No. 22-844

IN THE
Supreme Court of the United States

HAMID AKHAVAN AND RUBEN WEIGAND,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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The government's theory in this federal-bank-fraud prosecution relied heavily on Visa's transaction-processing policies. Petitioners vigorously contested the prosecution's account of those policies, as presented to the jury through a lone Visa representative, Martin Elliott. But unlike all others testifying for the government, Elliott never took the witness stand. He instead appeared as an image on a screen, dialing in from his attorneys' distant office—shielded from face-to-face confrontation and the jury's observation—simply because he had health-related travel concerns common across the adult population.

Only one court of appeals would condone such a jarring deviation from the constitutional right to confrontation. Outside the Second Circuit, departures from in-person confrontation are permitted only where truly "necessary." *Maryland v. Craig*, 497 U.S. 836, 850 (1990). By no plausible account was that standard met here; the government readily could have elicited the testimony from a Visa representative willing to testify in person. The Second Circuit abided Elliott's remote appearance only under the malleable, deferential balancing test that it adopted in *United States v. Gigante*, 166 F.3d 75 (1999), which has been rejected by every other court of appeals that has considered it. This case therefore squarely presents a recognized circuit conflict on a recurring constitutional question. And resolving that conflict has taken on exceptional importance in the wake of the pandemic, which catapulted remote video technology into unprecedented prominence.

The opposition brief scarcely denies those compelling grounds for certiorari. The government concedes the existence of a circuit conflict without defending

the *Gigante* rule. Instead, the government reimagines the decision below as applying *Craig*. But the Second Circuit did not apply *Craig*. And if it had, this Court's review would remain equally warranted. No other court of appeals that applies *Craig* would allow Elliott's remote testimony, and extending *Craig* that far would impugn its continued validity.

The government strains to find vehicle problems but comes up empty. Petitioners fully preserved their arguments below, invoking their Confrontation Clause rights and relying on the decisions that form the conflict this Court would resolve. And not even the Second Circuit accepted the government's claim that admitting Elliott's remote testimony could be harmless error. Visa's policies were central to the prosecution's theory; Elliott was Visa's sole trial representative; and he provided testimony no other witness could. Having obtained that testimony through extraordinary means, the government cannot now paint it as inconsequential.

A. The Second Circuit's Decision Is Wrong And Conflicts With The Decisions Of Other Federal Courts Of Appeals

The Confrontation Clause guarantees a criminal defendant "a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). Petitioners were undisputedly denied such an encounter with Elliott, who testified not "in the presence of" petitioners and the jury in New York, *id.* at 1020, but from "his attorneys' offices in the San Francisco area," Pet.App.64a. Far from meeting "frowning brow to brow," *Coy*, 487 U.S. at 1016 (citation omitted), petitioners and Elliott simply Zoomed from screen to screen.

1. The Second Circuit upheld that stark departure from "physical, face-to-face confrontation at trial," *Craig*, 497 U.S. at 850, under its *Gigante* test, Pet.App.11a-12a. *Gigante* held that *Craig*'s necessity standard for remote witness testimony applies only to *one*-way video, while remote testimony by *two*-way video is permissible if a district court finds—subject to review only for clear error and abuse of discretion—that "exceptional circumstances" and "the interest of justice" support the request. 166 F.3d at 81.

That rule is untenable. When a prosecution witness testifies remotely, the defendant loses the right to "live, in-person" confrontation regardless of how the cameras are configured. *Craig*, 497 U.S. at 851. After long urging courts of appeals to follow *Gigante*, *see* Pet. 22-23, the government acknowledges that every court of appeals that has considered the question has rejected *Gigante*, Opp. 18. And although the government argued for affirmance based on *Gigante* below, C.A. Br. 86-90, its brief in this Court falls strikingly mute on that point—offering no substantive defense of *Gigante* as distinct from *Craig*.

In sum, the government both concedes that *Gigante* is on the short side of a circuit conflict and declines to defend *Gigante*'s merits. That itself bespeaks warrant for this Court's intervention.

