No. _____

In the Supreme Court of the United States

PEDRO JORGE MORENO-GARCIA, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Is an immigration officer's signature on a warrant of removal attesting that he witnessed the alien depart the United States testimonial hearsay subject to the Confrontation Clause?

No. _____

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Petitioner Pedro Jorge Moreno-Garcia asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on August 1, 2019.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Moreno-Garcia*, No. 18-50910 (5th Cir. Aug. 1, 2019) (per curiam), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on August 1, 2019. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to … to be confronted with the witnesses against him …."

STATEMENT

In April 2018, Border Patrol agents found Pedro Moreno-Garcia on the U.S. side of the border fence in El Paso, Texas. He had entered the United States illegally by climbing over the fence. Moreno is a citizen of Mexico. He did not have permission from the

Attorney General or the Secretary of Homeland Security to enter or to reapply for admission to the United States.

Moreno was charged in a one-count indictment with illegally reentering the United States after having been removed, in violation of 8 U.S.C. § 1326. He pleaded not guilty and proceeded to a jury trial.

Before trial, Moreno filed a motion in limine to bar the admission of any executed warrants of deportation or removal. He argued that, because the documents are testimonial, admitting them into evidence without affording him the opportunity to cross-examine the witnesses to his removals would violate the Confrontation Clause. The district court denied Moreno's motion at the pretrial conference.

At trial, a records manager from U.S. Citizenship and Immigration Services testified about the contents of Moreno's A-file, which is a physical file containing an alien's immigration-related documents. Through the testimony of that witness, the Government offered into evidence Moreno's two prior executed warrants of removal. The return on both warrants contained a signature from an immigration officer who witnessed Moreno's departure from the United States. Moreno objected to the admission of both

documents for the reasons stated in his motion in limine. The district court denied Moreno's objections and admitted the documents. In his case-in-chief, Moreno testified on his own behalf, asserting an affirmative defense of duress.

Ultimately, the district court denied Moreno's requested jury instruction on duress, finding that he had not made required prima facie showing. The jury found him guilty. The district court sentenced him to time served, to be followed by one year of supervised release.

Moreno appealed. He argued in the Fifth Circuit, as he did in the district court, that admitting the executed warrants of removal at his trial violated the Confrontation Clause. He acknowledged that this argument was foreclosed by Fifth Circuit precedent. *See United States v. Garcia*, 887 F.3d 205 (5th Cir.) (per curiam), *cert. denied*, 139 S. Ct. 228 (2018). The court of appeals granted the Government's motion for summary affirmance.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's published holding in *United States v. Garcia*, 887 F.3d 205 (5th Cir. 2018) (per curiam)—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 him[.]" 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. Massachusetts*, 557 U.S. 305, 309 (2009).

In this case, the returns on the executed warrants of removal were used as hearsay to show Moreno's removal, and he lacked any opportunity to cross-examine the declarant. The Fifth Circuit, however, has held this document is not testimonial. *United States v. Garcia*, 887 F.3d 205 (5th Cir.) (per curiam), *cert. denied*, 139 S. Ct. 228 (2018).

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

> [M]aterial 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 51–52 (cleaned up); *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 (quoting *Crawford*, 557 U.S. at 52).

The warrant 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 826–27 (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, 356–59 (2011) (discussing the significance of this distinction).

Further, the agent who signed the document offered "the precise testimony the [agent] 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 warrant 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 warrant return is nontestimonial because it is drafted "to memorialize an alien's departure—not specifically or primarily to prove facts in a hypothetical future criminal prosecution." 887 F.3d at 213. Yet its nonprosecutorial purpose is 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 nonprosecutorial 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 321–22 (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 warrant 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 reentry prosecution.

CONCLUSION

FOR THESE REASONS, Moreno asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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