No. 13-680

In the Supreme Court of the United States

HOMERO GARCIA-REYES, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an Immigration Judge adjudicating an alien's application for discretionary cancellation of removal violated the Due Process Clause by considering a draft police report about the crime of which the alien was convicted, when the alien claims he was innocent of the crime but failed to challenge the conviction, to call known supporting witnesses, to present any written statement from them, or to seek the testimony of the preparer of the report.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted at 539 Fed. Appx. 467. The opinions of the Board of Immigration Appeals (Pet. App. 4a-11a, 25a-29a) and the Immigration Judge (Pet. App. 12a-24a, 30a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2013. The petition for a writ of certiorari was filed on November 27, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As relevant here, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an alien who has "been convicted of a violation of * * *

any law * * * of a State * * * relating to a controlled substance" is removable from the United States. 8 U.S.C. 1227(a)(2)(B)(i). Certain aliens admitted for lawful permanent residence who have been found to be removable may seek discretionary cancellation of removal. 8 U.S.C. 1229b(a). If an alien is statutorily eligible for cancellation of removal, relief is not automatic; instead, "[t]he Attorney General may, in his discretion, deny relief * * * if he concludes the negative equities outweigh the positive equities of the [alien's] case." *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013). In deciding whether to grant cancellation of removal, an Immigration Judge must review "the record as a whole" and "balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his or her behalf to determine whether the granting of . . . relief appears in the best interest of this country." *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (citation, quotation marks, and brackets omitted).

The government bears the burden of proving, by clear-and-convincing evidence, the removability of an alien who has been admitted to the United States. 8 U.S.C. 1229a(c)(3)(A); 8 C.F.R. 1240.8(a). But an alien determined to be removable bears the burden of proving by a preponderance of the evidence that he is both eligible for and deserving of discretionary relief from removal. 8 U.S.C. 1229a(c)(4)(A); 8 C.F.R. 1240.8(d).

The Federal Rules of Evidence do not apply to removal proceedings. See Fed. R. Evid. 101, 1101; see also, *e.g.*, *FTC* v. *Cement Inst.*, 333 U.S. 683, 705-706 (1948) ("administrative agencies * * * have never been restricted by the rigid rules of evidence"). Thus, during a removal hearing, an Immigration Judge gen-

erally "may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the [alien] or any other person during any investigation." 8 C.F.R. 1240.7(a); see 8 U.S.C. 1229a(b)(1). Aliens have a statutory and regulatory right to "a reasonable opportunity to * * * cross-examine witnesses presented by the Government." 8 U.S.C. 1229a(b)(4)(B); 8 C.F.R. 1240.10(a)(4). Regulations governing removal proceedings also provide for the issuance of subpoenas (8 C.F.R. 1003.35(b), 1287.4(a)(2)(ii)), and for the granting of continuances (8 C.F.R. 1003.29, 1240.6).

The federal courts generally lack jurisdiction to review removal orders based on controlled-substance convictions, and also to review agency determinations not to grant cancellation of removal as a matter of discretion. 8 U.S.C. 1252(a)(2)(B)(i) and (C). But an exception permits courts to consider "constitutional claims" and "questions of law." 8 U.S.C. 1252(a)(2)(D).

2. a. Petitioner is a native and citizen of Mexico who was admitted to the United States as a lawful permanent resident when he was a child in 1989. Pet. App. 14a. In 2007, at the age of 29, he was arrested and indicted by a Texas grand jury for possessing more than 2000 pounds of marijuana, and for a related firearms offense. *Ibid.*; Administrative Record (A.R.) 343, 360. The indictment alleged a specific amount of marijuana, totaling more than 4935 pounds with a street value of more than $11 million. A.R. 343.[1]

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[1] The indictment did not cite the statutes petitioner was charged with violating, but the possession charge appears to have been based on a provision that criminalizes the possession of various amounts of marijuana and treats "more than 2,000 pounds" as the most serious crime. Tex. Health & Safety Code Ann. § 481.121(a)

In 2008, petitioner pleaded guilty, with the aid of counsel, to the possession offense and was sentenced to a seven-year term of imprisonment. Pet. App. 14a; A.R 357-359. The prosecution "abandon[ed]" the firearms charge. A.R. 357. The conviction documents in the record do not reflect any attempt by petitioner to plead *nolo contendere* or assert his innocence despite his plea of guilt, as contemplated in *North Carolina* v. *Alford*, 400 U.S. 25 (1970).

b. In September 2010, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner, eventually charging him with being removable under 8 U.S.C. 1227(a)(2)(B)(i) based on his controlled-substance conviction. Pet. App. 14a; A.R. 353. The Immigration Judge sustained that charge, and petitioner sought discretionary cancellation of removal pursuant to 8 U.S.C. 1229b(a). Pet. App. 14a; A.R. 292.

