No. ______

IN THE
Supreme Court of the United States

JOHN WON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Confrontation Clause contains an exception that permits the government to present testimony at a criminal trial by two-way video so long as "exceptional circumstances" are present and admitting such testimony would serve the "interest of justice."

LIST OF PARTIES AND PROCEEDINGS

Petitioner is John Won. Respondent is the United States.

Related proceedings:

United States v. Won, No. 22-2716-cr (2d Cir.)

United States v. Won, No. 18-CR-00184 (RJD) (E.D.N.Y.)

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES AND PROCEEDINGS iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

INTRODUCTION 1

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 11

I. The Second Circuit's Decision Conflicts With Every Other Court To Have Considered The Issue. 12

A. This Court has cast profound doubt on *Gigante* 12

B. Numerous other courts have followed this Court's lead and rejected *Gigante*'s standard. 15

II. The Question Presented Is Exceptionally Important. 19

A. The gap between *Craig*'s standard and *Gigante*'s standard has great practical significance. 19

B. This Court should clarify how *Craig* and *Crawford* fit together. 22

III. This Case Is An Ideal Vehicle. 25

A. This case squarely tees up the question presented. 25

B. This case is a better vehicle than *Akhavan* 28

IV. The Second Circuit's Decision Is Wrong. 30

CONCLUSION 33

Appendix A
United States v. Won, Docket No. 22-2716, 2024 WL 827774 (2d Cir. Feb. 28, 2024) 1a

Appendix B
Transcript of Criminal Cause for Pre-Trial Conference, *United States v. Won*, Docket No. 18-CR-00184(RJD) (E.D.N.Y. Oct. 13, 2021) (excerpt) 15a

Appendix C
Denial of *Rehearing* en banc, *United States v. Won*, Docket No. 22-2716 (2d Cir. May 8, 2024) 17a

TABLE OF AUTHORITIES

CASES

Akhavan v. United States, 143 S. Ct. 2639 (2023) 25, 28

Bush v. State, 193 P.3d 203 (Wyo. 2008) 17

C.A.R.A. v. Jackson County Juvenile Office, 637 S.W.3d 50 (Mo. 2022) 18

California v. Green, 399 U.S. 149 (1970) 1, 30

Campbell v. Commonwealth, 671 S.W.3d 153 (Ky. 2023) 18, 24

Coronado v. State, 351 S.W.3d 315 (Tex. Crim. App. 2011) 24

Coy v. Iowa, 487 U.S. 1012 (1988) 1, 2, 30

Crawford v. Washington, 541 U.S. 36 (2004) 4, 12, 14, 15, 23, 31

Haggard v. State, 612 S.W.3d 318 (Tex. Ct. Crim. App. 2020) 17

Lipsitz v. State, 442 P.3d 138 (Nev. 2019) 17

Maryland v. Craig, 497 U.S. 836 (1990) 2, 23, 30, 31

Newson v. State, 526 P.3d 717 (Nev. 2023) 18

People v. Jemison, 952 N.W.2d 394 (Mich. 2020) 18, 19, 24

People v. Written, 923 N.E.2d 1099 (N.Y. 2009) 24

State v. Carter, No. 23-0156, -- N.E.3d --, 2024 WL 1447893 (Ohio Apr. 4, 2024) 18, 24

State v. Comacho, 960 N.W.2d 739 (Neb. 2021) 18

State v. Mercier, 479 P.3d 967 (Mont. 2021) 17

State v. Rogerson, 855 N.W.2d 495 (Iowa 2014) 16-17

State v. Smith, 636 S.W.3d 576 (Mo. 2022) 19, 24

State v. Strommen, 547 P.3d 1227 (Mont. 2024) 18

State v. Tate, 985 N.W.2d 291 (Minn. 2023) 18

State v. Thomas, 376 P.3d 184 (N.M. 2016) 17

United States v. Abu Ghayth, No. 98-cr-1023, 2014 WL 144653 (S.D.N.Y. Jan. 15, 2014) 21

United States v. Bethea, 888 F.3d 864 (7th Cir. 2018), *superseded by statute as stated in United States v. Coffin*, 23 F.4th 778 (7th Cir. 2022) 32

United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005) 15, 16, 31, 32

United States v. Carter, 907 F.3d 1199 (9th Cir. 2018) 16, 24, 32

United States v. Colello, No. 20-cr-613, 2023 WL 3584466 (S.D.N.Y. May 19, 2023) 22

United States v. Cox, 871 F.3d 479 (6th Cir. 2017) 23

United States v. Daskal, No. 21-cr-110, 2023 WL 4185966 (E.D.N.Y. June 26, 2023) 22

United States v. Gigante, 166 F.3d 75 (2d Cir. 1999) 3, 12-15, 20, 21, 31

United States v. Lawrence, 248 F.3d 300 (4th Cir. 2001) 32

United States v. Mostafa, 14 F. Supp. 3d 515 (S.D.N.Y. 2014) 21

United States v. Navarro, 169 F.3d 228 (5th Cir. 1999) 32

United States v. Rossy, No. 22-cr-550-02, 2023 WL 8520732 (S.D.N.Y. Dec. 8, 2023)...22

United States v. Torres-Palma, 290 F.3d 1244 (10th Cir. 2002)...33

United States v. Williams, 641 F.3d 758 (6th Cir. 2011) 33

United States v. Yates, 438 F.3d 1307 (11th Cir. 2006) (en banc)..................................16, 20, 31

Written v. New York, 560 U.S. 959 (2010) 25

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. VI 1

28 U.S.C. § 1254(1)...1

CARES Act, Pub. L. No. 116-136, § 15002(b)(1), 134 Stat. 281, 527-28 (2020) 17

OTHER AUTHORITIES

Brief of the United States in Opposition *Akhavan v. United States*, No. 22-844 (U.S. May 12, 2023), 2023 WL 3479617 .... 28, 29

Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 Wm. & Mary Bill Rts. J. 769 (2004) 33

Order of the Supreme Court, 207 F.R.D. 89 (2002) 4, 13, 14

Jenia I. Turner, *Remote Criminal Justice*, 53 Tex. Tech L. Rev. 197 (2021) 33

PETITION FOR A WRIT OF CERTIORARI

John Won respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Second Circuit (Pet. App. 1a-14a) is reported at 2024 WL 827774. The district court's oral decision granting the government's motion in limine (Pet. App. 15a-16a) is unreported. The Second Circuit's denial of rehearing en banc (Pet. App. 17a) is unreported.

JURISDICTIONAL STATEMENT

The judgment of the Second Circuit was entered on February 28, 2024. The Second Circuit denied rehearing en banc on May 8, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

INTRODUCTION

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI. As this Court has made clear, the "literal right to 'confront' the witness at the time of trial" lies at "the core of the values furthered by the Confrontation Clause." *California v. Green*, 399 U.S. 149, 157 (1970). As such, the Clause "guarantees the defendant a *face-to-face* meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (emphasis added). This right reflects the fundamental reality that "there is something deep in human nature that regards face-to-face confrontation

between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Id.* at 1017.

Only once—in a sharply divided, 5-4 decision—has this Court ever recognized an exception to that ancient principle. In *Maryland v. Craig*, 497 U.S. 836 (1990), a child witness who was the victim of abuse testified against his abuser by one-way closed-circuit television—that is, everyone in the courtroom could watch the child's testimony, but the child could not see the defendant. *Id.* at 841. This Court held, over a blistering dissent by Justice Scalia, that the admission of the child's testimony did not violate the Confrontation Clause. It reasoned that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850.

In the years since *Craig*, federal appellate courts and state supreme courts have repeatedly encountered cases in which the government sought to introduce testimony by two-way television—that is, both the victim and the defendant can see each other. With only one exception, every federal appellate court and state supreme court encountering that scenario has held that *Craig*'s "important public policy" exception is the sole exception to the Confrontation Clause's requirement of face-to-face confrontation. But the Second Circuit has charted a different course. For twenty-five years, it has recognized a *second* exception to the Confrontation Clause's requirement of face-to-face confrontation.

