No. 24-121

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This case is an ideal vehicle to resolve a longstanding conflict of authority over the legal standard governing the admissibility of two-way video testimony under the Confrontation Clause. In *Maryland v. Craig*, 497 U.S. 836 (1990), this Court held that the Confrontation Clause permits one-way video testimony (*i.e.*, the defendant can see the witness, but the witness cannot see the defendant) when the denial of face-to-face confrontation is "necessary to further an important public policy." *Id.* at 850. The overwhelming majority of lower courts have held that *Craig*'s standard also applies to two-way video testimony (*i.e.*, the defendant and witness can both see each other). But the Second Circuit has charted its own path. In *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), the Second Circuit held that in the context of a "two-way system," "it is not necessary to enforce the *Craig* standard." *Id.* at 81. Instead, two-way video testimony is admissible if the government can show "exceptional circumstances"—which, in turn, merely requires a showing that the "witness's testimony is material to the case" and "the witness is unavailable to appear at trial." *Id.* (quotation marks omitted).

In the quarter-century since *Gigante* was decided, no court has ever agreed with *Gigante*, and numerous courts have stated that *Gigante* is wrong. But the Second Circuit has stubbornly clung to *Gigante*, and the government has repeatedly relied on it as a basis for admitting testimony that would be inadmissible in other jurisdictions. In the decision below, the Second Circuit held that *Gigante* authorized the video testimony of two witnesses at petitioner John Won's criminal trial. This

case is therefore an ideal vehicle to decide whether *Gigante* is correct.

The government's brief in opposition does not defend *Gigante* or the reasoning of the decision below. Instead, the government's theory is that the testimony at issue could have been admitted under *Craig*. But the lower courts never addressed this argument, and the government affirmatively waived it—in the district court, the government insisted that "it is not necessary to enforce the *Craig* standard." CA2 A-89 (quoting *Gigante*, 166 F.3d at 81).[1]

The government's new argument is also wrong. The government now suggests for the first time that *Craig*'s "important public policy" standard was satisfied because the witnesses' live testimony might have posed COVID-related health risks to other trial participants. But every other trial participant appeared in the courtroom live, and there was zero evidence that the live testimony of these witnesses would have endangered any trial participants. Instead, the witnesses testified remotely because it would have been inconvenient for them to travel from foreign countries—precisely the sort of rationale that satisfies *Gigante* but not *Craig*.

The government also asserts that the admission of the witnesses' testimony was harmless error. Like the government's *Craig* argument, the government's harmless-error argument was not addressed by the lower courts and contradicts its own representations below. The government told the district court that these

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[1] "CA2 A-87" refers to page A-87 of the Second Circuit Appendix. *See* Pet. 6 n.1.

witnesses should be permitted to testify remotely because their testimony was "crucial to the government's case." CA2 A-87, A-88. Having persuaded the district court to admit the witnesses' testimony on that basis, the government cannot now avoid review by arguing that their testimony did not matter after all.

ARGUMENT

I. The Court Should Resolve the Circuit Split and Disregard the Government's New and Waived Arguments.

The case for certiorari is straightforward. The Second Circuit applies a lenient legal standard in deciding the admissibility of two-way video testimony. This Court has strongly suggested, and numerous lower courts have held, that the Second Circuit's standard is wrong. The Court should grant certiorari to resolve the split and ensure that the Confrontation Clause means the same thing in New York, Connecticut, and Vermont as it does everywhere else.

In *Gigante*, the Second Circuit held that *Craig*'s "important public policy" standard does not apply to two-way video testimony. 166 F.3d at 81. Instead, such testimony is admissible when there are "exceptional circumstances," which merely requires a showing that the "witness's testimony is material to the case and if the witness is unavailable to appear at trial." *Id.* (quotation marks omitted).

