No. 24-121

IN THE
Supreme Court of the United States

JOHN WON,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF FOR CLAUSE 40 FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Clause 40 Foundation ("the Foundation") is a tax exempt nonprofit 501(c)(3) nonpartisan organization whose mission is to honor, preserve, and promote the due process rights guaranteed in the U.S. Constitution. The Foundation takes its name from the fortieth clause of the Magna Carta, which, along with Clause 39, codified the foundational due process protections upon which the United States's criminal legal system is based. The Foundation promotes constitutional due process protections through nonpartisan public education, research, and litigation efforts.

The Foundation regularly files *amicus* briefs in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance touching on individual procedural rights, particularly when such issues arise in the context of the criminal legal system. The Foundation is deeply concerned with the proper extent of the rights enshrined in the Confrontation Clause of the Sixth Amendment. It is well-positioned to provide the Court additional insight into the tension the decision below creates with both this Court's Confrontation Clause jurisprudence and the scope of defendants' confrontation rights in jurisdictions outside the Second Circuit Court of Appeals.

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[1] Counsel for the parties received timely notice of *amicus's* intent to file this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition presents a critical question concerning a defendant's constitutional right to confront the witnesses against him face-to-face, on which the Second Circuit is an outlier. Every other circuit court to consider the question has rejected the Second Circuit's view. Moreover, a leading light of this Court presciently castigated the Second Circuit's aberrant rule.

One voice looms large in modern Confrontation Clause jurisprudence: Justice Antonin Scalia. Justice Scalia was a stalwart defender of the rights protected by the Clause, emphasizing, as he often did, that the Constitution meant what it said: "The Confrontation Clause, for example, requires confrontation." Antonin Scalia, *A Matter of Interpretation*, 46 (Amy Gutman ed., 2018); *see also Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (Scalia, J.) ("[S]imply as a matter of English [the Confrontation Clause] confers at least a right to meet face to face all those who appear and give evidence at trial.") (citation and internal quotation marks omitted). The Court adopted Justice Scalia's straightforward view of the Clause, and the importance of the original understanding and deep-seated historical legal traditions it embodied, in *Crawford v. Washington*, 541 U.S. 36 (2004). That landmark case forms an important part of Justice Scalia's legacy. But *Crawford* was not the only time the Justice spoke influentially about the Confrontation Clause.

The Second Circuit's rule in *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999) — the rule challenged in the instant petition — was a specific target of Justice Scalia's criticism. As the Justice warned, *Gigante*'s rule is inconsistent with the *sine qua non* of the Confrontation Clause, namely, the right to literal confrontation. The

Second Circuit's rule, however convenient it might seem, nevertheless dissolves a critical constitutional protection enshrined by the Framers. "It is," after all, "a truism that constitutional protections have costs." *Coy*, 487 U.S. at 1020. For that reason, when this Court had the opportunity to codify *Gigante*'s rule in the Federal Rules of Criminal Procedure, Justice Scalia took the opportunity to explain why it conflicted with both the Court's decisions and underlying principles embodied by the Clause. 207 F.R.D. 89, 93-96 (2002) (Scalia, J.). The Court wisely rejected the proposed amendment to the Rules. *Id.* at 91.

As the decision below illustrates, Justice Scalia's doubts about the constitutionality of *Gigante's* rule are only magnified in the wake of COVID-19 and the proliferation of remote testimony. In the age of Zoom, two-way video testimony threatens to become the "new normal" for trial courts in the name of convenience. But most of a defendant's constitutional rights are inconvenient to the government; it would be much easier to prove a crime if the government need not dispel reasonable doubt, or bother empaneling a full jury, or go through the trouble of securing an indictment. The legal community may have grown accustomed to remote proceedings, and may widely believe that such procedure is as good as the genuine, in-person article. But, as Justice Scalia warned, "the Constitution is meant to protect against, rather than conform to, current 'widespread belief.'" *Maryland v. Craig*, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting).

Because the *Gigante* rule is irreconcilable with the original understanding of the Confrontation Clause and the decisions of this Court, the Court should grant the petition and reverse the Second Circuit's judgment.

