No.

IN THE

SUPREME COURT OF THE UNITED STATES

BRADY FRANKLIN, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Maryland v. Craig*, 497 U.S. 836 (1990), this Court held that a defendant's Sixth Amendment right to confront a witness is satisfied without the witness's physical, face-to-face presence before the defendant if a judge deems the witness's testimony reliable and finds an exception to physical, face-to-face confrontation at trial is necessary to further an important public policy. *Craig* upheld a state statute that permitted a child accuser of sexual abuse to testify via one-way closed-circuit video from outside the courtroom when a court had found that testifying at trial in the presence of the defendant would cause the child serious emotional distress or an inability to communicate. Years after *Craig*, this Court in *Crawford v. Washington*, 541 U.S. 36 (2004), rejected a judicial determination of reliability as a factor for Confrontation Clause analysis. It stated that "open-ended balancing tests" undermined constitutional guarantees and that the Sixth Amendment recognized only those exceptions to confrontation "established at the time of the founding."

In Illinois, state statute 725 ILCS 5/106B-5 exempts children from physical, face-to-face confrontation with the defendant in circumstances similar to those in *Craig*, but also extends that protection to adults with intellectual disabilities.

The question presented is:

After *Crawford*, is the balancing test created by *Craig* still good law, and if so, does extending its exemption for children from physical, face-to-face confrontation to categories of adult witnesses—here, intellectually disabled adults—violate the Confrontation Clause?

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The petitioner, Brady Franklin, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The published opinion of the Illinois Appellate Court (Appendix A) is reported at 2023 IL App (1st) 200996. The Circuit Court's oral ruling permitting the witness to testify by closed-circuit testimony outside the petitioner's presence (Appendix B) is unreported. The order of the Illinois Supreme Court denying leave to appeal (Appendix C) is reported at 2023 WL 6444878.

JURISDICTION

On June 9, 2023, the Appellate Court of Illinois issued its decision. No petition for rehearing was filed. The Illinois Supreme Court denied a timely filed petition for leave to appeal on September 27, 2023. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *

The Illinois statute at issue here, 725 ILCS 5/106B–5 (2018), is set out in its entirety in Appendix D.

INTRODUCTION

This case involves an exception to the Sixth Amendment right to physical, face-to-face confrontation that this Court has made for child accusers of sexual abuse, who are permitted to testify by video outside the presence of the defendant, and whether that exception for children may be constitutionally extended to adults with intellectual or developmental disabilities.

Brady Franklin was convicted at a bench trial of the kidnaping and sexual assault of his ex-wife, S.R.. Under Illinois statute 725 ILCS 5/106B-5 (herein Section 106B-5), when an accuser in certain sex abuse cases is a child or moderately or severely intellectually disabled adult, the accuser may testify by video outside the presence of the defendant if testimony in the defendant's presence would result in the accuser not being able to reasonably communicate or suffering severe emotional distress causing severe adverse effects. Following a hearing, the court found S.R. to be an intellectually disabled adult and permitted a modified Section 106B-5 procedure in which Franklin watched from outside the courtroom via video while S.R. testified from the witness stand.

Illinois's Section 106B-5 stems from the rule generated in *Maryland v. Craig*, 497 U.S. 836 (1990), which authorized a similar video procedure for child accusers of sexual assault. *Craig* determined that while "the Confrontation Clause reflects a preference for face-to-face confrontation at trial, [that] preference that must occasionally give way to considerations of public policy and the necessities of the case." *Craig,* 497 U.S. at 849. The Court held that a defendant's confrontation rights are satisfied without the ability to confront a witness face-to-face if the witness's

testimony is deemed "reliable" and important public policy reasons justify the absence of the witness's physical, face-to-face presence before the defendant. *Id.* at 845–46, 851. According to the Court, "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 853.

Several years after *Craig*, this Court recognized that the Sixth Amendment's Confrontation Clause constitutionalized "the right of confrontation at common law, admitting only those exceptions established at the time of the founding."*Crawford v. Washington*, 541 U.S. 36, 54 (2004). *Crawford* rejected "open-ended exceptions from the confrontation requirement" and "reliability" as a factor for determining the Confrontation Clause's requirements, overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)—the very case upon which *Craig* relied to generate its balancing test regarding in court, face-to-face testimony. *Crawford*, 541 U.S. at 54.

Since *Crawford*, state and federal courts have struggled to reconcile *Crawford* and *Craig*'s competing understandings of the face-to-face requirement of the Confrontation Clause. Some courts have limited *Craig* to its facts and allowed its exception only in cases of child accusers of sexual assault. *See People v. Jemison*, 505 Mich. 352, 365 (2020). Other courts, as in Franklin's case here, have distinguished the subject matter of the two cases—prior out-of-court testimonial statements in *Crawford* and live testimony under oath in *Craig*. *See, e.g., State v. Tate*, 985 N.W.2d 291 (Minn. 2023). This uneasy distinction has allowed *Craig*'s balancing test to excuse physical, face-to-face confrontation of testifying witnesses

in all manner of circumstances in which courts have determined it necessary for purported important public policy reasons, often far afield from a state's unique interest in protecting children from the potential psychological harm of being forced to face their abusers.