A hearing on petitioner's application for discretionary relief was held on October 20, 2011, and petitioner appeared *pro se*. A.R. 307-342. Although petitioner had been informed more than a month before the hearing that he could call witnesses, A.R. 304, 306, he did not call any witnesses or offer any written statements made by other individuals. He alone testified at the merits hearing. A.R. 310. As relevant here, petitioner testified about his conviction, stating that, although he had been

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and (b)(6) (West 2003). As this Court explained in *Lopez* v. *Gonzales*, 549 U.S. 47, 60 (2006), "an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount." See also Pet. App. 6a ("Most jurisdictions would treat possession of such a large quantity of marijuana as possession with intent to distribute."). An aggravated-felony designation would make the alien statutorily ineligible for cancellation of removal. 8 U.S.C. 1229b(a)(3).

present at the scene when others (including his two brothers-in-law) were involved in unloading and loading "product" at a warehouse, A.R. 322-323, 327-329, petitioner remained at all times in a sport utility vehicle (SUV) that had been driven to the warehouse by one of his brothers-in-law. A.R. 319-320, 327-328, 330. Petitioner claimed that he knew nothing about the marijuana, which was later seized by police, and that he had committed no crime. A.R. 331-333, 339. Petitioner also stated that the police would testify that they never saw him touching marijuana or unloading a truck. A.R. 330-331.

To explain why he nevertheless pleaded guilty, petitioner said that his attorney had informed him that one of his brothers-in-law had struck a plea bargain in which he said "that everybody was involved," A.R. 321, and that police officers were "going to basically fabricate testimony" to say that petitioner was seen "outside" the SUV and was "somehow involved in the actual" process of unloading the drugs. A.R. 337-338.

The Immigration Judge asked whether the government had "any of the reports on this case," and the government's attorney explained that no response had been received to requests made "about 30 days" earlier. A.R. 340.

c. After the hearing, the Immigration Judge issued an oral decision granting petitioner's application for cancellation of removal. Pet. App. 30a-37a. After noting the "unfortunate" lack of "any kind of reports" about petitioner's offense, the Immigration Judge observed that he would "have to make [his] decision on the evidence before [him]." *Id.* at 36a. The Immigration Judge proceeded to balance petitioner's positive factors (including his long residence in the United States, his

close family ties, and his five United-States-citizen children) against the negative factors (including his involvement in "a major narcotics trafficking operation"). *Ibid.* The Immigration Judge credited petitioner's testimony that he "had nothing to do with this enterprise" and had pleaded guilty and received a seven-year prison term because his lawyer told him that the police "would testify that he was more involved" in the drug-trafficking enterprise than he actually was. *Id.* at 35a-36a. Based on the finding that petitioner's involvement in the criminal offense was "minor," the Immigration Judge found that the positive equities outweighed the negative equities and granted the application for cancellation of removal. *Id.* at 36a-37a.

d. DHS appealed the Immigration Judge's decision, and petitioner obtained counsel while the administrative appeal was pending. A.R. 226-228. After both sides submitted briefs, A.R. 170-202, 206-221, the Board of Immigration Appeals (Board) sustained DHS's appeal and remanded the case. Pet. App. 25a-29a. The Board determined that the Immigration Judge had committed clear error by "credit[ing] [petitioner's] assertion of factual innocence"; that the error had affected the weighing of the "various discretionary factors"; and that "the record must be remanded for reconsideration." *Id.* at 28a-29a. In doing so, the Board relied on Board precedents holding that, in considering an application for discretionary relief, a facially valid judgment of conviction is conclusive of guilt; that an Immigration Judge cannot redetermine the guilt or innocence of a convicted alien; and that no weight should be given to a convicted alien's claim of factual innocence. *Id.* at 28a.

3. a. On remand, a further hearing was scheduled for June 14, 2012. A.R. 128-129. Two weeks before-

hand, DHS served petitioner's counsel with a set of reports regarding the incident on which petitioner's conviction was based, A.R. 87-115, including four "Investigative Reports" prepared by the Texas Department of Public Safety (TDPS), A.R. 88-90, 92-99, 102-107, 109-110, and a "Report of Investigation" prepared by the U.S. Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), A.R. 113-115.

Three of the TDPS reports concerned events that occurred on the day before and the day of petitioner's arrest; all three were prepared by Sergeant Jose Noe Diaz and reflected that Sergeant Diaz personally observed many of the events they described. See A.R. 88-89, 92-96, 102-104. The first report is marked with an "approval" by other officials and is not marked "draft," A.R. 88, while the second and third are marked "draft" and do not contain any marks of approval, A.R. 92, 102.