ARGUMENT

I. Justice Scalia Presciently Identified The Constitutional Error in *Gigante*'s Rule.

Justice Scalia is the leading force behind the Court's contemporary Confrontation Clause jurisprudence. In his early years on the Court, he criticized decisions that had reduced the Clause to little more than a constitutionalized version of the hearsay rules. Eventually, his view of the Clause prevailed, and the Court adopted a more robust understanding of a defendant's confrontation rights grounded in the historical context underpinning the Framers' adoption of the Sixth Amendment.

Given Justice Scalia's foresight and prominence in this area of the Court's doctrine, his understanding of the Confrontation Clause merits particular weight and examination. This is all the more true when, as here, the late Justice had the opportunity to opine on a confrontation issue that the Court has yet to fully resolve.

Justice Scalia's analysis of the Confrontation Clause exposes the errors in the Second Circuit's permissive approach to two-way remote testimony. His writings forcefully demonstrate why the petition should be granted. First, three significant opinions he wrote in Confrontation Clause cases — the majority in *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988), his dissent in *Maryland v. Craig*, 497 U.S. 836 (1990), and the majority in *Crawford v. Washington*, 541 U.S. 36 (2004) — detail the primacy of the Framers' original understanding of the importance of in-person testimony embodied in the Clause. Second, Justice Scalia specifically described the flaws in the Second Circuit's *Gigante* rule in the explanatory statement he penned when the Court rejected an amendment to the Federal Rules of Criminal Procedure that would have

codified *Gigante*. Finally, Justice Scalia's writings remind us why we should be particularly skeptical of procedural innovations in the name of convenience that come at the expense of durable constitutional commands.

A. Justice Scalia's Opinions Explain that the Confrontation Clause Embodies the Original Understanding that *In-Person* Accusation is Critical to the Truth-Seeking Function of a Trial.

On three occasions, Justice Scalia had the opportunity to examine the foundational Confrontation Clause principles at the heart of the instant petition. Writing for the Court in *Coy v. Iowa*, 487 U.S. at 1014, Justice Scalia addressed an Iowa statute that permitted the placement of a large physical screen between a defendant accused of sexual assault and the minor victims testifying against him at trial. Similarly, in *Maryland v. Craig* the Court upheld a statute that permitted a minor victim of sexual abuse to testify via one-way closed-circuit television; this time, Justice Scalia wrote in dissent. 497 U.S. at 860. Finally, as alluded to above, Justice Scalia penned the Court's landmark decision in *Crawford*. 541 U.S. at 38. Each of these explorations reached the same bedrock conclusion: the Confrontation Clause requires actual, in-person confrontation.

Justice Scalia's opinion for the Court in *Coy* reflects the longstanding understanding of the primacy of *face-to-face* confrontation at the heart of the Confrontation Clause. The Justice emphasized that the literal meaning of the word "confrontation," both in the English language and its Latin derivation, means a face-to-face encounter. *Coy*, 487 U.S. at 1016 (noting that "as a matter of English" the Confrontation Clause "confers at least a right to meet face to face all those who appear and give evidence at trial" and

highlighting that "the word "confront" ultimately derives from the prefix "con-" (from "contra" meaning "against" or "opposed") and the noun "frons" (forehead)") (internal quotation marks omitted). The Court "ha[d] never doubted," he wrote, "that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Id.* And while the Justice acknowledged the very real harm such a face-to-face encounter might cause a young victim, that impact could not displace the Constitution's guarantee. *Id.* at 1020. As the Justice wrote, "[i]t is a truism that constitutional protections have costs." *Id.* Because the screen erected between the testifying victim and the defendant prevented the face-to-face meeting that is "the irreducible literal meaning of the Clause," the Court rejected the procedure as unconstitutional. *Id*. at 1021.