In *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), the Second Circuit dramatically expanded *Craig* in a case where the witness testified via two-way video. The Second Circuit rejected the defendant's argument that *Craig*'s standard should apply to such testimony—*i.e.*, that the testimony should be admissible only if the denial of face-to-face confrontation furthers an "important public policy." *Id.* at 81. It explained that "the Supreme Court crafted this standard to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant." *Id.* By contrast, in the context of a "two-way system that preserved the face-to-face confrontation, … it is not necessary to enforce the *Craig* standard." *Id.*

Instead, the Second Circuit held, as long as the "interest of justice" is furthered, district courts could authorize two-way video testimony based on a highly malleable standard: "exceptional circumstances." *Id.* The Court reasoned that video testimony was reliable because the jury could view the witness's demeanor, even though there was no actual face-to-face confrontation. *Id.* Applying this loose standard, the Second Circuit found that "exceptional circumstances" justified the district court's decision to permit testimony via two-way video where the witness was too ill to travel to court and was participating in the Federal Witness Protection Program, and the defendant was too sick to participate in a deposition. *Id.*

Shortly after the Second Circuit decided *Gigante*, this Court took a different view. The Court rejected the Judicial Conference's proposed revision to Criminal Rule 26(b) that would have authorized the use of two-

way video in criminal cases in "exceptional circumstances" if the "[victim] is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5)." Order of the Supreme Court, 207 F.R.D. 89, 99 (2002) (Appendix to Statement of Breyer, J.). The Judicial Conference expressly stated in the Committee Note that its intent was to codify *Gigante*'s legal standard. *Id.* at 101–03. But this Court refused to go along with *Gigante*. Concurring in that decision, Justice Scalia explained that he "share[d] the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution." *Id.* at 93 (Scalia, J., concurring). In Justice Scalia's view, the proposal "[wa]s unquestionably contrary to the rule enunciated in *Craig*." *Id.*

Two years later, Justice Scalia authored *Crawford v. Washington*, 541 U.S. 36 (2004), the most important Confrontation Clause case in modern history. Eschewing *Gigante*'s reliability-based rationale, this Court held that application of the Confrontation Clause does not turn on a trial judge's ad hoc assessment of a statement's reliability, but instead on whether a declarant is a "witness" under the Confrontation Clause's original public meaning.

In the subsequent years, every federal appellate court and state supreme court to have considered the matter has declined to adopt *Gigante*'s freewheeling "exceptional circumstances" exception. But the Second Circuit has stubbornly clung to *Gigante*. Within the Second Circuit, courts liberally authorize video testimony based on "exceptional circumstances," which

in practice, requires little more than a showing that the witness is outside of the court's subpoena power and unwilling to travel to trial.

This case is a paradigmatic example of how *Gigante* has hollowed out the Confrontation guarantee. Petitioner John Won's trial occurred in the latter stages of the COVID pandemic in late 2021, when international travel was legal but inconvenient. As a result, two witnesses in foreign countries were unwilling to travel to court to testify but were willing to testify by video. Every other federal appellate and state supreme court to have considered the matter would have disallowed such testimony, but the Eastern District of New York admitted it under *Gigante*'s "exceptional circumstances" standard. The Second Circuit affirmed, deeming itself bound by *Gigante*. It then denied rehearing en banc.

This Court's review is badly needed. Because of *Gigante*, criminal trial practice in the Second Circuit is now different from criminal trial practice everywhere else in the country. Even after COVID, prosecutors within the Second Circuit routinely request, and courts routinely permit, video testimony based on an "exceptional circumstances" standard that has been uniformly repudiated by every other court.

This must stop. The Confrontation Clause applies in *all* circumstances, even "exceptional" ones. This Court should grant certiorari and reverse.

STATEMENT OF THE CASE

Petitioner John Won was charged with conspiracy to commit wire fraud, conspiracy to commit securities

fraud, securities fraud, and conspiracy to commit money laundering. The charges stem from allegations that Won defrauded victims by persuading them to invest in a foreign exchange business called "ForexNPower" (FNP). Pet. App. 2a. According to the government, Won's alleged fraud in part involved lying to an online brokerage platform known as FXCM. Pet. App. 4a.

On September 27, 2021, less than two months before the trial was scheduled to begin, the government moved in limine for permission to call two witnesses via two-way video. CA2 A-87.[1]

The first witness was "Victim Investor," later identified as Greg Suh. CA2 A-87; *see* Pet. App. 6a. According to the government, "Victim Investor was an individual whom the defendant and his co-conspirators defrauded." CA2 A-87. After offering a detailed explanation of Suh's anticipated testimony, the government told the court that "Victim Investor's testimony is crucial to the government's case." *Id.* His "testimony is important to demonstrating the existence of" the allegedly fraudulent schemes, and "is also important to establishing the misrepresentations that the defendant and his co-conspirators made and directed as part of these fraudulent schemes, and how those misrepresentations harmed investors." *Id.*

[1] "CA2 A-87" refers to page A-87 of the Second Circuit Appendix. *See* Appendix, Volume 1 of 6, *Won v. United States*, No. 22-2716-cr (2d Cir. filed June 6, 2023), ECF No. 45. All other citations to the Second Circuit appendix will be written as "CA2 A-##." *See* Appendix, *Won v. United States*, No. 22-2716-cr (2d Cir. filed June 6, 2023), ECF Nos. 45–51.

The government then stated that "Victim Investor resides in South Korea" and "has advised the government that international travel to the United States would pose a significant burden on Victim Investor, his family, and his responsibilities at work." *Id.* The government emphasized that Victim Investor cared for his 77-year-old mother, who faced risk from COVID. *Id.* According to the government, "[a]lthough Victim Investor is vaccinated and thus may be granted an exception from South Korea's quarantine rules, Victim Investor is concerned that he could contract a breakthrough infection in the course of international travel, which could put his elderly mother at risk." *Id.* The government also explained that international travel would "impede [Victim Investor's] ability to fulfill his duties as a professor." *Id.* The government represented that "Victim Investor is willing to testify by [video] from South Korea," but "is beyond the subpoena power of the Court." CA2 A-88.

The second witness was "FXCM Employee," later identified as Deric Chen. CA2 A-88; *see* Pet. App. 6a. The government explained that FXCM Employee would testify about his business relationship with one of Won's businesses. CA2 A-88. According to the government, "FXCM Employee's testimony is crucial to the government's case." *Id.* Among other things, "FXCM Employee's testimony is important to demonstrating that the defendant unilaterally handled the relationship between [Won's businesses] and FXCM." *Id.* The government emphasized that "[i]mportantly, FXCM Employee is the government's only witness from FXCM who had first-hand interactions with the defendant." *Id.*

The government then stated that "FXCM Employee resides in Hong Kong," and "advised the government that if he were to travel to the United States and then return to Hong Kong, he would be required under Hong Kong law to quarantine at a hotel for 21 days." *Id.* This "would place a substantial burden on his personal, financial and professional life." *Id.* "First, FXCM Employee would be away from home for at least four weeks and, during that time, he would be unable to help care for his young children." *Id.* Second, "he would have to pay for the cost of the hotel during his quarantine, which he estimates would cost approximately $100 per day." *Id.* "Third, even if FXCM Employee were successfully to persuade his employer to allow him to take four weeks off from work, he would have to take all of his twelve vacation days and lose pay for the remaining time when he would be unable to work." *Id.* The government represented that FXCM Employee "is unable and unwilling to travel to New York to testify in person" but "is willing to testify by [video] from Hong Kong." *Id.* "FXCM Employee is beyond the subpoena power of the Court." *Id.*

Based on these representations, the government contended that there were "exceptional circumstances" that warranted video testimony. CA2 A-88 (quoting *Gigante*, 166 F.3d at 81). The government expressly relied on *Gigante*'s holding that "it is not necessary to enforce the *Craig* standard" when using two-way video. CA2 A-89 (quoting *Gigante*, 166 F.3d at 81). It emphasized that the testimony of both witnesses was "relevant, material and necessary to each of the six counts in the indictment." CA2 A-91. In particular,

"FXCM Employee is the government's only witness from FXCM who had first-hand interactions with the defendant and can demonstrate the defendant's central role in the scheme and the defendant's intent to continue the scheme in the face of significant investor losses." *Id.* The government represented that the witnesses were "unavailable" and that permitting them to testify "will further the interests of justice," in part because "the interests of justice are served by permitting the government to present evidence in order to meet that burden and in support of its efforts to present the whole truth to the jury." CA2 A-92.

Won objected to the admission of this testimony on Confrontation Clause grounds. CA2 A-99. He argued that neither witness was genuinely "unavailable." CA2 A-100–03. Victim Investor would miss only three days of work and was vaccinated, reducing the risk of a breakthrough infection. CA2 A-101. FXCM Employee's travel expenses could be mitigated if the government paid for his accommodation, and he could work remotely. CA2 A-102. Won also emphasized that the government failed to offer a deposition under Federal Rule of Criminal Procedure 15 that would have allowed for face-to-face confrontation. *Id.* As Won explained, "the reliability of FXCM Employee's testimony cannot be assured," because the United States rescinded its extradition treaty with Hong Kong and FXCM Employee could not be prosecuted for perjury or making false statements if he was not on U.S. soil. CA2 A-103.

The district court granted the government's motion in limine, concluding that "based upon the representations made to me," "exceptional

circumstances and the interests of justice warrant" video testimony. Pet. App. 16a.

