No. 09-1532

In the Supreme Court of the United States

CHARLES CLAYTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether probable cause existed to search petitioner's military quarters in Kuwait for evidence of child pornography.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 4a-29a) is reported at 68 M.J. 419. The opinion of the Army Court of Criminal Appeals (Pet. App. 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2010. The petition for a writ of certiorari was filed on June 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a conditional guilty plea before a general court-martial, petitioner was convicted of violation of a lawful general order and possession of child pornography, in violation of Articles 92 and 134 of the Uniform

Code of Military Justice (UCMJ), 10 U.S.C. 892, 934. Petitioner was sentenced to 40 months of imprisonment, which the convening authority subsequently reduced to 36 months, and a dismissal from the armed forces. Pet. App. 5a-6a. The Army Court of Criminal Appeals (ACCA) affirmed. *Id.* at 1a-3a. The Court of Appeals for the Armed Forces (CAAF) granted a petition for review and affirmed. *Id.* at 4a-29a.

1. Petitioner was a Lieutenant Colonel in the United States Army Reserve serving a tour of duty at Camp Arifjan, Kuwait. In November 2005, Senior Special Agent (SSA) Glen Watson, a child exploitation investigator for United States Immigration and Customs Enforcement (ICE), discovered an Internet child pornography group on Google entitled "Preteen-Bestiality-and-Anything-Taboo." SSA Watson discovered that child pornography had been posted on the site, along with requests for child pornography. Pet. App. 7a; CAAF J.A. 72.

SSA Watson contacted Google and requested information about the group's moderator and members. Google shut down the group and provided SSA Watson with the e-mail addresses and subscriber notification categories of the group members. The membership list included an e-mail account bearing petitioner's name, "charlesjclayton@yahoo.com." Through his investigation, SSA Watson learned that petitioner was the owner of that e-mail account. He also discovered that petitioner's Yahoo account had been accessed from a computer owned and operated by the United States Army in Kuwait. Finally, SSA Watson learned that petitioner had requested "digest notification[s]" from the group, meaning that he would automatically receive a daily e-mail containing up to 25 group postings, including

any attachments. SSA Watson referred the case to the Army's Criminal Investigation Command (CID) at Camp Arifjan. Pet. App. 7a-8a; CAAF J.A. 54, 135-136.

In April 2006, Special Agent (SA) Yolanda McClain of the 21st Military Police Detachment prepared a search authorization affidavit. SA McClain averred that she had participated in several investigations of computer crimes involving child pornography, and that prior investigations had shown that offenders share illicit material via e-mail, download the material, and store it on various media devices. She summarized the results of SSA Watson's investigation, and she averred that ICE had recently executed search warrants in California and Minnesota that had resulted in the arrest of the group moderator and media manager for possession of child pornography. SA McClain requested authorization to search petitioner's government laptop computer, and also to search petitioner's work area and living quarters for computers and media storage devices. Pet. App. 8a-9a; CAAF J.A. 54-55.

SA McClain's affidavit suggested that child pornography had been discovered on a government computer, and that petitioner was a suspected login user. SA McClain later testified that this was an error, and that she meant to say that a military computer had accessed petitioner's Yahoo account through a U.S. Army server in Kuwait, and that this Yahoo account was also used to access the child pornography group. Pet. App. 16a-17a; CAAF J.A. 73-74.

SA McClain presented the affidavit to a military magistrate judge, and she spent 30-45 minutes discussing the investigation with him. The magistrate judge reviewed the evidence and various sources of law, and he

approved the search request later that afternoon. Pet. App. 8a-10a; CAAF J.A. 171.

During a search of petitioner's quarters, the CID found three computers, 536 CDs and DVDs, three external hard drives, and other digital media that contained thousands of images of child pornography. Pet. App. 6a; CAAF J.A. 12.

2. On July 19, 2006, petitioner was charged with violating a lawful general order and possession of child pornography, in violation of Articles 92 and 134 of the UCMJ, 10 U.S.C. 892, 934. Petitioner filed a pretrial motion to suppress the evidence seized from his quarters, on the ground that there was no probable cause for the search. The military judge denied the motion. Pet. App. 5a-6a; CAAF J.A. 1.

