States v. Francis*, No. 24-1386, 132 F.4th 101 (1st Cir. 2025); Cert. App. 24-39.

REASONS FOR GRANTING THE WRIT

The Court should review this case because the First Circuit Court of Appeals and the district court decided an important federal question in a way that conflicts with relevant decisions of this Court and because federal courts of appeal have been inconsistent in addressing the same issue. *See* Supreme Court Rules 10(a) and (c).

The issue presented is whether the Fourth Amendment permits an FBI Agent, who is relying on an informant when applying to a Magistrate for a search warrant, to withhold from the Magistrate the facts that the informant had a conviction for a felony crime of dishonesty and that he had lied to law enforcement about other matters. In short, when a search warrant application is being evaluated on the basis of information from an informant, who decides whether the informant is credible and reliable, the FBI Agent or the neutral and detached Magistrate?

This Court says that the Fourth Amendment requires that determinations of probable cause be made by neutral and detached Magistrates. As this Court explained long ago, "zealous officers," like the FBI Agent in this case, often assume power that is not theirs and fail to grasp "[t]he point of the Fourth Amendment[.]" *Johnson v. United States*, 333 U.S. 10, 13 (1948). The Fourth Amendment requires that the inferences which support a finding of probable cause for a search warrant must be drawn by a "neutral and detached Magistrate," rather than "being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 14. *See also United States v. Leon*, 468 U.S. 897, 914 (1984); *Illinois v. Gates*, 462 U.S. 213, 238-40 (1983); *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

Johnson and other cases from this Court notwithstanding, the First Circuit held that the Fourth Amendment authorizes an FBI Agent, rather than the Magistrate, to draw those inferences. The First Circuit said that, since the Agent in this case believed his informant to be "completely credible" and since the Agent himself harbored no doubts about the informant's credibility, there was no need for the Agent to tell the Magistrate about the informant's conviction of a felony crime of dishonesty or his other lies to the police. *Francis*, 132 F.4th at 106, 109; Cert. App. 38-39. Thus, the First Circuit concluded that even though the FBI Agent was aware of his informant's conviction of a felony crime of dishonesty and his false statements to law enforcement, the Agent did not, according to the First Circuit's interpretation of the Fourth Amendment, intentionally or recklessly mislead the Magistrate because the Agent had decided for himself that the informant was credible. *Id.* at 109. The First Circuit's decision allows FBI Agents and other law enforcement to usurp the role of the neutral and detached Magistrate required by the Fourth Amendment.

The Ninth Circuit has held that "'[a]ny crime involving dishonesty necessarily has an adverse effect on an informant's credibility'" and "[t]herefore, when an informant's criminal history includes crimes of dishonesty, additional evidence must be included in the affidavit 'to bolster the informant's credibility or the reliability of the tip,'" for "[o]therwise, 'an informant's criminal past involving dishonesty is fatal to the reliability of the informant's information, and his/her testimony cannot support probable cause.'" *United States v. Elliott*, 322 F.3d 710,

716 (9th Cir. 2003) (quoting *United States v. Reeves*, 210 F.3d 1041, 1045 (9th Cir. 2000)). Thus, in the Ninth Circuit, the information about an informant's prior conviction of a crime of dishonesty must not only be included in the affidavit, it must considered by the Magistrate and found to be outweighed by other evidence of reliability before the Magistrate can make a finding of probable cause.

The Seventh and Fourth Circuits would also likely find, in a case like Francis's, that the FBI Agent had wrongly withheld the information about the informant's reliability from the Magistrate. In *United States v. Glover*, 755 F.3d 811 (7th Cir. 2014), "the officer had corroborated only the defendant's picture, address, and criminal history," while omitting the informant's criminal record, use of aliases, and other facts undermining his credibility. *Id.* at 817-18. In that circumstance, the Seventh Circuit held that, "[t]he omission of that adverse information [about the informant's credibility] impaired the neutral role of the magistrate deciding whether to issue the warrant." *Id.* (citing *Gates*, 462 U.S. at 240).