At trial, both Chen and Suh offered incriminating testimony. Suh claimed that Won's co-conspirator told him of Won's role in the company, that Won attended a seminar hosted by the co-conspirator, and that Won signed a share purchase certificate. CA2 A-820–21, 824, 827, 832–33, 835–36. Chen testified in detail regarding Won's alleged misrepresentations. He told the jury that Won represented how his company involved a "new strategy," "better risk management," and a "new algorithmic program" that would lead to "new partners." CA2 A-624-25. The government referred to Chen's testimony twenty-eight times during its main summation and twenty times during its rebuttal. CA2 A-1392–1456, CA2 A-1485–1506. Won was convicted on all counts. Pet. App. 2a.

The Second Circuit affirmed Won's convictions. As relevant here, the court rejected Won's claim that the admission of Chen's and Suh's testimony violated the Confrontation Clause. As the court explained, "[i]n the wake of *Craig*," the Second Circuit "recognized another narrow exception for testimony by two-way video in *United States v. Gigante*": a witness could testify "upon a finding of exceptional circumstances . . . when [video testimony] furthers the interest of justice." Pet. App. 6a (citation omitted). The court acknowledged Won's argument that "*Gigante* was wrongly decided," but stated that the Second Circuit has "never overruled it or deemed it abrogated," and noted that it is "bound by the decisions of prior panels until such time as they are

overruled either by an *en banc* panel of our Court or by the Supreme Court." Pet. App. 7a n.2 (citation omitted).

"Applying *Gigante* to the facts here," the Second Circuit held that "exceptional circumstances" justified permitting Chen and Suh to testify by video. Pet. App. 7a. It emphasized that the trial took place during COVID, and traveling to the United States would cause inconvenience for both Chen and Suh. *Id.* "Moreover, both witnesses were beyond the court's subpoena power and represented that they would not testify in person, even if the government were to bear the full cost of travel." *Id.*

The Second Circuit also rejected Won's argument that Chen and Suh were not "unavailable" under the criteria of Federal Rule of Evidence 804(a) because they had no "infirmity, physical illness, or mental illness" and did not meet any of Rule 804(a)'s other requirements. Pet. App. 8a. The court reasoned that *Gigante* is not "strictly limited to cases of 'unavailability' under Federal Rule of Evidence 804(a)," but instead "extends to other case-specific findings of 'exceptional circumstances.'" Pet. App. 8a. The court did not offer any alternative rationale for its holding, such as harmless error.

Won filed a petition for rehearing en banc, urging the Second Circuit to overrule *Gigante*. The court denied the petition. Pet. App. 17a.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision cements a widely-recognized, longstanding conflict of authority over the

admissibility of two-way video testimony under the Confrontation Clause. The question presented is extremely important, and this case is an ideal vehicle. This Court should grant certiorari and reverse the Second Circuit.

I. The Second Circuit's Decision Conflicts With Every Other Court To Have Considered The Issue.

In *Gigante*, the Second Circuit held that two-way video testimony was admissible at criminal trials in "exceptional circumstances" when needed to serve the "interest of justice." 166 F.3d at 81. But this Court then refused to adopt *Gigante*'s standard into the Federal Criminal Rules, and subsequently repudiated *Gigante*'s reliability-based logic in *Crawford v. Washington*, 541 U.S. 36 (2004). These developments make clear that *Gigante* is wrong. As such, numerous other courts have taken the hint and rejected *Gigante*'s standard. Yet the Second Circuit has clung to *Gigante*, creating a chasm between trial practice in the Second Circuit and trial practice everywhere else in the country.

A. This Court has cast profound doubt on *Gigante*.

In *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), the Second Circuit held "[u]pon a finding of exceptional circumstances, such as were found in this case, a trial court may allow a witness to testify via two-way closed-circuit television when this furthers the interest of justice." *Id.* at 81. In the Second Circuit's view, in the context of a "two-way system … it is not

necessary to enforce the *Craig* standard." *Id.* The Second Circuit based its ruling on the assumption that video testimony would be sufficiently reliable: in the court's view, despite the lack of face-to-face confrontation, the jury could "judge [the witness's] credibility through his demeanor and comportment" on the screen. *Id.*

Shortly after *Gigante* was decided, however, this Court made clear in two ways that it was not on board with *Gigante*'s loose approach to the Confrontation Clause.

First, as noted above, the Judicial Conference proposed a revision to Criminal Rule 26(b) that would have authorized the use of two-way video in criminal cases in "exceptional circumstances" if the "[victim] is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5)." Order of the Supreme Court, 207 F.R.D. at 99 (Appendix to Statement of Breyer, J.). The Judicial Conference openly stated that it intended to codify *Gigante*'s legal standard. *Id.* at 101–03.

But this Court refused to accept the Judicial Conference's proposal. Concurring in that decision, Justice Scalia explained that he "share[d] the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution." *Id.* at 93 (Scalia, J., concurring). In Justice Scalia's view, the proposal "[wa]s unquestionably contrary to the rule enunciated in *Craig*." *Id.* Justice Scalia acknowledged *Gigante*'s holding, on which the Committee relied, that "the use of

a two-way transmission made it unnecessary to apply the *Craig* standard." *Id.* at 93–94 (quotation marks omitted). But he disagreed with that holding: "I cannot comprehend how one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added." *Id.* at 94. "As we made clear in *Craig*, … a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image." *Id.*

Gigante justified its "exceptional circumstances" rule by analogizing two-way video testimony to depositions under Federal Rule of Criminal Procedure 15. 166 F.3d at 81. But Justice Scalia rejected that analogy. 207 F.R.D. at 94. Among other things, Justice Scalia pointed out that "Rule 15 accords the defendant a right to face-to-face confrontation during the deposition." *Id.* He further noted that a defendant could *voluntarily* agree to waive his right to confrontation, but could not "be *compelled* to hazard his life, liberty, or property in a criminal teletrial." *Id.*

Two years later, Justice Scalia authored this Court's seminal decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The Court overruled prior case law holding that admissibility under the Confrontation Clause turned on whether an out-of-court statement bore "adequate indicia of reliability." *Id.* at 42. The Court explained that the Framers did not mean "to leave the Sixth Amendment's protections … to amorphous notions of

'reliability.'" *Id.* at 61. To the contrary, "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* As the Court memorably explained, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 62. Instead, the Court held that *all* testimonial statements—whether "reliable" or not—are subject to the constitutional guarantee of confrontation. *Id.* at 68.

B. Numerous other courts have followed this Court's lead and rejected *Gigante*'s standard.

Following this Court's rejection of the Criminal Rules amendment and this Court's decision in *Crawford*, federal and state courts outside the Second Circuit have repeatedly repudiated *Gigante*'s conclusion that in the context of a "two-way system … it is not necessary to enforce the *Craig* standard." 166 F.3d at 81.

Three federal appellate courts have held that *Gigante* is wrong:

- In *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005), the Eighth Circuit held that "'[c]onfrontation' through a two-way closed-circuit television is not different enough from 'confrontation' via a one-way closed-circuit television to justify different treatment under *Craig*." *Id.* at 554. It explained that "*Gigante* does not persuade us that

'confrontation' through a two-way closed circuit television is constitutionally equivalent to a face-to-face confrontation." *Id.*

- In *United States v. Yates*, 438 F.3d 1307, 1313–14 (11th Cir. 2006) (en banc), the Eleventh Circuit held that "the findings of the trial court must satisfy the *Craig* test in order to satisfy the Confrontation Clause." *Id.* at 1313. The court declined to "disregard the history of the proposed amendments to Rule 26" and "approve a procedure not contemplated by the Federal Rules of Criminal Procedure." *Id.* at 1315. As the court noted, "[t]he Second Circuit stands alone in its refusal to apply *Craig*." *Id.* at 1313–14.

- In *United States v. Carter*, 907 F.3d 1199 (9th Cir. 2018), the Ninth Circuit "agree[d] with the Eighth and Eleventh Circuits that *Gigante* is an outlier and that the proper test is *Craig*." *Id.* at 1208 n.4. As the court explained, "[r]egardless of whether the video procedure is one-way or two-way, the defendant is being denied a physical, face-to-face confrontation at trial." *Id.* (internal quotation marks and citation omitted). The Ninth Circuit relied on the Supreme Court's rejection of the amendment to Rule 26. *Id.* at 1207.

