No._____

In the

Supreme Court of the United States

Ryan L. Bessert,
Petitioner

v.

State of Wisconsin
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

Petition For A Writ Of Certiorari

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Question Presented

Our constitution codifies the ancient right of confronting one's accuser. Relying on *Ohio v. Roberts*, this Court has held a procedure which eliminates in person confrontation was permissible sos long as it furthered an important public policy, was necessary, and the testimony was reliable. The Court subsequently overturned *Ohio v. Roberts* in *Crawford v. Washington.* After *Crawford*, does testimony taken using two-way video violate the Confrontation Clause?

Parties to the Proceeding

The petitioner is Ryan Bessert who was the defendant in the circuit court, defendant-appellant in the Wisconsin Court of Appeals, and the defendant-appellant-petitioner in the Supreme Court of Wisconsin.

The respondent is the State of Wisconsin, who was the the plaintiff in the circuit court, and the plaintiff-respondent in subsequent appellate proceedings.

Statement of Related Proceedings

This case arises from the following proceedings:

- *State of Wisconsin v. Ryan Bessert* 21-AP-1062-CR (Wis)
- *State of Wisconsin v. Ryan Bessert*, 22 WI App 30 (Wis. Ct. App.) (Unpublished opinion affirming the judgement of conviction)
- *State of Wisconsin v. Ryan Bessert*, Langlade County 2019-CF-54

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Petition for Writ of Certiorari

Petitioner Ryan Bessert respectfully petitions for a writ of certiorari to review the judgement of the Wisconsin Court of Appeals.

Opinions Below

The Wisconsin Supreme Court's order denying Mr. Bessert's petition for review is unreported, and has been reproduced at App. 1. The court of appeals opinion affirming the decision of the circuit court is unpublished, but can be found at 22 WI App 30, and is reproduced at Appendix 2. The circuit court's oral decision is reproduced at Appendix 4.

Jurisdiction

The Supreme Court of Wisconsin issued its opinion on September 13, 2022. A copy of this decision is reproduced at Appendix 1. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

Constitutional Provisions Involved

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him."

Statement of the Case

In 2019, the State of Wisconsin alleged Mr. Bessert had repeatedly sexually assaulted his infant daughter, charging him with twenty-six crimes. Mr. Bessert has vehemently asserted his innocence since police first spoke with him. After a bench trial, Mr. Bessert was found guilty of two counts of each: First Degree Child Sexual Assault, Intercourse with Person under Twelve; and Incest with a Child. He was found not guilty of the twenty-two remaining charges.

Prior to trial, the State sought permission to have the child witness, G.B., testify from an alternate location using closed circuit audio visual equipment. This issue was addressed at length in a pretrial hearing. (App. 4). Counsel for Mr. Bessert objected to this procedure on the grounds the State had not met its burden to demonstrate G.B. would not be able to reasonably communicate, or that she would suffer serious emotion distress, and that Mr. Bessert has a constitutional right to confront the witnesses who testify agains him in court. (App.4). Despite the circuit court noting it had not heard any specific statement about G.B. being afraid of seeing her father, the circuit court found:

> I am going to find that forcing [G.B] to testify in the presence of her father…will result in suffering serious emotional distress such that I am concerned she could not reasonably communicate effectively in this courtroom during the trial, and that video testimony…is necessary to provide a setting that is more amenable to securing [G.B]'s uninhibited and truthful testimony. (App.4).

At trial, A.H. testified she watched Mr. Bessert change G.B.'s diaper and play with her vagina while doing so. A.H testified that after doing so, Mr. Bessert would want to "finger" her. She also testified Mr. Bessert put his finger inside of G.B.'s vagina while bathing with her. A.H. freely admitted to using methamphetamine around the time she claims to have observed these events.

G.B. testified via closed circuit television from an alternate, out of court, location. G.B. could not remember what she ate for lunch. G.B. told the court when she woke up that morning, Mr. Bessert was under her blankets, "doing the bad stuff". In fact, Mr. Bessert was in the custody of law enforcement the morning of trial. G.B. told the court Mr. Bessert used his private to touch her private two times.