Citing *Illinois* v. *Gates*, 462 U.S. 213 (1983), the judge explained that his role was to determine whether the magistrate judge had a substantial basis to conclude that probable cause existed. Although the affidavit included an incorrect statement that child pornography had been located on a government computer, the military judge nevertheless concluded that the other information submitted to the magistrate judge, including evidence that petitioner belonged to a Google group devoted to child pornography and requested that digests of group postings be e-mailed directly to him, gave rise to a fair probability that child pornography would be found in petitioner's quarters. The military judge also concluded, in the alternative, that the evidence was admissible under the good faith exception to the exclusionary rule. Petitioner pleaded guilty to the charges, reserving his right to challenge the search on appeal. The military judge sentenced petitioner to 40 months of im-

prisonment and dismissal from the armed forces. Pet. App. 5a-6a, 10a-11a; CAAF J.A. 73-76.

3. The convening authority reduced petitioner's term of imprisonment to 36 months and waived the automatic forfeiture of his pay for six months, directing that the funds be paid to petitioner's wife. CAAF J.A. 255.

4. The ACCA amended the specification with respect to the location of the offense, and it affirmed the remaining findings and petitioner's sentence. Pet. App. 1a-3a.

5. The CAAF granted review of petitioner's Fourth Amendment claim and affirmed. Pet. App. 4a-29a. The court of appeals noted that, under *Gates* and corresponding military authorities, its role was to determine whether the military judge misapprehended the law by concluding that there was a substantial basis for the magistrate judge's probable cause determination. *Id.* at 11a-13a. The court of appeals also observed that many federal courts of appeals have held that a defendant's voluntary participation in a website group that had as a purpose the sharing of child pornography supports a probable cause determination that child pornography would be found on his computer. *Id.* at 13a-14a.

Applying those principles, the court of appeals concluded that the magistrate judge's probable cause determination had a substantial basis in light of petitioner's membership in the child pornography group, the confessions by the group's moderator and media manager that they were involved in child pornography distribution, petitioner's request for a digest notification to enable him to receive up to 25 postings every day from the website to his e-mail account, and the fact that an e-mail account bearing petitioner's name had been accessed by a government laptop computer in Kuwait. In support of

its conclusion that probable cause extended to the search of petitioner's quarters, the court of appeals remarked on the ease with which laptop computers are transported from work to home, and the ease with which computer media can be replicated on portable devices. Pet. App. 14a-16a.

The court of appeals acknowledged that SA McClain's affidavit inaccurately stated that child pornography had been found on a government computer. The court concluded that the misstatement did not constitute a significant element of the probable cause determination, and that probable cause existed even after excising the misstatement from the search authorization affidavit. Because it concluded that the affidavit was supported by probable cause, the court of appeals did not address the military judge's alternative holding that the evidence should be admitted under the good faith exception to the exclusionary rule. Pet. App. 16a-18a.

Judge Ryan, joined by Judge Erdmann, dissented on the ground that although the evidence established probable cause to believe that petitioner had access to child pornography, it did not demonstrate that such pornography would be found in his quarters in Kuwait. Judge Ryan also concluded that admission of the evidence was not justified under the good faith exception. Pet. App. 19a-29a.

ARGUMENT

Petitioner contends (Pet. 12-26) that the search of his computers and digital storage devices violated the Fourth Amendment because there was not probable cause to believe that child pornography would be found in his living quarters. The court of appeals correctly decided petitioner's fact-bound claim and its decision is

consistent with the decisions of other federal courts of appeals. Further review is therefore unwarranted.

1. Petitioner does not dispute the legal framework for determining whether the government has probable cause to conduct a search. Instead, he contends that the court of appeals misapplied settled law to the facts of this case. That claim does not warrant this Court's review, and the court of appeals correctly decided the claim in any event.

The probable-cause inquiry entails "a practical, common-sense" evaluation of the facts recited in support of a search warrant to determine whether there is a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). The probable cause standard "does not deal with hard certainties, but with probabilities," and law enforcement officers are entitled to "formulate[] certain common-sense conclusions about human behavior." *Id.* at 231 (quoting *United States* v. *Cortez*, 449 U.S. 411, 418 (1981)). Accordingly, the facts presented to the magistrate judge need only "warrant a [person] of reasonable caution in the belief" that evidence of a crime will be found; there is no requirement "that such a belief be correct or more likely true than false." *Texas* v. *Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (quoting *Carroll* v. *United States*, 267 U.S. 132, 162 (1925)).