State supreme courts, too, have repeatedly rejected *Gigante*'s reasoning and applied *Craig*'s standard to two-way video testimony. *See State v. Rogerson*, 855 N.W.2d

495, 503–04 (Iowa 2014) ("In contrast to the numerous courts that have applied the *Craig* test to two-way as well as one-way videoconferencing technology, the Second Circuit alone has declined to require a finding of *Craig*-based necessity before allowing witnesses to testify via two-way video. … Upon our review, we agree with the vast majority of courts that have considered the issue and determined that *Craig*'s test should apply to two-way as well as one-way video testimony."); *State v. Mercier*, 479 P.3d 967, 975, 977 (Mont. 2021) (observing that *Gigante* is part of a "circuit split" but concluding that "[d]espite the disagreement among courts, our research leads to the conclusion that the overwhelming majority of jurisdictions have applied *Craig* to two-way video procedures, a position that we continue to adhere to"); *Lipsitz v. State*, 442 P.3d 138, 143–44 (Nev. 2019) (holding that "the requirements articulated in *Craig* apply to two-way audiovisual transmission"); *State v. Thomas*, 376 P.3d 184, 194–95 (N.M. 2016) (stating that "we adopt the *Craig* standard here in our analysis of the admissibility of two-way video testimony" and confining *Gigante* to a "*But see*" citation); *Haggard v. State*, 612 S.W.3d 318, 325–26 (Tex. Ct. Crim. App. 2020) (adopting *Craig* standard and relying on Justice Scalia's concurrence); *Bush v. State*, 193 P.3d 203, 216 (Wyo. 2008) (adopting *Craig* standard).

During COVID, the CARES Act authorized federal trial courts to conduct certain hearings by two-way video, but that Act did not authorize video testimony in criminal trials. *See* CARES Act, Pub. L. No. 116-136, § 15002(b)(1), 134 Stat. 281, 527-28 (2020). Although some state trial courts experimented with permitting

video testimony in criminal trials, state supreme courts repeatedly held that the admission of such testimony violated the Confrontation Clause under *Craig*'s standard. *See State v. Carter*, No. 23-0156, -- N.E.3d --, 2024 WL 1447893, at *7 (Ohio Apr. 4, 2024); *State v. Strommen*, 547 P.3d 1227, 1241 (Mont. 2024); *Campbell v. Commonwealth*, 671 S.W.3d 153, 161 (Ky. 2023); *Newson v. State*, 526 P.3d 717, 722 (Nev. 2023); *C.A.R.A. v. Jackson Cnty. Juv. Off.*, 637 S.W.3d 50, 65 (Mo. 2022). In a few cases, courts found *Craig*'s "important public policy" standard to be satisfied when trial courts made specific findings that the witness was exposed to COVID and would endanger other courtroom participants if the witness testified live. *See State v. Tate*, 985 N.W.2d 291, 302-03 (Minn. 2023) (rejecting Confrontation Clause claim when witness had been exposed to COVID and was directed by public health officials to quarantine); *State v. Comacho*, 960 N.W.2d 739, 755 (Neb. 2021) ("We emphasize also that it is important to our determination of necessity that in this case, the witness had actually tested positive for COVID-19 and was experiencing symptoms."). But outside of that narrow context, courts held fast to the time-honored principle that criminal defendants have a constitutional right to confront witnesses face to face.

Two state supreme courts have applied an even more defendant-friendly standard on this issue. In *People v. Jemison*, 952 N.W.2d 394 (Mich. 2020), the Michigan Supreme Court held that it would "apply *Craig* only to the specific facts it decided," *i.e.*, testimony by "a child victim." *Id.* at 400. Outside of that specific factual context, "*Crawford* … provides the applicable rule"—

which is that *all* out-of-court testimonial statements, including those by two-way video, are excluded unless "the witness is unavailable and the defendant had a prior [opportunity] to cross-examine" him. *Id.* at 400-01. In *State v. Smith*, 636 S.W.3d 576, 587 (Mo. 2022), the Missouri Supreme Court similarly concluded that if the witness is "neither a victim nor a child," and is not "unavailable," the Confrontation Clause bars out-of-court testimony by two-way video. *Id.* Those cases squarely conflict with *Gigante*'s holding that two-way video testimony is admissible whenever there are "exceptional circumstances" and the "interest of justice" will be served.

In sum, there is an entrenched, longstanding, and widely-recognized conflict of authority over the admissibility of two-way video testimony under the Confrontation Clause.

II. The Question Presented Is Exceptionally Important.

The question presented was important when *Gigante* was decided, and it is even more important now, in view of the dramatic technological and legal developments since that time.

A. The gap between *Craig*'s standard and *Gigante*'s standard has great practical significance.

The Court should grant certiorari in view of the great practical significance of the question presented—which

has increased in view of the recent proliferation of two-way video communication technology.

This case is practically significant because *Gigante*'s "exceptional circumstances" standard permits video testimony in a broader range of circumstances than *Craig*'s more stringent standard. One recurring scenario when video testimony is inadmissible under *Craig*, but is admissible under *Gigante*, arises when a foreign witness refuses to travel to the United States but is willing to testify by video. In that scenario, it is impossible for a court to make the finding that *Craig* requires: "a case-specific finding" that video testimony is "'necessary to further an important public policy.'" 166 F.3d at 80 (quoting *Craig*, 497 U.S. at 850). Unlike in *Craig*, in which video testimony furthers the public policy of preventing child abuse victims from being re-traumatized, video testimony of foreign witnesses does not further any public policy—other than the generic public policy in obtaining criminal convictions, which arises in every case and cannot possibly be sufficient to satisfy *Craig*. *See Yates*, 438 F.3d at 1316 (rejecting argument that, for overseas witnesses, "providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of testimony by two-way video conference").

Yet, *Gigante*'s looser "exceptional circumstances" standard *does* permit video testimony in that scenario. In *Gigante*, the Second Circuit observed that "the 'exceptional circumstances' required to justify the deposition of a prospective witness" under Federal Rule of Criminal Procedure 15 "are present if that witness's

testimony is material to the case and if the witness is unavailable to appear at trial." 166 F.3d at 81. The *Gigante* court "decline[d] to adopt a stricter standard for its use than the standard articulated by Rule 15." *Id.*

Applying *Gigante*'s standard, courts within the Second Circuit—but nowhere else in the country—authorize video testimony of witnesses in foreign countries merely because they refuse to travel to the United States. For instance, in *United States v. Mostafa*, 14 F. Supp. 3d 515, 522-24 (S.D.N.Y. 2014), and *United States v. Abu Ghayth*, No. 98-cr-1023, 2014 WL 144653, at *2-3 (S.D.N.Y. Jan. 15, 2014), New York courts permitted a foreign witness to testify by video when the witness refused to travel to the United States out of fear that he would be arrested for violating U.S. law. There was no "public policy" that would be furthered by the witnesses testifying remotely—in fact, public policy would be *advanced* if the witnesses traveled to the United States and were held accountable for violating U.S. law. But applying *Gigante*'s legal standard, those courts held that the witnesses were unavailable and that remote testimony would advance the interests of justice—which was a sufficient basis to authorize such testimony.

In the pre-COVID era, remote testimony occurred infrequently. Technologies like Zoom and Microsoft Teams were not as widespread as today, and witnesses in foreign countries could not snap their fingers and set up a two-way video connection with an American courtroom. But people became accustomed to video communication during COVID. And now, in the post-COVID era, there are almost no technological barriers

to federal prosecutors requesting permission to examine foreign witnesses by video—and federal courts in the Second Circuit routinely authorize such testimony under *Gigante*. *See, e.g.*, *United States v. Daskal*, No. 21-cr-110, 2023 WL 4185966, at *2 (E.D.N.Y. June 26, 2023) (holding that *Gigante* authorized video testimony of witness who "refuses to travel to the United States to appear at trial, despite having traveled to New York for business just this past April"); *United States v. Colello*, No. 20-cr-613, 2023 WL 3584466, at *1 (S.D.N.Y. May 19, 2023) (holding that *Gigante* authorized video testimony of witness in the United Kingdom who had been hospitalized). Courts also authorize video testimony of witnesses who cannot attend trial for other reasons. *See, e.g.*, *United States v. Rossy*, No. 22-cr-550-02, 2023 WL 8520732, at *1 (S.D.N.Y. Dec. 8, 2023) (holding that *Gigante* authorized video testimony of witness who could not travel because of injuries sustained in accident).

Again, this type of two-way video testimony does not occur in the many jurisdictions that have rejected *Gigante*. This real-world divergence between trial practice in the Second Circuit and trial practice in other jurisdictions is a direct consequence of the circuit split.

B. This Court should clarify how *Craig* and *Crawford* fit together.

In addition to being practically significant, this case has profound jurisprudential significance. As numerous courts have observed, *Craig* and *Crawford* are difficult to reconcile. Only this Court can clarify how they fit together.