Of principal relevance here, the second report, dated May 7, 2007 (and updated May 14, 2007), described the surveillance conducted by Sergeant Diaz on April 18, 2007. A.R. 93. It recounted the arrival of a "green/tan Ford Expedition * * * occupied by two (2) Hispanic males" who appeared to be "conducting a counter surveillance operation to detect or deter any possible interference with Criminal activity." *Ibid.* The report identified petitioner as "the passenger in the Green Ford Expedition that was observed conducting the counter surveillance." A.R. 94. The report also stated that Sergeant Diaz walked along the sidewalk on the street next to the warehouse and "observed" petitioner and two others "positioned behind [a] trailer in what can only be described as a human conveyor belt off[-]loading unknown bundles from the pallets being removed from the trailer." *Ibid.* The report then de-

scribed the eventual arrest of petitioner and others and the recovery of 150 bundles of marijuana weighing approximately 4953 pounds. A.R. 95-96.

The ATF report was prepared by Special Agent Christopher Speer and was dated two days after petitioner's arrest. A.R. 113-115. It described the narcotics investigation on the day of petitioner's arrest. A.R. 113. It noted that Sergeant Diaz had received information about a drug delivery to be made in a tractor-trailer otherwise delivering produce to the warehouse, and explained that Sergeant Diaz observed the arrival of the tractor-trailer at the warehouse and then "observed several Hispanic males begin to unload white bundles f[ro]m the trailer of the truck." *Ibid.* The report described other events that day leading to the arrest of petitioner and others, and explained that the ATF and Special Agent Speer then took part in executing a search warrant at the warehouse. A.R. 113-114.[2]

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[2] In describing events that occurred before the joint execution of the search warrant, the ATF report contains immaterial discrepancies with Sergeant Diaz's draft report. The ATF report identified the SUV containing petitioner as a Ford Explorer (rather than a Ford Expedition), provided a license-plate number that differed by one character, stated that the SUV was later pulled over by local police for speeding (rather than after pulling into a restaurant parking lot), and gave a different list of that vehicle's occupants when they were arrested (though the lists in both reports included petitioner). Compare A.R. 113-114, with A.R. 93-95. Petitioner contends that the ATF report "reveals" that it would have been "physically impossible" for Sergeant Diaz to identify anyone unloading the tractor-trailer because he was "outside a fenced perimeter some distance from the warehouse" and his view was "completely blocked by a tractor-trailer." Pet. 10. But the ATF report merely noted that the trailer was "flush with the door" of the warehouse, without indicating that its position would have

b. After DHS served petitioner's counsel with the reports, the hearing originally set for June 14 was postponed until July 3, 2012. A.R. 118, 128. During that time, petitioner provided the Immigration Court with four documents, including evidence that he had been paroled from state custody, but he made no written objection to DHS's new evidence. A.R. 76-86. At the July 3 hearing, petitioner contended that the police reports were inadmissible because they were hearsay, contained inconsistencies, and were unreliable. A.R. 72-73. Petitioner did not dispute the authenticity of the documents, nor did he object based on any lack of foundation or on any statutory or regulatory right to cross-examine government witnesses. DHS responded to petitioner's objection on the grounds that the "documents are reliable" and that "[h]earsay is acceptable in Immigration Court." A.R. 73. The Immigration Judge admitted the police reports into evidence, expressing the view that petitioner's "objections go more to the weight of the document rather than its admissibility," and that "[i]t's clearly relevant and hearsay is allowed." *Ibid.*; see also Pet. App. 17a n.1. Both sides expressly declined the Immigration Judge's invitation to present any other witnesses or evidence. A.R. 73-74.

c. Two weeks after the hearing, the Immigration Judge issued a written decision denying petitioner's application for cancellation of removal. Pet. App. 12a-24a. Again, the Immigration Judge weighed both positive and negative factors. The Immigration Judge concluded that petitioner had not "demonstrated rehabilitation," despite his state parole, because he had failed to "accept responsibility for the conduct underly-

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prevented Sergeant Diaz from seeing who was unloading it. A.R. 113.

ing his arrest" and failed to "admit the true facts underlying his arrest," which were reflected in the investigative report's notation that he was observed participating in unloading the drug shipment. *Id.* at 21a-23a. Given the "serious conviction" involving 4935 pounds of marijuana, petitioner's lack of candor concerning his involvement in the offense, and his lack of rehabilitation, the judge concluded "that the negative factors outweigh the positive factors in this case," and that "granting discretionary relief to [petitioner] does not appear to be in the best interest of this country." *Id.* at 22a-24a. The judge therefore denied cancellation of removal and ordered petitioner removed to Mexico. *Id.* at 24a.

