No. 05-1062

In the Supreme Court of the United States

WILLIE COREAS, 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

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the search warrant affidavit established probable cause to search petitioner's computer and home for child pornography.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 05-1062

WILLIE COREAS, 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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A15-A31) is reported at 419 F.3d 151. The opinion of the court of appeals on denial of rehearing (Pet. App. A33-A37) is reported at 426 F.3d 615. The order denying rehearing en banc, along with the concurring and dissenting opinions of two judges (Pet. App. A41-A49), is reported at 430 F.3d 73.

JURISDICTION

The court of appeals entered its judgment on August 18, 2005. A petition for rehearing was denied on November 18, 2005 (Pet. App. A41-A49). The petition for a writ of certiorari was filed on February 16, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the entry of a conditional guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted of ten counts of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). He was sentenced to 27 months of imprisonment. The court of appeals affirmed. Pet. App. A15-A31.

1. In January 2001, FBI Special Agent Geoffrey Binney began investigating an interactive "e-group" website known as "Candyman" for possible violations of the federal prohibitions on possessing, receiving, and trafficking in child pornography, see 18 U.S.C. 2252, 2252A. The website's invitation read: "This group is for People who love kids. You can post any type of messages you like too or any type of pics and vids you like too. P.S. IF WE ALL WORK TOGETHER WE WILL HAVE THE BEST GROUP ON THE NET." Pet. App. A17. The homepage also included a "'transgender' category" for subscribers, and "made it clear that the site provided access to * * * images" of "child pornography." *Id.* at A8. The website contained a "files" section, which allowed members to upload to and download from the website photographic images and video files of children. *Ibid.*; Berglas Aff. (Gov't Mem. of Law in Opp. to Mot. to Suppress, Exh. A) paras. 24, 25. The photographs and video clips were images of (i) prepubescent minors engaged in sexual activities, (ii) the genitalia of nude minors, and (iii) child erotica, such as prepubescent minors posed in provocative ways. Berglas Aff. para. 25. The website also offered a "chat" site, which allowed members to converse with each other in real time, and provided access to an e-mail list, whereby members could

choose to receive e-mails from other members of the group and notices of newly posted images. *Id.* para. 24. In addition, the website contained a "polls" section, which surveyed members on such matters as "what age group do you prefer." *Ibid.* Finally, the website offered links to other websites with similar content. *Ibid.*

When Agent Binney clicked the "join" button on the Candyman website, he was presented with three options for receiving e-mail from the group: (i) automatic e-mail of all mail and postings to the group, (ii) an automatic digest of each day's e-mails, or (iii) no automatic e-mails. The latter option left it to the individual subscriber to decide, when visiting the website, which messages to read and which files to download. Agent Binney chose to receive all e-mails from the group automatically. Between January 2, 2001, and February 6, 2001, when the Candyman website was closed down, Agent Binney received 498 e-mail messages from members of the group, with 288 files transmitted. Of the 288 files, 105 contained child pornography. Pet. App. A17.

Shortly after the site was shut down, Yahoo! Inc., the host of the Candyman site, provided the government with a list of e-mail addresses of people who were "members" and activity logs for the group, including information about when members subscribed, unsubscribed, and carried out other activities such as posting images or text messages. Pet. App. A18-A19. Agent Binney then drafted an affidavit that law enforcement officials around the country relied on to support search warrant applications for the private residences of persons identified as members of the Candyman site. *Id.* at A18. That affidavit, however, falsely represented that all members of the group automatically received all e-mails and post-

ings of photographs and videos sent to the Candyman site. *Id.* at A19.[1]