Mr. Bessert testified in his own defense. He stated it would have been impossible to take a bath at the time A.H. alleged he did, as his leg had just been amputated and he had 63 staples in

his leg. When asked if he had ever molested his daughter, or touched his genitalia to hers, Mr. Bessert denied these allegations.

The court returned guilty verdict in counts 1-4, but found Mr. Bessert was not guilty of the remaining counts. Mr. Bessert was sentenced to twenty-six years of incarceration and ten years of extended supervision on counts one and three, and fifteen years of incarceration and ten years of supervision on counts two and four. These counts run concurrently.

A notice of intent to pursue post-conviction relief was filed on September 14, 2020. (R. 115). A notice of appeal was filed on June 18, 2021. (R. 131). The Court of Appeals issued an unpublished, but authored decision on May 3, 2022. The Court of Appeals concluded *Maryland v. Craig*, controlled its analysis, and Mr. Bessert's constitutional rights were properly subordinated to the State's interest in protecting G.B. Mr. Bessert petitioned the Supreme Court of Wisconsin for review, which was denied on September 13, 2022.

Reasons for Granting the Petition

For twenty-four years, the Confrontation Clause was treated as a mere preference; as long as there was sufficient "indicia of reliability" the literal requirements of the Constitution could be disposed of. *Ohio v. Roberts*, 448 U.S. 56, 65-67 (1980). In this twenty-four year period, this Court authorized the use of one-way closed circuit television when taking testimony, so long as there was an important public policy, necessity, and the reliability of the testimony is otherwise assured. *Maryland v. Craig*, 497 U.S. 836, 850 (1990). Justice Scalia, joined by Justices Marshall, Brennan, and Stevens, dissented, arguing the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures thought to assure reliable evidence, and the right to meet face to face all those who appear and give evidence at trial.. *Maryland v. Craig*, 497 U.S. 862.

In 2004, Justice Scalia's dissent in *Craig* became the majority opinion of this Court. *Crawford v. Washington*, 541 U.S. 36, (2004). The majority surveyed the text, history, and tradition of the Confrontation Clause, concluding it prevents the admission of testimonial statements of witnesses who did not appear at trial, unless one of the exceptions established at the time of the ratification of the Sixth Amendment would apply. *Crawford*, 541 U.S. 42-54. This

understanding of the Confrontation Clause has been repeatedly upheld. *See e.g. Melendez-Diaz v. Massachussetts*, 557 U.S. 305 (2009); *Hemphill v. New York*, 142 S. Ct. 681 (2022).

Crawford's return to the original understanding of the Constitution has largely eliminated the vague, open-ended balancing tests courts had used to determine if an accused right to confrontation had been violated. Yet confusion persists over the question of the use of closed circuit television and two-way video to take testimony in criminal trials. This Court should grant certiorari in this case to eliminate this confusion, and resolve this increasingly important question.

I. Federal and State Courts Are Divided Over the Question Presented

Numerous the lower courts have considered whether the use of two way video testimony violates the Confrontation Clause of the United States. The language of the Confrontation Clause is quite clear, and this Court has consistently held the Confrontation Clause guarantees a face-to-face meeting with witnesses appearing before the trier of fact. Yet the Confrontation Clause in this context has been interpreted in three different ways.

In *United States v. Gigant*e, a cooperating witness was permitted to testify via closed-circuit television due to his illness and

participation in the Federal Witness Protection Program. *United States v. Gigante*, 166 F.3d 75, 79 (2nd Cir. 1999). The Second Circuit examined the central concern of the Confrontation Clause, ensuring reliable evidence, and concluded the salutary effects of face-to-face-confrontation were all present in the use of closed circuit testimony. *Gigante*, at 80. Even while admitting there are "intangible elements of the ordeal testifying in a court room that are reduced or even eliminated by remote testimony", the Court concluded there was no deprivation of the right to confront his accuser. *Id*. at 81-82. The Sixth Circuit adopted this reasoning in *United States v. Benson*, 79 Fed. App. 813 (6th Cir. 2003)

The Supreme Court of Michigan has taken the exact opposite approach. *People v. Jemison*, 505 Mich. 352 (2020). The Court surveyed this Court's reasoning in *Crawford*, and concluded *Crawford* overruled *Roberts*, doing away with reliability balancing, and placed *Craig's* reliability-focused rule into doubt. *Jemison*, 505 Mich. 360-63. The Court concluded *Craig* is limited to the specific facts it decided, otherwise the use of two-way, interactive video testimony violates the right to confrontation. *Id*. at 365-66.

Crawford was explicit in its guidance: "The Constitution prescribes a procedure for determining the reliability of testimony in

criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising….By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design." *Crawford*, 541 U.S. 67-68. Despite this, the vast majority of courts to have considered the issue continue to apply a judicially created balancing test to cope with the technological development of two way video testimony.

Five federal circuits have held *Craig* controls the question whether a court can allow two-way video testimony in a criminal trial.[1] At least 22 states have also adopted this position.[2] The majority of these decision have come after *Ohio v. Roberts* was overturned in *Crawford.* A number of these decisions have openly questioned

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[1] *United States v. Yates*, 438 F.3d 1307, 1309 (11th Cir. 2006); *Horn v. Quarterman*, 508 F.3d 306 (5th Cir. 2007); *United States v. Carter*, 907 F.3d 1199, 1208 (9th Cir. 2018); *United States v. Abu Ali*, 528 F.3. 210 (4th Cir. 2008); *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005).

[2] *Spinks v. State,* 252 Md. App. 604, 607 (Md. Ct. Spec. App.2021); *White v. State*, 223 Md. App. 353 (Md. Ct. Spec. App. 2012); *Bush v. State*, 193 P.3d 203 (Wyo 2008); *People v. Wrotten*, 14 N.Y.3d 33 (N.Y. 2009); *Lipsitz v. State*, 442 P.3d 138, 144 (Nev. 2019); *State v. Comacho,* 309 Neb. 494 (Neb. 2021); *State v. Tate*, 969 N.W.2d 378 (Minn. Ct. App. 2022)(Review Granted); *State v. D.K.,* 21 Wn. App. 2d 342 (Wash Ct. App. 2022)(Review Denied); *Haggard v. State,* 612 S.W.3d. 318 (Tex. Crim. App. 2020); *In the interest of E.T.*, 342 GA App. 710 (Ga. Ct. App. 2017); *Lewis v. State*, 2019 Ark. App. 43 (Ark. Ct. App. 2019); *State v. Stefanko*, 193 N.E. 3d 632 (Ohio Ct. App. 2022); *State v. Thomas*, 376 P.3d 184 (N.M. 2016); *State v. Rogerson*, 855 N.W.2d 495 (Iowa 2014); *State v. Mercier*, 2021 MT 12 (Mont. 2021); *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998); *People v. Phillips*, 2012 COA 176 (Colo. App. 2012); *State v. Henriod*, 2006 UT 11 (Utah 2006); *State v. Jackson*, 216 N.C. App. 238 (N.C. Ct. App. 238); *Roadcao v. Commonwealth*, 50 Va. App. 732 (Va. Ct. App. 2007); *State ex rel. Montgomery v. Kemp*, 239 Ariz. 332 (Ariz. Ct. App. 2016); *State v. Vogelsberg*, 2006 WI App 228 (Wis. Ct. App. 2006).

whether *Craig* is still valid under *Crawford*, but have continued to build their caselaw on this constitutionally shaky ground.

While there may be a consistent pattern of adopting *Craig*, there is not a consistent adherence to its principles, and the results are at times contradictory. *Craig* requires an important public policy, specific factual findings of necessity, and a determination of the reliability of the testimony. *Craig* at 850. As this Court noted in *Crawford*, interest balancing and judicial determinations of reliability allow judges to assign different weights to subjective factors, leading to unpredictable results. *Crawford*, at 63.

In *United States v. Yates,* the district court permitted a witness who resided in Australia to testify in a two-way video conference. *United States v. Yates*, 438 F.3d 1307, 1309 (11th Cir. 2006). The government argued the video conferencing was necessary for the government to make its case and expeditiously resolve it. *Yates* at 1316. The Eleventh Circuit held this was an error, the government's desire to make its case is not the type of public policy which is important enough to outweigh the defendant's constitutional rights. *Id*.

The Maryland Court of Special Appeals was confronted with a similar situation in 2021, where the witness was outside of the United

States. The victim's mother resided in Guinea, and when she had a medical emergency the victim left the country. *Spinks v. State,* 252 Md. App. 604, 607 (Md. Ct. Spec. App.2021). The victim did not have a valid visa, and could not return to the United States. The trial court found victims of a crime have an interest in having their case decided by a jury, and this public policy was sufficient to override Spinks's constitutional rights; the Court of Special Appeals affirmed. *Id*. at 610.

Wyoming's Supreme Court reached a different decision when asked whether a relative's health condition was sufficient reason not to appear in court. *Bush v. State*, 193 P.3d 203 (Wyo 2008). One witness, Mr. Martin, suffered from congestive heart failure with a host of associated conditions, which were verified by his physician. *Bush*, at 214. But his wife was in fine health and could have been present. *Id.* at 216. While the Court concluded preventing further harm to Mr. Martin's health was an important public policy, preventing stress to Mrs. Martin due to her husband's circumstances was not a public policy which could override the defendant's constitutional rights. *Id*.

Preventing further harm to individuals who have serious, permanent health conditions has likewise been upheld as a sufficiently important interest in Maryland, New York and the Fifth Circuit. *White v. State*, 223 Md. App. 353 (Md. Ct. Spec. App. 2012); *People v.*

Wrotten, 14 N.Y.3d 33 (N.Y. 2009); *Horn v. Quarterman*, 508 F.3d 306 (5th Cir. 2007). But temporary health conditions have fractured the lower courts. Nevada allows the use of two way video when the witness would not be available for several months due to a residential drug treatment, but ignored *Craig's* requirement of finding an important public policy served. *Lipsitz v. State*, 442 P.3d 138, 144 (Nev. 2019) The Ninth Circuit disagrees, a temporary medical disability does not create necessity as there were alternatives available to preserve the right to confrontation. *United States v. Carter*, 907 F.3d 1199, 1208 (9th Cir. 2018).

The COVID-19 pandemic drastically increased the use of two-way video testimony. Nebraska's Supreme Court upheld a circuit court's decision to allow remote testimony as preventing the spread of COVID-19 was an important policy and the witness had actually tested positive. *State v. Comacho,* 309 Neb. 494 (Neb. 2021). Likewise, Minnesota's Court of Appeals held protecting public health in the throes of a global pandemic was an important public policy; the witness was exposed to an individual who had tested positive, creating sufficient necessity to override the defendant's constitutional rights. *State v. Tate*, 969 N.W.2d 378 (Minn. Ct. App. 2022)(Review Granted). The Washington Court of Appeals held two witnesses being immunocompromised created sufficient necessity for them to testify

remotely. *State v. D.K.,* 21 Wn. App. 2d 342 (Wash Ct. App. 2022) (Review Denied). But the COVID-19 pandemic has not been universally accepted as an "important public policy". *C.A.R.A. v. Jackson City. Juvenile Office*, 637 S.W.3d 50, 65 (Mo. 2022).

The lower courts have left a fundamental right in disarray. They are using multiple analytical methods to determine if whether an accused's right to confrontation is violated, and if so, if they may permit such a violation. The most popular analytical methodology continues to reduce the Confrontation Clause to a mere preference, and allows for a balancing of "a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor," rather than depending on "a body of evidence susceptible to reasoned analysis." *Heller v. District of Columbia*, 670 F. 3d 1244, 1274 (Kavanaugh, J., dissenting). This Court should grant certiorari to fulfill *Crawford*'s promise of ending open-ended balancing tests for categorical constitutional guarantees.

II. The Question Presented Is Extremely Important

The Confrontation Clause ranks among our "fundamental guaranties of life and liberty." *Kirby v. United States*, 174 U.S. 47, 55 (1899). The Clause secures a bedrock procedural guarantee essential to the kind of fair trial which is this country's constitutional goal.

Barber v. Page, 390 U.S. 719, 721 (1968) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)). The founding generation, conscious of the abuses of the English Crown enacted he Sixth Amendment to prevent trials reminiscent of the Spanish Inquisition. *Crawford*, 541 U.S 43-50.

As a matter of plain English, and plain Latin, the Confrontation Clause protects the accused right to meet face-to-face those who appear and give evidence at trial. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (quoting *California v. Green*, 399 U.S. 149, 175 (1970)(Harlan, J., concurring). Yet this right is still being given short shrift. Modern technology is allowing courts to hear testimony in ways the framers of the constitution never imagined, without actual presence in the courtroom. Virtual confrontation may protect virtual constitutional rights, but it is questionable if it is sufficient to protect real ones.

The use of two way video transmission is of dubious constitutionality. When the idea was initially proposed by the Judicial Conference in the 2002 Amendments to the Federal Rules of Criminal Procedure, the Court declined to forward the recommendation. Justice Scalia penned a concurrence, noting how the purpose of the Confrontation Clause is 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." *Amendments to the Fed. Rules of Crim. Procedure*, 2002 U.S. LEXIS 9432, at *3 (U.S. 2002)(Scalia, J., Concurring). Justice Breyer dissented, arguing the constitutionality of the use of two way video could be considered at a later time. *Id.* at *8. The judiciary committee's proposal was never adopted. Yet courts have effectively enacted this proposal themselves, using *Maryland v. Craig* to create a loophole in this Court's Confrontation Clause jurisprudence.

Virtual court appearances have skyrocketed in the past three years. Technology the founding generation could never have dreamed of is now ubiquitous. It has been twenty years since Justices Breyer and Scalia first opined on the constitutionality of two-way video usage in criminal trials. This Court should now resolve this important question, applying the text, history, and tradition of the Confrontation Clause to this modern technology.

III. *Maryland v. Craig* Is Incompatible With *Crawford v. Washington*. Only This Court Can Resolve This Incompatibility

At the time *Craig* was decided, *Ohio v. Roberts* was the leading case on the confrontation clause. *Roberts* held the focus of

the Confrontation Clause was reliability, and an unavailable declarant's testimony may be admitted along as there are sufficient indica of reliability; all the Sixth Amendment demands is "substantial compliance with the purposes behind the confrontation requirement". *Ohio v. Roberts*, 448 U.S. 56, 69, 100 S.Ct. 2531 (1980).

Craig's logical underpinnings rely entirely on the *Roberts* standard of reliability.

- "In sum our precedents establish that the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial" *Craig* at 849, *quoting Roberts* at 63.[3]
- "[O]ur precedents confirm 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*. *Craig*, at 850, *citing Roberts* at 64 (emphasis added).
- "[T]he presence of these other elements of confrontation… adequately ensures that the testimony is both *reliable* and subject to rigorous adversarial testing…These safeguards of *reliability* and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause". *Craig* at 851 (Emphasis added).
- "[T]hese assurances of reliability and adversaries are far greater than those required for admission of hearsay testimony under the Confrontation Clause. *Id. quoting Roberts* at 66

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[3] *but see*, *Coy v. Iowa* at 1016 (we have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witness appearing before the trier of fact).

- "[T]he Confrontation Clause does not prohibit use of a procedure that, ensures the *reliability* of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." *Craig* at 857 (Emphasis added).

Fourteen years after *Craig*, the Supreme Court explicitly overturned *Roberts*. The Court reasoned:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it s a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.
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> …
>
> The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It this replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. *Crawford* at 61-62.

With the *Roberts* reliability test no longer applicable, the underpinnings of *Craig's* logic fail. *Craig* based its reasoning on the premise the alternative method of taking testimony would prove more reliable. Case law prior to *Roberts*, and after *Crawford*, make it clear; it does not matter if the out-of-court testimony would be more reliable, the Confrontation Clause contains a procedural guarantee with only three exceptions. The *Craig* Court lacked the authority to create additional exceptions, only an amendment to the Constitution can do so.

Lower courts have continued to apply *Craig* even while noting the logical inconsistencies. As the Supreme Court of Missouri noted: "Nevertheless, *Crawford* did not overrule *Craig,* and it is the Supreme Court's prerogative alone to overrule one of its precedents." *State v. Smith*, 636 S.W.3d 576, 587 (Mo. 2022). This Court should seize this opportunity to explicitly overturn *Craig* and reject the remnants of the "indicia of reliability" era.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: Tuesday, December 6, 2022
Respectfully submitted,

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