d. Petitioner appealed to the Board, contending, *inter alia*, that the admission of the police reports had violated his right to due process. A.R. 32-38. The Board dismissed the appeal. Pet. App. 4a-11a. The Board agreed with the Immigration Judge that "the negative factors of [petitioner's] criminal conviction and his failure to prove genuine rehabilitation" outweighed his positive equities. *Id.* at 6a, 11a. The Board specifically rejected the contention that it was improper to consider Sergeant Diaz's draft report. *Id.* at 8a-10a. The Board noted that "[t]here is no hearsay rule in removal proceedings" and that regulations governing removal proceedings "expressly contemplate that an Immigration Judge 'may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.'" *Id.* at 8a-9a (quoting 8 C.F.R. 1240.7(a)). The Board determined that the police report was "plainly relevant because it provides a percipient

witness's description of [petitioner's] offense conduct." *Id.* at 9a.

The Board rejected petitioner's contention that the Immigration Judge was bound by a finding of rehabilitation made by the Texas Board of Pardons and Paroles. Pet. App. 10a. The Board also found that it was proper for the Immigration Judge to consider petitioner's "lack of candor" concerning his involvement in the crime as a failure to display genuine rehabilitation. *Ibid.* The Board further noted that an Immigration Judge is free to consider "whatever factors come to light during the course of removal proceedings," including petitioner's claim of innocence, which was contradicted by Sergeant Diaz's report. *Id.* at 10a-11a. The Board added that "[t]hese factors are relevant to the rehabilitation issue," and the "adverse rehabilitation finding was not clearly erroneous" in light of petitioner's failure to "come forward with substantial evidence to prove rehabilitation by other means." *Id.* at 11a.

The Board concluded that, "[i]nasmuch as a favorable exercise of discretion would not be in the best interest of the United States, we will affirm the Immigration Judge's denial of [petitioner's] application for cancellation of removal and dismiss his appeal." Pet. App. 11a.

4. The court of appeals denied in part and dismissed in part petitioner's petition for review of the Board's decision. Pet. App. 1a-3a. The court acknowledged that it had jurisdiction over "constitutional claims and questions of law." *Id.* at 2a. As relevant here, the court concluded that Sergeant Diaz's report met the test for admissibility of evidence in immigration proceedings, which is simply "whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law." *Ibid.* (quoting

Bustos-Torres v. *INS*, 898 F.2d 1053, 1055 (5th Cir. 1990)).

ARGUMENT

The unpublished decision of the court of appeals is correct and does not warrant review. Petitioner contends (Pet. 13) that this Court should grant review to "establish clear standards" for when the Due Process Clause prevents "hearsay documentary evidence" from being introduced into administrative immigration proceedings and, in particular, that it should adopt a "bright line" excluding "hearsay documentary evidence that bears multiple indicia of unreliability when such hearsay is also contradicted by other record evidence introduced by the government." But petitioner's *per se* rule was not pressed or passed upon in the court of appeals. That court applied the long-established standard for the admissibility of evidence in immigration proceedings, which considers probativeness and fundamental fairness. Petitioner's belief that the court of appeals misapplied that standard to the facts of his case does not warrant this Court's review. Nor does the decision below conflict with that of any other court of appeals, none of which has adopted any variation of petitioner's proposed rule. The petition for a writ of certiorari should be denied.

1. a. The court of appeals invoked the correct, and long-established, standard for evaluating petitioner's due-process challenge to the admission of evidence in an administrative immigration proceeding. As that court explained: "The test for admissibility of evidence in a deportation proceeding is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law." Pet. App. 2a (quoting *Bustos-Torres* v. *INS*, 898 F.2d 1053,

1055 (5th Cir. 1990)). That test apparently originated in *Marlowe* v. *United States INS*, 457 F.2d 1314, 1315 (9th Cir. 1972), and it has been followed by the Board of Immigration Appeals and by every court of appeals that reviews the Board's decisions.[3]

b. That test is fully consistent with this Court's decisions. In *Richardson* v. *Perales*, 402 U.S. 389 (1971), the Court rejected a due-process challenge to the admission in a Social-Security-disability-benefits hearing of "uncorroborated hearsay" reports that were "directly contradicted by the testimony of live medical witnesses and by the claimant in person." *Id.* at 398, 410. The Court was satisfied that the reports in question were "material" and their admission satisfied applicable statutory procedures as well as "fundamental fairness." *Id.* at 410. Although this Court has not addressed a similar question in the precise context of immigration proceedings, a four-Justice plurality invoked similar criteria when it suggested that a constitutional violation may occur in immigration proceedings when the conduct that was used to acquire evidence "transgress[es] notions of fundamental fairness and undermine[s] the