Craig was decided in a freewheeling era of Confrontation Clause jurisprudence when convenience trumped constitutional text. *Craig* held that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant," 497 U.S. at 845, and that a defendant's constitutional right to confrontation must sometimes give way to the "societal interest in accurate factfinding." *Id.* at 849. In the Court's view, a procedure that "ensures the reliability of the evidence" satisfies the Confrontation Clause "despite the absence of face-to-face confrontation." *Id.* at 857. *Crawford* repudiated this reasoning, holding that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." 541 U.S. at 61. The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.*

Several lower-court judges have recognized the tension between these two approaches. Judge Sutton, for instance, has observed that "*Craig* is in tension with, if not in opposition to," *Crawford*, "[a]nd yet, both decisions stand." *United States v. Cox*, 871 F.3d 479, 495 (6th Cir. 2017) (Sutton, J., concurring). Indeed, "the two opinions would give Janus a run for his money." *Id.* at 492. After walking through the irreconcilable differences between the two cases, Judge Sutton asked: "How can we guarantee the full effect of [the Confrontation Clause's] protection when two lines of cases, both purportedly good law, dispute the nature and reach of the Clause that guarantees it?" *Id.* at 494.

Several other courts have similarly remarked on the contradictory nature of these cases. *Carter*, 2024 WL 1447893, at *5; *Campbell*, 671 S.W.3d at 159-60; *Carter*, 907 F.3d at 1206 n.3; *Coronado v. State*, 351 S.W.3d 315, 321 (Tex. Crim. App. 2011).

And—as elaborated above—courts have resolved this tension in contradictory ways. Some courts have held that *Crawford*'s standard applies to two-way testimony in all cases except for testimony by child victims, *see Jemison*, 952 N.W.2d at 400-01; *Smith*, 636 S.W.3d at 586, while many others apply *Craig*'s "important public policy" standard to all cases involving two-way video. Meanwhile, the Second Circuit stands alone in applying a standard dramatically *broader* than *Craig*'s "important public policy" standard in cases involving two-way video. Only this Court can resolve the tension in its cases.

Notably, in a post-*Crawford* case, a member of this Court has questioned whether it makes sense to apply *Craig* in the context of two-way video testimony by unavailable witnesses. In *People v. Wrotten*, 923 N.E.2d 1099 (N.Y. 2009), the New York Court of Appeals, over two dissents, rejected a Confrontation Clause challenge to the admission of an 85-year-old witness's two-way video testimony. *Id.* at 1101. Applying *Craig*'s standard, the court held that admitting the testimony satisfied *Craig* because the witness was too ill to appear in court. *Id.* at 1102–03.

This Court denied the defendant's petition for certiorari. But Justice Sotomayor filed a separate statement observing that "[b]ecause the use of video

testimony in this case arose in a strikingly different context than in *Craig*, it is not clear that the latter is controlling." *Wrotten v. New York*, 560 U.S. 959 (2010) (statement of Sotomayor, J., respecting the denial of the petition for writ of certiorari). Justice Sotomayor concurred in the Court's decision to deny certiorari in light of the "procedural difficulties" arising from the case's "interlocutory posture," but thought it "appropriate to emphasize that the Court's action does not constitute a ruling on the merits and certainly does not represent an expression of any opinion concerning the importance of the question presented." *Id.* at 960 (internal quotation marks omitted).

In this case, there is a final judgment of conviction and there are no procedural difficulties. This case is an appropriate vehicle to decide the question that was important in *Wrotten*, and is even more important now.

III. This Case Is An Ideal Vehicle.

This case is a flawless vehicle to resolve the conflict between *Gigante* and every other court in the country. This Court previously denied certiorari in *Akhavan v. United States*, 143 S. Ct. 2639 (2023), which presented a similar question, but this case is a vastly better vehicle than *Akhavan*.

A. This case squarely tees up the question presented.

As the proceedings in both the district court and Second Circuit make clear, this case is a perfect vehicle for resolving the circuit split.

In the district court, the government's motion in limine to admit Suh's and Chen's testimony by video relied on *Gigante*'s "exceptional circumstances" standard. CA2 A-88 (quoting *Gigante*, 166 F.3d at 81). The government emphasized *Gigante*'s holding that "it is not necessary to enforce the *Craig* standard" when using two-way video. CA2 A-89 (quoting *Gigante*, 166 F.3d at 81). In response, Won expressly preserved a Confrontation Clause objection to the admission of this testimony. CA2 A-99. The district court's order granting the government's motion in limine concluded that "exceptional circumstances and the interests of justice warrant" admission of video testimony. Pet. App. 16a. Neither the government nor the district court ever suggested that *Craig*'s "important public policy" standard could be satisfied.

Nor, on the facts of this case, could the government possibly have made that showing. Unlike in *Craig*, when in-court testimony would have traumatized the child witness, no public policy would have been thwarted by live testimony. Although Suh, the less important of the two witnesses, resided with his 77-year-old mother, Suh was vaccinated, and there was no showing of any risk to the mother other than her age. CA2 A-87. The risk to Suh's family was no greater than the risk to the families of jurors and witnesses who attended court in person.

And even if concerns over Suh's mother's health represented an "important public policy," no such concerns existed with respect to Chen, the more important of the two witnesses. It is difficult to overstate how central Chen was to the government's case. The government *itself* explained that Chen's

testimony was "crucial" because he is "the government's *only witness* from FXCM who had first-hand interactions with the defendant and can demonstrate the defendant's central role in the scheme and the defendant's intent to continue the scheme in the face of significant investor losses." CA2 A-91 (emphasis added); *see also* CA2 A-88. Yet the government did not cite any health concerns that would arise if Chen testified live. Instead, the government reasoned that it would be inconvenient to Chen to testify live in view of his child-care obligations, out-of-pocket costs, and potential loss of vacation days. CA2 A-88. These personal inconveniences do not approach the type of "important public policy" that justifies abrogating Won's constitutional rights—which is perhaps why the government never bothered relying on *Craig*'s standard.

Of even greater importance, the government emphasized to the district court that both witnesses were outside of the court's subpoena power and neither witness was willing to attend the trial. CA2 A-88. As explained above, this case therefore presents a recurring scenario in which the disparity between the *Gigante* and *Craig* standards matters—making this case an ideal vehicle.

The proceedings within the Second Circuit confirm that this case is a flawless vehicle. The court not only expressly relied on *Gigante*, but expressly recognized that *Gigante*'s standard departs from *Craig*'s standard. Pet. App. 6a (emphasizing that "[i]n the wake of *Craig*, we recognized another narrow exception for testimony by two-way video in [*Gigante*]"). The court also emphasized that "both witnesses were beyond the

court's subpoena power and represented that they would not testify in person." Pet. App. 7a. The court noted Won's objection to *Gigante*, but nonetheless held it was bound by circuit precedent to follow it. Pet. App. 7a n.2 ("Though Won suggests that *Gigante* was wrongly decided, we have never overruled it or deemed it abrogated").

Won petitioned for rehearing en banc urging the Second Circuit to reconsider *Gigante* in view of subsequent developments, but the petition was denied. Pet. App. 18a. It is clear that the sharp split of authority will persist until this Court steps in.

B. This case is a better vehicle than *Akhavan*.

This Court previously denied certiorari in *Akhavan v. United States*, 143 S. Ct. 2639 (2023), which presented a similar question. But this case is easily distinguishable from *Akhavan*. The government's brief in opposition in *Akhavan* highlighted several vehicle problems which counseled against review. All of those vehicle problems are absent here.

- In *Akhavan*, "the district court … specifically found that '[t]he standard articulated in *Craig* is satisfied,'" and the "court of appeals then echoed the district court's analysis, citing *Craig* throughout its discussion." Br. of the United States in Opposition at 13 *Akhavan*, No. 22-844 (U.S. May 12, 2023), 2023 WL 3479617 ("*Akhavan* BIO"). Here, by contrast, the district court made no such finding, and the court of appeals went out of its way to emphasize that *Gigante* represented

"another narrow exception" to the Confrontation Clause which was distinct from *Craig*. Pet. App. 6a.

- In *Akhavan*, Mr. Akhavan "expressly agreed with *Gigante*'s reasoning and conclusion" in the Second Circuit, and the government therefore claimed that Mr. Akhavan had forfeited his argument. *Akhavan* BIO 18-19. Here, Won expressly disagreed with *Gigante* at the panel stage, and the Second Circuit held it was bound by circuit precedent. Pet. App. 7a n.2. Won then filed a petition for rehearing en banc, urging the court to overturn *Gigante*, but it was denied. Pet. App. 17a.

- In *Akhavan*, the district court made an express determination that "any error in this case would have been harmless beyond a reasonable doubt." BIO 19 (quotation marks omitted). The government's BIO offered an extensive explanation of why the asserted error was harmless. *Akhavan* BIO 19-22. Here, the courts below did not offer any hint that the error would have been harmless. This is no surprise, because the government's motion in limine to permit the video testimony was premised on the government's own representations to the district court that the witnesses were "crucial." *See* CA2 A-87 ("Victim Investor's testimony is crucial to the government's case"); CA2 A-88 ("FXCM Employee's testimony is crucial to the government's case").