Similarly, in *United States v. Lull*, 824 F.3d 109 (4th Cir. 2016), the Fourth Circuit reversed the district court's denial of a motion to suppress because, "the search warrant application omitted material information about the reliability of the confidential informant who was the primary source of the information used to establish probable cause." *Id.* at 111. The Fourth Circuit explained that "trustworthiness of the confidential informant lies at the heart of the reliability determination[.]" *Id.* at 117. For that reason, the relevance of the informant's criminal record should have been "obvious" to law enforcement, "especially so

because the affidavit contained no other statement concerning the informant's credibility or experience working as a confidential informant." *Id.*

The First Circuit, however, has said that "[e]ven a prior conviction for a crime of dishonesty is not always dispositive of a witness's reliability." *United States v. Tanguay*, 787 F.3d 44, 50 (1st Cir. 2015). Thus, in Francis's case, the First Circuit had no problem with the evidence of the prior conviction for a crime of dishonesty being left out of the affidavit or with ceding to the FBI Agent, rather than the neutral and detached Magistrate, the determination of whether the informant is reliable and credible despite the conviction. Other circuits appear to agree with the First Circuit. *See, e.g.*, *United States v. Williams*, 477 F.3d 554, 559-60 (8th Cir. 2007) ("We have held that probable cause is not defeated by a failure to inform the magistrate judge of an informant's criminal history if the informant's information is at least partly corroborated"); *United States v. Riaski*, 91 F.4th 933, 937 (8th Cir. 2024) (omission of informant's criminal history counterbalanced by track record of accurate information and purchases under agent's supervision); *United States v. Avery*, 295 F.3d 1158, 1168 (10th Cir. 2002) (given other information bolstering the informant's reliability, it was "improbable that a specific recitation of the confidential informant's criminal history would have influenced the magistrate judge's decisionmaking process or assessment of the informant's veracity"); *Madiwale v. Savaiko*, 117 F.3d 1321, 1327 (11th Cir. 1997) (explaining how that "this court [has] held that, where unsavory information relating to the background of an informant was omitted from an affidavit, the warrant was still valid, due in

part to the 'firsthand character' of the statements coupled with independent corroboration of the information by another person").

The First Circuit and some other circuits have wrongly held that an agent seeking a search warrant may withhold from the Magistrate evidence of an informant's dishonesty. The Fourth Amendment, this Court, the Ninth Circuit, and in some cases, the Seventh and Fourth Circuits, require that such information be evaluated by a neutral and detached Magistrate. Therefore, because the First Circuit's decision conflicts with case law from this Court interpreting the Fourth Amendment, and because other circuit court decisions are inconsistent, this Court should grand petitioner's writ and hear this case on the merits.

The merits of Francis's motion to suppress are set forth below so that the issue presented for review may be considered in its full context.

The Good Faith Exception Does Not Bar a Challenge to the Sufficiency of the Affidavit for the Search Warrant When an FBI Agent Recklessly Failed to Include Information Which Discredited the Informant.

The Fourth Amendment to the United States Constitution requires that search warrants be supported by probable cause. U.S. Const. amend IV.

> Probable cause exists where the facts and circumstances within their knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Brinegar v. United States, 338 U.S. 160, 175 (1949) (cleaned up). The usual remedy for a violation of the Fourth Amendment is suppression. *See Leon*, 468 U.S. at 910.

However, when law enforcement relies in good faith on a search warrant obtained from a neutral and detached Magistrate, suppression is not warranted. *Id.* at 923.

Nevertheless, as first recognized in *Franks v. Delaware*, 438 U.S. 154 (1978), "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id.* at 155-56. If the defendant establishes that the "allegation of perjury or reckless disregard…by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 156. Federal courts have extended *Franks* to include material omissions. *See, e.g.*, *United States v. Dorfman*, 542 F.Supp. 345, 367-68 (N.D. Ill. 1982) (collecting cases).

Furthermore, because the exclusionary rule is premised on deterring police misconduct, *Leon*, 468 U.S. at 906,

> Suppression therefore remains an appropriate remedy if the Magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth.