Justice Scalia spoke for only four justices in *Maryland v. Craig*, but his discussion of the fundamental principle at the heart of the Confrontation Clause remains unassailable.[2] Justice Scalia understood the majority's approach, in approving of a one-way video testimony procedure for a minor victim, to "abstract[] from the right [to confront one's accusers] to its purposes," namely, ensuring the reliability of evidence, and then to approve the procedure in question because it was adequately reliable. 497 U.S. at 862 (Scalia, J., dissenting). The Justice emphasized, however, that the explicit, irreducible right guaranteed by the Confrontation Clause was not a right to

[2] As discussed further below, Justice Scalia understood that the *Gigante* rule was far broader than the narrow exception recognized in *Craig*. Granting the petition here, therefore, would not disturb *Craig*'s holding; if anything, it would only serve to rein in the Second Circuit's radical expansion of remote testimony beyond both *Craig*'s bounds and the original principles described in *Crawford*.

reliable evidence, but rather a right to test the reliability of evidence via a particular method: in-person, face-to-face confrontation of the witness. *Id.* "Whatever else it may mean in addition, the defendant's constitutional right 'to be confronted with the witnesses against him' means, always and everywhere, at least what it explicitly says: the 'right to meet face to face all those who appear and give evidence at trial.'" *Id.* (quoting *Coy*, 487 U.S. at 1016 (additional quotations omitted)). And because, in Justice Scalia's view, the text of the Clause could not be clearer about this minimum requirement, mere practical considerations like "[t]he 'necessities of trial and the adversary process' [were] irrelevant . . . since they cannot alter the constitutional text." *Id.* at 863; *see also id.* ("[W]e are not talking here about denying expansive scope to a Sixth Amendment provision whose scope for the purpose at issue is textually unclear; 'to confront' plainly means to encounter face-to-face, whatever else it may mean in addition.").

Justice Scalia did command a majority, however, when he wrote for the Court in *Crawford*. In this landmark case, the Court revitalized the salience of the Clause by returning to the "historical background of the Clause to understand its meaning." 541 U.S. at 42. This exegesis not only informed the Court's determination of the constitutional requirements for admission of out-of-court testimonial statements — it also described durable principles enshrined in the Confrontation Clause that bear on the instant petition. As Justice Scalia documented, the confrontation right that gave rise to the Clause was grounded in English common law traditions. In particular, he detailed the abuses of *ex parte* procedure in English history that prompted the founding generation's concern with a right to face one's accuser. *See id.* at 42-50. The

Justice distilled two guiding principles from the historical context that inform original meaning of the Confrontation Clause. First, the "principal evil" the Clause was designed to remedy was the type of *ex parte* interrogations of witnesses prevalent in continental civil law systems. *Id.* at 50. "The Sixth Amendment," he wrote for the Court, "must be interpreted with this focus in mind." *Id.* The second guiding principle was that the ***only*** exception to in-person confrontation contemplated by the Sixth Amendment was to admit the statements of an *unavailable* witness when the defendant had enjoyed a previous opportunity for cross-examination. *See id.* at 53-54 ("The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."). And, as Justice Scalia cautioned, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 54. He specifically emphasized that "the Framers [did not] mean[] to leave the Sixth Amendment's protection . . . to amorphous notions of 'reliability,'" instead, the Confrontation Clause "reflects a judgment . . . about how reliability can best be determined." *Id.* at 61.

A consistent theme runs through these opinions, a theme that Justice Scalia saw clearly: the paramount concern of the Confrontation Clause is *literal* confrontation. The Justice reaffirmed this view on other, more informal occasions as well. *See* Antonin Scalia, *A Matter of Interpretation*, 46 (Amy Gutman ed., 2018) ("The Confrontation Clause, for example, requires confrontation."); Justice Antonin Scalia, *Remarks to the*

Woodrow Wilson Int'l Ctr. for Scholars: Constitutional Interpretation the Old Fashioned Way, 5 (Mar. 14, 2005), https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf) ("[A] a Living Constitution Court held that all that was necessary to comply with the Confrontation Clause was that the hearsay evidence which is introduced — hearsay evidence means you can't cross-examine the person who said it because he's not in the court — the hearsay evidence has to bear indicia of reliability. I'm happy to say that we reversed it last term with the votes of the two originalists on the Court. And the opinion said that the *only* indicium of reliability that the Confrontation Clause acknowledges is *confrontation*.") (emphasis added); *Piers Morgan Tonight: Interview with Antonin Scalia* (CNN television broadcast Oct. 13, 2012) ("All legal rules do not come out with a perfect, sensible answer in every case. The confrontation clause, in some situations, does seem to be unnecessary. But there it is. And its meaning could not be clearer. You are entitled to be confronted with the witnesses against you.").