This case exemplifies the conflict between *Crawford* and *Craig*, in which a state statute subjects a historical and textual constitutional right to an arbitrary balancing test dependent upon the political preferences of the time. *See Craig*, 497 U.S. at 861 (Scalia, J., dissenting) (criticizing the "subordination of explicit constitutional text to currently favored public policy"). In the wake of *Crawford,* the explicit constitutional right of physical, face-to-face confrontation cannot be subject of an open-ended balancing test that favors particular classes of adults. *See Crawford*, 541 U.S. at 54. Even if the Confrontation Clause allows for sensitivity to the protection of children, after *Crawford, Craig*'s rule can go no further.

This Court should grant review and vindicate that "bedrock constitutional protection[] afforded to criminal defendants." *Hemphill v. New York*, 142 S. Ct. 681, 690 (2022); *see Crawford*, 541 U.S. at 42.

STATEMENT OF THE CASE

At criminal trials involving certain sexual assault charges, Illinois allows accusers who are children, and also adults "with a moderate, severe, or profound intellectual disability," to testify via closed-circuit television if a judge determines that requiring the accuser to testify in the presence of the defendant would result in such "serious emotional distress" that the accuser would not be able to reasonably communicate or would cause the accuser to suffer "severe adverse effects." 725 ILCS 5/106B-5(a)(2) (2018). (Appx. 2a–3a, ¶ 6).

Brady Franklin was charged with multiple counts of aggravated criminal sexual assault and aggravated kidnaping after he allegedly abducted and sexually assaulted his estranged wife S.R.. (Pet. App. 2a, ¶ 4). The State moved to allow S.R., 47 years old, to testify outside Franklin's presence by closed-circuit television pursuant to Section 106B-5. (Pet. App. 2a ¶ 6, 6a ¶ 19; Pet. App. 48a–56a). Franklin filed his own motion to exclude the use of closed-circuit testimony at trial. (Pet. App. 5a, ¶ 13; Pet App. 57a–61a).

A. Section 106B-5 Motions

The State's motion claimed S.R. had a moderate intellectual disability. (Pet App. 53a). It included a report from clinical psychologist Dr. Lori Tall, who conducted a cognitive evaluation that showed S.R.'s IQ was 57, "consistent with individuals diagnosed with an intellectual impairment," and her reading and math skills were kindergarten level. (Pet. App. 3a, ¶ 8). The doctor's report opined that S.R. functioned at the level of an eight to ten year old. (Pet. App. 3, ¶ 8). S.R. had received special education services before dropping out of the ninth grade and had

previously been prescribed medications for anxiety, panic disorder, depression, and post-traumatic stress disorder. (Pet. App. 3a–4a, ¶¶ 7, 9). The report concluded that S.R. had severe cognitive and adaptive difficulties and impairments consistent with "a moderate intellectual disability." (Pet. App. 3a, ¶ 8).

Franklin argued that the application of Section 106B-5 to an adult complaining witness violated his right to face his accuser as guaranteed by the Sixth Amendment of the United States Constitution. (Pet. App. 5a, ¶ 13; Pet. App. 57a–61a). Franklin described S.R. as a functional adult able to maintain a household and raise children. (Pet. App. 5, ¶ 13). He pointed to S.R.'s several drug arrests and convictions, a felony forgery conviction, and alluded to statements made by S.R.'s probation officer that she did not think S.R. had a mental illness but that she struggled with anger issues. (Pet. App. 5, ¶ 13).

Dr. Tall testified at a hearing that she had interviewed S.R. about her accusations against Franklin, which caused her to become highly emotional, fearful, and caused difficulty communicating. (Pet. App. 7, ¶ 21). At one point, S.R. shut down and cried, asking to go home. (Pet. App. 7, ¶ 21). S.R. was calmed after about 30 minutes, and S.R.'s demeanor improved after Dr. Tall said she would not ask about the incident with Franklin any further. (Pet. App. 7, ¶ 21). Dr. Tall testified that if S.R. were in the same room as Franklin during the trial, "I think that she would not be able to function[,]" and would likely cry and lose the ability to express herself. (Pet. App. 9a–10a, ¶ 26).

A victim specialist with the state's attorney's office, Maria Godinez, testified about her five to ten meetings with S.R. (Pet. App. 10a, ¶ 27). She said S.R.

expressed fear of running into Franklin at the courthouse and would experience panic attacks when she attempted to discuss her allegations against Franklin. (Pet. App. 10a–11a, ¶¶ 27–28).

