No. 24-121

In the Supreme Court of the United States

JOHN WON, PETITIONER

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 two international witnesses to testify via two-way video in the midst of the COVID-19 pandemic.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is available at 2024 WL 827774.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2024. A petition for rehearing en banc was denied on May 8, 2024 (Pet. App. 17a). The petition for a writ of certiorari was filed on July 31, 2024. 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 Eastern District of New York, petitioner was convicted on two counts of conspiring to commit wire fraud, in violation of 18 U.S.C. 1343 and 1349; one count of conspiring to commit securities fraud, in violation of 18 U.S.C. 371; one count of securities fraud, in

violation of 15 U.S.C. 78j(b) and 78ff; and one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (h). Judgment 1-2. The district court sentenced petitioner to one year and one day of imprisonment, to be followed by two years of supervised release, with $842,076.81 in restitution. Judgment 3-4, 7. The court of appeals affirmed petitioner's conviction but vacated his sentence and remanded for further proceedings. Pet. App. 1a-14a.

1. Petitioner was involved in two fraudulent investment schemes: a foreign exchange trading scheme and a stock investment scheme. At the center of both were two foreign exchange trading companies that petitioner and his coconspirators operated under the name ForexNPower (FNP), which purported to manage foreign currency trading on behalf of investor clients and to train individual investors to trade foreign currency. Presentence Investigation Report (PSR) ¶¶ 14-15.

To induce investors to open managed foreign exchange trading accounts, petitioner and his coconspirators ran fraudulent advertisements that misrepresented "(1) the experience and expertise of FNP's trading staff"; "(2) the rates of return historically achieved by FNP"; "(3) the likely future rates of return that would be achieved by FNP through its computerized trading systems and platforms"; "(4) the general risks associated with [foreign exchange] trading"; and "(5) an insurance program FNP purported to maintain, which the coconspirators claimed would pay investors back for any losses they incurred, plus a 10% profit." PSR ¶ 16.

One advertisement, for example, claimed that FNP had a "secret trading method" that would generate "more than 10% monthly profit." PSR ¶ 16. In reality, however, "nearly all individual investors lost the money

they invested" in the foreign exchange market; "[petitioner] and his co-conspirators had little experience or expertise in [foreign exchange trading]"; and "no insurance program had been initiated or implemented to repay investors." PSR ¶ 18.

To perpetrate the scheme, petitioner also made materially false statements to FNP's online trading platform (FXCM) and to an "introducing broker" (FXEvolve) that solicited customers to open FNP accounts in exchange for a shared commission for each trade placed through FNP's platform. PSR ¶¶ 19, 22. Petitioner circumvented FXCM's limits on the number of investors in certain accounts by using FXEvolve as an intermediary, and lied to FXCM about FNP holding itself out to the public as a commodity trading advisor or money manager. PSR ¶¶ 20-22.

In addition to duping individuals into opening foreign exchange trading accounts, petitioner and his coconspirators also participated in a separate scheme to induce victims to invest in FNP directly by lying about the company's trading success and the intended use of the invested funds. See PSR ¶¶ 24-25. While telling potential investors that FNP would use the funds to invest in the foreign exchange market or expand FNP's offices to other locations, petitioner and his coconspirators "misappropriated the majority of the money and spent it on personal expenses having nothing to do with FNP's trading business, and to pay other investors when those investors asked for their money back"—in essence, to run a Ponzi scheme. PSR ¶ 25; see PSR ¶¶ 24-25.

2. A federal grand jury in the Eastern District of New York charged petitioner and one of his coconspirators with two counts of conspiring to commit wire fraud, in violation of 18 U.S.C. 1343 and 1349; one count of con-

spiring to commit securities fraud, in violation of 18 U.S.C. 371; one count of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; and one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (h). Indictment 12-17.

a. The district court scheduled petitioner's trial for November 2021, while the court was operating under limitations stemming from the COVID-19 pandemic. See Pet. App. 7a; Gov't C.A. App. 39-44. Conferences leading up to trial were almost exclusively held by teleconference pursuant to the Eastern District of New York's rules governing operation during a national emergency. See generally The Health & Safety Protocols for Courthouses in the E.D.N.Y., *COVID-19 (Coronavirus) Information* (effective Oct. 7, 2022) https://www.nyed.uscourts.gov/covid-19. And in September 2021, the Chief Judge of the Eastern District of New York issued an order extending earlier findings regarding "the national emergency" caused by COVID-19. Gov't C.A. App. 39.