Id. at 923 (citing *Franks,* 438 U.S. at 154). *See also Herring v. United States*, 555 U.S. 135, 144 (2009) ("the exclusionary rule serves to deter deliberate, reckless, or

grossly negligent conduct…"). In other words, police cannot claim good faith reliance on a Magistrate's determination of probable cause when the police themselves have recklessly failed to provide the Magistrate with important information.

Francis met the standard for a *Franks* hearing in this case. He raised the *Franks* issue in his motion to suppress evidence seized from the car. App. 25-43. He specifically stated that the informant had been convicted of the New Hampshire felony of Falsifying Physical Evidence and that Agent Burke left that fact out of the affidavit. App. 25, 29, 41. Francis requested an evidentiary hearing, App. 37, 43, and, despite the Government's objection to the hearing, App. 10, 84, 98-103, the district court granted that request. App. 12; Add. 9. In so doing, the district court effectively acknowledged that Francis made at least a "substantial preliminary showing" that "a false statement or omission in the affidavit was made knowingly and intentionally or with reckless disregard for the truth and that the false statement or omission was necessary to the finding of probable cause." *United States v. Leonard*, 17 F.4th 218, 224 (1st Cir. 2021) (quotations and citations omitted). As the district court judge himself said, "… you claim there was a material omission deliberately or recklessly made . . . that would detract from the – negate the probable cause if included…. That's what we are here for." App. 168. Finally, the district court's denial of the defense motion was not based on the good faith exception but rather on the court's finding that the affidavit, even considering the omitted information, provided probable cause. Cert. App. 1-24; Add. 8-30.

The Lower Courts Erred In Finding That the Affidavit Was Sufficient Even After Considering the Omitted, Discrediting Information.

The district court denied the motion to suppress, finding that "even upon a reformed affidavit, there was a fair probability that contraband or evidence of a crime would be found in defendant's car." Cert. App. 18; Add. 25. The district court found that: (1) "the affidavit sufficiently establishes the probable veracity of the CW [Cooperating Witness]"; (2) "law enforcement corroborated several aspects of the information provided by the CW, as could be done practically"; (3) "the information omitted, while not irrelevant, does not meaningfully undermine the substantive information included in the affidavit"; and, (4), "Special Agent Burke, a ten-year veteran of the FBI, assessed the significance of the information provided by the CW based on his own professional experience, skill, and knowledge" and did not "harbor[] any doubts at all." Cert. App. 11, 13, 15, 17; Add. 18, 20, 22, 24.

On appeal, the First Circuit found that the "totality of the circumstances supports the [informant's] probable veracity" and that the Agent's "explanations were objectively reasonable as to why he thought such information about the criminal record of the [informant] did not undercut the credibility or the veracity of his statements about Francis." *Francis*, 132 F.4th at 108-09; Cert. App. 37, 39. It also found that "the district court correctly held that the omissions, had they been included within the affidavit, would not have undercut probable cause." *Francis*, 132 F.4th at 109; Cert. App. 39.

The lower courts were wrong because the affidavit failed to state probable cause on its face and fails to an even greater extent when the omitted information discrediting the informant is read into the affidavit.

Even Before Considering the Omitted Information About the Informant's Dishonesty, the Affidavit Did Not State Sufficient Facts on Its Face to Support a Finding of Probable Cause.

The affidavit described two motor vehicle stops of the informant, both resulting in the seizure of large quantities of controlled substances. S.App. 3-4. The affidavit also described an interview with law enforcement following another arrest after the two prior motor vehicle stops. In that interview, the informant claimed that the drugs seized in the first stop had been provided by a member of the Gangster Disciples gang, who, in turn, said the drugs provided to him came from Francis. S.App. 4-5. The informant further claimed that following that gang member's July 2023 arrest, Francis contacted the informant to say he would be directly supplying the drugs in the future. The informant said the drugs found after his second arrest were provided directly by Francis. S.App. 5. The informant went on to claim that he got drugs from Francis on a "daily basis," specifying purported quantities and prices. S.App. 5. The informant alleged that he met Francis in Manchester, New Hampshire, sometimes near the intersection of Rimmon and Putnam Streets, and that he believed Francis lived nearby. S.App. 5. The informant said he would meet personally with Francis and described the make, model, and rims of Francis's car, that the controlled substances would be in the passenger

compartment or trunk of the car, and that Francis sometimes had a gun with him. S.App. 5-6.