In addition, "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" *Gates*, 462 U.S. at 236 (quoting *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969)). The courts' role is limited to ensuring that the magistrate had a "'substantial basis for * * * conclud[ing]' that probable cause existed." *Id.* at 238-239 (quoting *Jones* v. *United States*, 362 U.S. 257, 271 (1960), overruled on

other grounds by *United States* v. *Salvucci*, 448 U.S. 83 (1980)) (brackets in original).

The court of appeals correctly applied the probable cause standard to the facts of this case. SA McClain's affidavit established that petitioner had registered for an online group devoted to child pornography using an e-mail address that bore his name. Furthermore, petitioner had requested that the website's moderator furnish him with a daily e-mail containing up to 25 postings to the group, including any attachments. These facts give rise to the "common-sense" inference, *Gates*, 462 U.S. at 238, that petitioner likely used his registration to download and obtain child pornography. Indeed, it is well established that "evidence that a person has visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material." *United States* v. *Wagers*, 452 F.3d 534, 540 (6th Cir.) (discussing uniform views of other circuit courts), cert. denied, 549 U.S. 1032 (2006); see, *e.g.*, *United States* v. *Terry*, 522 F.3d 645, 649 (6th Cir.) (noting that courts have "universally found" that the probable cause threshold is satisfied if "defendants had purchased *access* to child pornography" on websites), cert. denied, 129 S. Ct. 235 (2008).

Petitioner's contention (Pet. 13-17) that the magistrate judge did not have a substantial basis for concluding that child pornography would be found in petitioner's quarters is without merit. SA McClain's affidavit explained that prior experience investigating child pornography computer crimes shows that offenders typically share information via e-mail, download the material, and store it on various media storage devices. CAAF J.A. 54. Possession of child pornography is a

crime that is intimately tied to a place of seclusion and privacy, making it very likely that a defendant will store child pornography at his home or office. See *Wagers*, 452 F.3d at 540; see also *United States* v. *Paton*, 535 F.3d 829, 836 (8th Cir. 2008).

In this case, the most secure place that petitioner could have kept his child pornography files was in his personal quarters. If petitioner kept his child pornography files at his military workplace, those files could be exposed during a military inspection, see Military R. Evid. 313 (authorizing the admission of evidence found during legitimate military inspections), or during a reasonable search of military property, see Military R. Evid. 314(d) (authorizing searches without probable cause of government property that is not issued for personal use). Cf. *City of Ontario* v. *Quon*, 130 S. Ct. 2619 (2010) (upholding as reasonable search of government communication device issued to government worker). Moreover, as the court of appeals noted (Pet. App. 15a), given the ease with which laptop computers can be transported from work to home and the ease with which computer files and digital media can be replicated on portable devices, it was reasonable to infer that petitioner had child pornography in his quarters, even if he initially accessed the material from another location.

The court of appeals' decision is in accord with the decisions of every other court of appeals to consider similar factual scenarios. See *Wagers*, 452 F.3d at 540; see also *United States* v. *Wilder*, 526 F.3d 1, 6 (1st Cir.) ("[I]t was a fair inference from [the defendant's] subscription to the Lust Gallery website, as described in the affidavit, that downloading and preservation in his home of images of child pornography might very well follow."), cert. denied, 129 S. Ct. 626 (2008); *United States* v.

Gourde, 440 F.3d 1065, 1071-1072 (9th Cir.) (en banc) (concluding that probable cause supported search of defendant's computer where he purchased two-month membership to child pornography website), cert. denied, 549 U.S. 1032 (2006); *United States* v. *Martin*, 426 F.3d 68, 75 (2d Cir. 2005) (finding probable cause to search house where occupant of house was member of child pornography e-group), cert. denied, 547 U.S. 1192 (2006); *United States* v. *Froman*, 355 F.3d 882, 890-891 (5th Cir. 2004) (finding probable cause to search defendant's apartment where he voluntarily joined an e-group formed primarily to send and receive child pornography); *United States* v. *Hutto*, 84 Fed. Appx. 6, 8 (10th Cir. 2003) (concluding that defendant's subscription to child pornography e-group "would strongly support an inference that his computer hard drive contained images of child pornography").

Petitioner's attempt (Pet. 19-20) to distinguish these cases is unpersuasive. Petitioner notes (Pet. 20) that the defendant in *Gourde* paid a monthly fee for his subscription service and therefore did more than simply "click * * * the computer mouse button" to join the group. Petitioner too, however, did more than simply click a button and join a child pornography e-group. He also signed up to receive digest notifications from the group, meaning that he would automatically receive a daily e-mail containing up to 25 group postings, including any attachments. Pet. App. 7a-8a; Gov't CAAF Br. 3-4.