Following *Gigante*, this Court rejected a proposed revision to Criminal Rule 26(b) that would have codified *Gigante*. Order of the Supreme Court, 207 F.R.D. 89, 99

(2002) (Appendix to Statement of Breyer, J.); *see id.* at 101-03. Concurring in that decision, Justice Scalia emphasized that the proposed rule was "of dubious validity under the Confrontation Clause" and was "unquestionably contrary to the rule enunciated in *Craig*." *Id.* at 93 (Scalia, J., concurring). Justice Scalia expressly disagreed with *Gigante*, explaining that "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.* at 94.

Two years later, Justice Scalia authored *Crawford v. Washington*, 541 U.S. 36 (2004), which overruled prior case law holding that out-of-court statements could be admitted under the Confrontation Clause if they were sufficiently reliable. *See id.* at 61. Instead, the Court held that the Confrontation Clause applied to *all* testimonial statements, whether "reliable" or not. *See id.* at 68-69.

In subsequent years, the Eighth, Ninth, and Eleventh Circuits rejected *Gigante* and held that *Craig*'s rigorous standard applied to two-way video testimony. Pet. 15-16. Numerous state supreme courts have similarly rejected *Gigante*, including two that have confined *Craig* to its facts. Pet. 16-17, 18-19. Yet the Second Circuit has adhered to *Gigante*, yielding an entrenched split of authority that cries out for Supreme Court resolution.

The government does not defend *Gigante*'s standard. Instead, it argues that, on the particular facts of this

case, the testimony at issue would have been admissible under *Craig*'s standard. BIO 11-12. It further contends that, as applied to criminal trials during COVID, the *Craig* standard and *Gigante* standard "point in the same direction." BIO 12. The government has waived these arguments, and they are meritless in any event.

To begin, although the government now claims the testimony would have been admissible under *Craig*, the lower courts did not resolve the case on that ground. The Second Circuit relied on *Gigante* while recognizing 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 Second Circuit noted Won's objection to *Gigante*, but it did not suggest that the case would have come out the same way under *Craig*. Instead, it merely stated that it was bound by circuit precedent to apply *Gigante*. Pet. App. 7a n.2. Likewise, the district court applied *Gigante*'s standard and made no reference to *Craig*'s standard. Pet. App. 16a.

The reason the lower courts did not address this argument is that the government never made it. In both the district court and the Second Circuit, the government relied solely on *Gigante*. Indeed, the government did not merely forfeit this argument: it affirmatively waived it. The government emphasized to the district court that "it is not necessary to enforce the *Craig* standard." CA2 A-89 (quoting *Gigante*, 166 F.3d at 81). It is improper for the government to attempt to shield this case from review by advancing a new argument in its brief in opposition that it told the district

court not to consider. *See Wood v. Milyard*, 566 U.S. 463, 474 (2012) (finding that state intentionally waived an argument when "after expressing its clear and accurate understanding of" the issue, it "deliberately steered the District Court away from the question").

Even if the government had made its *Craig* argument below, the argument would have failed. *Craig* upheld the admissibility of video testimony in a case where there were "individualized findings" demonstrating that denying confrontation would advance an "important public policy"—in that case, preventing a child victim from being re-traumatized. 497 U.S. at 845, 850. Here, video testimony from Suh and Chen did not advance public health or any other "important public policy." The government emphasizes that the trial occurred during COVID, but conditions were safe enough that the trial occurred live. The judge, jurors, lawyers, spectators, and every witness other than Suh and Chen showed up in person. The government now speculates that Suh and Chen might have endangered other trial participants because of the risks of international travel (BIO 11-12), but the government has never made this argument at any point in this litigation. In the district court, the government argued that Suh resided with his 77-year-old mother, CA2 A-87, but there was no showing of any risk to the mother other than her age, and no showing that the risk to the mother was any greater than the risk to the families of the people who showed up in person. As to Chen, the government made *no* arguments about anyone's health. Instead, the government's argument for video testimony relied exclusively on Chen's child-

care obligations, out-of-pocket costs, and potential loss of vacation days. CA2 A-88. Moreover, excluding video testimony would not have endangered public health for a more basic reason—the government represented that the witnesses were outside of the court's subpoena power and would refuse to show up. CA2 A-88. There was simply no basis for a finding that the testimony was admissible under *Craig*—which is likely why the government did not even attempt this argument.