This Court's denial of certiorari in *Akhavan*, therefore, should not deter the Court from granting certiorari here.

IV. The Second Circuit's Decision Is Wrong.

Gigante is wrong. There is no "exceptional circumstances" exception to the Confrontation Clause's requirement of face-to-face confrontation. In light of *Crawford*, the Second Circuit has no warrant to dramatically expand *Craig*'s narrow exception to the Confrontation guarantee.

The "literal right to 'confront' the witness at the time of trial" lies at "the core of the values furthered by the Confrontation Clause." *Green*, 399 U.S. at 157. "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy*, 487 U.S. at 1017 (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)). When looking directly at a witness, a fact-finder can better ascertain credibility, as it is "more difficult to tell a lie about a person 'to his face.'" *Id.* at 1019.

Craig acknowledged these principles. It emphasized that "face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person," and noted the "strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence." *Craig*, 497 U.S. at 846–47. Nonetheless, *Craig* approved video testimony in a very narrow circumstance—when justified by the "important public policy" of preventing a child abuse victim from being re-traumatized and

"where the reliability of the testimony is otherwise assured." *Id.* at 850. In *Crawford*, this Court abandoned "reliability" as the basis for admissibility under the Confrontation Clause, instead holding that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." 541 U.S. at 59. There is no "reliability exception to the common-law rule." *Id.* at 61.

In light of *Crawford*'s guidance, *Craig* should not be expanded. Yet that is exactly what the Second Circuit did in *Gigante*. *Gigante* held that because the district court "employed a two-way system that preserved … face-to-face confrontation …, it is not necessary to enforce the *Craig* standard." 166 F.3d at 81. The decisions of other courts of appeals rejecting that reasoning are persuasive. "The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation." *Yates*, 438 F.3d at 1315.

"[T]wo-way systems share with one-way systems a trait that by itself justifies the application of *Craig*: the 'confrontations' they create are virtual, and not real in the sense that a face-to-face confrontation is real." *Bordeaux*, 400 F.3d at 554. "Given the ubiquity of television, even children are keenly aware that a television image of a person (including a defendant in the case of a two-way system) is not the person something is lost in the translation." *Id.* "Thus, a defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the

courtroom." *Id.* *Gigante* "neglects the intangible but crucial differences between a face-to-face confrontation and a 'confrontation' that is electronically created by cameras, cables, and monitors." *Id.* at 554–55.

"There are also important practical differences between face-to-face confrontation and virtual confrontation. From the remote witness's point of view, the courtroom will necessarily be defined by the angle and quality of the courtroom camera as well as the size and quality of the screen on which the video is projected. These variables can distort any effort to approximate in-person testimony." *Carter*, 907 F.3d at 1207.

In the analogous context of sentencing, based on the same crucial distinction between being face-to-face versus on video, numerous courts of appeals have found that a district court reversibly errs by substituting virtual presence for actual physical presence when sentencing a criminal defendant. *See United States v. Bethea*, 888 F.3d 864, 867 (7th Cir. 2018) (in the absence of a "personal interaction between the judge and the defendant," which "videoconferencing cannot fully replicate," the "force of the other rights guaranteed by Rule 43 is diminished"), *superseded by statute as stated in United States v. Coffin*, 23 F.4th 778 (7th Cir. 2022); *United States v. Lawrence*, 248 F.3d 300, 303-05 (4th Cir. 2001) (Rule 43 "reflects a firm judgment . . . that virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it"); *United States v. Navarro*, 169 F.3d 228, 239 (5th Cir. 1999) ("In light of the value of face-to-face sentencing, we find the logic in

the Notes to Civil Rule 43 to be equally applicable to Criminal Rule 43—i.e., transmission [from a different location] cannot be justified by showing that it is inconvenient for the defendant to attend the sentencing."); *United States v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011) ("Rule 43 requires that the defendant be present, which simply cannot be satisfied by anything less than physical presence in the courtroom."); *United States v. Torres-Palma*, 290 F.3d 1244, 1246-48 (10th Cir. 2002) ("[V]ideo conferencing for sentencing is not within the scope of a district court's discretion.").

An abundant secondary literature similarly notes concerns as to the reliability of video testimony. *See, e.g.*, Jenia I. Turner, *Remote Criminal Justice*, 53 Tex. Tech L. Rev. 197, 220-21 (2021) (collecting empirical data "suggest[ing] that the use of video may have biasing effects"); Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 Wm. & Mary Bill Rts. J. 769, 786 (2004) (concluding, based on social science literature review, that "in live testimony, face-to-face transmission plainly increases the information available to the fact-finder").

This Court should therefore hold that *Gigante*'s freewheeling "exceptional circumstances" standard is incompatible with the Confrontation Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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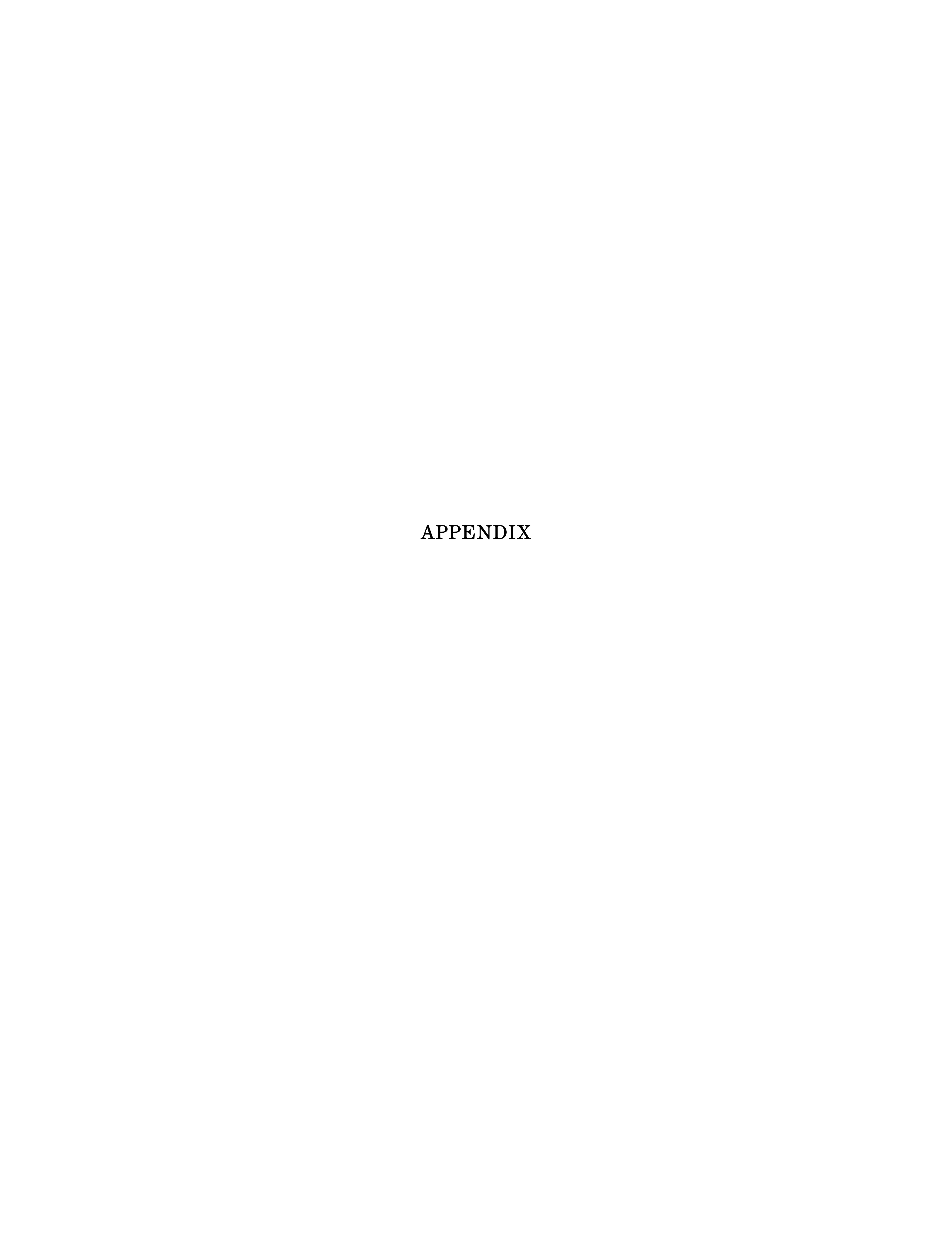

APPENDIX

TABLE OF CONTENTS

Appendix A
United States v. Won, Docket No. 22-2716, 2024 WL 827774 (2d Cir. Feb. 28, 2024) 1a

Appendix B
Transcript of Criminal Cause for Pre-Trial Conference, *United States v. Won*, Docket No. 18-CR-00184(RJD) (E.D.N.Y. Oct. 13, 2021) (excerpt) 15a

Appendix C
Denial of Rehearing en banc, *United States v. Won*, Docket No. 22-2716 (2d Cir. May 8, 2024) 17a

Appendix A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of February, two thousand twenty-four.