The FBI Agent corroborated a few of these facts. He confirmed that a member of the Gangster Disciples had been arrested in July of 2023. S.App. 5. He confirmed that Francis was associated with a residence in the general area where the informant claimed to have met Francis to pick up drugs. S.App. 6. And the FBI Agent corroborated the make and model of Francis's car. S.App. 6.

However, the FBI Agent did not corroborate any instance of criminal activity by Francis. Nor did he say that the informant accurately predicted some future behavior of Francis, criminal or otherwise. Similarly, the FBI Agent did not provide any independent verification that the informant and Francis had meetings or communications, much less committed a crime together. There were no text messages, no recorded conversations, no statements from any other witnesses who saw the two together, or anything of the kind, which might confirm that the informant was meeting with Francis or receiving drugs from him.

Furthermore, there was no claim in the affidavit that the informant's statements regarding Francis should be accepted because the informant provided reliable information in the past. To the contrary, the affidavit was completely silent as to any prior information received from the informant. The only "track record" of the informant was his own repeated criminal conduct, in the form of arrests for serious drug crimes and thus his motive to curry favor with law enforcement. S.App. 3-4.

A few corroborated innocent facts and entirely uncorroborated claims of criminal conduct do not establish probable cause. Probable cause exists when "given all the circumstances set forth in the affidavit…including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. Magistrates are to use a "totality-of-the-circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip[.]" *Id.* at 234. "[R]elevant considerations" include "the informant's 'veracity' or 'reliability' and his 'basis of knowledge,'" *id.* at 233, and corroboration of the informant's allegations. *Id.* at 241-42, 244-45. A "deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233. But "a mere conclusory statement that gives the Magistrate virtually no basis at all for making a judgment regarding probable cause" is insufficient. *Id.* at 239.

The Affidavit Did Not Establish the Probable Veracity and Basis of Knowledge of the Informant.

The FBI Agent admitted that the informant had no track record of being a reliable source of information. App. 199, 335-36. He had never provided information of criminal conduct in prior cases, let alone information which had been verified. App. 199. Nor did he do so in this case.

Similarly, the FBI Agent acknowledged that in many cases, a cooperating witness makes a "controlled buy" observed by law enforcement. App. 198. The usual

scenario is that agents search the informant to make sure he has no drugs, then provide him money to buy drugs from the suspect, then law enforcement observes the controlled buy from a distance, sometimes even recording it. *See, e.g.*, *United States v. Carmona*, 103 F.4th 83, 87 (1st Cir. 2024); *United States v. Moore*, 999 F.3d 993, 998 (6th Cir. 2021); *United States v. Bacon*, 991 F.3d 835, 840 (7th Cir. 2021); *United States v. Bradley*, 924 F.3d 476, 481 (8th Cir. 2019). The affidavit in this case is devoid of any such evidence.

In addition, from the FBI Agent's testimony, it appears that there were other means available to determine whether the informant was telling the truth. The informant claimed that he arranged meetings with Francis by phone and text message. S.App. 5. Such claims could be verified to support an informant's credibility. In other cases, appellate courts have recognized that confirmation of electronic communications between the informant and suspect helps buttress the informant's credibility. *See, e.g.*, *Carmona*, 103 F.4th at 90-91; *United States v. Gomez*, 358 F.3d 1221, 1227 (9th Cir. 2004); *United States v. Crawford*, 943 F.3d 297, 307 (6th Cir. 2019). The FBI Agent acknowledged as much. App. 185-86. He testified that law enforcement often looks at evidence of phone contact and text messages between an informant and a suspect to buttress the informant's claims. App. 185-86. Yet there is no such information in the affidavit in this case. S.App. 4-6; App. 196-97.