2. In November 2001, federal agents obtained search warrants to search for child pornography at petitioner's residence and 23 other residences based on an affidavit from FBI Agent Austin Berglas. The Berglas affidavit incorporated Agent Binney's representations concerning the content and design of the Candyman e-group. The affidavit further identified petitioner as having used the e-mail address "rev_bd@yahoo.com" as a member of the Candyman website from January 17, 2001, until the site was shut down on February 6, 2001. Berglas Aff. para. 133. The affidavit explained that the government had traced that e-mail address to petitioner's residence. *Id.* para. 137. The affidavit also provided a lengthy profile of the practices and characteristics of child pornography collectors and their use of Internet sites like Candyman to feed their desires, to justify their behavior, and to provide a veil of secrecy over their illicit habits. The profile further noted that child pornographers rarely dispose of their child pornography collections. Pet. App. A19-A20; Berlgas Aff. paras. 8-20. Lastly, the affidavit explained that the majority of individuals who collect child pornography also collect child erotica, because the erotica can "fuel their deviant sexual fantasies involving children." *Id.* para. 20(b).

Agents executing the search warrant at petitioner's residence found approximately 100 computerized images

---

[1] The affidavit also falsely asserted that all new members were required to join Candyman by sending an e-mail message to the group's moderator, when, in fact, the Agent and others had joined the Candyman group by clicking a subscriber button on its website. Pet. App. A22-A23.

involving child pornography. Pet. App. A21. Petitioner was subsequently indicted on ten counts of possessing child pornography. *Ibid.*

After the government learned of Agent Binney's inclusion of two false assertions in his affidavit, the government notified petitioner's counsel, who then moved to suppress the evidence obtained during the search. Pet. App. A21-A22. The district court initially denied the motion on the ground that petitioner had not shown that Agent Binney's errors (upon which Agent Berglas relied in preparing the affidavit in this case) were intentional. *Id.* at A1-A6, A22.

Petitioner moved for reconsideration, noting that other district courts and evidence provided by Yahoo's records demonstrated that the statements were intentionally false. The district court denied petitioner's motion for reconsideration. Pet. App. A7-A13. The court held that, even if the false statements were redacted, the affidavit established probable cause to believe that evidence of child pornography would be found at petitioner's residence. The court relied on the affidavit's documentation of the proclivities and characteristics of Internet child pornography subscribers, the content and nature of the Candyman site, the types of photographs and images to which it provided access, and petitioner's voluntary membership in the group for three weeks. *Id.* at A12.

Petitioner then entered a conditional plea of guilty to the child pornography charges and was sentenced to ten concurrent terms of 27 months of imprisonment. Pet. App. A24.

3. The court of appeals affirmed, Pet. App. A15-A31, remanding the case only for resentencing in light of *United States* v. *Booker*, 543 U.S. 220 (2005). Applying

this Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), the court first held that the inaccuracies in the affidavit underlying the search warrant for petitioner's home were made in reckless disregard of the truth. Pet. App. A24-A25.

With respect to the second question under *Franks* —whether, setting aside the falsehoods in the affidavit, the remaining allegations were sufficient to support a finding of probable cause—the panel indicated its view that the affidavit did not establish probable cause. Pet. App. A25. In the panel's view, the remaining allegations established only petitioner's "mere act of responding affirmatively to the invitation to join Candyman." *Ibid.* That was deemed to be insufficient to establish probable cause because a "person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Ibid.* (quoting *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979)). The panel also expressed concern that, if the mere act of "clicking a button" was sufficient to justify a search of an individual's premises, First Amendment rights of free speech and association would be chilled. *Id.* at A25-A26.

The panel nevertheless concluded that it was compelled to uphold the search warrant based on the recent and binding decision of the Second Circuit in *United States* v. *Martin*, 426 F.3d 68, on rehearing, 426 F.3d 83 (2005), petition for cert. pending, No. 05-1073 (filed Feb. 16, 2006). In *Martin*, the court of appeals upheld a search based upon a similarly flawed affidavit pertaining to a defendant's subscription to the e-group "girls 12-16." Pet. App. A27. The *Martin* court relied on the facts that the overriding purpose of the "girls 12-16" e-group was to traffic in child pornography; the website's

welcome message announced that its purpose was to trade in child pornography; the affidavit contained an extensive background discussion of the modus operandi of child pornographers, including their reliance on the internet to access, download, and permanently store and keep child pornography; and the defendant had voluntarily joined the "girls 12-16" website and had never cancelled his membership. 426 F.3d at 74-77.[2]

While the panel in petitioner's case "believe[d] *Martin* itself was wrongly decided," it affirmed in reliance on *Martin* "under established rules of this circuit." Pet. App. A30-A31.