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[3] See, *e.g.*, *White* v. *INS*, 17 F.3d 475, 480 (1st Cir. 1994); *Aslam* v. *Mukasey*, 537 F.3d 110, 114 (2d Cir. 2008); *Ezeagwuna* v. *Ashcroft*, 325 F.3d 396, 405 (3d Cir. 2003); *Anim* v. *Mukasey*, 535 F.3d 243, 256 (4th Cir. 2008); *Bouchikhi* v. *Holder*, 676 F.3d 173, 180 (5th Cir. 2012); *Alexandrov* v. *Gonzales*, 442 F.3d 395, 404-405 (6th Cir. 2006); *Pouhova* v. *Holder*, 726 F.3d 1007, 1011 (7th Cir. 2013); *R.K.N.* v. *Holder*, 701 F.3d 535, 539 (8th Cir. 2012); *Sanchez* v. *Holder*, 704 F.3d 1107, 1109 (9th Cir. 2012); *N-A-M* v. *Holder*, 587 F.3d 1052, 1057-1058 (10th Cir. 2009), cert. denied, 131 S. Ct. 898 (2011); *Mancinas-Hernandez* v. *United States Att'y Gen.*, 533 Fed. Appx. 874, 878 (11th Cir. 2013); *In re Velasquez*, 25 I. & N. Dec. 680, 683 (B.I.A. 2012); *In re Lam*, 14 I. & N. Dec. 168, 172 (B.I.A. 1972).

probative value of the evidence obtained." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1050-1051 (1984). Furthermore, even in the criminal context, this Court has generally declined to invoke the Due Process Clause to exclude categories of evidence altogether. As the Court recently explained, "[t]he Constitution * * * protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Perry* v. *New Hampshire*, 132 S. Ct. 716, 723 (2012). That understanding dovetails with the Immigration Judge's observation in this case that petitioner's "objections go more to the weight of the document rather than its admissibility." A.R. 73.

c. Indeed, the test that the court of appeals and the Board applied in this case is the one that petitioner urged them to apply. See Pet. C.A. Br. 23 (quoting the Fifth Circuit's decision in *Bustos-Torres*, *supra*); A.R. 32 (same). Although petitioner believes that the court of appeals and the Board misapplied the test he urged to the facts of his case, that kind of error does not warrant this Court's review. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

d. In any event, the court of appeals did not err in concluding that the draft report in question was probative and that its use was fundamentally fair. Pet. App. 2a. That is especially true given the context in which the report was used: not to establish an element of the government's own case, but to impeach petitioner's

testimony with respect to an issue on which he bore the burden of proof.[4]

There has been no dispute in this case about petitioner's removability under 8 U.S.C. 1227(a)(2)(B)(i) based on his controlled-substance conviction. Pet. App. 5a, 26a. Petitioner admitted that conviction, and the Immigration Judge found him removable based on that admission and the conviction documents offered by the government (which did not include the police reports to which petitioner objects). *Id.* at 31a; A.R. 286-287, 292, 343, 356-359. The government therefore met its burden of proving removability by clear-and-convincing evidence before it submitted Sergeant Diaz's reports.

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[4] The court of appeals assumed *sub silentio* that petitioner had an interest protected by the Due Process Clause in the determination of whether he merited a grant of cancellation of removal as a matter of discretion (including a protected interest in the evidence considered as part of that discretionary determination). As the government explained in the court of appeals (C.A. Br. 13-14), petitioner had no such interest protected by the Due Process Clause, which would provide an independent ground for affirming the decision below. See *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972) (to have a protectable interest in a benefit, one "must have more than a unilateral expectation of it"; "[h]e must, instead, have a legitimate claim of entitlement to it"). A grant of discretionary relief in immigration proceedings of this sort is an "act of grace," accorded pursuant to discretion of the Attorney General that is unfettered by statute. *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (quoting *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956)); see *Cevilla* v. *Gonzales*, 446 F.3d 658, 662 (7th Cir. 2006) (finding no liberty interest in cancellation of removal for non-permanent residents, even if all statutory requirements are satisfied, because "[a] procedural entitlement is not a liberty interest"); *Dave* v. *Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004) (holding that lawful permanent resident could not "raise a due process challenge to the BIA's denial of his application for cancellation of removal," because it is "a form of discretionary relief").