2. The government principally contends that the Second Circuit's decision is justified by *Craig*, which supposedly supplies a valid alternative basis for the judgment and eliminates any circuit conflict. Opp. 13-17. That argument fails for multiple reasons.

a. To begin, the Second Circuit did not decide this case under *Craig*. It held that the "district court

rightly applied *Gigante*." Pet.App.11a; *see id.* at 12a (holding that the district court did not "abuse its discretion in permitting two-way video testimony pursuant to *Gigante*"). The government notes that "the *district court* … found that 'the standard articulated in *Craig* is satisfied' as well." Opp. 13 (quoting Pet.App.63a n.12) (emphasis added; brackets omitted). But the court of appeals issued no such alternative holding. And the government's suggestion that the Second Circuit found *Craig* satisfied "by necessary implication," Opp. 15, is just wishful thinking.

b. Even if the Second Circuit had allowed Elliott's testimony under *Craig*, this Court's review would be warranted. While the government now questions whether there is "meaningful daylight … between *Craig* and *Gigante*," Opp. 15, the government has long urged courts to follow *Gigante* rather than *Craig*. *See* p. 3, *supra*. And *Gigante*'s stated premise is that "it is not necessary to enforce the *Craig* standard." 166 F.3d at 81. Those positions confirm that the *Craig* and *Gigante* standards "materially differ." Opp. 15.

Specifically, *Craig*'s bar for admitting remote testimony is far higher than *Gigante*'s. *Craig* allowed departure from in-person confrontation only upon a "showing of necessity." 497 U.S. at 855. There, necessity was demonstrated when testifying in the defendant's presence would cause a child sex-abuse victim such trauma that the child could not "reasonably communicate." *Id.* at 856 (citation omitted).

The facts of this case are miles away from *Craig*. Elliott was not an eyewitness to a crime, nor the victim of a trauma; he was *a corporate representative* with "no firsthand knowledge of the specific transactions at issue" who testified about Visa's general

policies. Pet.App.54a. The government does not dispute that other Visa representatives could have testified in his stead. *Id.* at 107a-122a. Nor does the government contest that vast numbers of Americans traveled during the pandemic amidst commonplace health concerns paralleling Elliott's. *See* Pet. 7. Indeed, Elliott himself traveled by plane in the summer of 2020. *Id.* In short, Elliott's circumstances do not come close to satisfying *Craig*'s necessity standard. And as with other constitutional protections, the pandemic creates no general license to weaken that standard. Pet. 3; *see Arizona v. Mayorkas*, No. 22-592, 2023 WL 3516120, at *2-4 (May 18, 2023) (Gorsuch, J.).

c. The government is similarly wrong that courts of appeals rejecting *Gigante* might allow Elliott's remote testimony under *Craig*. Opp. 17-18. The reasoning of those circuits makes clear why they would disallow such testimony. Pet. 22-24.

The Ninth Circuit, for example, reversed a conviction when a witness testified remotely because she was unable to travel during pregnancy. *United States v. Carter*, 907 F.3d 1199, 1202 (2018). The court explained that "[t]here were alternatives available to preserve [the defendant's] right to physical face-to-face confrontation, meaning that denying him that right was not necessary." *Id.* at 1208. The Eleventh Circuit similarly reversed a conviction where "essential witnesses to the government's case-in-chief" testified remotely from Australia because they would not travel and could not be subpoenaed. *United States v. Yates*, 438 F.3d 1307, 1310 (2006) (en banc) (citation omitted). The court explained that "there simply is no necessity of the type *Craig* contemplates," because "an alternative" mechanism for obtaining the testimony (a

Rule 15 deposition) was "strikingly apparent." *Id.* at 1316; *see also United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005).

The arguments supporting remote testimony in those cases were, if anything, even *more* compelling than any here. The witnesses testifying remotely there were—unlike Elliott—percipient witnesses with firsthand knowledge of the alleged crimes. And their reasons for not testifying in person were at least as strong as Elliott's. If it was "strikingly apparent" that adequate alternatives to remote testimony existed there, *Yates*, 438 F.3d at 1316, it is even clearer that such alternatives exist here. For just that reason, district courts in circuits that reject *Gigante* have rejected requests for remote testimony in cases paralleling this one. *E.g.*, Pet. 25.[1]

d. If *Craig* is properly read to permit remote testimony here, this Court should overrule *Craig*. *Cf.* Opp. 16-17. *Craig* did not base its exception to in-person confrontation on the original meaning or historical application of the Confrontation Clause; it relied on a balancing of public-policy considerations. 497 U.S. at 853. Whatever the merits of that approach then, *cf. id.* at 860 (Scalia, J., dissenting), it is irreconcilable with current Confrontation Clause jurisprudence, *see*

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[1] The government cites a Minnesota Supreme Court decision that applied *Craig* to allow remote testimony by a witness ordered to quarantine following COVID-19 exposure. Opp. 15 (citing *State v. Tate*, 985 N.W.2d 291 (2023)). Other recent state supreme court decisions have held that allowing similar remote testimony violated the Confrontation Clause. *Campbell v. Commonwealth*, 2023 WL 3113315 (Ky. Apr. 27, 2023); *Newson v. State*, 526 P.3d 717 (Nev. 2023). Those decisions underscore the need for this Court to resolve this recurring question.