Taking a related tack, the government argues that *Craig* and *Gigante* "point in the same direction." BIO 12-13. This argument is again both new and wrong. *Craig* requires the government to show that video testimony will "further an important public policy," like protecting the mental health of child victims. 497 U.S. at 850. *Gigante* merely requires that the testimony be material and the witness be unavailable. 166 F.3d at 81. As Justice Scalia recognized, those are "unquestionably" different standards. 207 F.R.D. at 93-94 (Scalia, J., concurring). Indeed, this case perfectly illustrates how the *Craig* and *Gigante* standards diverge. The government would have lost under *Craig*: There was no "important public policy" in ensuring that Suh and Chen would not be inconvenienced and would keep their vacation days. But the government won under *Gigante* because their testimony was material and they refused to attend trial. It is no surprise that the government has relied exclusively on *Gigante* throughout this case.

Contrary to the government's suggestion, other jurisdictions did not conflate the *Gigante* and *Craig* standards during COVID. Instead, they applied *Craig*. In cases where there was a particularized showing that

a witness had been exposed to COVID and would endanger other courtroom participants, courts held that *Craig* authorized video testimony in view of the important public policy in protecting public health. Pet. 17 (citing cases from Supreme Courts of Minnesota and Nebraska). In cases where the government could not make such a showing, courts held that *Craig* did not authorize video testimony. Pet. 18 (citing other cases from the Supreme Courts of Ohio, Montana, Kentucky, Nevada, and Missouri).[2] The government insists that in the latter line of cases, "the lower courts had failed to make adequate case-specific findings of necessity." BIO 14. But all those courts held that the Confrontation Clause required "case-specific findings" *under the Craig standard*. *See*, *e.g.*, *State v. Carter*, 238 N.E.3d 87, 96 (Ohio 2024) (holding that "public-policy interest in mitigating the spread of COVID-19" did not justify video testimony because "the trial court made no specific findings regarding the risk of infecting court attendees with COVID-19 had [witness] appeared at trial"); *Newsom v. State*, 526 P.3d 717, 719 (Nev. 2023) ("While we acknowledge that efforts to curtail the spread of the COVID-19 virus and protect the public health constitute compelling public policy interests, to satisfy procedural safeguards a district court must make specific findings as to why permitting a witness to testify remotely is

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[2] The government (BIO 13-14) cites *State v. Walsh*, 525 P.3d 343 (Mont. 2023), but in that case the trial court found that live testimony created a "heightened risk of contracting COVID-19." *Id.* at 346. In the follow-up case of *State v. Strommen*, 547 P.3d 1227 (Mont. 2024), the court clarified that generalized pandemic-related health concerns were an insufficient basis to justify video testimony under the Confrontation Clause. *See id.* at 1239.

necessary to further this interest. Concerns of convenience, cost-savings, or efficiency generally do not justify permitting remote testimony."). No court other than the Second Circuit has ever applied the *Gigante* standard.

Moreover, the government is overlooking the forest for the trees. Won does not seek review on any COVID-related legal issue. Instead, Won seeks review on the general legal standard governing the admissibility of two-way video testimony. The lower courts were divided on that issue before COVID, and they continue to be divided on that issue after COVID. The Court should resolve that split.

II. The Question Presented Warrants Supreme Court Review.

The Court should grant review in this case because the question presented is both practically and jurisprudentially important. Moreover, the Second Circuit's legal standard is wrong—and the government barely defends it.

From a practical perspective, the importance of the question presented is obvious. Today, two-way video services like Zoom and Microsoft Teams are ubiquitous. The admissibility of testimony using those tools is of great importance to the administration of justice. Further, this Court has an interest in ensuring that federal trial practice within the Second Circuit aligns with federal trial practice in other jurisdictions.