The Second Circuit's permissive approach to remote testimony cannot be squared with the Sixth Amendment's insistence on actual confrontation. One can easily imagine how Justice Scalia would view the rule applied in the decision below. In fact, one need not imagine, as the Justice already questioned the constitutionality of the very rule challenged in the instant petition.

B. Justice Scalia Highlighted the Error in *Gigante*'s Rule.

Justice Scalia targeted the Second Circuit's decision in *Gigante* for particular criticism. Following *Gigante*, the Judicial Conference proposed an amendment to Federal

Rule of Criminal Procedure 26(b) that would have codified the *Gigante* rule and permitted two-way video testimony under a showing of exceptional circumstances. The Court, however, rejected that proposed rule. 207 F.R.D. 89. Justice Scalia wrote to explain why, in his view, such a rule (and, by extension, the decision in *Gigante* itself) was "of dubious validity under the Confrontation Clause". *Id.* at 93 (Scalia, J.)

Justice Scalia questioned the constitutionality of the proposed rule on two grounds. First, he explained, the rule went far beyond the narrow exception the Court announced in *Craig*. He understood the permissive standard embodied by the proposed rule to be "unquestionably contrary to the rule enunciated in *Craig*." *Id.* Second, and more importantly, he castigated the proposal for ignoring the constitutional protections enshrined in the Clause as elucidated in *Craig*. Justice Scalia derided the notion that "one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) [could] become transformed into full-fledged confrontation when reciprocal transmission is added." *Id.* at 94. The whole heart of confrontation is to "compel accusers to make their accusations *in the defendant's presence*," he wrote, "which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image." *Id.* The *Gigante* rule permitted "virtual confrontation" rather than the genuine article, and therefore fell short of what the Sixth Amendment requires. *See id.* ("Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.").

Justice Scalia's objections to the *Gigante* rule were primarily grounded in the *Craig* decision; *Crawford* had yet

to be decided. But his objections would only be more forceful if he had had the opportunity to examine the rule in the post-*Crawford* world. The gravamen of the Confrontation Clause is confrontation; the *Gigante* rule provides for every feature of live in-court testimony *except* confrontation.

C. Justice Scalia Warned Against Eroding the Confrontation Right in the Name of Pragmatic Policy.

Justice Scalia was particularly vigilant concerning the Confrontation Clause because it provided the readiest example of constitutional interpretation *erasing* rights established in the text of the Constitution. The majority's decision in *Craig*, he believed, was one in which modern policy sensibilities outweighed the Sixth Amendment's literal requirement for in-person confrontation. *See* Antonin Scalia, *The Essential Scalia On the Constitution, the Courts, and the Rule of Law*, 17 (Jeffrey S. Sutton & Edward Whelan eds., 2020) ("Perhaps it [the right to be confronted] is, as I have suggested, a right that (at least in the case of child witnesses) the majority no longer cares for. But a right consists precisely of entitlement *against the wishes of the majority*. There is no blinking the fact that we have eliminated a freedom that used to exist—that the 'evolving Constitution' can evolve toward less freedom as well as more.").

The evolution and proliferation of remote trial procedures in the post-COVID era presents a similar risk. As judges become accustomed to the "new normal" of proceeding remotely when counsel, parties, or staff are unavailable, the temptation to push forward with trial when a witness cannot or will not come to court will become all the greater. But a policy of convenience cannot

override the Constitution's durable commands. "The purpose of enshrining [the Confrontation Clause's] protection[s] in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." *Craig*, 497 U.S. at 861 (Scalia, J., dissenting).

As Justice Scalia exhorted, "[w]e are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings." *Id.* at 870. Whatever the benefits of trial-by-Zoom, they cannot justify the cost of abandoning the Constitution.

CONCLUSION

For the foregoing reasons, and because Justice Scalia presciently identified the constitutional error in the Second Circuit's rule, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 19, 2024