The informant also alleged that he sometimes met Francis in the vicinity of Putnam and Rimmon Streets in Manchester. S.App. 5. The trial court credited law

enforcement for corroborating that Francis resided at 231 Thornton Street, "close to where the CI said his drug transactions with Francis were conducted." Cert. App. 3; Add. 10. Despite this information, law enforcement did not obtain any surveillance video, GPS records, or other evidence that could have been used to evaluate the informant's claims about having met Francis in a particular location and confirmed these alleged meetups in west Manchester.

Finally, while cases have recognized that predictions of future behavior of a suspect may indicate an informant is reliable and has a sound basis of information, *Gates*, 462 U.S. at 244, *Alabama v. White*, 496 U.S. 325, 331-32 (1990), the affidavit in this case lacked any such predictions. *See Florida v. J.L.*, 529 U.S. 266, 271 (2000). If Francis was selling drugs from his car, typically from a particular location, the agents could have surveilled the location for such activity. The affidavit here does not contain such a prediction of future behavior.

The Affidavit Did Not Establish that the Informant's Statements Reflected Firsthand Knowledge.

In its denial of the motion to suppress, the district court wrote that the "information provided by the CW was detailed and comprehensive," specifically, "the make, model and identifying details of defendant's car, the location of the reported drug deals, how his meet-ups with Francis were arranged, where Francis would store drugs to be exchanged at the meet-ups, the nearby location of the defendant's residence, the amounts of drugs the CW purchased from Francis, and the prices at which the drugs were purchased." Cert. App. 13; Add. 20.

The First Circuit misinterpreted its own precedent to conclude that corroboration of innocent details alone is sufficient to establish probable cause. *Compare Francis*, 132 F.4th at 108; Cert. App. 36 *with United States v. Tiem Trinh*, 665 F.3d 1, 12 (1st Cir. 2011) (explaining that corroboration of innocent activity "may support a finding of probable cause" where informant gave detailed description of interior of premises and law enforcement corroborated informant's claims with intercepted phone calls and surveillance). That court also erroneously cited to *Illinois v. Gates* in support of that argument, when, in fact, *Gates* was referring to "future actions of third parties ordinarily not easily predicted." *Compare Francis*, 132 F.4th at 108; Cert. App. 36 (erroneously suggesting that *Gates* was describing "defendants' seemingly innocent activities") *with Gates*, 462 U.S. at 245 (describing how "[i]f the informant had access to accurate information of [future actions of third parties ordinarily not easily predicted] a Magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gateses' alleged illegal activities.").

Moreover, the informant's claims of firsthand knowledge did not establish that he actually had any firsthand knowledge. As Francis emphasized in his motion to suppress and at oral argument, the information provided by the informant was innocuous, publicly available information, or allegations of uncorroborated, past criminal activity. Law enforcement only corroborated innocent facts: they ran a criminal background check on Francis, ran a records check for vehicles registered to Francis, identified a residence associated with Francis, and confirmed that that

address was in the vicinity of the urban intersection where the informant claimed to meet Francis. S.App. 6. None of these claims, standing alone, establishes any firsthand knowledge of past or future criminal activity. Moreover, the FBI Agent acknowledged that publicly available information is less reliable than information not generally available to the public which might indicate special, or firsthand, knowledge. App. 184-85.

Both the affidavit and the FBI Agent's testimony detailed the informant's claim that he had daily or near daily meetups with Francis. S.App. 5; App. 169-70. Yet, law enforcement never witnessed any of these alleged meetings and the affidavit does not describe any other witnesses to such meetings. App. 196. Nor was there any other evidence of the claimed meetings, such as security video collected from a nearby business showing a meet-up. In short, the affidavit contains claims by the informant that Francis had engaged in criminal conduct, but the affidavit does not actually establish that the informant had any firsthand knowledge of such conduct.

The Affidavit Only Described Corroboration of a Few Innocent Facts and Did Not Provide Corroboration of Any Criminal Conduct or Future Conduct of Francis, Whether by Surveillance or Otherwise.