Although the government acknowledges that it has repeatedly relied on *Gigante* both before and after

COVID, it offers the assurance that courts within the Second Circuit are not "readily dispensing with traditional cross-examination procedures in mine-run cases." BIO 15-16. This Court should make clear that the Confrontation Clause applies in *all* cases, not just "mine-run cases."

This case is jurisprudentially important because "*Craig* is in tension with, if not in opposition to," *Crawford*. *United States v. Cox*, 871 F.3d 479, 495 (6th Cir. 2017) (Sutton, J., concurring). Yet, *Gigante* significantly *expands* *Craig*'s exception to the Confrontation Clause, even in the face of *Crawford*. The government insists that *Crawford* and *Craig* are compatible because *Crawford* did not specifically discuss *Craig* (BIO 16-17). But as Judge Sutton explained, the reasoning of the two cases is inconsistent: *Craig* focused on reliability, while *Crawford* holds that reliability is irrelevant. *See Cox*, 871 F.3d at 492-93 (Sutton, J., concurring); *see also* Pet. 24 (collecting cases expressing similar views). The government also cites *Mattox v. United States*, 156 U.S. 237 (1895), but that case involved a deceased witness's prior trial testimony that *was* subject to live cross-examination. *See Crawford*, 541 U.S. at 57 (emphasizing that in *Mattox*, "the defendant had had, at the first trial, an adequate opportunity to confront the witness"). That is nothing like *Craig* or this case, in which there was *never* live cross-examination.

Finally, this case warrants review because *Gigante* is wrong. Notably, the government does not defend *Gigante*'s holding that the admissibility standard for two-way video testimony should be more lenient than the standard for one-way video testimony. Nor does it

defend *Gigante*'s holding that unavailability, even without an important public policy, is a sufficient basis to deny face-to-face confrontation. The government should not be permitted to obtain unconstitutional convictions based on a legal standard that even the government cannot bring itself to defend.

III. The Government's Harmless Error Argument is Meritless and Directly Contrary to Its Own Position in the District Court.

In a last-ditch effort to avoid review, the government argues that the admission of Suh and Chen's testimony was harmless. BIO 17-19. Although the government made this argument in the Second Circuit, the Second Circuit did not resolve the case on that ground, so it would be no impediment to this Court's review.

The government's argument is irreconcilable with its position in the district court. *Gigante*'s standard requires that the testimony be "material." 166 F.3d at 81. To satisfy that requirement, the government told the district court that both Suh's and Chen's testimony were "crucial to the government's case." CA2 A-87, A-88. It emphasized that Suh "can speak directly" about the alleged misrepresentations, while Chen was "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." CA2 A-91. Having successfully persuaded the district court to admit this testimony based on the representation that the testimony was material, the government cannot avoid review based on its argument that the testimony was immaterial.

The government's harmlessness argument also fails on the merits. In assessing harmlessness, the court's analysis "cannot include consideration of whether the witness' testimony would have been unchanged" had the Confrontation Clause been honored. *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988). Instead, the court considers whether the result would have changed if the witness had not testified at all. *See id.* Under that standard, the error was not "harmless beyond a reasonable doubt." *Id.* Chen was the government's star witness: 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. In rejecting Won's sufficiency-of-the-evidence challenge, the Second Circuit repeatedly cited Chen's testimony. Pet. App. 4a. The government now asserts that another witness not affiliated with FXCM corroborated Chen's testimony and speculates that it might have been able to introduce certain evidence through a different witness (BIO 18-19), but this cannot take away from the fact that the government's central focus at trial was Chen's testimony. Won explained to the Second Circuit in detail why the testimony was harmful (CA2 Reply Br. at 12-17), and the Second Circuit resolved this case solely on the merits—not based on harmless error. This case is therefore an appropriate vehicle for Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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