The order observed that "the community transmission rate in all counties comprising the Eastern District" was "'high'" and explained that, although vaccines were becoming more available, "many people, including court employees, have not been vaccinated," and "several judges, court staff, and attorneys * * * continue to work remotely, and many defendants, members of the public, and others continue to limit their travel or are unable to come to the courthouse because they are at higher risk for contracting COVID-19, and the CDC and other public health authorities continue to advise taking precautions to reduce the possibility of exposure." Gov't C.A. App. 41-42.

The order provided that, based on the above circumstances, "among others, in-person proceedings in th[e] District must continue to be limited to avoid seriously jeopardizing the public health and safety of in-court participants and others with whom they may have contact." Gov't C.A. App. 42. It further provided that "it is necessary for the judges in this District to be able to continue to conduct proceedings remotely, by videoconference or teleconference," including for "felony pleas under Rule 11 of the Federal Rules of Criminal Procedure and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure." *Id.* at 42-43.

b. Following the order, the government sought permission to call two foreign witnesses via two-way video: Dr. Greg Suh, an investor-victim, and Deric Chen, an FXCM employee. Gov't C.A. App. 53-56. Both witnesses were unwilling, at least in part for pandemic-related reasons, to travel to the United States to testify in person, and both were beyond the subpoena power of the court. See C.A. App. A86-A93.

In a sworn declaration, Suh explained that he lived and worked in Seoul, South Korea, where he cared for his 77-year-old mother, who was at severe risk if she contracted COVID. Gov't C.A. App. 53-54. Suh noted that the travel requirement to testify in person would impede both his work and his ability to provide care for his mother, although he was optimistic that his vaccinated status "may" permit an exemption from South Korea's otherwise-mandatory two-week quarantine requirement. *Ibid.*

Chen, who lived in Hong Kong, explained that if he traveled to New York, he "would be required under Hong Kong law to quarantine at a hotel for 21 days" upon his return. Gov't C.A. App. 55. That amount of

time, in addition to time spent in the United States for trial, would cause him to be away from his young children for four weeks. *Ibid.*; see C.A. App. A592-A593. Chen further stated that he was not permitted to work remotely and could lose his job. Gov't C.A. App. 55-56.

The district court granted the government's motion. Pet. App. 15a-16a. The court found, based on the government's representations in its motion, that "exceptional circumstances and the interests of justice warrant[ed]" the two-way video testimony. *Id.* at 16a. Responding to concerns raised by petitioner, who had opposed the motion, the court "insist[ed] that this technology be crystal clear, both audio and video." *Id.* at 15a-16a. The court observed that the "video arrangement, which I doubt is here to stay, but given COVID is here for the time being, may indeed provide the fact-finder with a greater opportunity to observe the nuances, facial expressions and so forth, of the witnesses." *Id.* at 16a.

c. At trial, Suh and Chen testified by two-way video and defense counsel cross-examined them. Suh and Chen were able to see the attorneys, the judge, and Won throughout their testimony, and vice versa. C.A. App. A676-A677, A817-A818, A840. To ensure that they were clearly displayed to the jury on a big screen that the judge compared to "going * * * to the movies," *id.* at A807, the trial moved to another courtroom with a better setup, *ibid.*

Apart from Suh and Chen, the government called other victim investors who testified about their communications with petitioner; employees of FNP's business partners; an FBI analyst who traced victim money to petitioner and his coconspirators; and an investigator who attested to FNP's losses; and other witnesses. See

Gov't C.A. Br. 7-8. The government also introduced e-mails detailing petitioner's schemes, his involvement, and fraudulent advertisements used to induce victims to invest in petitioner's companies. *Id.* at 8.

The jury found petitioner guilty on all counts. See C.A. App. A1566-A1568.

3. In a nonprecedential order, the court of appeals affirmed petitioner's convictions, but vacated and remanded his sentence to permit the district court to address an error in the restitution award. Pet. App. 1a-14a.