4. The panel denied a petition for rehearing, even though the *Martin* panel had recently issued a decision on rehearing that noted possible distinctions between the two cases, see *Martin*, 426 F.3d at 85-86. Pet. App. A33-A37.

The full Second Circuit also denied rehearing en banc simultaneously in both *Martin* and petitioner's case. Pet. App. A41-A49. Judge Wesley specially concurred in the denial, noting that "this case is not about an accidental tourist who while casually surfing the internet stumbles upon a website with a 'few clicks of a mouse.'" *Id.* at A43 (quoting *id.* at A49). He stressed that the probable cause standard does not require certainty of guilt or the exclusion of innocent conduct. It requires only a "practical, common-sense decision" that there is a "fair probability" that evidence of a crime will be found. *Id.* at A45 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983)). He noted that the defendants had affirmatively joined an e-group; they had maintained their

[2] One member of the *Martin* panel, Judge Pooler, filed a dissent, 426 F.3d at 78-83, which the panel in petitioner's case largely echoed, see Pet. App. A30.

memberships until the sites were shut down; the website's purpose was "predominantly illegal"; and, "in the internet era, *many* crimes can be committed with just a few clicks of a mouse." *Id.* at A43 & n.2. Judge Wesley further noted that the court's decision was in accord with the ruling of every other court of appeals to address the question. *Id.* at A43 n.1.

Judge Pooler dissented from the denial of rehearing en banc. Pet. App. A47-A49.

ARGUMENT

Petitioner seeks this Court's review of whether the affidavit used to obtain a search warrant in his case, with the false statements redacted, established probable cause to believe that child pornography would be found in his home. That record-bound question does not merit this Court's review. Its resolution turns on the application of settled law to the facts of petitioner's case. Moreover, more than three years have passed since the falsehoods in the Candyman affidavit were exposed. The narrow question of whether and when warrants arising from that long-since-completed investigation establish probable cause does not present the type of recurring legal question that merits an exercise of this Court's certiorari jurisdiction.

1. Petitioner does not dispute that the court of appeals applied the correct legal standard in this case and in *United States* v. *Martin*, 426 F.3d 68 (2d Cir.), on rehearing, 426 F.3d 83 (2005), petition for cert. pending, No. 05-1073 (filed Feb. 16, 2006), which the court held controlled petitioner's case, Pet. App. A27. In both cases, the outcome turns on a case-specific application of this Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), to determine (i) whether the falsehoods

in the affidavit were recklessly made, and, if so, (ii) whether the remaining allegations independently supported probable cause. Compare *id.* at 156, with Pet. App. A24, and *Martin*, 426 F.3d at 73.

Furthermore, the *Martin* court correctly articulated the governing probable-cause standard. As this Court has directed, the court of appeals made a "*practical, common-sense decision* whether, given all the circumstances set forth in the affidavit before [the court] * * * there is a *fair probability* that contraband or evidence of *a* crime will be found in a particular place." *Martin*, 426 F.3d at 74 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 238-239 (1983)) (emphases added by panel). The court underscored that "[p]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Ibid.* (quoting *Gates*, 462 U.S. at 232). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence," or even "a prima facie showing[] of criminal activity," "have no place in the [court's] decision." *Ibid.* (quoting *Gates*, 462 U.S. at 235).

2. The error that petitioner claims is the Second Circuit's "assessment of probabilities in [this] particular factual context[]," *Gates*, 426 U.S. at 232. That claim does not warrant review for four reasons.