Pet. 28-30; *United States v. Cox*, 871 F.3d 479, 492-95 (6th Cir. 2017) (Sutton, J., concurring). So long as *Craig*'s exception remains narrowly confined to genuine necessity, the tension with subsequent cases is limited. But if the exception were extended to these circumstances, then regard for precedent would require overruling rather than maintaining *Craig*. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405-08 (2020) (overruling prior Sixth Amendment precedent that was subsequently undermined).[2]

B. This Case Presents A Clean Vehicle For Reviewing The Question Presented

The government separately contends that "this case would be a poor vehicle for considering" the question presented. Opp. 18. But none of its purported vehicle concerns has substance.

1. The government contends that petitioners did not preserve their present arguments below. Opp. 18-19. That is baseless. The relevant section of petitioners' briefing below began by invoking the circuit decisions that rejected *Gigante* and relied on *Craig* (*e.g.*, *Carter*, *Yates*, and *Bordeaux*)—the cases that form the circuit conflict petitioners ask this Court to review—and then cited district courts that had "appl[ied] *Craig* to deny witness request[s] to testify via two-way video conference." Akhavan C.A. Br. 48-49 & n.20. When

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[2] The government compares *Craig*'s exception to *Mattox v. United States*, 156 U.S. 237 (1895), in which this Court allowed the admission of prior trial testimony by a witness who later died. Opp. 11, 17. But *Mattox* emphasized that admitting such testimony did not deprive the defendant of any confrontation right, because "he ha[d] … see[n] the witness face to face, and … subject[ed] him to the ordeal of a cross-examination." 156 U.S. at 244.

the government suggested Elliott's testimony could be admitted under *Craig*, petitioners expressly countered, explaining why *Craig*'s "stringent standard would not be met." Akhavan C.A. Reply Br. 46.

The government's claim that petitioners' position below was the "opposite" of their current position is absurd. Opp. 18. The government relies on a one-sentence footnote in Akhavan's Second Circuit brief that recited *Gigante*'s rationale. Akhavan C.A. Br. 50 n.21. But acknowledging circuit precedent is not endorsing it, *see United States v. Williams*, 504 U.S. 36, 44 (1992), and petitioners' briefing thoroughly contested *Gigante*'s validity, *see, e.g.,* Akhavan C.A. Br. 50-55.

2. The government also contends that any error in permitting Elliott's remote testimony would be harmless. Opp. 19-22. But the government made that argument below, C.A. Br. 93-97, and the Second Circuit declined to adopt it, *cf.* Pet.App.13a (relying on harmless error in rejecting another claim). The court had good reason for not going where the government now urges: Elliott's remote testimony could not be found harmless by any measure, let alone "beyond a reasonable doubt." *Coy*, 487 U.S. at 1021.

a. The government first suggests that there is "no reason to believe that Elliott would have testified differently on any relevant topic" if he had testified in person. Opp. 20 (quoting Pet.App.34a). But as the government appears to recognize, *see id.*, "[a]n assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation," *Coy*, 487 U.S. at 1021-22. Otherwise, courts could countermand the Framers' judgment by simply supposing that in-person

confrontation makes no difference. *Cf. Crawford v. Washington*, 541 U.S. 36, 62 (2004).[3]

b. The proper harmless-error inquiry is instead whether the government can show beyond a reasonable doubt that Elliott's testimony could not have swayed the jury's decision. The Second Circuit rightly did not find that high standard satisfied.

This novel prosecution for bank fraud hinged on close questions of materiality and intent. Pet. 4-6, 11. The government needed to convince the jury that banks' generic policies against processing "illegal" transactions were understood as extending to marijuana sales that were *not illegal* in the relevant states and *greenlighted* by the federal government for banks to process. Pet. 4-6. Given that banks repeatedly allowed and profited from such transactions, the government relied heavily on evidence that Visa and Mastercard would not knowingly process transactions of the kind petitioners facilitated, and that banks would follow their lead. Pet. 5, 11. As the sole representative of one of those two credit-card companies, Elliott's testimony was pivotal. Pet. 10-13. The government cannot credibly gainsay his importance by trying to differentiate him from its 42 references to Visa in its closing argument. Opp. 21-22. Elliott testified as *Visa's lone representative*; he was the company's face (or digital image) to the jury, and the two cannot be separated for these purposes.