S.R. testified at the hearing in the courtroom while defense counsel was present, though Franklin was not. (Pet. App. 11a, ¶¶ 29–30). S.R. said that she would not feel safe testifying at trial with Franklin present, even with sheriff's deputies there for protection. (Pet. App. 11a, ¶ 30). But she said she would be able to talk about the case if Franklin were in a different room. (Pet. App. 11a, ¶ 30).

The trial court's ruling stated that it was balancing Franklin's confrontation rights with "the victim's right to not have an emotional breakdown in the course of a trial." (Pet. App. 12a, ¶ 34). It found S.R. was "affected by a developmental disability" and "profoundly moderately or severely intellectually disabled," and therefore within ambit of the statute. (Pet. App. 12a, ¶ 34). The trial court granted the State's motion to permit S.R. to testify by video outside Franklin's presence. (Pet. App. 12a–13a, ¶ 34).

B. Bench Trial

At Franklin's bench trial, S.R. testified from inside the courtroom, while Franklin watched the proceedings by a closed-circuit television feed from a waiting room outside the courtroom. (Pet. App. 13a, ¶ 37). Franklin renewed his objection to S.R.'s testimony on confrontation grounds and objected to the presence of support people in the courtroom while Franklin was outside. (Pet. App. 32a, ¶ 98).

S.R. testified that in 2014, she was married to Franklin, but after he had kicked her and blackened her eye, she moved several blocks away to stay with her

aunt and uncle. (Pet. App. 13a, ¶ 38). One evening while walking back from a store, Franklin forcibly took her back to his house. (Pet. App. 14a, ¶¶ 39–40). S.R. said that over the next three days, Franklin physically and sexually assaulted her. (Pet. App. 14a, ¶ 40). She was able to escape when a friend of hers came looking for her with the police. (Pet. App. 14a, ¶ 40).

The friend, Tanavia Williams, corroborated some of S.R.'s testimony, although her testimony differed from S.R.'s in some key details. (Pet. App. 14a, ¶ 41). Where S.R. had said that she was taken by Franklin, Williams testified that two children had came to S.R.'s apartment saying that something was wrong with their father, and S.R. went with them willingly. (Pet. App. 14a, ¶ 41). The parties later stipulated that surveillance video from the store that S.R. said she had visited did not show S.R. on any of the video from that day. (Pet. App. 18a, ¶ 53).

Franklin's children Breanna and Brandon Franklin, who were 11 and 9 years old, respectively, at the time of the events, testified that they had walked with S.R. from her apartment back to Franklin's house. (Pet. App. 14a–16a, ¶¶ 42–45). They testified to seeing some injuries on S.R. and hearing sounds of violence and intercourse, but they did not testify to observing violence or sexual acts. (Pet. App. 14a–16a, ¶¶ 42–45).

Franklin testified that S.R. came to his house with his children. (Pet. App. 17a, ¶ 49). He said he and S.R. had a loud conversation, a hairstyling mishap, and consensual sex. (Pet. App. 17a–18a, ¶¶ 50–51).

The trial court found Franklin guilty of aggravated criminal sexual assault and aggravated kidnaping. (Pet. App. 19a, ¶ 55). Franklin moved for a new trial

based on his confrontation objection, and the trial court denied the motion. (Pet. App. 63a).

C. Appellate review

The Illinois Court of Appeals affirmed Franklin's conviction and rejected his argument that the form of S.R.'s video testimony violated the Confrontation Clause.

First, the appellate court found that the balancing test this Court announced in *Maryland v. Craig*, 497 U.S. 836 (1990), was not limited to child victims and applied here. (Pet. App. 22a, ¶ 70). The protection of the psychological well-being of intellectually disabled adults like S.R. was an important state interest that justified an exception to the face-to-face element of the Confrontation Clause and satisfied the Clause's requirements. (Pet. App. 22a, ¶¶ 65–76).

Second, the appellate court rejected Franklin's argument that *Craig*'s balancing test was limited by this Court's later opinion in *Crawford v. Washington*, which disapproved of "open-ended exceptions from the confrontation requirement[.]" 541 U.S. 36, 54 (2004). Although the appellate court "acknowledge[d] that there is tension between" *Craig*'s and *Crawford*'s approaches to the Confrontation Clause, and that "continuing to rely on *Craig* in the era of *Crawford* 'may be problematic,'" the appellate court believed it remained bound by *Craig* and its balancing test. (Pet. App. at 26–27, ¶¶ 80, 82).

Franklin also argued on appeal that the trial court's removal of Franklin from the courtroom during S.R.'s testimony, rather than S.R.'s testifying from outside the courtroom as set forth by Section 106B-5, violated his right to be present. However, the appellate court found that the argument was forfeited

because the trial record showed that Franklin's counsel did not make a specific objection to the inverted procedure and invited any error in permitting S.R. to testify within the courtroom rather than elsewhere. (Pet. Appx. at 31–34, ¶¶ 95–101).

Franklin timely filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on September 27, 2023.

REASON FOR GRANTING CERTIORARI

I. This case deepens an acknowledged and entrenched conflict between this Court's opinions in *Craig* and *Crawford* that only this Court can resolve.

The Illinois Appellate Court joins a long line of courts wrestling with *Craig* and a defendant's right to physical, face-to-face confrontation of witnesses in the wake of *Crawford*'s understanding of and instructions on the Sixth Amendment's Confrontation Clause. *See*, *e.g.*, *United States v. Carter*, 907 F.3d 1199, 1206 n.3 (9th Cir 2018) ("The vitality of *Craig* itself is questionable in light of the Supreme Court's later decision in *Crawford*."); *Campbell v. Commonwealth*, 671 S.W.3d 153 (Ky. 2023) ("The U.S. Supreme Court has not dealt with the inherent contradiction between *Crawford* and *Craig*."). While some courts have noted that the two cases are inherently contradictory in their respective approaches to the Confrontation Clause and have struggled to apply both decisions, others have analyzed the requirements of the right to confrontation as distinct depending upon whether the testimony at issue is live or a prior, out-of-court statement.

In *Craig*, this Court considered the constitutionality of a state procedural provision that allowed a criminal trial court "to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse." *Maryland v. Craig*, 497 U.S. 836, 850 (1990). The statute permitted such video testimony, taken outside the physical presence of the defendant, upon a finding that "testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." *Craig*, 497 U.S. at 841 (citation omitted). When such a finding was

made, "the child witness, prosecutor, and defense counsel [would] withdraw to a separate room," where the child could be "examined and cross-examined"—in person—by counsel, while "the judge, jury, and defendant" watched from the courtroom via video monitor. *Id.*

This Court permitted the video procedure because it found the "state interest in protecting child witnesses from the trauma of testifying in a child abuse case"—embodied there in a state law—"sufficiently important" to overcome the defendant's right to "a physical, face-to-face confrontation." *Id.* at 850, 855. *Craig* created a balancing test allowing for exceptions to a defendant's right to physical, face-to-face confrontation at trial when "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850. The reliability prong of this balancing test relied in significant part on *Ohio v. Roberts*, which established a "reliability" test for hearsay exceptions to the Confrontation Clause. 448 U.S. 56, 66, 68–69 (1980); *see Craig*, 497 U.S. at 846–50.

This Court subsequently overruled *Roberts* in *Crawford*, holding that "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 69; *see id.* at 55–56, 59 (explaining that confrontation is required apart from narrow, historical exceptions); *see also Hemphill v. New York*, 142 S. Ct. 681, 691 (2022) ("If *Crawford* stands for anything, it is that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees."). Although the substance of *Crawford* resolved the Confrontation Clause implications of a prior out-of-court statement and

not live trial testimony, numerous courts, state and federal, have recognized that "[w]hen *Crawford* overruled *Roberts*, it put *Craig*'s reliability-focused rule into serious doubt." *C.A.R.A. v. Jackson Cty. Juvenile Office*, 637 S.W3d, 50, 65–66 (Mo. 2022); *State v. Thomas*, 376 P.3d 184, 193 (N.M. 2016) ("*Crawford* may call into question the prior holding in *Craig* to the extent that *Craig* relied on the reliability of the video testimony.").

Crawford transformed "Confrontation Clause doctrine from a case-by-case reliability-balancing test to a categorical rule." *State v. Smith*, 636 S.W.3d 576, 584 (Mo. 2022). For some courts, *Crawford*'s rejection of balancing tests in determining Confrontation Clause exceptions has meant that *Craig* has been implicitly overruled, because *Craig*'s rationale relying on *Roberts* has "been fatally undermined." *Spalding v. Commonwealth*, 671 S.W.3d 693, 697 (Ky. 2023); *see Haggard v. State*, 612 S.W.3d 318, 326 (Tex. Crim. App. 2020) ("*Crawford* implicitly overruled *Craig*, or at least the reliability prong").

Yet other courts have attempted to work around any contradiction or denied that any conflict exists. *See United States v. Patterson*, No. 21-1678-CR, 2022 WL 17825627, at *4 (2d Cir. Dec. 21, 2022). ("*Crawford* does not stand in tension with *Maryland v. Craig*"). These courts have found that "[b]ecause *Crawford* did not explicitly overrule *Craig*, the two cases must be reconciled." *State v. D.K.*, 21 Wash. App. 2d 342, 348 (Wash. 2022). For many courts, similar to the Illinois Appellate Court here, such reconciliation comes by finding the two cases "address distinct confrontation questions[.]" *State v. Vogelsberg*, 2006 WI App 228, ¶ 15. Thus, these courts allow *Craig*'s balancing test to determine the defendant's right of face-to-face

confrontation for "witnesses who testify in court, under oath and subject to cross examination," while *Crawford*'s understanding of historical exceptions to the Confrontation Clause is reserved for out-of-court statements. (Pet. App 26a, ¶ 81); *see State v. Tate*, 985 N.W.2d 291, 305 (Minn. 2023) ("[T]he cases address different Confrontation Clause issues"); *State v. White*, No. 22-0522, 2023 WL 5607148, at *4 (Iowa Ct. App. Aug. 30, 2023) (applying *Craig*'s test to remote testimony because it and *Crawford* deal with "distinct" spheres of confrontation). Lower-court determinations about the use of closed-circuit testimony remain controlled by *Craig*, although "[a]dmittedly, *Craig*'s rationale seems inconsistent with some language in *Crawford*." *State v. Jackson*, 216 N.C. App. 238, 241–44 (2011).

Given the incongruence between *Crawford*'s rejection of balancing tests for confrontation rights and *Craig*'s use of public policy as a balancing factor against the right to face-to-face confrontation, some courts conclude that "[t]o respect the one decision slights the other." *United States v. Cox*, 871 F.3d 479, 492–93 (6th Cir. 2017) (Sutton, J., concurring). Attempting to apply *Crawford* to *Craig* while remaining within the scope of its authority respecting this Court's rulings, Michigan has limited *Craig* "only to the specific facts it decided: a child victim may testify against the accused by means of one-way video (or a similar *Craig*-type process) when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection." *People v. Jemison*, 505 Mich. 352, 365 (2020). In all other cases of testimony, the defendant has a "right to face-to-face cross-examination[.]" *Jemison*, 505 Mich. at 366. Michigan's narrowing approach allows *Craig*'s exception for

children to survive while granting that *Crawford*'s interpretation of the Confrontation Clause generally controls. But even this methodology can only go so far, as "*Crawford* carefully identified the kinds of exceptions that might be allowed under its approach and conspicuously never mentions *Craig* as one of them." *Cox*, 871 F.3d at 493 (Sutton, J., concurring).

This Court's intervention is needed to resolve the confusion and divide among lower courts regarding continued application and reach of the *Craig* balancing test after *Crawford*'s rejection of balancing tests for a defendant's confrontation rights.

II. This issue is recurring and important to the proper administration of criminal trials.

The question of the extent and validity of the *Craig* test implicates recurring issues of national significance to the proper administration of criminal trials in which remote testimony plays an increasingly central role. Since *Craig* was decided in 1990, the use of live witness testimony taken outside the presence of the defendant has expanded. The "important public policy" prong of *Craig*'s balancing test has generated exceptions to physical, face-to-face confrontation in circumstances far removed from its initial circumstances protecting the psychological well-being of child victims of sexual crimes.

Several states have, like Illinois, expanded *Craig* beyond child victims to create a statutory or other exemption from physical, face-to-face confrontation for adults with intellectual or developmental disabilities who are also victims of particular sexual or violent crimes. *See*, *e.g.*, Cal. Penal Code § 1346–1347.5; Mich. Comp. Laws Ann. § 600.2163a; Ohio Rev. Code Ann. § 2945.481–491; Vt. R. Evid. 807. Certain states further expand the statutory exemption beyond victims to include intellectually disabled adult witnesses in cases of particular sexual or violent charges. *See*, *e.g.*, Ala. Code 1975 §§ 15-25-1, 15-25-3; Ind. Code Ann. § 35-37-4-8. The exception is pushed further with exceptions for intellectually disabled adult witnesses, regardless of the type of matter they testify about. *See* Colo. Rev. Stat. C.R.S.A § 16-10-402; Fla. Stat. Ann. § 92.53; Iowa Code Ann. § 915.38; La. R.S. § 15:283; N.D. Cent. Code Ann. § 31-04-04.2. New Jersey allows for any adult victim or witness, regardless of disability, to testify from outside the

defendant's presence when certain charges are involved. N.J. Stat. Ann. § 2A:84A-32.4.

These statutes and rules, while procedurally preserving the veneer of *Craig*'s requirement that a court make a finding of necessity, go far beyond the Court's finding in *Craig* that an exemption for children from the Confrontation Clause's requirement of physical, face-to-face meeting with the defendant serves an important state interest. *Craig*, 497 U.S. at 855 ("[T]he state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important. . ."). Instead, these statutes exemplify the warning within the dissent's reminder in *Craig* that the very purpose of the Confrontation Clause is "to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court[.]" *Craig*, 497 U.S. at 861 (Scalia, J., dissenting).

Even without explicit statutory authorization, courts have applied an expanded version of *Craig*'s the exception to justify remote testimony based on the state's interest in the psychological well-being of adult victims—victims who lack the same vulnerabilities as children, or even as intellectually disabled adults under the same circumstances. *Lipsitz v. State*, 135 Nev. 131, 137 (2019) (adult victim in drug treatment); *State ex rel. Montgomery v. Kemp*, 371 P.3d 660, 661–62, 665 (Ariz. Ct. App. 2016) (adult experiencing mental health difficulties). Applying *Craig*, courts have even held that the protection of the mental health of a non-complainant adult witness is an important public policy sufficient to trump a defendant's confrontation rights. *See Kramer v. State*, 277 P.3d 88, 94 (Wyo. 2012) (witness

committed to a mental hospital); *State v. Seelig*, 783 S.E.2d, 427, 435 (N.C. Ct. App. 2013) (witness unable to travel due to panic attack induced by fear of flying at time of flight to trial).

What constitutes an important public policy when it comes to a particular witness's needs often appears as arbitrary. Physical face-to-face confrontation has been excused for elderly witnesses, cancer patients, and witnesses in drug treatment. *See United States v. Benson*, 79 Fed. Appx. 813, 820–21 (6th Cir. 2003) (elderly witness too ill to travel); *Horn v. Quarterman*, 508 F.3d 306, 317 (5th Cir. 2020) (cancer patient); *Lipsitz*, 442 P.3d at 144 (drug treatment). But temporary unavailability due to pregnancy did not meet the necessity prong in *United States v. Carter*, 907 F.3d 119, 1208 (9th Cir. 2018).

Often in conjunction with protecting the health of a witness, the important public policy prong of *Craig*'s balancing test has used the state's interest in "resolving criminal cases" to justify an absence of physical, face-to-face testimony. *People v. Wrotten*, 923 N.E.2d 1009, 1103 (N.Y. 2009); *see also Harrell v. Butterworth*, 251 F.3d 926, 926 (11th Cir. 2001) (considering state's interest in "expeditiously and justly" resolving criminal matters). In *United States v. Abu Ali*, the prosecution of those "bent on inflicting mass civilian casualties" was found to be "just the kind of important public interest contemplated by the *Craig* decision." 528 F.3d 210, 239–41 (4th Cir. 2008). *Craig*'s necessity prong has been used to consider the state's interest in "resolving cold cases" to overcome a defendant's confrontation right. *See e.g.*, *White v. State*, 223 MD. App. 353, 387 (2015); *Kemp*, 371 P.3d at 660 (permitting an adult victim to testify by video where it "preserv[ed] society's

interest in prosecuting accused sexual offenders."). Some courts have even considered the burden and expense of securing a live witness as an important state interest justifying remote testimony from a forensic analyst. *Cf. City of Missoula v. Duane*, 355 P.3d 729 734 (Mont. 2015); *but see People v. Jemison,* 505 Mich. 352 (2020) (rejecting cost-savings as an important state interest).

The COVID-19 pandemic further highlights the urgency for determining *Craig*'s applicability to adults, as its exception has been invoked to justify an absence of face-to-face confrontation. *See, e.g., State v. Tate*, 985 N.W.2d 291, 305 (Minn. 2023) (finding defendant's confrontation right was not violated when witness exposed to COVID-19 testified by video). But at the same time, some courts have found that COVID-19 concerns do not justify exceptions to in-person confrontation. *See*, *e.g.*, *C.A.R.A. v. Jackson Cty. Juvenile Office*, 637 S.W3d, 50, 65–66 (Mo. 2022) (rejecting remote testimony for generalized concern about COVID-19); *United States v. Riego*, 2022 WL 4182431, at *3–*4 (D.N.M. Sept. 13, 2022) (applying *Coy v. Iowa*, 487 U.S. 1012 (1988) to live testimony without mentioning *Craig* and denying request to testify remotely despite witness's "chronic respiratory condition that leaves her more vulnerable to COVID-19").

While *Craig* was willing to balance a textual constitutional right with a historical sensitivity to the unique state interest in the protection of children, its rule has since generated an often arbitrary and open-ended exception that subjects a defendant's right to physical, face-to-face confrontation to the various state interests and public policy preferences for adult witnesses for whom the state lacks the same or similar historical interest.

III. This case is an excellent vehicle to address the question presented because it centers face-to-face presence of a witness and defendant.

This case offers an ideal vehicle for this Court to resolve the question presented. Franklin preserved his Confrontation Clause objections throughout the proceedings. (Pet. App. 5a, ¶ 13; Pet. App. 57a–61a; Pet. App. 63a). The trial court rejected his argument, and on direct appeal the Illinois Appellate Court addressed Franklin's Confrontation Clause challenge in its published decision, which treated *Craig*'s balancing test as dispositive. (Pet. App. at 26–27, ¶¶ 80, 82).

The case also squarely raises the question presented. The decision to permit accuser, S.R., to testify from outside Franklin's presence was critically important. S.R.'s testimony was at the center of the trial. On the basis of 725 ILCS 106B-5, S.R. testified from the courtroom while Franklin watched by video from another room. (Pet. App. 13a, ¶ 37). Aside from physical presence, what this court has called the other core-value elements of confrontation were satisfied—the witness here was under oath, cross-examined, and observed by the fact-finder. *See Maryland v. Craig*, 497 U.S. 836, 846 (1990)*; California v. Green*, 399 U.S. 149, 158 (1970). To the extent this procedure inverted the *Craig* procedure, in which it was the accuser who was outside the courtroom, this case precisely centers the question on the right to the physical, face-to-face encounter between accuser and defendant during testimony at trial.

The statute at issue here, extending *Craig*'s exception from children to adults, is a direct outgrowth of the open-ended exception to face-to-face confrontation, warned of in *Craig's* dissent and *Crawford*'s holding, that result from a balancing test weighing "important state interests" or "important public policy"

against a textual constitutional right. *See Craig* at 861 (Scalia, J., dissenting) (criticizing the "subordination of explicit constitutional text to currently favored public policy"). This Court's review is warranted to affirm due regard for a core, express constitutional guarantee and to ensure that criminal defendants accused of the most offensive crimes are afforded critical constitutional protections.

IV. The decision below is wrong. The Confrontation Clause's historical obligations apply whether the testimony at issue is live or an out-of-court statement.

The Illinois Appellate Court acknowledged the tension between *Craig* and *Crawford*'s different approaches to the same Confrontation Clause, but because this Court has not explicitly overruled *Craig*, the Appellate Court felt bound to apply *Craig*'s balancing test here. (Pet. App. at 26–27, ¶¶ 80, 82). To do so, it analyzed Franklin's right to confrontation as though the Confrontation Clause's obligations and exceptions meaningfully distinguish between live, in-court testimony, and out-of-court testimonial statements. (Pet. App. at 26, ¶ 81). But *Crawford* said of the Confrontation Clause, without distinction, that it enshrined "the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). Given that, *Craig*'s balancing test cannot persist to sustain exceptions to the right of confrontation for adult witnesses.

The creation of *Craig*'s balancing test and its exception to face-to-face confrontation for child accusers of sexual assault who present live testimony rest upon this Court's discernment from its Confrontation Clause cases that the face-to-face requirement "must occasionally give way to considerations of public policy and the necessities of the case[.]" *Maryland v. Craig*, 497 U.S. 836, 849 (1990), quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895). To justify a rule "sensitive to [the Confrontation Clause's] purposes and sensitive to the necessities of trial and the adversary process[,]" *Craig* pointed to exceptions to physical, face-to-face confrontation in cases of nontestifying co-conspirators, dying declarations, and prior

trial testimony of deceased witnesses. *Craig*, 497 U.S. 848–49, citing *Bourjaily v. United States*, 483 U.S. 171 (1987) (co-conspirator's out-of-court statements); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (deceased witness's prior trial testimony); *Kirby v. United States*, 174 U.S. 47, 61 (1899) (dying declarations). But each of these examples collapses the distinction between live testimony and prior statements that the Illinois Appellate Court relied upon to affirm Franklin's conviction here. (Pet. App. at 26, ¶ 81). To derive a rule for the requirements of confrontation when live testimony is involved, *Craig* relied upon its understanding of the meaning and requirements of confrontation as applied to out-of-court statements. *See Craig*, 497 U.S. 848–49. It stands no less that here, *Crawford*'s understanding of confrontation's exceptions applies as much to live testimony as out-of-court statements.

Crawford interpreted the meaning of a defendant's right "to be confronted with the witnesses against him." U.S. Const. amend VI. This Court's earliest opinions addressing the Confrontation Clause emphasized the defendant's rights "of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Mattox*, 156 U.S. at 244. The Sixth Amendment does not distinguish between witnesses making out-of-court statements and those presenting live testimony, but instead "contemplates two classes of witnesses—those against the defendant and those in his favor." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313–14 (2009) (referring to the Confrontation Clause and Compulsory Process Clause). *Crawford* delineated simply that the Confrontation Clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony[,]'"

regardless of whether their testimony is presented in or out of court. *Crawford*, 541 U.S. at 51. *Crawford*'s analysis reconciled any distinction between in- and out-of-court testimony by affirming that all who are "acting as 'witnesses' [are] subject to the right of confrontation." *Ohio v. Clark*, 576 U.S. 237, 253 (2015) (Scalia, J., concurring). Indeed, this Court has recognized that out-of-court testimonial evidence is "functionally identical to live, in-court testimony" because it does "precisely what a witness does on direct examination." *Melendez-Diaz*, 557 U.S. at 310–11, quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006).

Thus, when the State offers testimony from a witness, the Confrontation Clause demands the defendant receive "the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54. Such exceptions were "recognized long before the adoption of the constitution, and not interfering at all with its spirit." *Mattox*, 156 U.S. at 243. Dying declarations, for example, are quintessentially statements a defendant does not have the ability to confront, "yet from time immemorial they have been treated as competent testimony[.]" *Id.* at 243. Similarly, this Court has recognized historical exceptions for testimonial statements of "a witness who was 'detained' or 'kept away' by the "means or procurement" of the defendant." *Giles v. California*, 554 U.S. 353, 359 (2008) (rejecting alternative to historical forfeiture-by wrongdoing exception that was not "established at the time of the founding"). Such statements avoid exclusion "simply from the necessities of the case." *Mattox*, 156 U.S. at 244. It is these ancient exceptions to confrontation that, by necessity of the case, survive the enactment of the Confrontation Clause. *See Greene v. McElroy*, 360 U.S. 474,

496 (1959) ("[T]he requirements of confrontation and cross-examination. . . have ancient roots.").

While *Craig* seized upon *Mattox*'s recognition that certain case-specific necessities may require an exception to the literal language of the Confrontation Clause, it ignored that such were rooted in the clause's codification of the historical common law tradition of exceptions. *See Mattox*, 156 U.S. at 243 ("We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted"); *Clark*, 576 U.S. at 246 (admitting out-of-court statements "that would have been admissible in a criminal case at the time of the founding"). *Mattox* admitted prior testimony of a deceased witness under a traditionally recognized confrontation exception—the witness was unavailable and the defendant had a prior opportunity for confrontation. *Mattox*, 156 U.S. at 240; *see Barber v. Page*, 390 U.S. 719, 722 (1968) ("[T]here has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings"). But *Mattox* noted specifically that this exception did involve an opportunity for the defendant to physically confront the witness—the prior testimony was admissible because "the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case[.]." *Mattox*, 156 U.S. at 241. Confrontation exceptions that allowed a testimonial witness to wholly avoid physically facing the defendant were few and articulated by historical tradition.

Outside of these historical exceptions adopted with the Confrontation Clause's enactment, a defendant has a right to be convicted only upon the testimony

of witnesses "upon whom he can look while being tried[.]" *Kirby*, 174 U.S. at 55. This Court has "never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). The Confrontation Clause codified the understanding that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy*, 487 U.S. at 1017, quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965). This right "preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Crawford*, 541 U.S. at 57, quoting *Mattox*, 156 U.S. at 244.

Crawford rejected "open-ended exceptions" and "open-ended balancing tests" to determine the Confrontation Clause's requirements. *Crawford*, 541 U.S. at 54. Even if *Craig*'s specific finding of an exception for physical, face-to-face confrontation because of the state's interest in the protection of the psychological well-being of child victims giving testimony in cases of sexual abuse can survive, that singular exception cannot justify an open-ended exception for adult witnesses. *See Craig*, 497 U.S. at 855. A state's interest in protecting children is among its highest interests, and it has "an independent interest in the well-being of its youth." *Ginsberg v. New York*, 390 U.S. 629, 640 (1968). A state's interest in safeguarding the mental and physical welfare of children "is evident beyond the need for elaboration." *New York v. Ferber*, 458 U.S. 747, 756–57 (1982). It is an interest both "traditional" and "transcendent." *Craig*, 497 U.S. at 855, quoting *Ginsberg*, 390 U.S. at 640. Children play a unique role in society, because "[a] democratic society rests,

for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). It is because of this place of paramount importance to the state's own continued existence that this Court has occasionally "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber*, 458 U.S. at 756–57. *Craig* relied on this well-established history to conclude that a state has an interest in protecting children from psychological harm that is so important it justifies curtailing a defendant's Sixth Amendment rights, and this Court tailored its limited rule to permit closed-circuit testimony of children in sexual abuse cases under narrow circumstances. *Craig*, 497 U.S. at 853. Perhaps a state has a unique, historical, and constitutionally sound interest in protecting children from the psychological harm of testifying in court in specific instances. But there is no comparative state interest for adult accusers, and no relevant historical tradition of such exceptions for adults, no matter their cognitive backgrounds.

While *Crawford* articulated an interpretation of the Confrontation Clause that limited its exceptions to those of historical common law, *Craig* generated a balancing test exception that allowed a child to testify outside the physical presence of the defendant, a practice contrary to the text of the Confrontation Clause itself. The further extension of *Craig* from children to adults, as allowed by Illinois's Section 106B-5 here, is not within the purview of historical exceptions to a defendant's right "to be confronted with the witnesses against him[.]" U.S. Const. amend VI.

Because Illinois violated Brady Franklin's right to confront the witnesses against him when it permitted S.R. to testify outside Franklin's physical presence, this Court should grant certiorari to reaffirm that face-to-face testimony given in the presence of the defendant is part and parcel of the meaning of "confrontation" in the Confrontation Clause.

CONCLUSION

For the foregoing reasons, petitioner, Brady Franklin, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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