When the government submitted those reports, the sole issue was whether petitioner merited a favorable exercise of discretion regarding his application for cancellation of removal. Pet. App. 5a, 18a; A.R. 72-73. Petitioner bore the burden of proof on that issue. See 8 U.S.C. 1229a(c)(4)(A); 8 C.F.R. 1240.8(d). In attempting to establish his equities, petitioner sought to minimize his involvement in the drug offense for which he was convicted (and received a seven-year term of imprisonment), testifying that he never got out of the SUV at the scene of the crime, that police officers did not see him touch marijuana or help unload the tractor-trailer, and that they would so testify. A.R. 327-328, 330-331. Because Sergeant Diaz's report cast doubt on, and thus impeached, each of those aspects of petitioner's testimony, it was probative. See *Black's Law Dictionary* 1323 (9th ed. 2009) (evidence is "probative" when it "[t]end[s] to prove or disprove" something).[5]

It was also fundamentally fair to consider Sergeant Diaz's report. Notwithstanding the report's "draft" nature and its date (see Pet. 8-9), multiple indicia made it sufficiently reliable and trustworthy to be considered

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[5] That context distinguishes this case from *Bridges* v. *Wixon*, 326 U.S. 135 (1945), on which petitioner relies (Pet. 17). In *Bridges*, the Court considered the admission of hearsay statements offered by the government to support its charge that an alien was deportable based on his membership in the Communist Party, *id.* at 138-140, 150-154; the case did not involve a request for discretionary relief by an alien who was concededly deportable. The Court expressly "assume[d]," moreover, that the statements could have been admitted "for purposes of impeachment." *Id.* at 153. *Bridges* is further distinguishable from this case because it was "conceded that the statements were admitted in violation of" INS regulations intended "to afford [the alien] due process of law." *Id.* at 151, 152.

at least as impeachment evidence in connection with petitioner's effort to obtain a favorable exercise of discretion by minimizing his role in an offense involving very substantial amounts of marijuana. The report was prepared by an identified individual, who recounted many of his own observations in the report, rather than merely describing general events without specifying who witnessed them or what their personal observations were. A.R. 93-96; see Pet. App. 9a (noting that the report "provides a percipient witness's description of [petitioner's] offense conduct"). The level of detail indicated a reliable reporter, as did the fact that Sergeant Diaz provided information on which a search warrant was obtained in connection with the events he reported. A.R. 94-95, 103. The report's details also provided context for Sergeant Diaz's observations and indicated that he was motivated to make accurate observations. In addition—despite petitioner's repeated suggestions to the contrary—the critical passage recounting Sergeant Diaz's observation of petitioner's participation in the unloading of bundles at the warehouse (A.R. 94) was not contradicted by the ATF report but was instead partly corroborated by the ATF report's statement that Sergeant Diaz "observed several Hispanic males begin to unload white bundles f[ro]m the trailer of the truck," A.R. 113.[6]

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[6] As noted above (see note 2, *supra*), there were some discrepancies between Sergeant Diaz's report and the ATF report. But those discrepancies did not pertain to Diaz's observation of petitioner in the act of unloading the tractor-trailer. Indeed, although petitioner asserts that the two reports "flatly contradict each other about what various individuals were doing, and where they were located at different points in time" (Pet. 9), the only inconsistencies of that nature involved what happened *after* the SUV drove away from the warehouse, and about which suspects were in the SUV,

Of course, petitioner was free to advance arguments about asserted flaws in the report and its reliability, allowing the fact-finder to assess all the reasons why the report should or should not be given any or significant weight. Petitioner in fact did contend before the Immigration Judge that the draft report was unreliable, and he continued to do so before the Board and the court of appeals. A.R. 33-38, 72-73; Pet. C.A. Br. 24-33; Pet. C.A. Reply Br. 15-16. But petitioner pointedly failed to pursue several other possible alternatives, the availability of which support the fundamental fairness of the process of admitting the report.

Petitioner had the report for more than a month before the hearing at which it was admitted, A.R. 87-115, giving him ample time to review the documents, consider his response, and obtain additional evidence. He might have disputed the authenticity and foundation of the documents. He might have argued that, under circuit precedent, the government should make Sergeant Diaz available for cross-examination. Cf. *Olabanji* v. *INS*, 973 F.2d 1232, 1234 (5th Cir. 1992); 8 U.S.C. 1229a(b)(4)(B); 8 C.F.R. 1240.10(a)(4). He might himself have called Sergeant Diaz as a witness, pursuant to subpoena, and, if necessary, requesting a continuance. See 8 U.S.C. 1229a(b)(1) (regarding subpoenas); 8 C.F.R. 1003.35(b), 1287.4(a)(2)(ii) (same); 8 C.F.R. 1003.29, 1240.6 (regarding continuances). Or petitioner

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and which in other vehicles, when they were arrested. Pet. C.A. Br. 27-28. Sergeant Diaz's report shows that he had already left the scene (to prepare a search warrant) when those events occurred. A.R. 95. Minor differences in how he and the author of the ATF report recounted events at which neither was apparently present do not cast doubt on Sergeant Diaz's account of his personal observation of petitioner.

himself could have testified further about the specific details of the report, describing any reason why Sergeant Diaz's vantage point on the sidewalk would not have enabled him to make an identification. Or petitioner could have called either of his brothers-in-law or his criminal defense attorney as a witness (or offered written statements from any of them). Petitioner pursued none of those options for refuting the report.