First, there is no conflict in the circuits. Quite the opposite, every court of appeals that has addressed the question has held that a search warrant affidavit issued in the Candyman investigation established probable cause, even with Agent Binney's false statements redacted. See *United States* v. *Froman*, 355 F.3d 882, 891 (5th Cir. 2004); *United States* v. *Ramsburg*, 114 Fed. Appx. 78 (4th Cir. 2004), cert. denied, 544 U.S. 989

(2005); *United States* v. *Hutto*, 84 Fed. Appx. 6 (10th Cir. 2003); cf. *United States* v. *Gourde*, 440 F.3d 1065, 1070-1071 (9th Cir. 2006) (en banc) (upholding a search warrant in a different Internet child pornography investigation because (i) the predominant purpose of the website was the distribution of child-pornography, (ii) the defendant's two-month paid subscription "manifested his intention and desire to obtain illegal images," and (iii) it was likely that evidence of such pornography would be retrievable from his computer, which factors, in turn, (iv) established that the defendant "probably had viewed or downloaded such images onto his computer").[3]

Second, petitioner emphasizes (Pet. 10-12, 15-16) the Second Circuit's internal disagreement over the resolution of his case.[4] But establishing intra-circuit harmony is not the usual province of this Court's certiorari jurisdiction. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Had the Second Circuit itself perceived the unworkable disunity that petitioner perceives, that court could have granted rehearing en banc.

---

[3] Petitioner's reliance (Pet. 16) on *United States* v. *Brown*, 951 F.2d 999 (9th Cir. 1991), and *United States* v. *Rubio*, 727 F.2d 786 (9th Cir. 1983), is misplaced. Those cases stand for the narrow principle that membership in a group does not, standing alone, constitute probable cause to search if the group has both legitimate and illegitimate functions. See *Brown*, 951 F.2d at 1003; *Rubio*, 727 F.2d at 793. The Second Circuit here did not purport to rely upon mere membership. And the en banc Ninth Circuit's recent decision in *Gourde* forecloses any argument that *Brown* and *Rubio* require the level of particularized evidence that petitioner demands here.

[4] The disagreement was not as skewed in his favor as petitioner suggests (see Pet. 11). See *United States* v. *Schmidt*, 373 F.3d 100, 103 (2d Cir. 2004) (per curiam) (agreeing, in dicta, with the majority of courts that have upheld warrants in the Candyman investigation).

It did not. Even more telling, not a single member of the panel that decided petitioner's case joined the dissent from rehearing en banc or even "requested that a vote be taken" on whether rehearing en banc was warranted. Pet. App. A40. That underscores that, whatever the views of some judges on that court about the application of the probable-cause standard to the particular facts here, the majority of that court does not believe that the decision either changes established law or foreordains untoward developments in the application of the Fourth Amendment to Internet-based offenses.

Third, the court of appeals correctly concluded that probable cause existed. The predominant, if not sole, purpose of the Candyman website was "clear" to petitioner and others when they visited the home page. Pet. App. A8. Its self-confessed purpose was to facilitate and supply the acquisition by child pornographers—euphemistically described as "People who love kids"—of "pics and vids" of children, including in the "transgender" category. *Ibid.*; see *Ramsburg*, 114 Fed. Appx. at 81 ("Candyman's primary purpose was to facilitate the exchange and distribution of child pornography."); *ibid.* ("Candyman's raison d'etre was to facilitate the exchange of child pornography."); *Froman*, 355 F.3d at 890 ("The *sole* purpose of the Candyman eGroup, as demonstrated by the statement in its website and the activities generated on the website * * * was to receive and distribute child pornography and erotica."). Especially when considered in light of the name "Candyman," no reasonable visitor to the site could misunderstand its aim or content. See *id.* at 885 ("Candyman was categorized as an adult, transgender, image gallery, at once suggesting its sexual content.").

Petitioner thus "was on notice that the site was an active marketplace for the illicit trade of child pornography," *Martin*, 426 F.3d at 88, and yet affirmatively chose not only to visit the site, but to subscribe to it, Pet. App. A12. He maintained that subscription for three weeks, until it was terminated by the closure of the site rather than any independent effort by petitioner to disassociate himself from the e-group. *Id.* at A18. Tellingly, petitioner did not subscribe in his own name. He adopted a pseudonymous e-mail account, which was consistent with the affidavit's explanation of child pornographers' pattern of attempting to hide their activities. Berglas Aff. paras. 20(c), 133.