The testimony from "bank witnesses" and others in the financial industry, Opp. 22, does not diminish

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[3] In any event, the record and common sense demonstrate that Elliott's Zoom testimony from his attorney's offices was not the equivalent of testimony in the courtroom. Pet. 9-11, 34.

Elliott's centrality. Rather than stake out their own position on whether and to what extent marijuana transactions qualified as "illegal," those witnesses consistently deferred to the *credit-card companies*' interpretation and implementation of their own policies. *See* Pet.C.A.J.A.1466-67, 2056, 2381-82. So those roads, too, lead back to Elliott and Visa.

Nor was Elliott's testimony "largely duplicative" of testimony from Mastercard's representative in any relevant sense. Opp. 21 (citation omitted). Mastercard's representative described Mastercard's policies, not Visa's policies. Had the jury disbelieved Elliott about Visa's policies, that would have demolished a pillar of the prosecution's case. Pet.App.26a-28a. Moreover, Elliott was especially damaging to the defense: he uniquely espoused the government's thesis that marijuana-related transactions were specifically and categorically prohibited by governing policies. *See, e.g.*, Pet.C.A.J.A.2148; Pet. 11-12.

In sum, Elliott was a key prosecution witness on the thorniest questions in this close case. Having bent constitutional strictures to accommodate this singular witness, the government cannot persuasively argue that his testimony never mattered. At a minimum, the harmless-error argument should not obstruct merits review of this exceptionally important constitutional question. *See, e.g.*, *Hemphill v. New York*, 142 S. Ct. 681, 693 n.5, 694 (2022) (reversing Confrontation Clause error and remanding for harmless-error analysis); *cf. McDonnell v. United States*, 579 U.S. 550, 580 (2016) (reversing jury-instruction error and rejecting harmless-error argument).

C. This Court's Review Is Warranted

This case meets all criteria for this Court's review. It presents an important, recurring question of constitutional law on which the circuits have split. The question was squarely resolved, pursuant to established circuit precedent, by the court of appeals that hears the nation's most significant white-collar prosecutions. And the court's resolution of the question directly impacted the bottom-line result.

More broadly, the case implicates fundamental concerns about how evolving technology should intersect with enduring constitutional rights. *E.g.*, *Riley v. California*, 573 U.S. 373 (2014); *Kyllo v. United States*, 533 U.S. 27 (2001). The Confrontation Clause reflects insights about "human nature," *Coy*, 487 U.S. at 1017, and this case raises the deep question whether remote video technology is an adequate substitute for in-person interaction—or if, instead, there are "intangible but crucial differences between a" live personal encounter and one "electronically created by cameras, cables, and monitors," *Bordeaux*, 400 F.3d at 554-55.

That question arose in criminal trials before the pandemic; it grew in importance during the pandemic; and it now persists. The government acknowledges that district courts within the Second Circuit have repeatedly allowed remote video testimony by relying on *Gigante*. Opp. 16; *see* Gov't C.A. Br. 87-88 (citing additional cases); *see also, e.g.*, Dkt. Entry, *United States v. John Won*, No. 18-cr-184 (E.D.N.Y. Oct. 18, 2021). Indeed, commentators have identified the Southern District of New York as one of the "specific jurisdictions [that] … has lowered the bar for what a 'public policy interest' for virtual witness testimony can be." Jefferson Wolfe, *Virtual Witness Testimony and the*

Zoom Age: A Sixth Amendment Violation or the Future of Criminal Law?, 91 UMKC L. REV. 217, 231 (2022). The question recurs frequently in other jurisdictions as well, *see* p. 6 n.1, *supra* (citing multiple state supreme court decisions this year), and it looms ever larger amidst the march of remote video technology.

Resolving the question presented would provide essential clarity for all concerned. Had the government known in this case that it could not procure remote testimony by a corporate representative invoking commonplace concerns, it could have subpoenaed a different Visa representative. Or it could have found ways to make Elliott comfortable traveling. Or it could have proceeded without a Visa representative. The one thing it could not do is rely on Elliott's testimony to secure criminal convictions without affording what "the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 69.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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