PRESENT:
SUSAN L. CARNEY,
RICHARD J. SULLIVAN,
EUNICE C. LEE,
Circuit Judges.

No. 22-2716

UNITED STATES of America, Appellee,

v.

John WON, Defendant-Appellant.*

FILED February 28, 2024

* The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

Attorneys and Law Firms

For Defendant-Appellant: Brian A. Jacobs, Morvillo Abramowitz Grand Iason & Anello P.C., New York, NY.

For Appellee: Sarah M. Evans (Nicholas J. Moscow, on the brief), Assistant United States Attorneys, for Breon Peace, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Raymond J. Dearie, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the September 27, 2022 judgment of conviction is **AFFIRMED** except as to the sentence, which is **VACATED** and **REMANDED** for further consideration consistent with this order.

SUMMARY ORDER

John Won appeals a judgment of conviction entered following a jury trial in which he was found guilty of conspiracy to commit wire fraud in violation of 18 U.S.C. §§ 1349 and 1343; conspiracy to commit securities fraud in violation of 18 U.S.C. § 371; securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff; and conspiracy to commit money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(h), in connection with his involvement in a fraudulent foreign exchange business called ForexNPower ("FNP") that he ran with his longtime business partner, Tae Hung ("Kevin")

Kang.[1] We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

I. Sufficiency of the Evidence

Won first argues that the district court erred in denying his motion for a judgment of acquittal, which he made after the prosecution rested and renewed after the close of his defense. He asserts that the government failed to prove his specific intent – a necessary element for each of Won's counts of conviction – and urges us to reverse his convictions for insufficient evidence. We decline to do so.

"[A] defendant challenging the sufficiency of the evidence that led to his conviction at trial bears a heavy burden, as the standard of review is exceedingly deferential." *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (citation and internal quotation marks omitted). Ultimately, "[a] judgment of acquittal is warranted only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. Martoma*, 894 F.3d 64, 72 (2d Cir. 2017) (internal quotation marks omitted). Moreover, "[t]he law has long recognized that criminal intent may be proved by circumstantial evidence alone," which is particularly appropriate for conspiracies given that they are typically "undertak[en] in secret." *United States v. Heras*, 609 F.3d 101, 106 (2d Cir. 2010) (internal quotation marks omitted). For instance, circumstantial

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[1] Kang was also charged and ultimately pleaded guilty.

evidence can prove conspiratorial intent by showing "a defendant's association with conspirators in furtherance of the conspiracy" or "his presence at critical stages of the conspiracy that cannot be explained by happenstance." *United States v. Anderson*, 747 F.3d 51, 60 (2d Cir. 2014) (internal quotation marks omitted).

The jury heard more than enough evidence to infer Won's specific intent to participate in the FNP fraud. To begin, witnesses from two of FNP"s key partners – online brokerage platform FXCM and introducing broker FXEvolve – testified that Won was their main contact at FNP and that he lied to them in order to establish the critical relationships that propped up FNP's fraud. When FNP first applied to trade on FXCM through an FNP trading entity called Safety Capital Management, Inc. ("Safety Capital"), Won misrepresented that Safety Capital was eligible to do business with FXCM because it was "exempt" from certain licensing regulations. App'x at 615–16. Then, after FXCM banned Safety Capital, specifically due to Kang's involvement, over "excessive losses," *id.* at 621, Won maneuvered to resume trading on FXCM by falsely stating that he had formed a new venture – GNS Capital Inc. ("GNS") – with "new partners," even though Kang was in fact still at the helm, *id.* at 624–25, 636–38. Won then compounded his misrepresentations by falsely attesting that GNS was also exempt from licensing regulations. *See id.* at 646–49; Gov't App'x at 340, 353. Won also made false statements to FXEvolve – which provided FNP with a vital revenue stream in the form of commissions for each trade made in an FNP customer account – when he misrepresented that FNP provided

only "educational services" and was not trading on behalf of clients. App'x at 776–77; Gov't App'x at 301–02.

The jury also heard detailed testimony concerning Won's "association with conspirators in furtherance of the conspiracy" through his participation in FNP's predatory seminars. *Anderson*, 747 F.3d at 60 (internal quotation marks omitted). One victim testified about multiple occasions on which Won distributed false brochures and prospectuses, spoke on stage, and at one point even "shouted" a solicitation to potential investors, urging them to "line up" in order to invest. App'x at 511. This victim also explained that Won was in charge of setting up accounts for new investors, and that Kang introduced Won as someone who was "like a brother to him" and whom Kang "had been doing business partnerships [with] for years." *Id.* at 470. At one point Won even handed the victim a business card featuring the false claim that FNP used a "[s]ecret method of generating 10 percent or more [in monthly] profit." *Id.* at 472.

Although Won argued to the jury that he was just an assistant who engaged in only a "handful" of misrepresentations to FNP's business partners and was merely "presen[t]" when Kang misled investors at seminars, Won Br. at 22, there was ample circumstantial evidence from which the jury could reasonably conclude that Won intended to join the conspiracy with full knowledge of its illegal purpose.

II. Confrontation Clause

Won also argues that his Confrontation Clause rights were violated when the district court permitted

two witnesses – Deric Chen, from FXCM, and Dr. Greg Suh, an investor-victim – to testify by two-way video. We review challenges under the Confrontation Clause *de novo*. *See United States v. Vitale*, 459 F.3d 190, 195 (2d Cir. 2006).

In general, "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). But this right is "not absolute." *Maryland v. Craig*, 497 U.S. 836, 850 (1990). Indeed, the Supreme Court has recognized that, in limited cases, a witness may testify by "one-way closed circuit television" – outside the defendant's presence – upon a case-specific finding that such testimony is "necessary to further an important state interest." *Id.* at 852, 857 (holding that one-way video testimony was permissible in that case to protect a child victim of sexual abuse from the trauma of testifying in front of her abuser). In the wake of *Craig*, we recognized another narrow exception for testimony by two-way video in *United States v. Gigante.* 166 F.3d 75, 81 (2d Cir. 1999) (explaining that the "*Craig* standard" does not apply in the case of "two-way" video). There we held that a witness could testify by two-way video – without offending a defendant's confrontation right – "upon a finding of exceptional circumstances ... when [video testimony] furthers the interest of justice." *Id.* Based on that standard, we found that a witness with a "fatal illness" who was "participat[ing] in the Federal Witness Protection Program" could testify by two-way

video within the confines of the Confrontation Clause. *Id.*[2]

Applying *Gigante* to the facts here, we find that exceptional circumstances likewise justified the use of two-way video testimony against Won. At the time of Won's trial in November 2021, the world was in the midst of a pandemic, prompting the Chief Judge of the Eastern District of New York to extend the court's "national emergency" protocols as new strains of the virus emerged that were potentially vaccine-resistant. Gov't App'x at 39–44. Chen lived in Hong Kong and would have had to quarantine for three weeks after returning from the United States. Suh lived in South Korea and was the caretaker for his seventy-seven-year-old mother; live, in-person testimony would have required Suh to abandon his mother for weeks while potentially exposing her to COVID upon his return. Moreover, both witnesses were beyond the court's subpoena power and represented that they would not testify in person, even if the government were to bear the full cost of travel. Finally, the district court used procedures to ensure the protection of Won's confrontation rights, including by setting up large screens that allowed the jury to see the witnesses and also allowed the witnesses to see the attorneys and Won himself. Though two-way video "should not be considered a commonplace substitute for in-court testimony," we are persuaded that "exceptional

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[2] Though Won suggests that *Gigante* was wrongly decided, we have never overruled it or deemed it abrogated. *See United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) ("[W]e ... are bound by the decisions of prior panels until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court.").

circumstances" justified such video testimony here. *Gigante*, 166 F.3d at 81.

In so holding, we reject Won's argument that *Gigante* is strictly limited to cases of "unavailability" under Federal Rule of Evidence 804(a), such as when a witness is unable to testify due to their own "infirmity" or "physical illness." Fed. R. Evid. 804(a). To the contrary, *Gigante* itself looked to factors beyond the compass of Rule 804(a) when it stressed that the witness was unavailable due to both his "fatal illness *and* [his] participation in the Federal Witness Protection Program" – the latter of which does not bear on the Rule 804(a) standard for "[u]navailability." *Gigante*, 166 F.3d at 81 (emphasis added). Moreover, we have held that *Gigante* permitted two-way testimony during the pandemic in part because a witness had to care for elderly relatives, which is again a factor not found in the Rule 804(a) analysis. *See United States v. Patterson*, No. 21-1678, 2022 WL 17825627, at *4 (2d Cir. Dec. 21, 2022). By its own terms and its subsequent application, *Gigante* thus extends to other case-specific findings of "exceptional circumstances" beyond the rigid confines of Rule 804(a).