This Court has distinguished between an informant's "easily obtained facts" and other information, like descriptions of "future actions of third parties ordinarily not easily predicted." *Gates*, 462 U.S. at 245. Likewise, in *White*, this Court quoted *Gates* and distinguished information that "[a]nyone could have 'predicted'" with an informant's predictions of future conduct, which "demonstrated inside information –

a special familiarity with [the defendant's] affairs." *White*, 496 U.S. at 332. Without predictive information from the informant, corroboration does not confirm the reliability of the informant. *See J.L.*, 529 U.S. at 271.

Here, law enforcement merely corroborated publicly available, innocuous information. The most detailed information the informant provided, the color, make, model, and rims of the Defendant's car, is information that any person on the street could offer. But as this Court has explained, such information, like a "subject's readily observable location and appearance…does not show that the tipster has knowledge of concealed criminal activity." *J.L.*, 529 U.S. at 272. This is a far cry from corroboration of "significant aspects" of the informant's allegations that this Court has found import reliability to the informant. *White*, 496 U.S. at 332. *See also United States v. Tuter*, 240 F.3d 1292, 1297-98 (10th Cir. 2001) (concluding that the "minimal corroboration of innocent, readily observable facts" like the defendant's "appearance, residence, [and] cars" is "insufficient to establish the veracity or reliability" of an informant), *cert. denied*, 538 U.S. 886 (2001).

The informant's allegation that the drugs were stored either in the passenger compartment or the trunk, S.App. 5; App. 170, is similarly unhelpful in strengthening the informant's credibility because the claim merely alleges that drugs were somewhere in the vehicle. The trunk or the passenger compartment are, of course, the most likely place for anyone to store items in a car. Without any more specific details about where in the passenger compartment or trunk items were located, or what those compartments looked like, the informant's claim was nothing

more than a generalized allegation that Francis had drugs somewhere in his car, not the sort of tip that "demonstrated inside information — a special familiarity with [the defendant's] affairs," *White*, 496 U.S. at 332, or "any basis for believing he had inside information." *J.L.*, 529 U.S. at 271. Likewise, the informant's claims about the interior of the car—that Francis allegedly kept a gun there and that sometimes the exchanges took place there—were not corroborated.

The Agent Claimed to Have Assessed the Probable Significance of the Informant's Statements, But in Reality, the Agent Withheld Information Which Would have Discredited the Informant.

The agent's assessment of the informant's statements cannot be considered without recognizing that the FBI Agent discounted discrediting information which he should have revealed to the Magistrate. As he testified, he performed a criminal record check on the informant, App. 192, would have noticed his felony conviction for falsifying evidence, App. 192, and "was aware of his criminal history." App. 196. The FBI Agent was likewise aware of the informant's prior arrests, App. 323, reviewed reports of those arrests, App. 324-25, and included details from those reports in his affidavit. App. 325-26. Yet, he did not inform the Magistrate that the informant had been deceptive and that officers described him as deceitful. App. 326, 331. He failed to provide this information despite his admission that those factors would be important in assessing the informant's reliability. App. 187. His only explanation was that he "didn't feel like it was necessary." App. 186-87, 196.

The district court's response to these arguments was that "[b]est practices might counsel including the omitted information, but failure to include it did not

undermine the Magistrate judge's assessment" because "[n]either the CW's prior criminal conviction, nor the CW's dishonesty as described in the July 30 police report are sufficient to undermine the probable cause finding." Cert. App. 10; Add. 17. The district court was mistaken in its conclusion. The court failed to give the omitted discrediting information the weight it deserved and the First Circuit erred in affirming the district court's decision.

More to the point for this petition, the FBI Agent usurped the Magistrate judge's role when he unilaterally decided that the informant's criminal conviction for dishonesty and history of lying to law enforcement were irrelevant. App. 194-96. As explained in this Court's *Johnson* opinion, the Fourth Amendment allocates that decision to the Magistrate, not to the law enforcement agent. As detailed above, the Ninth Circuit has held that conviction of a crime of dishonesty, standing alone, is "fatal to the reliability" of an informant unless the affidavit notes the crime and offers additional evidence to explain why the informant should nonetheless be trusted. *Elliott*, 322 F.3d at 716 (quoting *Reeves*, 210 F.3d at 1045). Likewise, the Seventh Circuit has explained that where "the officer's affidavit omitted all credibility information…the Magistrate had no meaningful opportunity to exercise his or her discretion to draw favorable or unfavorable inferences." *Glover,* 755 F.3d at 818.

The First Circuit likewise erred when it concluded that because the district court found the FBI Agent to be credible and that his explanations for failing to include the informant's criminal history of dishonesty and deception were

"objectively reasonable," therefore there was no *Franks* violation. *Francis*, 132 F.4th at 109; Cert. App. 39. It was for the issuing Magistrate, not law enforcement, to conduct "a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip." *Gates*, 462 U.S. at 234; *Johnson*, 333 U.S. at 13-14; *Wong Sun*, 371 U.S. at 481-82.

An agent providing an affidavit to a Magistrate in support of a request for a search warrant should, of course, inform the Magistrate of the agent's opinion of the informant's credibility and the basis for that opinion, but that does not mean that all the decisions regarding credibility and reliability belong to the agent. Yet here, the FBI Agent said he decided against including the informant's criminal history because he did not think it was necessary. App. 194-96. He also admitted that he does "a lot of assessment himself" and makes "decisions on whether someone's telling the truth." App. 183, 200. This is the opposite of what this Court has instructed: the "point of the Fourth Amendment…is not that it denies law enforcement the support of the usual inferences which reasonable men drawn from evidence" but that its "protection consists in requiring that those inferences be drawn by a neutral and detached Magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* 333 U.S. at 13-14 (1948) (underline added).

Furthermore, there are good reasons to question the FBI Agent's assessment of an informant's credibility. The FBI Agent testified that he was more likely to believe someone who had been caught twice with drugs than a random citizen. App.

199-200. But this Court has said the opposite. *Compare Gates*, 462 U.S. at 233-34 ("if an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny of the basis of his knowledge unnecessary") (citing *Adams v. Williams*, 407 U.S. 143, 146-47 (1972) *with Jaben v. United States*, 381 U.S. 214, 224 (1965) (describing "narcotics informants…whose credibility may often be suspect").

The FBI Agent's Conduct Was Either "Reckless" or "Knowing."

Finally, the FBI Agent's omissions were not unintended mistakes. Under *Franks*, the defendant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit[.]" *Franks*, 438 U.S. at 155-56. Here, the FBI Agent acknowledged that the affidavit for the search warrant depended on the credibility of the informant. App. 189. He admitted that the informant was substantially motivated after his arrests to do something to help himself. App. 183-84, 191. He even acknowledged that a felony conviction for Falsifying Physical Evidence would be "pretty important" in assessing credibility. App. 187. In these circumstances, the FBI Agent was more than negligent when he omitted the evidence of the informant's record from the affidavit. His conduct was reckless or knowing.

The district court gave weight to the FBI Agent's assessment of credibility and wrote that there "is no evidence suggesting that Burke harbored any doubts at

all – let alone serious doubts – about the veracity of the affidavit, or that he thought that either of the omitted facts were significant in assessing probable cause." Cert. App. 17; Add. 24. Similarly, the First Court found the FBI Agent's explanations to be "objectively reasonable." *Francis*, 132 F.4th at 109; Cert. App. 39. Those conclusions miss the point. Even if the agent's decision was reasonable, it was not his decision to make. Francis had a Fourth Amendment right to not have his car searched pursuant to a warrant unless and until the facts were assessed and inferences were drawn by a neutral and detached Magistrate who made the determination of probable cause.

CONCLUSION

For all of the foregoing reasons, Francis respectfully requests that the Court grant his petition for a writ of certiorari.

Date: June 23, 2025

Respectfully submitted,

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CERTIFICATE OF MEMBERSHIP OF SUPREME COURT BAR

I, Richard Guerriero, certify that I am a member of the Supreme Court Bar, Bar No. 177863, since 1988.

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SUPREME COURT OF THE UNITED STATES

MICHAEL FRANCIS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari in this case contains 6,542 words, excluding the parts of the document that are excluded by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

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APPENDIX

Table of Contents