Petitioner also argues (Pet. 20) that unlike in *Gourde*, *Martin*, and *Froman*, SA McClain's affidavit did not establish that petitioner was a collector of child pornography or explain how collectors store and maintain pornographic images. That is incorrect. Similar to the affidavits in those cases, SA McClain averred that

she had participated in several investigations of computer crimes involving child pornography, and that prior investigations had shown that offenders share illicit material via e-mail, download the material, and store it on various media devices. Pet. App. 8a-9a; CAAF J.A. 54-55. In any event, the courts in *Gourde*, *Martin*, and *Froman* did not suggest that their findings of probable cause depended on such allegations. Rather, those courts simply concluded, based on the totality of the circumstances, that the magistrates' probable cause determinations satisfied the fair-probability standard. See *Gourde*, 440 F.3d at 1071-1072; *Martin*, 426 F.3d at 75-76; *Froman*, 355 F.3d at 890-891. Petitioner has identified no error in the court of appeals' fact-bound conclusion that warrants this Court's review.[*]

2. Nor does the decision below conflict with decisions of other courts of appeals, as petitioner suggests. Petitioner asserts (Pet. 23) that a panel of the Second Circuit in *United States* v. *Coreas*, 419 F.3d 151 (2005), concluded that an affidavit stating that the defendant was a member of a child pornography e-group did not support an inference that he possessed child pornography. *Id.* at 156-157. However, as petitioner acknowledges (Pet. 23), the Second Circuit panel that decided *Coreas* concluded that it was bound by the earlier panel decision in *Martin* to hold that probable cause existed. *Id.* at 159. The decision in *Coreas* therefore does not create a circuit conflict. It is also distinguishable. The

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[*] Petitioner correctly observes (Pet. 17) that SA McClain's affidavit inaccurately stated that child pornography had been found on a government computer, but he fails to address the court of appeals' conclusion that the affidavit established probable cause after excising that false statement. Pet. App. 16a-18a. That fact-bound conclusion warrants no further review.

defendant in *Coreas* joined a child pornography e-group "by clicking a button that added his e-mail address to its roll of members," but he did not sign up to receive the group's e-mails. *Id.* at 156. The *Coreas* court placed significant weight on the absence of the additional step that petitioner took here by signing up to receive digests of the group's postings. *Id.* at 152, 156.

Petitioner also asserts (Pet. 24) that the decision below conflicts with the decision of a panel of the Ninth Circuit in *United States* v. *Weber*, 923 F.2d 1338, 1344 (1990). That case is distinguishable, and it was in fact distinguished in the Ninth Circuit's subsequent en banc decision in *Gourde*. See 440 F.3d at 1073-1074 (distinguishing *Weber*). In *Weber*, the court found probable cause lacking where the warrant affidavit relied on the defendant's possibly unsolicited receipt of pornography advertisements (which he never actually retrieved); his subsequent placement of a single order for child pornography, unfulfilled at the time of the warrant, in response to non-explicit advertisements mailed to him by federal investigators; and general statements about the proclivities of "pedophiles." The court reasoned that the defendant's conduct did not provide any basis on which to infer that a search would reveal any child pornography. 923 F.2d at 1344-1345. Here, by contrast, petitioner's registration for a child pornography e-group and his request to receive daily digests of the material posted to the group provide ample basis for an inference that he possessed child pornography. The Ninth Circuit has upheld a finding of probable cause based on similar facts. See *Gourde*, 440 F.3d at 1073-1074.

In any event, even if there were a conflict within the Second or the Ninth Circuit regarding whether certain facts amount to probable cause, that would not warrant

this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Nor does the court of appeals' decision conflict with cases holding that mere membership in a group suspected of criminal activity is insufficient to establish probable cause. See Pet. 24-25 (citing *United States* v. *Brown*, 951 F.2d 999 (9th Cir. 1991), and *United States* v. *Rubio*, 727 F.2d 786 (9th Cir. 1983)). Petitioner voluntarily joined a group that had as its purpose the sharing of child pornography, and he took further steps indicative of criminal activity by registering to have daily digests of the group postings delivered to his e-mail account.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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