The court of appeals rejected petitioner's argument that Chen's and Suh's testimony had violated the Confrontation Clause. Pet. App. 6a-8a. The court explained that although "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact, * * * this right is not absolute." *Id.* at 6a (citations and internal quotation marks omitted). In particular, this Court had allowed one-way closed circuit television testimony "upon a case-specific finding that such testimony is 'necessary to further an important state interest.'" *Ibid.* (quoting *Maryland* v. *Craig*, 497 U.S. 836, 852 (1990)), and the Second Circuit had permitted two-way video testimony "'[u]pon a finding of exceptional circumstances . . . when [video testimony] furthers the interest of justice.'" *Ibid.* (quoting *Craig*, 497 U.S. at 852, and *United States* v. *Gigante*, 166 F.3d 75, 81 (2d Cir. 1999), cert. denied, 528 U.S. 1114 (2000)) (brackets in original).

The court of appeals "f[ou]nd that exceptional circumstances * * * justified the use of two-way video testimony against [petitioner]." Pet. App. 7a. The court highlighted the pandemic and the Chief Judge's order extending the district court's "national emergency pro-

tocols as new strains of the virus emerged that were potentially vaccine-resistant." *Ibid.* (internal quotation marks omitted). The court also noted the difficulties Chen and Suh would face if they were to travel to the United States, quarantine for a lengthy period of time, and expose family members to COVID upon their return. *Ibid.*

The court of appeals also emphasized that "the district court used procedures to ensure the protection of [petitioner's] confrontation rights, including by setting up large screens that allowed the jury to see the witnesses and also allowed the witnesses to see the attorneys and [petitioner himself]." Pet. App. 7a. While cautioning that "two-way video 'should not be considered a commonplace substitute for in-court testimony,'" it found that the exceptional circumstances resulting from a worldwide pandemic and international witnesses "justified such video testimony here." *Id.* at 7a-8a (quoting *Gigante*, 166 F.3d at 81).

ARGUMENT

Petitioner renews (Pet. 11-33) his claim that the Confrontation Clause precluded the district court from allowing Chen and Suh 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. In any event, because the government introduced independently convincing evidence of petitioner's guilt, any error in permitting Suh and Chen to testify was harmless. 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 abuse its discretion in admitting witness testimony by two-way video.

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 *Maryland* v. *Craig*, 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 (or anyone else in the courtroom). *Id.* at 851; see *id.* at 840-841.

b. Here, the court of appeals complied with this Court's precedent in finding—under the unusual circumstances of this pandemic-era case—that permitting Chen and Suh to testify by two-way video did not violate the Confrontation Clause. As the district court found, and the court of appeals affirmed, the as-yet-uncontrolled COVID-19 pandemic, in combination with the particular witnesses' international locations, work, and family obligations, gave rise to exceptional circumstances justi-

fying a limited deviation from ordinary trial-testimony procedures.

The court of appeals addressed the case through the lens of *United States* v. *Gigante*, 166 F.3d 75 (2d Cir. 1999), cert. denied, 528 U.S. 1114 (2000), 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 for one-way video, as instructive on the specific findings required for two-way video testimony. 166 F.3d at 81 (citation omitted).

But the lower courts' determinations here are equally consistent with the standard articulated in *Craig*. As the court of appeals observed, at the time of trial "the world was in the midst of a pandemic," dealing with "new strains of the virus * * * that were potentially vaccine-resistant." Pet. App. 7a. Requiring the witnesses to travel internationally from Asia could have ex-

posed court personnel, the witnesses, and their family members to COVID. *Ibid.* And the district court implemented procedures that protected petitioner's confrontation rights, "by setting up large screens that allowed the jury to see the witnesses and also allowed the witnesses to see the attorneys and [petitioner] himself." *Ibid.*

The lower courts' findings thus illustrate that the circumstances here would present a rare "occasion" 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 the witnesses' own unique circumstances—including lengthy quarantine requirements, caretaker obligations, and the possible loss of a job—made it necessary to permit the witnesses to provide live testimony remotely, which still allowed that testimony to be subjected to the "rigorous adversarial testing" required by the Clause. *Craig*, 497 U.S. at 857; see *id.* at 845.

2. Petitioner's contrary arguments lack merit. He does 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 does he 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, petitioner contends that the Second Circuit's *Gigante* decision contravenes *Craig*.

Whatever daylight exists between *Craig* and *Gigante*, the two decisions point in the same direction with

respect to a circumstance as exceptional as a global pandemic and the particular circumstances of the two overseas witnesses at issue here. Indeed, without even mentioning *Gigante*, the Supreme Court of Montana applied the *Craig* test to circumstances similar to the ones here, upholding the use of two-way video testimony where the witness was located in Greece, "would have to travel over 11,000 miles and spend over 30 hours in flight time" at a time when there were "official governmental advisories against such travel," and "could well have placed herself, the court, the other witnesses, and the defendant into a heightened risk of contracting COVID-19." *State* v. *Walsh*, 525 P.3d 343, 346 (2023).

More generally, 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*). Other courts are in accord. See, *e.g.*, *United States* v. *Donziger*, No. 19-cr-561, 2020 WL 5152162, at *2 (S.D.N.Y. Aug. 31, 2020) (finding that the admission of two-way video testimony 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).

Petitioner acknowledges that during the pandemic, courts have "found *Craig*'s 'important public policy'

standard to be satisfied when trial courts made specific findings" regarding the witnesses. Pet. 18 (citing *State* v. *Tate*, 985 N.W.2d 292, 302-303 (Minn. 2023); *State* v. *Comacho*, 960 N.W.2d 739, 755 (Neb.), cert. denied, 142 S. Ct. 501 (2021)). Petitioner attempts (*ibid.*) to frame those cases as narrow outliers, with other courts rejecting the use of two-way video testimony during COVID. But in the cases petitioner cites, the courts held that the video-testimony was impermissible because the lower courts had failed to make adequate case-specific findings of necessity. See *State* v. *Carter*, 238 N.E.3d 87, 97 (Ohio 2024) (reasoning that "[r]ising COVID-19 cases in Minnesota is too general an observation to support a case-specific finding that requiring Mullins to testify in person would jeopardize the health of anyone involved with the trial"); *State* v. *Strommen*, 547 P.3d 1227, 1239 (Mont. 2024) (rejecting State's reliance on public health concerns where neither "the State [n]or the District Court assert[ed] or rel[ied] on any Covid-based concern" and instead pointed to the witness's scheduling conflict); *Campbell* v. *Commonwealth*, 671 S.W.3d 153, 161 (Ky. 2023) (finding that Zoom testimony violated the Confrontation Clause where the witness "needed to testify via Zoom because he was needed at the hospital"—which "amount[ed] to a scheduling difficulty * * * likely caused by the belated issuance of the subpoena"); *Newson* v. *State*, 526 P.3d 717, 722 (Nev. 2023) (en banc) (finding that two-way video testimony violated the Confrontation Clause when the "State conceded that its request for remote testimony was inadequate and that it failed to include pandemic-related justifications" and instead asserted only "convenience" of the witnesses); *C.A.R.A.* v. *Jackson County Juvenile Office*, 637 S.W.3d 50, 65-66 (Mo. 2022) (en banc) (finding that two-way

video testimony violated the Confrontation Clause in the absence of "witness-specific" findings). Those cases do not hold that two-way video testimony is categorically precluded under *Craig*, or indicate that it would necessarily be impermissible in the specific circumstances of this case.

3. Because the outcome would be the same under either *Gigante* or *Craig*, petitioner's assertion (Pet. 12-22) of a conflict among the lower courts is overstated. As a threshold matter, petitioner's reliance (Pet. 12-19) on decisions by other courts of appeals that have rejected *Gigante* and this Court's rejection of the Judicial Conference's proposed revision to Criminal Rule 26(b), which would have codified *Gigante*'s exception, is misplaced. Under the circumstances of this case, *Craig* would have permitted Suh and Chen to testify by video conference.

Nor is petitioner correct in suggesting (Pet. 21-22) that the existence of other cases within the Second Circuit, in the quarter-century since *Gigante* was decided, in which an adult witness was allowed to testify by two-way video 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); *United States* v. *Colello*, No. 20-cr-613, 2023 WL 3584466, at *1 (S.D.N.Y. May 19, 2023) (witness hospitalized in the United Kingdom due to heart failure and could not safely travel); *United States* v. *Rossy*, No. 22-cr-550-02, 2023 WL 8520732, at *1 (S.D.N.Y. Dec. 8,

2023) (witness injured and unable to travel in current physical condition).

Petitioner suggests (Pet. 18-19) that two recent state supreme court decisions appear to have applied *Craig* more narrowly than federal courts of appeals. See *People* v. *Jemison*, 952 N.W.2d 394, 400 (Mich. 2020) (holding that the court "will apply *Craig* only to the specific facts it decided"); *State* v. *Smith*, 636 S.W.3d 576, 587 (Mo. 2022) ("Missouri courts should certainly continue to apply *Craig* to the facts it decided."); but see *C.A.R.A.*, 637 S.W.3d at 65-66 (appearing to apply *Craig* to testimony of a child victim's mother and babysitter in decision issued the same day as *Smith*). But any shallow and recent disagreement does not warrant this Court's review at this time. No federal court of appeals has confined *Craig* to its facts, nor does petitioner seem to advocate for that result.

4. Petitioner does request (Pet. 22-23) that this Court grant certiorari to "clarify how *Craig* and *Crawford* fit together." But *Craig*'s holding has not been undercut by this Court's later decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004). *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. *Id.* 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 cited and relied 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. Furthermore, 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").

5. Finally, even if the question presented otherwise warranted this Court's consideration, this case would be a poor vehicle for considering it because granting certiorari would not change the outcome. Given the strong evidence of petitioner's guilt, any error in permitting Suh and Chen's testimony was harmless. 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") .

At trial, petitioner's counsel did not dispute the existence of the schemes in question, arguing instead that petitioner's coconspirator was responsible while petitioner lacked the requisite knowledge. See C.A. App. A1456-A1485. Even without the testimony of Suh and

Chen, however, the evidence of petitioner's knowledge was overwhelming. In addition to Suh, the government introduced testimony from several other victim investors who spoke to petitioner's knowledge and active involvement in the scheme. See Gov't C.A. Br. 7. Indeed, in addressing petitioner's sufficiency challenge on appeal, the court of appeals relied on the testimony of a different victim—Allen Kim—who "testified about multiple occasions on which [petitioner] distributed false brochures and prospectuses, spoke on stage, and at one point even 'shouted' a solicitation to potential investors." Pet. App. 5a (quoting C.A. App. A511). That witness also testified regarding petitioner's close ties to his coconspirator and the business card that petitioner provided to the victim, "featuring the false claim that FNP used a '[s]ecret method of generating 10 percent or more [in monthly] profit.'" *Ibid.* (quoting C.A. App. A472) (brackets in original).

Similarly, in addition to Chen's testimony as an employee of FXCM, the government offered a witness from another one of FNP's "key partners," Jason Hoerr, who worked at FXEvolve and testified that petitioner "made false statements * * * when he misrepresented that FNP provided only 'educational services' and was not trading on behalf of clients." Pet. App. 4a-5a (quoting C.A. App. A776). And while the government relied on Chen's testimony in summation (frequently in the same sentence as it cited Hoerr's), that is largely due to the fact that the government introduced numerous inculpatory e-mails through Chen—e-mails that petitioner did not dispute could have been introduced even without Chen's testimony. See Pet. C.A. Reply Br. 14; see Pet. App. 4a (citing C.A. App. A615, A636-A638,

A646-A649, all of which involve documentary evidence introduced through Chen).

Thus, even setting aside the testimony from Suh and Chen, the evidence plainly showed that petitioner misrepresented his company's successes to victim investors, distributed false and misleading advertisements, and knew about the significant losses his investors were suffering, all while petitioner reaped the benefits of their investments. And that alternative ground for affirming the court of appeals' judgment, which the court did not need to reach but was advanced by the government, underscores the unsuitability of this case for this Court's review. See *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (a party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals") (citation omitted); Gov't C.A. Br. 40-42.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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