Although the site offered some services that were not by themselves pornographic, the content of those services could reasonably be understood as reinforcing or fueling demand for the pornographic images provided by the site. The provision of erotica involving prepubescent children posed in sexually provocative positions was designed to "fuel [subscribers'] deviant sexual fantasies involving children." Berglas Aff. para. 20(b). The polling service was designed to make sure that the pornography supplied satisfied the gender, age group, and "actions" preferences of subscribers. *Froman*, 355 F.3d at 885; Berglas Aff. para. 24. In addition, "[t]ext-based e-mail that helps others 'meet,' 'chat up,' and sexually exploit children" is relevant evidence of the subscribers' pornographic proclivities. *Martin*, 426 F.3d at 87. The affidavit further established a reasonable basis for concluding that child pornographers would visit such a site, would use the images on the site to fulfill their illicit desires, and would retain evidence of those activities on their computers. Berglas Aff. paras. 10-18. As the en banc Ninth Circuit recently held, given that constella-

tion of factors, "[i]t neither strains logic nor defies common sense to conclude, based on the totality of the circumstances," that a multi-week subscriber to a website that "actually purveyed child pornography probably had viewed or downloaded such images onto his computer." *Gourde*, 440 F.3d at 1071.

Petitioner's reliance (Pet. 14-15) on *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), is misplaced. In *Ybarra*, the Court held that a search warrant for a bartender and a public tavern for narcotics did not authorize the search of a patron who happened to be in the bar when the warrant was executed. The Court has stressed, however, that *Ybarra* involved an "unwitting tavern patron," *Wyoming* v. *Houghton*, 526 U.S. 295, 304 (1999), and a "public tavern" rather than a private club, *Maryland* v. *Pringle*, 540 U.S. 366, 373 (2003). The Court has also recognized that a close association between a suspect and known criminals is relevant in determining probable cause. In *Pringle*, the Court held that the presence of three men in a vehicle containing drugs and cash established probable cause that each passenger solely or jointly possessed the drugs. *Ibid.*

Similarly here, petitioner did not casually wander into a public bar oblivious to the possibility of illicit activity. Rather, after seeing a welcome message that "clearly and unambiguously indicated that children were being sexually exploited by adults through the exchange of child pornography," Pet. App. A46 (Wesley, J., concurring in the denial of rehearing en banc), petitioner affirmatively joined the e-group "and remained a member * * * for [three] weeks until it was shut down," *id.* at A43.

Fourth, the question of whether search warrants issued as part of the Candyman investigation establish

probable cause does not present a question that is likely to recur with any frequency. The errors in the Binney affidavit were exposed more than three years ago, and the Candyman e-group was shut down more than five years ago. The number of cases arising from that investigation thus is waning.

Furthermore, following the exposure of Agent Binney's falsehoods, the Justice Department established an Advisory Committee composed of experienced child exploitation prosecutors to review all proposals for nationwide child exploitation investigations and to make timely recommendations to prosecutors in the field. See United States Attorney's Manual § 9-75.110 <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/75mcrm.htm>. That internal check is designed to prevent, in part, search warrant affidavits that are based on false statements by officials conducting child pornography investigations.

In addition, although petitioner expresses concern about the implications of the court's decision (Pet. 20-22), courts across the country have been upholding Candyman warrants for years. Yet petitioner identifies no problems that have materialized as a result of those decisions.[5]

---

[5] The fact that petitioner can hypothesize an innocent researcher who might be subjected to a search warrant (Pet. 20) is beside the point. Probable cause does not require the exclusion of an innocent explanation for the conduct. *Gates*, 462 U.S. at 244 n.13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
THOMAS E. BOOTH
Attorney

MAY 2006