No. _____

In the

Supreme Court of the United States

Luis Alberto Armendariz-Chavez,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an immigration officer's warrant of removal is testimonial for purposes of the Confrontation Clause?

PARTIES TO THE PROCEEDING

Petitioner is Luis Alberto Armendariz-Chavez, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Luis Alberto Armendariz-Chavez seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is *United States v. Armendariz-Chavez*, 747 F. App'x 266 (5th Cir. 2019). It is reprinted in Appendix A to this Petition. The district court did not issue a written opinion.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on January 9, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

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

U.S. Const. Amend. VI.

STATEMENT OF THE CASE

On November 18, 2016, immigration officers learned that Luis Armendariz-Chavez, Petitioner, was in the United States illegally. On July 26, 2017, officers arrested Mr. Armendariz-Chavez and determined that he had been deported in December 2004. A federal grand jury subsequently indicted Mr. Armendariz-Chavez on one count of Illegal Reentry after Deportation, in violation of 8 U.S.C. § 1326(a). Mr. Armendariz-Chavez elected to plead not guilty and proceeded to trial.

The one-day trial was held on January 8, 2018. The Government called two witnesses in its case-in-chief, ICE Officer Bryan Wheeler and fingerprint analyst Bruce Evans, who collectively established the elements of the offense. In his case-in-chief, Mr. Armendariz-Chavez testified on his own behalf, asserting an affirmative defense of duress.

During his testimony, Officer Wheeler related the contents of Mr. Armendariz-Chavez's A-File over defense counsel's objection. Specifically, counsel objected on the grounds of hearsay and the Confrontation Clause. The district court overruled defense counsel's Confrontation Clause objection on the basis that the documents within the A-File were nontestimonial.

Ultimately, the jury was not persuaded by Mr. Armendariz-Chavez's duress defense and found him guilty of the charged offense. On April 25, 2018, the district court sentenced him to 21 months imprisonment, followed by three years of supervised release. On January 9, 2019, the Fifth Circuit affirmed, based on prior circuit precedent in *United States v. Garcia*, 887 F.3d 205 (5th Cir. 2018).

Mr. Armendariz-Chavez now seeks review by this Court to determine whether the contents of the A-file, particularly the return on the warrant of deportation, is testimonial under the Confrontation Clause.

REASONS FOR GRANTING THIS PETITION

The Fifth Circuit's published holding in *United States v. Garcia*, 887 F.3d 205 (5th Cir. 2018) that a warrant of removal is nontestimonial directly conflicts with this Court's modern Confrontation Clause jurisprudence.

The Sixth Amendment entitles every accused "to be confronted with the witnesses against them." U.S. Const. Amend. VI. The confrontation clause prohibits the use of testimonial hearsay from an absent declarant, unless the declarant is unavailable and the defendant had a prior opportunity to cross examine him. *See Crawford v. Washington*, 541 U.S. 36, 54 (2004); *Melendez-Diaz v. Massachussetts*, 557 U.S. 305, 309 (2009).

In this case, the Return on the Warrant of Deportation was used as hearsay to show Mr. Armendariz-Charvez's actual removal, and he lacked any opportunity to cross-examine the declarant. The Fifth Circuit, however, has held it nontestimonial. *United States v. Garcia*, 887 F.3d 205 (5th Cir. 2018).

The "core class" of testimonial statements includes, at a minimum:

> material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially ... extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and] ... statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51; *Melendez-Diaz*, 557 U.S. at 310. This Court has explained that "testimonial" statements are those that do "what a witness does on direct

examination." *Melendez-Diaz*, 557 U.S. at 311 (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)). They thus include a "solemn declaration or affirmation made for the purpose of establishing as proving some fact" and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 557 U.S. at 310.

The Return falls directly within the testimonial class of statements. It is part of a warrant, and the portion that asserts the defendant's departure attests to an officer's compliance with a judicial order. It could thus hardly be more formalized. Indeed, knowing falsification would subject the author to felony liability, *see* 18 U.S.C. §1001, so it is effectively under oath. *See Davis*, 547 U.S. at 826-827 (holding that statements made to police officers are "formal" because modern statutes impose criminal liability for the provision of false information). It is not a spontaneous declaration, but rather invites the particular testimony given by the author: the officer fills in the blank to attest to the alien's removal. It narrates a past event (the alien's departure) for future use; it does not discuss an on-going event. *See Michigan v. Bryant*, 562 U.S. 344, 356-359 (2011) (discussing the significance of this distinction).

Further, the officer who signed the document offered "the precise testimony [he or she] would be expected to provide if called at trial," namely that the defendant left the country. *Melendez-Diaz*, 557 U.S. at 310. Finally, the document's use in future proceedings against the accused—criminal, civil, or administrative—is obvious and

routine. The Return is, in plain terms, "a solemn declaration or affirmation made for the purpose of establishing as proving some fact."

In *United States v. Garcia*, the Fifth Circuit held the Return nontestimonial because it was drafted "to memorialize an alien's departure—not specifically or primarily to prove facts in a hypothetical future criminal prosecution." 887 F.3d 205, 213 (5th Cir. 2018). Yet its non-prosecutorial purpose was of a special kind: to determine an alien's rights to be present in the United States.

Immigration proceedings are a legal process brought by the sovereign to exercise power over the body of a particular, targeted individual. They result in incarceration and the separation of a person from family, home, and work. *See Woodby v. INS*, 385 U.S. 276, 285 (1966) ("This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification."). "[M]emorializ[ing] an alien's departure" is thus a special kind of non-prosecutorial purpose, unusually close to the core concerns of the Confrontation Clause. Unlike nontestimonial hearsay, it involves Government production of evidence for the purpose of targeting someone—a particular someone—for legal proceedings that may restrict his or her freedom. Notably, the Supreme Court has suggested that a document prepared for civil litigation would be testimonial hearsay. *See Melendez-Diaz*, 557 U.S. at 321-322 (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943), a civil case, to demonstrate the limits on any presumed exemption of business records from the definition of testimonial

hearsay).

Further, the Return should qualify as testimonial hearsay even if documents drafted exclusively for civil or administrative proceedings do not trigger the confrontation clause. It is true, of course, that not all removals result in a criminal prosecution. But certainty of a future criminal prosecution is not required. Rather, a statement is testimonial if made for the primary purpose of establishing "past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. And the drafter of the document certainly knows that some predictable subset of removals will result in re-entry prosecution.

CONCLUSION

This Court should grant review to resolve this entrenched question below. Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

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