III. Jury Instructions

Won also contends that the district court erred in administering a "conscious avoidance" instruction to the jury with respect to each of his counts. We review such challenges *de novo*. *See United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003). "[A] conscious avoidance instruction may be given only (i) when the defendant asserts the lack of some specific aspect of knowledge

required for conviction, and (ii) the appropriate factual predicate for the charge exists, *i.e.*, the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *Id.* (citation and internal quotation marks omitted). Defendants challenging the existence of that factual predicate face a "heavy burden," as we will affirm so long as "*any* rational trier of fact" could have found conscious avoidance beyond a reasonable doubt. *Id.* at 171 (internal quotation marks omitted).

Won argues that the government failed to establish the necessary "factual predicate" because there was "no evidence" that Won was aware of a "high probability" that Kang was defrauding investors. Won Br. at 42. The trial record belies that contention. Won was well aware that Safety Capital was losing money, to the point that Won had to form an alter ego entity (GNS) just to keep trading with FXCM after Safety Capital was kicked off the platform. At the same time, Won attended seminars and distributed materials – including his own business card – proclaiming that FNP used a "[s]ecret method of generating 10 percent or more [monthly] profit" and could turn a $10,000 investment into $1.5 million in three years. App'x at 463, 472. In light of this evidence, a rational juror could well have found that Won consciously avoided learning the fraudulent truth underpinning FNP.[3]

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[3] We also reject Won's contention that the district court committed plain error by failing to "make clear" that the conscious avoidance instruction could not be applied to Won's aiding-and-abetting

IV. Rule of Completeness

Next, Won contends that the district court abused its discretion when it precluded Won from introducing portions of his deposition under Federal Rule of Evidence 106, known as the rule of completeness. We review such evidentiary decisions for abuse of discretion. *See United States v. Williams*, 930 F.3d 44, 58 (2d Cir. 2019). Though Rule 106 permits the introduction of omitted portions of a statement (including those made during a deposition) to "explain" or provide "context," the completeness doctrine does not "require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages." *United States v. Johnson*, 507 F.3d 793, 796 (2d Cir. 2007) (internal quotation marks omitted).

Won argues that the district court should have allowed him to introduce three excerpts from his deposition pursuant to Rule 106. Because none of these excerpts explained or provided context for the admitted portions, the district court was well within its discretion to exclude them. For instance, Won contends that he should have been permitted to introduce deposition testimony that he was not aware that a specific

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charges or used to prove Won's intent to participate in a conspiracy. Won Br. at 44. The district court's instructions were accurate, and Won cites no case in which we found error merely because a district court failed to give a gratuitous reminder that conscious avoidance should not be used when assessing intent. *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) ("We typically will not find [plain] error where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this Court." (internal quotation marks omitted)).

investor's check had been deposited into an FNP bank account used to distribute proceeds to the conspirators. But that testimony was not relevant to the admitted portion of the deposition, in which Won conceded that he ultimately controlled that bank account and was a signatory on it. Nor was his testimony that he did not trade in customers' individually managed accounts relevant to his admitted testimony that he was CEO and president of GNS, or that he had access to a different GNS-managed account of "pooled" investor funds. App'x at 1274, 1276–77. Lacking any clear relevance to the admitted portions, these omitted segments were properly excluded.

V. Expert Testimony

Nor are we persuaded by Won's challenge to the district court's admission of expert testimony explaining regulations on the foreign exchange market. As with other evidentiary rulings, we review this challenge for abuse of discretion, reversing only if we find "manifest error." *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997). Won argues that it was improper to admit testimony from Daniel Driscoll – who testified about the foreign exchange market's license and registration rules, proficiency exam requirements, and advertising regulations – because it invited the jury to find Won guilty (or otherwise disfavor him) based on his uncharged failure to comply with those rules. We cannot agree. As this Court has already held, references to regulations are not "improper" when the district court provides a "limiting instruction" and when the "purpose" of the reference is to explain the basis for a defendant's misconduct, as opposed to "suggest[ing] to the jury that

it could find the defendant guilty simply by reason of his violation of the regulation." *United States v. McElroy*, 910 F.2d 1016, 1023–24 (2d Cir. 1990).

Here, the purpose of Driscoll's testimony was to explain how Won's misrepresentations to FXCM and FXEvolve furthered FNP's fraudulent business, and the district court gave several limiting instructions to cabin the jury's use of that evidence. It was therefore "well within the court's discretion to allow the evidence." *McElroy*, 910 F.2d at 1024.

VI. Speedy Trial

Won next argues that his case should have been dismissed with prejudice because his trial was conducted in violation of his Sixth Amendment guarantee of a speedy trial. A "constitutional speedy trial right claim is governed by the four *Barker v. Wingo* factors: '[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.' " *United States v. Abad*, 514 F.3d 271, 274 (2d Cir. 2008) (quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). Though the first factor – the forty-two-month delay until Won's trial – favors Won, the rest do not. If anything, the second factor favors the government, as the delay was attributable not to governmental obstruction but rather to joint scheduling requests, Won's motion for severance from Kang, and Won's insistence that Kang go to trial first. The third factor likewise favors the government, given that Won did not demand a speedy trial or otherwise raise the issue below. The final factor is neutral, as Won was not prejudiced by any delay, since he was not incarcerated pretrial and the government

faced similar challenges in preparing for trial in the midst of the pandemic. On balance, Won cannot establish that his Sixth Amendment right was violated.

VII. Restitution

Finally, Won argues that the district court should have ordered him to pay restitution on a joint-and-several basis with Kang. The government concedes that this was error and joins Won's request that we remand for resentencing.

Generally, "[w]e review awards of restitution for abuse of discretion." *United States v. Desnoyers*, 708 F.3d 378, 389 (2d Cir. 2013). Because Won "fail[ed] to object to ... the order of restitution in the court below, we review his arguments on appeal for plain error." *United States v. Nucci*, 364 F.3d 419, 421 (2d Cir. 2004). This requires a showing that there was an error that was plain and that the error affected his substantial rights as well as the fairness, integrity, or public reputation of the judicial proceedings. *See id.*

Here, the district court did not initially order Won and Kang to pay restitution jointly and severally. At the request of Kang's counsel – and without a similar motion from Won – the district court amended Kang's judgment to impose restitution jointly and severally with Won. The district court did not amend Won's judgment and offered no explanation for the resulting discrepancy in its treatment of the two co-defendants.

We agree that this was plain error. As is well established, a district court abuses its discretion when it fails to explain discrepancies in restitution judgments.

See Desnoyers, 708 F.3d at 390. This error also affected Won's substantial rights and the fairness of judicial proceedings, as it required Won to pay his restitution award on arbitrarily harsher terms than his co-defendant. *See Nucci*, 364 F.3d at 421. We therefore vacate Won's sentence and remand so that the district court may either amend Won's judgment to impose joint-and-several liability or provide an explanation for the mismatch.

* * *

We have considered Won's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of conviction except as to Won's sentence, which we **VACATE** and **REMAND** to allow the district court to reconsider Won's restitution obligation.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	18-CR-00184(RJD)
-against-	United States Courthouse Brooklyn, New York Wednesday, October 13, 2021
JOHN WON, Defendant.	2:00 p.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR PRE-TRIAL CONFERENCE BEFORE THE HONORABLE RAYMOND J. DEARIE UNITED STATES SENIOR DISTRICT JUDGE

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Page 7

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THE COURT: Okay, I will leave that to all of you to schedule and set up.

As far as the other principal issue that I am ready to discuss is concerned, also involving testimony of an unusual nature, you know, having been through the papers, including the Government's last response, I think it is pretty clear to me that they have met their burden to justify this testimony by video. However, I really am going to insist that this technology be crystal

clear, both audio and video, for the very reasons raised by the defense in their application as we've read before. I want the jury to see these witnesses in a way, as some have opined and written, in terms of the jury sizing up a witness, this video arrangement, which I doubt is here to stay, but given COVID is here for the time being, may indeed provide the fact-finder with a greater opportunity to observe the nuances, facial expressions and so forth, of the witnesses.

And I am comfortable with the notion that under these circumstances, and based upon the representations made to me, that exceptional circumstances and the interests of justice warrant it.

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Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of May, two thousand twenty-four.

United States of America,
Appellee,
v.

ORDER

Docket No: 22-2716

John Won,

Defendant - Appellant.

Appellant, John Won, has filed a petition for rehearing *en banc*. The active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk