No. 22-844

In the Supreme Court of the United States

HAMID AKHAVAN AND RUBEN WEIGAND,
PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Amendment's Confrontation Clause precluded the district court from allowing a witness—who "risked substantial illness or death" had he traveled and appeared in person—to testify via two-way video.

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1a-17a) is not published in the Federal Reporter but is available at 2022 WL 17825627. The opinion of the district court denying petitioners' post-trial motions (Pet. App. 22a-42a) is not published in the Federal Supplement but is available at 2021 WL 2776648. The opinion and order of the district court permitting testimony by two-way video (Pet. App. 43a-64a) is reported at 523 F. Supp. 3d 443.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2022. The petition for a writ of certiorari was filed on March 2, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to commit bank fraud, in violation of 18 U.S.C. 1344 and 1349. Akhavan Judgment 1; Weigand Second Am. Judgment 1. The district court sentenced petitioner Akhavan to 30 months of imprisonment, to be followed by three years of supervised release, Akhavan Judgment 2-3, and sentenced petitioner Weigand to 15 months of imprisonment, Weigand Second Am. Judgment 2. The court of appeals affirmed petitioners' convictions and sentences, Pet. App. 1a-17a, but vacated the forfeiture order entered as to petitioner Akhavan and remanded for further proceedings, *id.* at 13a-17a.

1. Between 2016 and 2019, petitioners schemed to deceive United States banks and other financial institutions into processing credit-card and debit-card payments for the purchase and delivery of marijuana products in transactions that were illegal under federal law. Pet. App. 3a, 22a; see Gov't C.A. Br. 3-4. Petitioners worked with Eaze, a California-based company that operated a mobile application and website facilitating the on-demand sale and delivery of marijuana products between dispensaries and customers. Pet. App. 3a. Eaze offered customers the option of paying for their purchase by credit or debit card. C.A. App. 1740.

Many banks, however, are unwilling to process payments involving marijuana products, whose sale and purchase is illegal under federal law. Pet. App. 5a, 26a-27a, 29a. The same is true of credit-card companies Visa and Mastercard, which prohibit unlawful transactions on their networks and reserved the right to penalize issuing banks for permitting such transactions. *Id.* at

26a, 29a, 31a-32a. Petitioners thus devised a scheme to disguise the marijuana transactions using shell companies. *Id.* at 65a; see Gov't C.A. Br. 6-10.

Petitioners and their co-conspirators set up numerous phony merchants purportedly selling items like dog products, diving gear, carbonated drinks, green tea, and face creams, and they established Visa and Mastercard charge-processing accounts for those merchants with multiple offshore banks. Pet. App. 65a; see Gov't C.A. Br. 7. Many of the phony merchants were outfitted with fake websites—which did not mention Eaze or marijuana—to give the impression that they were legitimate. See Gov't C.A. Br. 7-8. Petitioners also directed others to apply incorrect merchant category codes to disguise Eaze's marijuana transactions as instead involving such unrelated categories as freight carrier trucking, jewelry, stenographic services, music stores and pianos, and cosmetics stores. See *id.* at 9. Petitioners' scheme ultimately resulted in the unlawful processing of approximately $156 million in marijuana transactions using phony merchants. *Id.* at 13.

2. A federal grand jury in the Southern District of New York charged petitioners with conspiring to commit bank fraud, in violation of 18 U.S.C. 1344 and 1349. Pet. App. 266a-267a.

a. To provide evidence regarding Visa's payment-processing network and its policies on illegal transactions, the government subpoenaed Martin Elliott, the Global Head of Visa's Franchise Risk Management Group. Pet. App. 54a. Elliott's testimony was also designated by the company as responsive to Akhavan's own subpoena for testimony from Visa. *Ibid.*

Before trial, Elliott and Visa filed a motion requesting that Elliott be permitted to testify by two-way

video. D. Ct. Doc. 174 (Feb. 17, 2021). At the time—February 2021—the nation had experienced unprecedented peaks in new COVID-19 cases and deaths, and vaccines were not yet generally available.[1]

In his motion and accompanying declaration, Elliott explained that he resided in California, was 57 years old, and had been diagnosed with hypertension and atrial fibrillation, a heart condition affecting roughly two percent of the population. Pet. App. 55a.[2] Elliott lived with his wife, who was 55 years old and also suffered from hypertension. *Ibid.* In addition, Elliott and his wife were primary caregivers for his 83-year-old mother-in-law, who lived alone nearby. *Ibid.*; see D. Ct. Doc. 174-3, at 1. Elliott and Visa accordingly represented that two-way video testimony was warranted because his age and medical conditions made him "significantly more vulnerable to COVID-19" than the general population. D. Ct. Doc. 174, at 4.

Elliott and his family members had "diligently heeded the CDC's public health guidance to minimize [their] risk of contracting COVID-19." D. Ct. Doc. 174-3, at 2. Elliott, his wife, and his mother-in-law had not previously contracted COVID-19; while his mother-in-law had received one dose of a COVID-19 vaccine, neither Elliott nor his wife had been vaccinated. Pet. App.

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[1] See Ctrs. for Disease Control and Prevention, *COVID Data Tracker Weekly Review* (updated Feb. 12, 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/past-reports/02122021.html (reporting that the nation had experienced its highest peak of new cases in January 2021 and that the mid-February number was still higher than 2020 peaks; further reporting that "[d]aily mortality remains higher than in previous waves of the pandemic").

[2] See Jelena Kornej et al., *Epidemiology of Atrial Fibrillation in the 21st Century*, Circulation Research (June 2020) (prevalence of atrial fibrillation in the United States is one to two percent).

55a. Elliott attested that, given their ages and comorbidities, they had not traveled outside California since the onset of the pandemic in early 2020, and Elliott had not traveled by airplane since flying to see his daughter (elsewhere in California) in the summer of 2020. D. Ct. Doc. 174-3, at 2.

b. The government took no position on Elliott's motion, D. Ct. Doc. 174, at 1, but petitioners opposed it, D. Ct. Doc. 175 (Feb. 18, 2021). In a March 1, 2021 order, the district court granted the motion. Pet. App. 54a-64a.

The district court looked to this Court's decision in *Maryland* v. *Craig*, 497 U.S. 836 (1990), which found "live testimony through a one-way videoconferencing system"—there, by a child witness testifying regarding abuse by the defendant—constitutionally permissible, and to the Second Circuit's decision in *United States* v. *Gigante*, 166 F.3d 75 (1999), cert. denied, 528 U.S. 1114 (2000), which had involved two-way video testimony. Pet. App. 59a-60a. The court observed that this Court's subsequent decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), which addressed whether "confrontation was required for certain out-of-court statements," had not abrogated *Gigante*, which addressed whether the confrontation right "can be vindicated in exceptional circumstances by video testimony." Pet. App. 61a.

The district court found that, because "Elliott [could] not travel across the country without subjecting himself to a substantial risk of contracting COVID-19"—which, "[g]iven his age and comorbidities[,] * * * could well result in serious illness or death"—Elliott was "'unavailable' to testify in person within the meaning of *Gigante*." Pet. App. 62a. And the court further found that "the need to prevent Elliott's serious illness

or death (and to protect his family)" provided "exceptional circumstances" justifying the use of two-way video procedures. *Ibid.*

The district court also determined that "[t]he standard articulated in *Craig* is satisfied" in the circumstances of this case. Pet. App. 63a n.12. The court specifically found both that Elliott's two-way video testimony "'further[ed] an important public policy'"—namely, "[p]reventing the serious illness or death of a third-party witness whose testimony is compelled by subpoena"—and that the procedures the court intended to use for Elliott's testimony would "preserve every adversarial element of confrontation other than physical presence itself." *Id.* at 63-64a n.12 (citation omitted). The court emphasized that the videoconference technology would "permit the defendants," as well as "defense counsel, the questioner, the judge, and the jurors all to see and be seen by the witness," and that counsel for defendants would be permitted to send representatives to be in the same room as Elliott throughout his testimony. *Id.* at 64a.

The case proceeded to trial, and Elliott testified by two-way video from his counsel's office in San Francisco. Each petitioner had a representative present in the room with the witness. Pet. App. 33a n.3. Consistent with the district court's order, at all times during his testimony, Elliott was able to see and be seen by petitioners, the jurors, the examining attorney, and the judge. *Ibid.*

c. After a three-and-a-half week trial, the jury found both petitioners guilty. Akhavan Judgment 1; Weigand Second Am. Judgment 1. Following the verdicts, Akhavan filed a motion for a judgment of acquittal or a new trial, which (*inter alia*) renewed his objection to

Elliott's testimony. D. Ct. Doc. 258, at 22-33 (Apr. 21, 2021).[3] The district court denied the motion. Pet. App. 22a-42a.

Addressing the confrontation claim again, the district court explained that it had faced an "extraordinarily unusual situation": the trial was taking place during a "global pandemic," at a time when "[v]accines were not yet widely available"; "Weigand was fervently pressing his constitutional and statutory rights to a speedy trial";[4] and "[t]he witness, Elliott, averred that given the ages and medical conditions of the members of his household, complying with the Government's subpoena by flying across the country to testify in person would imperil his and his family member's lives." Pet. App. 33a.

The district court also emphasized that Akhavan's claims about the "practical difficulties" petitioners experienced while cross-examining Elliott by video were "entirely without merit." Pet. App. 34a. The court observed that any issues with the technology and exhibits were "incredibly brief" and "about as disruptive as a witness's sneeze"; that Akhavan's suggestion that he would have been able to better "control" Elliott were the witness physically present in court was "unsubstantiated speculation"; and that Akhavan had pointed to "no significant topic he was unable to cover with the

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[3] Weigand also filed a post-trial motion but did not renew his Confrontation Clause claim.

[4] Weigand had sought dismissal of the indictment based on claims that the three-month delay between the scheduled December 2020 trial date and the trial's actual start in March 2021 violated his rights under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, and the Speedy Trial Clause. Pet. App. 44a-45a. The district court had rejected those claims. *Id.* at 46a-54a.

witness on cross-examination." *Id.* at 34a-35a. The court also observed that, even if permitting Elliott to testify by video had been erroneous, "any error in this case would have been harmless beyond a reasonable doubt" because "Elliott's testimony was largely duplicative of John Verdeschi's (of MasterCard), and more generally, there was no shortage of testimony by credit card companies." *Id.* at 35a-36a.

d. The district court sentenced Akhavan to 30 months of imprisonment, Akhavan Judgment 2, and Weigand to 15 months of imprisonment, Weigand Second Am. Judgment 2.

3. Akhavan (whose arguments Weigand joined, Weigand C.A. Br. 1) renewed the Confrontation Clause claim on appeal. Akhavan C.A. Br. 45-60. In their brief to the Second Circuit, petitioners agreed that "as this Court explained in *Gigante*, the '*Craig* standard' is inapplicable where, as here, a court 'employ[s] a two-way system' and not a one-way feed." *Id.* at 50 n.21 (quoting *Gigante*, 166 F.3d at 81) (brackets in original). Petitioners recognized, however, that the district court had relied on both decisions to permit Elliott's two-way video testimony here. *Id.* at 46; cf. Pet. 8-9. They contested the district court's findings and also argued, in the alternative, that *Crawford* had called into question or overruled those precedents. Akhavan C.A. Br. 49-55; see *id.* at 14; Akhavan C.A. Reply Br. 44-46; see also Pet. App. 10a.

In a nonprecedential summary order, the court of appeals affirmed petitioners' convictions and sentences but vacated a forfeiture judgment against Akhavan and remanded for a redetermination of the judgment's amount. Pet. App. 1a-17a. Like the district court, the court of appeals found no Confrontation Clause

violation in permitting Elliott to testify by two-way video because of his particular health risks. *Id.* at 10a-12a. The court first rejected petitioners' argument that *Crawford* had overtaken this Court's and the Second Circuit's respective decisions approving of video testimony in *Craig* and *Gigante*. *Id.* at 10a-11a. The court explained that "*Gigante*, like *Craig*, concerned whether video testimony may vindicate Confrontation Clause rights that undeniably exist," while *Crawford* addressed the question "whether the Confrontation Clause is implicated in the first instance by testimonial, out-of-court statements notwithstanding other indicia of reliability." *Id.* at 11a. "Because *Crawford* concerns an entirely different question than *Gigante* and *Craig*," the court found no "tension" in the case law. *Ibid.*

The court of appeals also found no clear error in either the district court's finding "that Elliott was unavailable because he could not travel across the country at a time when vaccines were not yet easily obtained without subjecting himself to a substantial risk of contracting COVID-19, which, given his age and comorbidities, could well result in serious illness or death," or its finding that Elliott's particular circumstances were "exceptional." Pet. App. 11a-12a. And the court of appeals emphasized that the video procedure utilized here, which "permitt[ed petitioners], defense counsel, the questioner, the judge, and the jurors all to see and be seen by the witness, * * * safeguarded 'the reliability of the evidence by subjecting it to rigorous adversarial testing.'" *Id.* at 12a (quoting *Craig*, 497 U.S. at 857).

The court of appeals closed by reiterating *Gigante*'s caution that "two-way video testimony 'should not be considered a commonplace substitute for in-court testimony by a witness.'" Pet. App. 12a (quoting *Gigante*,

166 F.3d at 81). But it declined to disturb the district court's case-specific finding that allowing video testimony here, "amidst an unprecedented global pandemic, where the witness was unvaccinated and risked substantial illness or death from COVID-19, 'further[ed] the interest of justice.'" *Ibid.* (quoting *Gigante*, 166 F.3d at 81) (brackets in original).

ARGUMENT

Petitioners renew (Pet. 16-30) their claim that the Confrontation Clause precluded the district court from allowing Elliott to testify via two-way video. The court of appeals' nonprecedential order is correct and does not conflict with any decision of this Court or another court of appeals. Nor would this case, in which the district court found any error to be harmless, be a suitable vehicle for further review. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly found that, in the extraordinary circumstances of this case, the district court did not err in admitting Elliott's testimony by two-way videoconference.

a. The Confrontation Clause of the Sixth Amendment 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. There are several "elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Maryland* v. *Craig*, 497 U.S. 836, 846 (1990). This Court has made clear, however, that "face-to-face confrontation is not an absolute constitutional requirement." *Id.* at 857; see *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973) ("Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to

accommodate other legitimate interests in the criminal trial process."). Instead, "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. at 849 (citations and internal quotation marks omitted).

Accordingly, this Court has twice held that the confrontation right had been preserved through a procedure short of live, in-person testimony by a trial witness. First, in *Mattox* v. *United States*, 156 U.S. 237 (1895), the Court held that the testimony of government witnesses in a past trial against the defendant, where the witnesses were cross-examined but had died after that first trial, was admissible at the defendant's second trial. *Id.* at 243-244. Even though the defendant could not cross-examine the witnesses in the second trial, and even though the jury in the second trial could not view the witnesses' demeanor while testifying, the Court found the previous cross-examination sufficient for confrontation purposes. *Id.* at 243.

Nearly a century later, the Court relied on *Mattox* for its holding in *Craig*, *supra*, that the Confrontation Clause "may be satisfied absent a physical, face-to-face confrontation at trial" so long as "denial of such confrontation is necessary to further an important public policy" and "the reliability of the testimony is otherwise assured." 497 U.S. at 850. *Craig* itself allowed the use of one-way closed-circuit television to present the testimony of a child victim in the defendant's child-abuse prosecution. *Id.* at 857-858. While "reaffirm[ing] the importance of face-to-face confrontation," the Court declined to "say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Id.* at 849-850. The Court instead explained that "[t]he central

concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* at 845. And the Court found that requirement satisfied where defense counsel could still cross-examine the witness under oath in view of the jury, notwithstanding that the jury was not in the same room as the witness and the witness could not see the defendant. *Id.* at 851; see *id.* at 840-841.

b. Here, the lower courts complied with this Court's precedent in finding—under the "extraordinarily unusual" circumstances in this case, Pet. App. 33a—that permitting Elliott to testify by two-way video did not violate the Confrontation Clause. *Id.* at 10a-12a. As the district court found, and the court of appeals affirmed, the confluence of the as-yet-uncontrolled global pandemic, combined with the witness's serious medical conditions and the conditions of his immediate family members, gave rise to "exceptional circumstances" justifying a limited deviation from ordinary trial-testimony procedures. *Id.* at 11a-12a, 33a, 62a. "Elliott [could]not travel across the country without subjecting himself to a substantial risk of contracting COVID-19," which, "[g]iven his age and comorbidities[,] * * * could well result in serious illness or death." *Id.* at 62a; see *id.* at 11a-12a.

The lower courts principally addressed the case through the lens of *United States* v. *Gigante*, 166 F.3d 75 (2d Cir. 1999), which had considered a confrontation challenge to the use of two-way video to present the testimony of a witness whose end-stage cancer made it medically unsafe to travel to testify in person. *Id.* at 79-80. *Gigante* had noted that the *Craig* standard was "crafted * * * to constrain the use of one-way closed-

circuit television, whereby the witness could not possibly view the defendant," not two-way video, which "preserve[s]" various "salutary effects of face-to-face confrontation," including "1) the giving of testimony under oath; 2) the opportunity for cross-examination; 3) the ability of the fact-finder to observe demeanor evidence; and 4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence." *Id.* at 80-81. And *Gigante* had looked to Federal Rule of Criminal Procedure 15, under which "the 'exceptional circumstances' required to justify the deposition of a prospective witness are present if that witness's testimony is material to the case and if the witness is unavailable to appear at trial," rather than to the *Craig* standard, as instructive on the specific findings required for two-way video testimony. 166 F.3d at 81 (citation omitted).

But the district court here specifically found that "[t]he standard articulated in *Craig* is satisfied" as well, because "[p]reventing the serious illness or death of a third-party witness whose testimony is compelled by subpoena is an important public policy," and "the procedures applied here, even more than the one-way video testimony in *Craig*, will preserve every adversarial element of confrontation other than physical presence itself." Pet. App. 63a-64a n.12. And the district court made clear that it had "set detailed guidance to ensure that the two-way video would have the hallmarks of live testimony," including by allowing the defendants to have representatives in the room with Elliott while he was testifying, and ensuring that Elliott could see and be seen by the courtroom participants "at all times." *Id.* at 33a n.3. The court of appeals then echoed the district court's analysis, citing *Craig* throughout its discussion, recognizing

that "the need to prevent serious illness and death and to protect [Elliott's] family" demonstrated a necessity for the two-way video procedure, and finding that the procedure—which "permit[ed] [petitioners], defense counsel, the questioner, the judge, and the jurors all to see and be seen by the witness"—"safeguarded 'the reliability of the evidence.'" *Id.* at 10a-12a (quoting *Craig*, 497 U.S. at 857).

Those findings identified this particular case as one of those very rare "occasion[s]" where the Confrontation Clause's preference for face-to-face examination must "give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. at 849; see *Mattox*, 156 U.S. at 243. The extenuating circumstances of a once-in-a-lifetime pandemic and a witness with specific and rare vulnerabilities made it necessary to permit the witness to provide live testimony remotely, where that testimony was still subjected to the "rigorous adversarial testing" required by the Clause. *Craig*, 497 U.S. at 857; see *id.* at 845.

2. Petitioners' contrary arguments lack merit. They do not ask this Court to revisit its prior holdings that circumstances exist in which the Confrontation Clause can be satisfied by means other than a physical, in-person confrontation between witness and defendant in the same room as the jury. Nor do they specifically seek review of the lower courts' findings of fact. Cf. Sup. Ct. R. 10 (noting that certiorari "is rarely granted when the asserted error consists of erroneous factual findings"). Instead, petitioners contend (Pet. 25) that the Second Circuit's *Gigante* decision contravenes *Craig*, which petitioners view as "stat[ing] a general rule" applicable to two-way video procedures as well as a one-way video.

But the question whether meaningful daylight exists between *Craig* and *Gigante* is not presented here, as the courts below found—either expressly or by necessary implication—that the procedure used for Elliott's testimony satisfied both standards. See pp. 13-14, *supra*. Moreover, *Gigante* itself emphasized that video testimony "should not be considered a commonplace substitute for in-court testimony." 166 F.3d at 81. And aside from the nonprecedential decision below, the Second Circuit has never applied *Gigante* in a subsequent case to resolve a Confrontation Clause claim regarding video testimony, meaning that the court accordingly has not had occasion to clarify the *Gigante* standard and the extent to which it might materially differ from *Craig*. The decision below, like other lower-court decisions, recognized that *Craig* and *Gigante* point in the same direction and that the procedure used for Elliott's testimony met either formulation. See pp. 13-14, *supra*; see also *United States* v. *Donziger*, No. 19-CR-561, 2020 WL 5152162, at *2 (S.D.N.Y. Aug. 31, 2020) (similarly finding that the admission of two-way video testimony in that case satisfied both *Gigante* and *Craig*); *United States* v. *Cole*, No. 20-cr-424, 2022 WL 278960, at *4-*5 (N.D. Ohio Jan. 31, 2022) (same); cf. *State* v. *Tate*, 985 N.W.2d 291, 302 (Minn. 2023) ("Given this extraordinary context of courts trying to administer justice safely during a virulent and deadly outbreak of disease, the district court correctly found that a valid public policy interest was furthered by the use of remote testimony for this one witness.").

As the Eleventh Circuit has observed, "if the district court [in *Gigante*] had applied the *Craig* test," *Craig*'s "necessity standard likely would have been satisfied," since, "to keep the witness safe and to preserve the

health of both the witness and the defendant, it was necessary to devise a method of testimony other than live, in-court testimony." *United States* v. *Yates*, 438 F.3d 1307, 1313 (2006) (en banc); cf. *Order of the Supreme Court*, 207 F.R.D. 89, 97 (2002) (Breyer, J., dissenting) (noting the Rules Committee's assessment that its proposed exceptional-circumstances standard was "arguably" "at least as stringent as the standard" in *Craig*). That petitioners have identified (Pet. 21) five other cases within the Second Circuit in which an adult witness was allowed to testify by two-way video—in the near quarter-century since *Gigante* was decided—in no way indicates that courts in that circuit are readily dispensing with traditional cross-examination procedures in mine-run cases. See, *e.g.*, *United States* v. *Mostafa*, 14 F. Supp. 3d 515, 522-524 (S.D.N.Y. 2014) (allowing two-way video testimony of a foreign al Qaeda member in a terrorism prosecution); *United States* v. *Abu Ghayth*, No. 98-cr-1023, 2014 WL 144653, at *2-*3 (S.D.N.Y. Jan. 15, 2014) (same witness and situation); cf. Pet. App. 33a (district court here emphasizing that "[t]his was an extraordinarily unusual" situation in which the court "was forced to balance competing considerations in the face of a global pandemic").

Petitioners suggest in passing that "[w]hether *Craig* retains vitality may be questionable." Pet. 29. But they do not ask this Court to overrule that decision. See *ibid.* Nor do they supply any justification for why that extraordinary step would be warranted. Furthermore, as the court of appeals recognized, *Craig*'s holding has not been undercut by this Court's later decision in *Crawford*. Pet. App. 10a-11a; see Pet. 16 (acknowledging that this Court's decisions "[i]n recent years * * * repeatedly address[ing] the meaning of 'witnesses' in the Confrontation

Clause[]" do not concern "the issue in this case"). *Crawford* held that the Confrontation Clause precludes the admission of "testimonial" hearsay unless the witness is unavailable to testify and the defendant has been afforded a prior opportunity for cross-examination. 541 U.S. at 68. *Crawford* did not involve or address the scope of a defendant's right to physically confront the witnesses against him, let alone suggest an absolute right of such physical confrontation.

Indeed, the opinion of the Court in *Crawford* does not discuss *Craig*, which had already established the absence of any absolute entitlement. And the *Crawford* Court did cite and rely on *Mattox*—another decision of this Court approving of witness testimony delivered outside the presence of the jury, so long as the defendant had an earlier opportunity for cross-examination. See *Crawford*, 541 U.S. at 54, 57, 59 n.9. And since *Crawford*, this Court has continued to invoke *Craig* for the proposition that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant." *Perry* v. *New Hampshire*, 565 U.S. 228, 245-246 (2012) (quoting *Craig*, 497 U.S. at 845); see *Williams* v. *Illinois*, 567 U.S. 50, 98-99 (2012) (Breyer, J., concurring) (same); see also *Crawford*, 541 U.S. at 61 (explaining, consistent with *Craig*, that the Clause requires that "reliability be assessed" by "testing in the crucible of cross-examination").

3. Petitioners additionally contend (Pet. 22-24) that the decision below conflicts with decisions from other courts of appeals. But they do not cite any decision holding that two-way video testimony by adult witnesses is necessarily unconstitutional. Instead, they cite three court-of-appeals decisions declining to adopt the Second Circuit's *Gigante* standard to decide whether the admission of such testimony was

constitutional in particular cases. See Pet. 22-23. But each of those decisions criticized *Gigante* for departing from what those courts viewed as the appropriate test: the standard articulated in *Craig*. See *Yates*, 438 F.3d at 1313 ("*Craig* supplies the proper test for admissibility of two-way video conference testimony."); *United States* v. *Carter*, 907 F.3d 1199, 1208 n.4 (9th Cir. 2018), cert. denied, 139 S. Ct. 2743 (2019) ("[T]he proper test is *Craig*."); *United States* v. *Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) ("'Confrontation' 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*."); cf. *Order*, 207 F.R.D. at 93-94 (statement of Scalia, J.) (criticizing the 2002 Rule Committee proposal on a similar basis).

Petitioners provide no sound reason to conclude that those courts would necessarily deem the Confrontation Clause to preclude Elliott's testimony notwithstanding the district court's findings under *Craig*. Any distinction between the two standards or disagreement among the circuits about which to apply is thus immaterial to the disposition of this case.

4. Finally, even if the question presented otherwise warranted this Court's consideration, this case would be a poor vehicle for considering it.

First, although petitioners now fault the Second Circuit for purportedly failing to apply the standard from *Craig*, see, *e.g.*, Pet. 19, 25 (arguing that "nothing in the Court's [*Craig*] decision suggests that its standard is limited to [one-way video] technology"), petitioners took the exact opposite position below. In the court of appeals, petitioners expressly agreed with *Gigante*'s reasoning and conclusion that "the '*Craig* standard' is inapplicable where, as here, a court 'employ[s] a two-

way system' and not a one-way feed." Akhavan C.A. Br. 50 n.21 (quoting *Gigante*, 166 F.3d at 81) (brackets in original). And petitioners did not ask the court of appeals to clarify or reconsider the extent to which *Gigante*'s test deviates from *Craig*'s—the primary issue they now press before this Court, and the basis for their claim of a circuit conflict in need of resolution. See Pet. 19-28; see also pp. 17-18, *supra*; but see pp. 13-14, *supra* (explaining that the Second Circuit applied *Craig* as well). Because that issue was "not pressed or passed upon below," the Court should adhere to its "traditional rule" and not grant certiorari to consider it in the first instance. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted); see *id.* at 44-45 (indicating that an issue would not be reviewable in this Court if the petitioner had conceded below that the court of appeals' precedent on that issue was "correct[]").

Second, the district court correctly determined that "any error in this case would have been harmless beyond a reasonable doubt." Pet. App. 35a; see *Delaware* v. *Van Ardsall*, 475 U.S. 675, 684 (1986) (Confrontation Clause errors are subject to the harmless-error analysis in *Chapman* v. *California*, 386 U.S. 18 (1967)); *Coy* v. *Iowa*, 487 U.S. 1012, 1021 (1988) (noting that the Court has "recognized that other types of violations of the Confrontation Clause are subject to * * * harmless-error analysis," and "see[ing] no reason why denial of face-to-face confrontation should not be treated the same"). Contrary to petitioners' suggestions (Pet. 15, 33), the court of appeals did not indicate otherwise; that court merely did not address this alternative basis for affirmance in light of its determination that no Confrontation Clause error occurred.

To begin with, even if speculation about how Elliott's testimony might have changed were relevant to the harmlessness inquiry, but see *Coy*, 487 U.S. at 1021-1022, petitioners' contention (Pet. 9) that the use of two-way video "significantly constrained and impaired the cross-examination" of Elliott is unsound. The district court—which experienced Elliott's testimony firsthand with the rest of the courtroom participants—found no merit to Akhavan's complaints about "minor issues with video transmission or with locating exhibits," observing that "[b]oth the raising and the resolution of these issues was incredibly brief and was about as disruptive as a witness's sneeze." Pet. App. 34a. The court similarly repudiated Akhavan's "unsubstantiated speculation" that "he would have been able to better 'control' the witness if [Elliott] were present in open court." *Ibid.*; see *id.* at 34a n.4 (noting that if counsel were to "badger[]" the witness, the court would have "put a stop to" it). Rather, "from all the evidence offered at trial," the court identified "no reason to believe that Elliott would have testified differently on any relevant topic merely because he was in the same room as [petitioners]." *Id.* at 34a.

The district court also rejected petitioners' argument (Pet. 10) about the allotted time limit for cross-examining Elliott, noting that it was a routine trial-management decision; that "[i]n actuality, the [court] asked defense counsel how much longer defense counsel would need for cross-examination"; and that the court "then permitted defense counsel to take that time, and more." Pet. App. 35a. As for the supposed "key piece of evidence" (Pet. 10)—a Visa slide deck—that petitioners were unable to question Elliott about because it was admitted later at trial, the district court found that the

exhibit "bordered on the trivial," and that "the defense repeatedly adduced evidence and testimony from Elliott and others to support the overarching point for which [Akhavan] offered the slide deck: that credit card companies and banks profited from marijuana transaction." Pet. App. 35a.

More fundamentally, the district court properly determined, based on its firsthand knowledge, that there was no reasonable possibility that Elliott's testimony affected the verdict. Pet. App. 35a. Contrary to petitioners' contentions (Pet. 33-34), Elliott's testimony played only a minor role in the case, which included 13 other prosecution witnesses (all of whom testified in person). The court observed that "Elliott's testimony was largely duplicative of John Verdeschi's (of MasterCard)," who, like Elliott, testified to the roles of different players in the card-payment processing network; the information provided to the credit-card companies and issuing banks when processing transactions; policies prohibiting illegal transactions, including marijuana transactions; processes for enforcing those policies; and Mastercard's termination of certain marijuana merchants, including fake merchants used by petitioners. Pet. App. 36a; see C.A. App. 724-911.

Moreover, the fact that Visa's policies prohibited the processing of illegal transactions was also addressed in testimony by representatives from Bank of America, Citigroup, and Actors Federal Credit Union. See Gov't C.A. Br. 93. And as the district court also correctly observed, the evidence supporting the jury's verdicts was "overwhelming[]." Pet. App. 32a. Petitioners' emphasis (Pet. 11) on the prosecution "referenc[ing] Visa" 42 times in its closing argument is likewise misplaced. The prosecution referred to Elliott's testimony only twice,

C.A. App. 2768, 2793-2794, as many witnesses other than Elliott—including bank witnesses, cooperating witnesses, and petitioners themselves—had referenced Visa or its policies. See Gov't C.A. Br. 94-95.

Accordingly, even if the manner in which Elliott was permitted to testify were deemed erroneous, it did not prejudice petitioners. See Fed. R. Crim. P. 52(a). A resolution of the question presented in petitioners' favor would not change the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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