Finally, as the Board noted, Sergeant Diaz's report was consistent with the crime to which petitioner pleaded guilty, and the conviction that he apparently never challenged. Pet. App. 9a-10a. Decisions in cases in which a conviction parallels a police report have often upheld the use of such reports in immigration proceedings.[7]

The court of appeals thus did not err in agreeing with the Board's conclusion that the admission of the report did not violate petitioner's due-process rights.

2. Petitioner nevertheless urges (Pet. 13) the Court to use this case as "a vehicle to establish clear standards to be applied consistently by the U.S. Courts of Appeals, the BIA and immigration judges." In particular, he suggests (*ibid.*) that the Court should adopt a categorical rule governing "hearsay documentary evidence that bears multiple indicia of unreliability when such hearsay is also contradicted by other record evi-

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[7] See *Solis* v. *Mukasey*, 515 F.3d 832, 835-836 (8th Cir. 2008); *Carcamo* v. *United States Dep't of Justice*, 498 F.3d 94, 98 (2d Cir. 2007); *Lopez-Molina* v. *Ashcroft*, 368 F.3d 1206, 1211 & n.6 (9th Cir. 2004); *Emile* v. *INS*, 244 F.3d 183, 189 (1st Cir. 2001); *In re Grijalva*, 19 I. & N. Dec. 713, 721-722 (B.I.A. 1988); cf. *Henry* v. *INS*, 74 F.3d 1, 5-7 (1st Cir. 1996) (upholding the use of a police report even without a conviction, noting that arrest reports can be admitted even if they are entitled to "limited weight").

dence introduced by the government." As a fallback position, he suggests (Pet. 13-14) that the Court could "establish a list of factors" to be "consider[ed] and weigh[ed]" in connection with the admission of such evidence. But petitioner proffered no such refinements of the probative-and-fundamentally-fair standard to the court of appeals, which did not pass upon them as propositions of law, much less determine whether petitioner would prevail under them. Accordingly, this Court's "traditional rule * * * precludes a grant of certiorari." *United States* v. *Williams*, 504 U.S. 36, 41 (1992); cf. *Holland* v. *Florida*, 560 U.S. 631, 654 (2010) (noting this Court is one of "final review and not first view") (citation and internal quotation marks omitted).

3. Nor is there any basis for petitioner's suggestion that the courts of appeals have disagreed about his newly proposed refinements of the test for the admissibility of documents containing hearsay.

a. As an initial matter, petitioner appears to suggest (Pet. 18-19, 23-24) that a uniform rule from this Court might reduce variations in the rates at which specific courts of appeals reverse decisions of the Board. But, as petitioner concedes (Pet. 23 & n.5), a wide variety of factors may account for such variations, and petitioner provides no reason to believe that those variations are meaningfully attributable to different views about the admissibility of hearsay evidence. Cf. *United States* v. *Bass*, 536 U.S. 862, 864 (2002) (per curiam) ("raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*").

b. Petitioner's more specific assertion of a conflict fares no better. Petitioner contends (Pet. 25-26) that "[t]he Ninth and Eleventh Circuits have distinguished between 'uncontradicted hearsay' and contradicted

hearsay." But the cases he cites do not substantiate that distinction. Even setting aside the fact that the Eleventh Circuit decisions he cites are (like the Fifth Circuit's decision in this case) unpublished, the propositions in question trace back to the Ninth Circuit's decision in *Marlowe*, *supra*, which found that documents were admissible in a deportation proceeding because they were "probative and their use was not fundamentally unfair." 457 F.2d at 1315. *Marlowe* did not require the documents to be "uncontradicted" and did not even discuss whether they were.[8] And the single-judge opinion from the Ninth Circuit that petitioner cites (Pet. 26) disregarded certain statements because they had no probative value, not because they were contradicted by any other evidence. *Choe* v. *INS*, 11 F.3d 925, 936 (1993) (Alarcon, J., specially concurring in part and dissenting in part).

Petitioner identifies no case in which the mere assertion of a contradiction resulted in the exclusion of hearsay evidence from an immigration proceeding on due-process grounds. And there is little reason to believe that such a factor alone would warrant a different test, because this Court's decision in *Richardson* approved the admission of hearsay evidence in administrative proceedings even when it was "directly contradicted." 402 U.S. at 398, 410. Furthermore, as noted above (see notes 2 and 6, *supra*), petitioner does not actually identify a direct contradiction between Sergeant Diaz's report and the ATF report with respect to the statement that Sergeant Diaz witnessed petitioner participating in offloading bales that were later found to con-

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[8] Another recent, unpublished opinion of the Eleventh Circuit quotes the test without the word "uncontradicted." *Mancinas-Hernandez*, 533 Fed. Appx. at 878.

tain marijuana. This case would therefore be a poor vehicle for considering whether to draw a line predicated on whether "the hearsay evidence at issue is contradicted by other record evidence introduced by the government." Pet. 27.

c. Petitioner also asserts (Pet. 20-23) that the decision below is inconsistent with decisions from the Third and Seventh Circuits. But the facts in those two cases were materially different.

In *Pouhova* v. *Holder*, 726 F.3d 1007 (7th Cir. 2013), the court did find that one document was unreliable in part because of a delay in its creation. *Id.* at 1014. But there, the form in question recounted a statement that an immigration official said had been made more than seven years before the form was prepared, *id.* at 1009, 1013-1014—a much longer lapse than the 19 days about which petitioner complains. *Pouhova* also expressed concern that the alien had no "basis to contest the statements in the document" because she had not "been present for the conversation that was reported." *Id.* at 1014. Here, by contrast, petitioner admits he was present at the scene described in Sergeant Diaz's report, and petitioner was not precluded from presenting his own version of what happened. Finally, the unreliable documents in *Pouhova* "were the government's only evidence supporting the smuggling charge" that would make the alien removable, *id.* at 1016, whereas the evidence at issue here served to impeach petitioner's testimony and went only to whether petitioner should be granted discretionary relief from removal, a matter on which petitioner bore the burden of proof, see p. 16, *supra*.

Petitioner also relies (Pet. 21-23) on the Third Circuit's decision in *Ezeagwuna* v. *Ashcroft*, 325 F.3d 396

(2003), which applied the same test as the decision below, *id.* at 405, but concluded that a letter from a Department of State official was insufficiently reliable and trustworthy to be admitted, *id.* at 406-408. The concerns expressed about that letter are inapposite here. *Ezeagwuna* concluded that the letter was "multiple hearsay of the most troubling kind," by an author who "was three steps away from the actual declarants" and sought "to report statements and conduct of three declarants who are far removed from the evidence sought to be introduced." *Id.* at 406. The court also stressed that the letter provided no information about how the "investigation" on which it reported "was conducted." *Id.* at 408. Here, by contrast, Sergeant Diaz's report involved one identifiable out-of-court declarant, who explained how he acquired the relevant information. There is accordingly no reason to conclude that the *Ezeagwuna* court would have reached a different result in petitioner's case than the decision below.

d. Since the petition for a writ of certiorari was filed, the Ninth Circuit decided *Angov* v. *Holder*, 736 F.3d 1263 (2013), in which it disagreed with the conclusion—sustained in *Ezeagwuna* and other cases that petitioner cites (Pet. 23, 24, 25)—that certain investigative reports prepared by the Department of State were inadmissible in removal proceedings due to the way they were prepared and the circumstances under which they were authenticated. Compare *Angov*, 736 F.3d at 1268-1281, with *Banat* v. *Holder*, 557 F.3d 886, 890-893 (8th Cir. 2009); *Anim* v. *Mukasey*, 535 F.3d 243, 256-262 (4th Cir. 2008); *Alexandrov* v. *Gonzales*, 442 F.3d 395, 404-409 (6th Cir. 2006); *Ezeagwuna*, 325 F.3d at 405-408. Because the alien in *Angov* may yet file a petition for rehearing (see 07-74963 Docket entry (9th Cir. Dec. 24,

2013) (extending deadline for rehearing petition to March 31, 2014)), any disagreement in the courts of appeals could be resolved without intervention from this Court.

In any event, this case would be a poor vehicle for addressing the issue in *Angov*, because the other courts of appeals addressing inadmissibility have typically relied on their conclusions that the particular reports at issue involved multiple levels of hearsay, unidentified sources of information, and inadequately explained investigations about events in a foreign country. See, *e.g.*, *Anim*, 535 F.3d at 256-258; *Ezeagwuna*, 325 F.3d at 406-408. As discussed above (see p. 23, *supra*), Sergeant Diaz's report does not present any such concerns.

Especially in the absence of any conflict in the courts of appeals concerning the sort of domestic law-enforcement document at issue here—and thus in the absence of any conflict that could be resolved by this Court in this case—further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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